

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APR 26 2013

S.C. Supreme Court

Opinion No. 5082
SC Ct. App. filed February 13, 2013
Withdrawn, Substituted and Refiled March 27, 2013

Thomas Lee Brown, ... Petitioner,

v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc., ... Respondents.

APPENDIX

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VOLUME II

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South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
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Columbia, SC 29202-1715
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WCC File #: 0809238
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: THOMAS LEE BROWN SSN: _____ Employer's Name: BULLDOG HIWAY EXPRESS/PEOPLELEASE CORP.
Address: _____ Address: POST OFFICE BOX 40247
City: _____ State: _____ Zip: _____ City: CHARLESTON State: SC Zip: 29423
Home Phone: () - Work Phone: () - Insurance Carrier: ARCH INSURANCE COMPANY
Preparer's Name: PRESTON F. MCDANIEL Law Firm: MCDANIEL LAW FIRM Preparer's Phone #: (803) 771-7211

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: 5/2/2008 (m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

PLEASE SEE ATTACHMENT.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Scott B. Garrett, Esquire, McAngus, Goudelock & Courie,
Post Office Box 12519, Columbia, SC29211

Name

on the _____ day of December, 2010 by ☒ first class mail ☐ personal service ☐ certified mail.

Preparer's Signature

Claimant's Attorney
Title

Date

Check this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 1 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

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THOMAS LEE BROWN v. PEOPLELEASE CORP.
W.C.C. File No. 0809238

1. That the Hearing Commissioner erred by not specifically awarding the Claimant lifetime medical care for his low back and legs where the undisputed facts are that the Defendants did not contest that the Claimant had sustained injury to and/or which affected his low back and legs and where the uncontested medical evidence from the authorized treating physicians establishes that from the date of the accident forward he was treated for problems with his low back and legs and where those and other doctors stated the opinions that these injuries and need for treatment to these body parts stemmed from the work-related automobile accident.

2. That the Hearing Commissioner erred as a matter of law by failing to designate the previously authorized treating physicians as the physicians to continue to provide treatment at least until such time as the Defendants specifically designate and/or provide medical care through physicians of their choice for his continuing problems under the award of lifetime medical benefits to effect a cure or provide relief from the Claimant's disabling symptoms stemming from the accident.

3. That the Claimant requests a review by the Commission on the specific and limited issue as to whether or not the average weekly wage and resulting compensation rate as awarded by the Commissioner should be further raised to an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73, which is based on the uncontested evidence of a full year of employment with his previous employer prior to the Claimant coming to work with the employer and further based on the pay stubs that were submitted into the Record which supports the testimony of the Claimant that he was to make at least \$.50/mile and is contrary to the testimony of the employer representative that the maximum rate was \$.38/mile wherein those pay stubs reflect that he was to be paid \$1.00 per mile, specifically as set out on pgs. 125, 126, and 127 of the Claimant's APA Submissions.

The above-referenced Exceptions are subject to amendment upon receipt of the Transcript.

Respectfully submitted,


Preston F. McDaniel, Esquire
Attorney for the Claimant

December 6, 2010

CERTIFICATE OF SERVICE BY MAIL

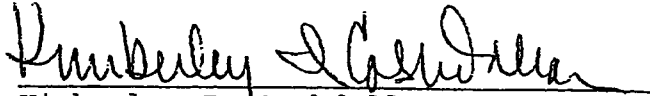
WCC FILE NO. 0809238

I hereby certify that I have on this day served the following in the matter of Thomas Lee Brown v. Peoplelease Corp. with a copy of the FORM 30 - REQUEST FOR COMMISSION REVIEW by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Scott B. Garrett, Esquire
McAngus Goudelock & Courie
PO Box 12519
Columbia, SC 29211

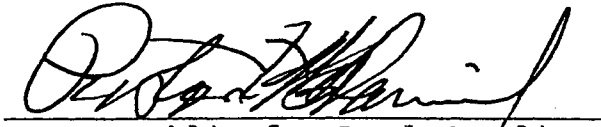
Virginia L. Crocker, Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202

I also hereby certify that a regular communication by mail exists.


Kimberley I. Cashdollar

SWORN TO BEFORE ME this

6TH day of December, 2010.


(L.S.)
Notary Public for South Carolina,

My Commission Expires: 10/28/18

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No: 0809238

THOMAS BROWN,)
)
Employee-Claimant,)
)
v.)
)
PEOPLEASE CORP.,)
)
as Employer and)
)
ARCH INSURANCE COMPANY,)
)
as Carrier,)
)
Defendants.)
)

APPELLANT'S BRIEF TO THE
FULL COMMISSION

Mr. Brown requested a Hearing for a determination that he was entitled to an award for total and permanent disability based on either or both that he had sustained a greater than 50% loss of use of his back including without reference to his low back injuries, multiple surgeries to his neck, and myelopathy in his arms and paresthesia/weakness in his legs and/or based on his total loss of earning capacity. Subsequently in his Pre-hearing Brief, due to the fact that more than one (1) doctor had expressed the opinion that he needed additional medical care before being determined at maximum medical improvement, he plead that while he had filed requesting an award for total and permanent disability that he would request either the additional medical care as recommended or a decision that he was entitled

to an award for total and permanent disability with accompanying lifetime medical treatment to include the recommended medical care. In the Form 50 and in the Pre-hearing Brief, the Claimant listed that he had sustained injuries and medical problems resulting from the accident to his neck/back/arm and head, and an aggravation of his pre-existing diabetic condition.

After the hearing, the Hearing Commissioner awarded Mr. Brown total and permanent disability benefits on the basis that he had sustained a total and permanent loss of earning capacity under S.C. Code §42-9-10 and §42-1-120, and based on his total and permanent disability he awarded him lifetime causally related medical care for treatment of his cervical spine and diabetes. However, the Commissioner found as a fact of Findings in Fact #3:

"In reference to the award simply being based under §42-9-30 for the loss of use of the back, the case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work." (Emphasis added).

Based on this finding, the Hearing Commissioner did not award Mr. Brown lifetime medical care for his lower back. The Claimant also requested that the Commissioner designate a local doctor in the Orangeburg area to provide medical care, and suggested the previously authorized doctors, Dr. Allgood and Dr. Abu-Ata be authorized to treat him locally with access to the

authorized treating neurosurgeon, Dr. Scott Boyd, at least until the Defendants authorized a local doctor(s) of their choice in the Orangeburg area to provide such medical care. This request was not addressed.

The Hearing Commissioner also found that exceptional circumstances existed to determine the average weekly wage and resulting compensation rate and established an average weekly wage of \$740.38 with a resulting compensation rate of \$493.84 based mainly on the testimony of the defense witness which a review will establish was inaccurate on contradicted by company records put into evidence.

The Decision of the Hearing Commissioner finding the Claimant totally and permanently disabled and entitled to lifetime medical treatment for his neck and radicular symptoms and aggravation of diabetes has not been appealed and is the law of the case. Further the finding that the evidence establishes that exceptional circumstances exist for the determination of the average weekly wage and the resulting compensation rate and the compensation rate that was applied has not been appealed and therefore the application of the law and that finding has become the law of the case and at a minimum the compensation rate and average weekly wages is as set out by the Commissioner in his decision.

The decision of the Commissioner in refusing to grant the Claimant lifetime benefits for treatment of his low back and the basis for that decision that, "there is no specific medical report that ties the lumbar problems to the injury at work," is being appealed.

Further, the Claimant had requested that the average weekly wage be increased to \$887.55 with a compensation rate of \$591.73, which is based on a full year employment by the Claimant with the company that he was with prior to going with Bulldog Hiway Express or that at a minimum since the evidence established that his reason for changing work was that he could make more money, was closer to home and would be paid at a higher rate of pay per mile and that his income during his weeks with Bulldog showed an ever increasing rate of pay and based on this evidence at a minimum his average weekly wage should be \$795.90 with a resulting compensation rate of \$530.63 considering the weeks (36) with his former employer and his ever increasing weekly (16) income with Bulldog.

From the decision of the Hearing Commissioner denying him benefits and these specific benefits, this appeal is filed mainly to obtain lifetime medical care and also asking the Commission to consider raising the compensation rate to \$591.73 based on a preponderance of the evidence in the Record. This appeal follows.

I. THE CLAIMANT WOULD REQUEST THAT HE BE GRANTED LIFETIME MEDICAL CARE FOR THE PROBLEMS HE HAS WITH HIS LOW BACK BASED ON THE EVIDENCE IN THE RECORD.

A review of the evidence will establish that the Hearing Commissioner inadvertently overlooked evidence in the Record concerning the causal relationship of the Claimant's low back problems to the accident (which very understanding due to the focus/severity of the neck) and the fact that medical care had been authorized ever since the accident for treatment of his low back. Overlooking the medical evidence is probably again simply to the fact that because of the severe nature of the Claimant's cervical spine that treatment on the low back became lost or was differed until after treatment of the cervical spine. The Claimant would simply ask the Commission to review the Record and amend the award to include lifetime medical care for his low back.

The Commission's review will show that following the accident, Mr. Brown initially was referred to and was seen by Dr. Denise Algood and had to go to the Emergency Room at the Regional Medical Center on July 6, 2008, wherein the doctor recorded the mechanism of injury was, "complaint occurred by vehicle", and a history, "pt (patient) was in mvc (motor vehicle accident) two months ago when he developed the pain. He does a lot of heavy lifting at work, which he believes has exacerbated the pain. . . . Also reports shooting pain down both legs with

some numbness. . . ." The doctor's final diagnosis was primary, "lumbar strain, sciatica". The treatment included medications, x-rays and on discharge Mr. Brown was referred to Dr. Abu-Ata (Claimant's APA Submissions, pp. 26-28).

The Claimant was then seen by Dr. Abu-Ata on July 10th and Dr. Abu-Ata's assessment was, "This is a 58 year old male patient with history of neck and back trauma after a motor vehicle accident after which he is complaining of intermediate frequent neck and back pain in addition to bilateral arm and leg numbness, foot and hand numbness." Based on his findings he had an MRI performed of both the cervical and lumbar spine for evaluation of the cervical and lumbar spine and disc disease especially with, "the history of back trauma". (Claimant's APA Submissions, pp. 34-35). When he received the results of the cervical spine MRI due to the severe condition of the Claimant's condition, there was an emergency referral to Dr. Scott Boyd who recorded a history that, "Mr. Brown is a very pleasant 58 year old truck driver who says that on May 2nd he was involved in a motor vehicle accident and shortly thereafter developed severe neck and back pain. He denies any previous problems with his neck or back. His greatest problem seems to be the neck which is radiating down to his arms bilaterally." (Claimant's APA Submissions, p. 60). Due to the severe condition and problems that he was having with his cervical spine, Dr. Boyd immediately

scheduled the Claimant for a three (3) level cervical spine fusion and on September 15, 2008 expressed the opinion that it was his opinion to a reasonable degree of medical certainty that the problems that he has with "his neck and back and his need for medical care either stem directly from the automobile accident on May 2, 2008 or the accident aggravated and caused to become symptomatic a pre-existing condition in his neck and back which resulted in need for medical care." That opinion was expressed in reference to the problems that the Claimant had reported in his initial consultation with Dr. Boyd. (Claimant's APA Submissions, p. 55). After that, the treatment was concentrated on treatment of the Claimant's cervical spine wherein he had to have not one (1) but two (2) separate cervical fusion surgeries and was placed on chronic pain medication to control the problems that he had with his neck. There was never any question that the treatment that was needed for the back, separate and apart from his neck or that all the problems that he was having with his back in any area, were related to the automobile accident nor was any treatment ever not authorized. All this medical care was paid for by the Defendants. On April 4, 2009, Mr. Brown Claimant underwent an independent medical evaluation by Dr. Blake Moore who found that he had suffered injuries in the motor vehicle accident on May 2, 2008 and had ongoing problems with his back and neck at that time. Dr. Moore

expressed the opinion that given the mechanism of the injury and the temporal relationships that the problems that he was having with his neck and back were related to the automobile accident and he expressed his opinion to a reasonable degree of medical certainty. (Claimant's APA Submissions, p. 77).

Then in preparation for his request for an award, Mr. Brown underwent an independent medical evaluation conducted by Dr. Leonard Forrest with the Southeastern Spine Institute who noted all the treatment for the cervical spine and then noted that, "I do not see any studies to the lumbar spine." Dr. Forest went on to state the following opinion:

"It is certainly most likely that Mr. Brown's ongoing symptoms including those in the neck and upper extremities as well as the low back and lower extremities are the result of the automobile accident of May, 08. . . . Despite having a three level fusion, in my opinion further evaluation at this time is needed. Mr. Brown is not at maximum medical improvement. . . .

With regard to the back and related leg symptoms, this almost certainly seems to be related to the motor vehicle accident for the same reason as stated above, but has not been evaluated adequately at this point. It continues to be a problem for him. I would recommend a MRI and then he will most certainly need treatment for the back related component of his symptoms also." (Claimant's APA Submissions, p. 84).

As noted, all of the treatment in reference to the problems with his low back and legs has been authorized and paid for by the Defendants and the Claimant veribly believes that the Hearing Commissioner overlooked the opinions that were expressed

in reference to the low back again because the major part of the medical care was directed towards the severe condition and the multiple surgeries that he had concerning his neck. The Claimant simply asks that the Commission review the evidence and amend the Award to include lifetime medical care for his problems with his low back.

II. THE CLAIMANT WOULD REQUEST A REVIEW OF THE APPLICABLE AVERAGE WEEKLY WAGE AND COMPENSATION RATE AND THAT IT BE RAISED FROM \$492.84 TO \$591.73 BASED ON THE EVIDENCE IN THE RECORD.

As noted, the decision of the Hearing Commissioner finding that exceptional circumstances existed for a determination of the average weekly wage has not been appealed nor do the Defendants contest the average weekly wage and resulting compensation rate applied by the Commissioner. The Claimant has filed a limited appeal simply to request that the Commission review the evidence and increase the compensation rate to \$591.73.

Mr. Brown had been employed by Boyd Brothers and testified that he left Boyd Brothers for several reasons. The first of which was to come off the road and be able to run more local routes; and the second was that he could make more money according to what he was being told with the employer, Bulldog Hiway Express. Mr. Brown testified that he was told when he began work for Bulldog that he would make .50 cents per mile.

He also produced documentary evidence concerning his claim in the form of paychecks with Bulldog.

In addition to the Claimant's testimony, the Defendants presented testimony of Ms. Monica Reese concerning the rate of pay and the average weekly wage of people that worked for Bulldog.

In the Findings of Fact concerning the average weekly wage and applicable compensation rate, there is actually no evidence set out. However, in the Statement of the Case the Hearing Commissioner noted the Claimant's testimony concerning one of the reasons being that he would make .50 cents per mile but noted that, "he did not produce any witness to that effect nor did he produce any documentation to the effect."

He then noted that Ms. Reese disagreed with the mileage rate and testified that the drivers for Bulldog, "did not make .50 cents per mile and then testified as to rate which they were paid."

The Hearing Commissioner then again noted there was no documentation "to support the Claimant's testimony" of being promised .50 cents per mile and he did not identify the exact person that told him that. The Commissioner then noted the employer's representative (unsupported) testimony concerning what an employee would make considering all the employees and that he had considered the evidence presented by the Claimant,

"concerning his past wages". He determined that based on that the testimony of Ms. Reese concerning the average weekly wage and what a top producer for Bulldog made, which he found it appears the Claimant would be, he established the average weekly wage.

The Hearing Commissioner gave obvious credence to the Claimant's testimony and evidence he presented about the amount of money that he had made in the past and really did not increase the Claimant's average weekly wage only because of a lack of documentation or testimony to support his statement that he was told he would be paid .50 cents per mile.

The Hearing Commissioner obviously gave weight to the testimony of Ms. Reese to keep from raising the Claimant's compensation rate to \$591.73 he based his decision almost exclusively on the Claimant's failure to present evidence, documentary or "supporting" otherwise, to support his claim that he was told he would make .50 cents per mile but relied on Ms. Reese's testimony that no Bulldog driver made that amount of money per mile. In fact, she testified at p. 45 specifically that the most any Bulldog driver would make would be .42 cents per mile.

Mr. Brown had testified that when he left Boyd Brothers that he was being paid approximately .39 cents per mile and that

Bulldog was offering him .50 cents per mile and that that was going to increase his pay. (Tr., p. 18, ll. 16-19).

Mr. Brown would readily admit that during the hearing, any documentation supporting his testimony on the mileage rate was not pointed out but the Commissioner's statement that there was not documentation supporting his testimony and more importantly documentation that is contrary to the testimony of Ms. Reese is inaccurate. To the contrary, there is specific documentation in the Record contrary to her testimony.

In support of his claim, Mr. Brown submitted various paychecks from his employer in support of his claim which can be found at APA Submissions p. 125 through 127. Those paychecks were admitted without objection and showed that Bulldog was paying Mr. Brown \$1.00 per mile. On the paycheck found at p. 126, the Claimant was paid for 474.2500 miles at the rate of \$1.00 per mile for a total of \$474.25. On the paycheck on p. 127, the Claimant was paid for a total of 368 miles at a rate of \$1.00 per mile for a total of \$368.00 and on the paycheck on p. 125, the Claimant was paid for a total of 177.5 miles at a rate of \$1.00 per mile for a total of \$177.50. Obviously, this supports the Claimant's testimony that he was to be paid .50 cents or more per mile and that is one of the reasons he went to Bulldog, Inc. There is no contradictory documentary evidence in the Record on the mileage rate.

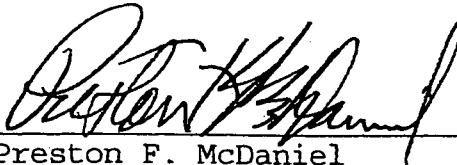
Finally, the Claimant came from a job where he was making a lot more money than he was making at the time of injury. Our Supreme Court has held that the earning capacity of the Claimant stretches into the future and his loss in terms of the loss of earning capacity from the injury must be thought of in terms of that future loss and the Commission should award a compensation rate to compensate him for that future loss. The Claimant would simply ask that the Commission review the documentary evidence that is set out above which is confirmatory of the testimony of the Claimant and contrary to the testimony of Ms. Reese and also that the Commission review the amount of money that the Claimant was making for over a full year when he went to work for Bulldog (which confirms his testimony as to why he was leaving Boyd Brothers and coming with Bulldog which was simply for two reasons: 1) to be closer to home and 2) to make more money), and would ask that the Commission increase the compensation rate to \$591.79 which represents just the income he was making when he came to Bulldog.

CONCLUSION

For the foregoing reasons, the Claimant would simply ask that the Commission amend the Order of the Commissioner to award him lifetime medical benefits for the problems that he has with

his low back as substantiated by the evidence and that the Commission increase the compensation rate to \$591.97 which is a rate which will fairly compensate him for the loss he sustained as a result of this accident. This man is totally and permanently disabled and is 59 years old and even at the increased compensation rate, the award in this matter would only partially compensate him for the severe loss of earnings that he will have as a result of the accident.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Preston F. McDaniel", is written over a horizontal line.

Preston F. McDaniel
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Attorney for the Claimant

February 14, 2011

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0809238

THOMAS LEE BROWN, Employee,

Claimant/Appellant,

vs.

PEOPLEASE CORPORATION, Employer,

AND

ARCH INSURANCE COMPANY C/O
GALLAGHER BASSETT SERVICES, INC.,
Carrier,

Defendants/Respondents.

**RESPONDENTS' BRIEF TO THE
FULL COMMISSION**

A Hearing in this matter was held on October 22, 2010. The Single Commissioner, by Order dated November 23, 2010, found the Claimant permanently and totally disabled. In addition, the Commissioner increased the Claimant's compensation rate from \$393.14 to \$493.84. Despite this victory, the Claimant's attorney appealed the Order of the Single Commissioner. Specifically, the Claimant requested that the low back and legs be designated injured body parts in this case; that specific treating physicians be designated in the Order; and that the average weekly wage and compensation rate be raised even further to \$591.73.

The Defendants contend that the Single Commissioner's Order should be affirmed as written.

QUESTIONS PRESENTED

1. Should the Claimant's lower back be included as a compensable body part in the claim?
2. Should the Claimant's compensation rate be raised further to \$591.73?

ARGUMENT

1. **The Claimant never received any authorized medical treatment for his low back and the lower back should not be a compensable injury in this claim.**

The Claimant was injured while driving an 18-wheeler. He was traveling down the interstate when a car swerved into the side of the trailer. The Claimant testified that he felt a jolt when his 18-wheeler was impacted. The impact did not stop his truck. The Claimant slowed his truck down and pulled over to the side of the road.

The Claimant ultimately underwent two surgeries on his cervical spine. The Defendants never provided any medical care for the Claimant's lower back. Further, the Claimant never requested any treatment for his low back. When seen by his family physician, Dr. Denise Algood, on June 23, 2008 (six weeks after the accident), the Claimant complained of pain on the left side of his neck.

There is no mention of the need for any additional medical treatment for the Claimant's low back. The Defendants therefore request that the Order be affirmed as written regarding compensability of the lower back.

2. **The Claimant received a generous increase from the Single Commissioner regarding his average weekly wage and compensation rate and there is no evidence to support a further increase.**

The Form 20 and all documentary wage information in this claim showed an average weekly wage of \$589.69 and a compensation rate of \$393.14. A statement of the Claimant's actual earnings was submitted into evidence and is attached as Exhibit A to this Brief. This statement shows actual earnings of \$17,617.25 over a period of thirty weeks. This statement would give the Claimant an average weekly wage of \$587.24. The testimony of Monica Reese at the hearing supported the documentary evidence and the Form 20. However, Commissioner Huffstetler chose to use his discretion and grant the Claimant some increase in his average

weekly wage and compensation rate. It can only be assumed he was attempting to look into the future to the Claimant's potential future earnings.

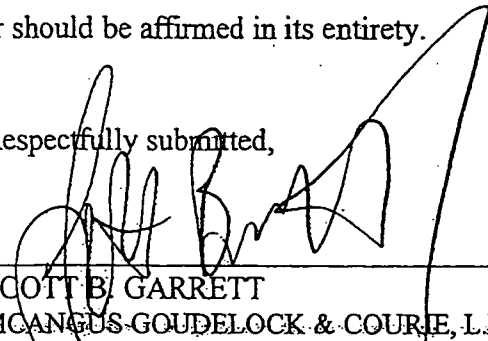
Monica Reese of the Employer testified that the highest paid truck drivers employed through Bulldog would earn \$38,500 per year. The Hearing Commissioner used the \$38,500 per year figure to end up with an average weekly wage of \$740.38 and a compensation rate of \$493.84.

The Defendants contend this calculation is more than fair to the Claimant and should therefore be affirmed.

CONCLUSION

The Order of the Single Commissioner should be affirmed in its entirety.

Respectfully submitted,



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Columbia, South Carolina
March 1, 2011

Brown 2008

System Date: 12/15/2008
 User Date: 12/14/2008
 Time: 10:44:35 AM

PeoplLease Corp 2007-2008 Employee Earnings - Summary

Page: 1
 User ID: Monica

Employee: 01-010-BROT- 01-010-BROT
 Check Date: 0/0/0000 - 12/31/9999

Legend:
 * = More than one rate for the check

Check Date	Gross Wages/Tips	Rept. Tips	FICA/SS	FICA/Med	FIT	EIC	State	Local	Deductions	Net Wages
Employee: 01-010-BROT Thomas Brown										
1/15/2008	\$357.00	\$0.00	\$22.13	\$5.15	\$0.00	\$0.00	\$3.85	\$0.00	\$75.00	\$459.84
1/29/2008	\$450.00	\$0.00	\$27.90	\$6.55	\$0.00	\$0.00	\$3.18	\$0.00	\$50.00	\$553.44
2/12/2008	\$366.00	\$0.00	\$22.82	\$5.34	\$0.00	\$0.00	\$3.25	\$0.00	\$150.00	\$446.59
2/26/2008	\$737.75	\$0.00	\$45.74	\$10.69	\$46.80	\$0.00	\$26.89	\$0.00	\$150.00	\$717.63
3/15/2008	\$991.00	\$0.00	\$61.44	\$14.37	\$86.73	\$0.00	\$44.62	\$0.00	\$84.99	\$958.05
3/29/2008	\$308.00	\$0.00	\$19.10	\$4.47	\$0.00	\$0.00	\$1.30	\$0.00	\$205.99	\$284.14
4/12/2008	\$519.25	\$0.00	\$32.19	\$7.52	\$13.18	\$0.00	\$11.60	\$0.00	\$103.24	\$611.51
5/7/2008	\$405.00	\$0.00	\$25.11	\$5.87	\$1.75	\$0.00	\$4.86	\$0.00	\$125.99	\$451.42
5/14/2008	\$728.00	\$0.00	\$45.14	\$10.26	\$43.72	\$0.00	\$26.21	\$0.00	\$195.99	\$686.38
5/21/2008	\$678.25	\$0.00	\$42.05	\$9.83	\$36.26	\$0.00	\$22.73	\$0.00	\$79.99	\$747.39
5/28/2008	\$531.00	\$0.00	\$33.05	\$7.75	\$14.55	\$0.00	\$12.56	\$0.00	\$250.49	\$474.62
6/4/2008	\$474.25	\$0.00	\$29.40	\$6.88	\$8.68	\$0.00	\$8.53	\$0.00	\$175.99	\$504.67
6/11/2008	\$846.00	\$0.00	\$52.45	\$12.26	\$61.42	\$0.00	\$34.47	\$0.00	\$176.74	\$768.66
6/18/2008	\$836.75	\$0.00	\$51.88	\$12.14	\$60.03	\$0.00	\$33.82	\$0.00	\$176.74	\$762.14
6/25/2008	\$658.25	\$0.00	\$40.81	\$9.54	\$33.26	\$0.00	\$21.33	\$0.00	\$175.99	\$637.32
7/2/2008	\$548.50	\$0.00	\$33.76	\$7.90	\$16.19	\$0.00	\$13.37	\$0.00	\$275.99	\$457.29
7/9/2008	\$696.25	\$0.00	\$41.03	\$9.59	\$33.78	\$0.00	\$21.57	\$0.00	\$211.28	\$639.00
7/16/2008	\$677.00	\$0.00	\$39.83	\$9.32	\$30.89	\$0.00	\$20.21	\$0.00	\$210.53	\$626.21
7/23/2008	\$770.25	\$0.00	\$45.61	\$10.67	\$44.88	\$0.00	\$26.75	\$0.00	\$118.53	\$783.81
7/30/2008	\$729.00	\$0.00	\$43.06	\$10.07	\$38.69	\$0.00	\$23.86	\$0.00	\$175.53	\$697.78
8/6/2008	\$430.00	\$0.00	\$24.52	\$5.72	\$0.80	\$0.00	\$4.43	\$0.00	\$277.78	\$376.74
8/13/2008	\$786.25	\$0.00	\$46.60	\$10.90	\$47.28	\$0.00	\$27.87	\$0.00	\$210.53	\$703.07
8/20/2008	\$925.50	\$0.00	\$55.24	\$12.92	\$68.16	\$0.00	\$37.62	\$0.00	\$212.03	\$799.53
8/27/2008	\$177.50	\$0.00	\$8.87	\$2.07	\$0.00	\$0.00	\$0.00	\$0.00	\$135.53	\$83.03
9/3/2008	\$386.00	\$0.00	\$21.75	\$5.10	\$0.00	\$0.00	\$2.61	\$0.00	\$241.53	\$322.93
9/10/2008	\$341.25	\$0.00	\$19.01	\$4.44	\$0.00	\$0.00	\$1.26	\$0.00	\$286.28	\$238.26
9/17/2008	\$549.00	\$0.00	\$33.90	\$7.45	\$12.70	\$0.00	\$11.26	\$0.00	\$205.53	\$550.15
9/24/2008	\$792.25	\$0.00	\$46.98	\$10.49	\$48.18	\$0.00	\$28.29	\$0.00	\$212.03	\$705.78
10/1/2008	\$464.25	\$0.00	\$26.64	\$6.23	\$4.22	\$0.00	\$6.09	\$0.00	\$211.28	\$469.79
10/8/2008	\$457.75	\$0.00	\$26.24	\$6.14	\$3.57	\$0.00	\$5.74	\$0.00	\$135.53	\$540.53
Employee Totals: 01-010-BROT Thomas Brown										
	\$17,617.25	\$0.00	\$1,062.29	\$248.44	\$762.93	\$0.00	\$493.28	\$0.00	\$5,384.80	\$17,049.51

$$17,617.25 \div 30 = 587.24$$

ANW

System Date: 10/15/2010
User Date: 10/14/2010
Time: 12:44:39 AM

PeoplEase Corp 2007-2008
Employee Earnings - Summary

Page: 32
User ID: Monica

Range:
Employee: 01-010-BROT - 01-010-BROT
Check Dates: 01/01/0000 - 12/31/9999

Legend:

--- More than one rate for the check

Check Date	Gross Wages/Tips	Rept. Tips	FICA/SS	FICA/Med	ELT	ELC	State	Local	Deductions	Net Wages
Report Total:	\$57,617.55	\$50.00	\$1,062.29	\$548.94	\$762.93	\$0.00	\$193.28	\$0.00	\$5,384.80	\$17,049.51

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

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JUL 28 2011
SC Court of Appeals

WCC File No. 0809238

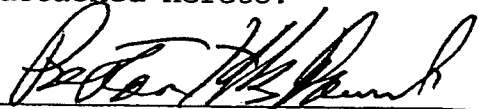
Thomas Lee Brown, ... Claimant/Appellant

v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc. Defendants/Respondents.

NOTICE OF APPEAL

Claimant Thomas Lee Brown appeals the final Order of the South Carolina Workers' Compensation Commission dated June 29, 2011. Appellant received notice of entry of this Order by email on June 29, 2011. The Appellant has not received notice by registered mail as required by S.C. Code §42-17-60 nor by mail pursuant to S.C. Code §1-23-350. The grounds for the appeal pursuant to S.C. Code §42-17-60 are attached hereto.


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Attorney for Appellant

July 27, 2011

Other Counsel of Record:

Scott B. Garrett, Esquire
MCANGUS, GOUDELOCK & COURIE
Post Office Box 12519
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803-227-2224
Attorney for Respondents

GROUNDS FOR APPEAL

THOMAS LEE BROWN v. PEOPLELEASE CORP.

W.C.C. File No. 0809238

1. That the Hearing Commissioner and Commission erred by not specifically awarding the Claimant lifetime medical care for his low back and legs where the undisputed facts are that the Defendants did not contest that the Claimant had sustained injury to and/or which affected his low back and legs and where the uncontested medical evidence from the authorized treating physicians establishes that from the date of the accident forward he was treated for problems with his low back and legs and where those and other doctors stated the opinions that these injuries and need for treatment to these body parts stemmed from the work-related automobile accident.

2. That the Hearing Commissioner and Commission erred as a matter of law by failing to designate the previously authorized treating physicians as the physicians to continue to provide treatment at least until such time as the Defendants specifically designate and/or provide medical care through physicians of their choice for his continuing problems under the award of lifetime medical benefits to effect a cure or provide relief from the Claimant's disabling symptoms stemming from the accident.

3. That the Claimant requests a review by the Court as a matter of law under S.C. Code §42-1-40 on the specific and limited issue as to whether or not the average weekly wage and resulting compensation rate as awarded by the Commission should be further raised to an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73, which is based on the uncontested evidence of a full year of employment with his previous employer prior to the Claimant coming to work with the employer and further based on the pay stubs that were submitted into the Record which supports the testimony of the Claimant that he was to make at least \$.50/mile and is contrary to the testimony of the employer representative that the maximum rate was \$.38/mile wherein those pay stubs reflect that he was to be paid \$1.00 per mile, specifically as set out on pgs. 125, 126, and 127 of the Claimant's APA Submissions.

Respectfully submitted,



Preston F. McDaniel, Esquire
Attorney for the Employee/Claimant
/Appellant

July 27th, 2011

APPELLATE PANEL
DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0809238

THOMAS LEE BROWN,

EMPLOYEE,
CLAIMANT/APPELLANT,

vs.

PEOPLEASE CORPORATION,

EMPLOYER,

AND

ARCH INSURANCE COMPANY d/b
GALLAGHER BASSETT SERVICES, INC.,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in
Columbia, South Carolina on March 21, 2011.

APPEARANCES: Claimant/Appellant represented by Preston F. McDaniel, Esquire
of Columbia, SC.

Defendants/Respondents represented by Scott B. Garrett, Esquire
of Columbia, SC.

STATEMENT OF THE CASE

This claim arises out of an admittedly compensable injury which occurred on May 2, 2008. The parties were heard by the Single Commissioner on October 22, 2010 in Walterboro, South Carolina on the Forms 50 and 51. The Claimant maintained that he was permanently and totally disabled as a result of the work-related accident. Specifically, the Claimant maintained that he sustained injuries to his cervical spine, lumbar spine, bilateral upper extremities, and an aggravation of his underlying diabetic condition in his capacity as a truck driver with the Employer. In addition, the Claimant also sought a determination for a deviation in the calculation of his average weekly wage.

The Defendants admit the Claimant sustained a compensable injury by accident arising out of and in the course of his employment on May 2, 2008 resulting in an injury to his cervical spine with an aggravation to the Claimant's underlying diabetic condition. The Defendants denied that the Claimant sustained injuries to the lumbar spine or bilateral upper extremities, and that the Claimant was not entitled to an award of permanent and total disability benefits on the basis that the medical records do not support such a finding. Both parties agreed that the Claimant reached maximum medical improvement on September 28, 2010.

In an Order dated November 23, 2010, the Single Commissioner determined that the Claimant sustained a compensable injury to his cervical spine with aggravation of his underlying diabetic condition. The Single Commissioner further ordered that the Claimant is entitled to an award of permanent and total disability with lifetime, causally-related medical care as a result of loss of earning capacity pursuant to Section 42-9-10 and Section 42-9-120 of the Act. The Single Commissioner further determined that the

Claimant's average weekly wage is \$740.38 with a corresponding compensation rate of \$493.84.

In reaching his Order, the Single Commissioner found and ruled as follows:

IT IS HEREBY ORDERED that the Defendants shall pay the Claimant benefits consistent with permanent and total disability.

IT IS FURTHER ORDERED that the Defendants shall provide the Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetes.

Within the statutory period, counsel for the Claimant filed an Application for Review in this case setting forth his reasons, copies of which were furnished to all interested parties prior to the scheduled oral argument presented before the Appellate Panel on March 21, 2011.

By appeal, Claimant respectfully submitted the Hearing Commissioner erred in the following:

1. That the Hearing Commissioner erred by not specifically awarding the Claimant lifetime medical care for his low back and legs where the undisputed facts are that the Defendants did not contest that the Claimant has sustained injury to and/or which affected his low back and legs and where the uncontested medical evidence from the authorized treating physicians establishes that from the date of the accident forward he was treated for problems with his low back and legs and where those and other doctors stated the opinions that these injuries and need for treatment to these body parts stemmed from the work-related automobile accident.

2. That the Hearing Commissioner erred as a matter of law by failing to designate the previously authorized treating physicians as the physicians to continue to provide treatment at least until such time as the Defendants specifically designate and/or provide medical care through physicians of their choice for his continuing problems under the award of lifetime medical benefits to effect a cure or provide relief from the Claimant's disabling symptoms stemming from the accident.

3. That the Claimant requests a review by the Commission on the specific and limited issue as to whether or not the average weekly wage and resulting compensation rate as awarded by the Commissioner should be further raised to an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73, which is based on the uncontested evidence of a full year of employment with his previous employer prior to the Claimant coming to work with the Employer and further based on the pay stubs that were submitted into the record which supports the testimony of the Claimant that he was to make at least \$.50/mile and is contrary to the testimony of the Employer representative that the maximum rate was \$.38/mile wherein those pay stubs reflect that he was to be paid \$1.00/mile, specifically as set out on pages 125, 126 and 127 of the Claimant's APA submissions.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered to the individual members of the Appellate Panel and have since been under study and consideration.

In the Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1989), review the award, weigh the evidence as presented at the initial

hearing, and, if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner.

Thus, the Appellant and Respondents were present for oral argument on March 21, 2011 before the Appellate Panel. Therefore, based upon all submitted documentary evidence, the Record on Appeal, the Commission's file and Appellate Briefs, the Appellate Panel, by and through its statutory and inherent power, entered into its decision pursuant to S.C. Code Ann. §42-17-50. After careful review of the instant case, the Commission, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, the Appellate Panel has stated that the following Findings of Fact and Conclusions of Law shall become the law of the case and, therefore, the Decision and Order of the Hearing Commissioner is **AFFIRMED** in its entirety.

FINDINGS OF FACT

After hearing able arguments from counsel for the parties, a reading of the parties' respective Motions and Responses and Briefs, and a thorough analysis of the applicable statutes and regulations, the Appellate Panel concludes that Commissioner Huffstetler's Findings and Conclusions in his Order dated November 23, 2010, are correct as stated. Specifically, we the Appellate Panel find the following as fact:

1. That this is an admitted accident and that the only issues before this Appellate Panel are a determination of the disability award to which the Claimant is entitled as a result of his injuries sustained as a result of the accident and as to the average weekly wage and resulting compensation rate which will apply in this matter.

2. We find that exceptional circumstances exist to determine a fair and reasonable average weekly wage and resulting compensation rate for all parties involved and which will properly represent the Claimant's loss of earning capacity into the future. The average weekly wage of \$740.38 with a resulting compensation rate of \$493.84 should apply.

3. That the Claimant has requested an award for total and permanent disability benefits based on either a total loss of earning capacity and/or for having lost more than 50% of the use of his back. In reference to an award simply being based under Section 42-9-30 of the Act for loss of use of the back, the case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work. The Claimant suffered a cervical injury with multi-level fusions and aggravation of his underlying diabetic condition.

4. That, based upon the decision that the Claimant is totally and permanently disabled, he is entitled to lifetime, causally-related medical care to his cervical spine and diabetes.

5. That the Claimant is currently receiving weekly temporary total disability benefits. Based on the decision that the Claimant's condition is total and permanent and that he is entitled to an award for such, the Claimant shall continue to receive weekly benefits at the compensation rate of \$493.84 per this award until the balance of the 500 weeks of compensation is paid. A lump sum request was withdrawn by the Claimant at the time of the hearing. Such lump sum request may be renewed and decided by the Commission at a later date and is subject to subsequent Order of the Commission. The

attorney's fees and costs in this matter may be requested and taken off the back end and paid in a lump sum.

6. That the Claimant was determined to have reached maximum medical improvement per the determination by Dr. Scott Boyd on April 19, 2010.

CONCLUSIONS OF LAW

In view of these Findings of Fact, and as provided in the South Carolina Code of Laws, we the Appellate Panel conclude the following as matters of law:

1. That under Section 42-1-40, the determination is made as to the average weekly wage and resulting compensation rate.
2. That under Section 42-9-10 and Section 42-1-120, the determination is made as to the Claimant's entitlement to an award for total and permanent disability for total loss of earning capacity.
3. That under Section 42-15-60, the determination is made as to the Claimant's entitlement to medical care and, based on the decision that he is entitled to an award for total and permanent disability, the Claimant is entitled to lifetime, causally-related medical care for his cervical spine and diabetic condition.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Appellate Panel hereby **ORDERS, ADJUDGES AND DECREES:**

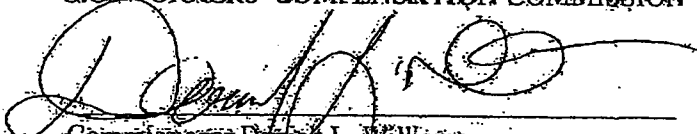
IT IS HEREBY ORDERED that the Defendants shall pay the Claimant benefits consistent with permanent and total disability.

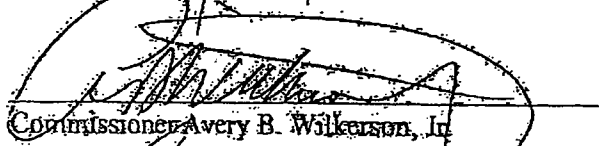
IT IS FURTHER ORDERED that the Defendants shall provide the Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetic condition.

AND IT IS SO ORDERED.

The Hearing Commissioner's Order is AFFIRMED IN FULL by the Appellate Panel of the South Carolina Workers' Compensation Commission.

S.C. WORKERS' COMPENSATION COMMISSION


Commissioner Derrick L. Williams


Commissioner Avery B. Wilkerson, Jr.


Commissioner T. Scott Beck

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on June 29, 2011

Preston F. McDaniel
Scott B. Garrett
Clyde C. Dean Jr.

Mary Sowell League
Latonya Edwards

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

RECEIVED

JUL 28 2011

SC Court of Appeals

WCC File No. 0809238

Thomas Lee Brown, ... Claimant/Appellant

v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc. Defendants/Respondents.

MOTION PURSUANT TO S.C. CODE §1-23-380(3) FOR LEAVE TO SUBMIT
ADDITIONAL EVIDENCE AND TO
STAY THE APPEAL FILED IN THIS MATTER PENDING FURTHER HEARING
OF THE S.C. WORKERS' COMPENSATION COMMISSION

TO: SCOTT B. GARRETT, ESQUIRE, ATTORNEY FOR THE RESPONDENTS
AND THE S.C. WORKERS' COMPENSATION COMMISSION:

YOU WILL PLEASE TAKE NOTICE that pursuant to SCACR Rules
240 and 241 and S.C. Code §1-23-380(3), the Claimant/Appellant
hereby moves for an Order of the Court for leave to present
additional evidence and remanding this case to the S.C. Workers'
Compensation Commission to take such evidence upon such

conditions that the Court determines to be appropriate and to thereafter consider modifying its Findings and Decisions by reason of the additional evidence and to then file the evidence, modifications, new Findings and/or Decision with the Court, and for an Order of the Court staying the appeal pending the remand to the S.C. Workers' Compensation Commission for the purpose of taking the additional evidence. Said Motion is based upon the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.



Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Employee/Claimant
/Appellant

July 27, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

WCC File No. 0809238

Thomas Lee Brown, ... Claimant/Appellant

v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc. Defendants/Respondents.

MEMORANDUM IN SUPPORT OF
MOTION PURSUANT TO S.C. CODE §1-23-380(3) FOR LEAVE TO SUBMIT
ADDITIONAL EVIDENCE AND TO
STAY THE APPEAL FILED IN THIS MATTER PENDING FURTHER HEARING
OF THE S.C. WORKERS' COMPENSATION COMMISSION

The Appellant would respectfully show unto the Court in
support of the Motion as follows:

1. That this matter arises out of a Form 50 request for hearing filed by the Appellant with the S.C. Workers' Compensation Commission requesting an Award of total disability benefits and lifetime medical care in his claim. A hearing was held before the Honorable David W. Huffstetler, Commissioner, who was heard in Walterboro, South Carolina on October 22, 2010. The Hearing resulted in an Award for total and permanent disability, lifetime medical care for certain injuries and an increase in the compensation rate.

2. That as part of that request, the Claimant requested pursuant to S.C. Code §42-1-40 a review as a matter of fact and law of the applicable compensation rate under Paragraph 1 of that Code Section on the basis that the Claimant had worked for a period of less than 52 weeks for his employer and that the evidence would show that he had left his former employer Boyd Brothers, for whom he had worked for the entire previous calendar year prior to his accident, and had gone to work with Bulldog Trucking, Inc. (later identified in pleadings as Bulldog/Peoplease) to be closer to home and so he could make more money based in large part on a higher mileage rate. Further, under Paragraph 2 of that Code Section, the Claimant submitted that exceptional circumstances existed to increase his average weekly wage and resulting compensation rate based on the amount of money that he was making with his previous employer on an average

weekly basis for the entire year prior to leaving that employer to go to work for Bulldog/Peoplease and considering the increasing amount of time and income that he was working with Bulldog/Peoplease and the rate of pay (mileage rate) that he was told he would be making at Bulldog/Peoplease.

3. That testimony was taken at this Hearing from the Claimant, Mr. Thomas Brown, and from a representative of the Employer, Ms. Monica Reese, who testified that she was corporate counsel for Peoplease. (Tr. p. 30, ll. 24-25).

4. That as part of his testimony in support of his claim for a higher average weekly wage, the Claimant/Appellant testified that in addition to wanting to be closer to home, that when he left Boyd Brothers he was making .39 (thirty-nine) cents per mile and that when he applied, was hired and went through orientation to work for Bulldog/Peoplease, he was offered and told he would make .50 (fifty) cents per mile and therefore going with Bulldog/Peoplease would give him the opportunity to increase his pay. (Tr. p. 18, ll. 11-19).

5. That Ms. Monica Reese testified on direct examination that she was corporate counsel for Peoplease (Tr. p. 30, ll. 19-25); as to the number of drivers that Peoplease had employed with Bulldog; and that she was involved in the day-to-day running and operations of Bulldog/Peoplease; and that as part of her responsibilities as corporate counsel she was assigned to the

management of and to operate as the supervisor of all the workers' compensation claims (Tr. p. 31, l. 7 - p. 32, l. 11). She testified that she was responsible for and prepared the Form 20s in each case, which is the form used to determine the average weekly wage and compensation rate in every workers' compensation claim. (Tr. p. 33, ll. 5-12). She then testified on recross-examination as follows:

"By Mr. McDaniel:

Q: Madame, I want to make absolutely sure of something. You are saying that Bulldog does not pay any drivers over .40 (forty) cents or they don't pay people in his classification over .40 (forty) cents.

A: They don't pay any driver over .42 (forty-two cents).

(Emphasis added).

Q: So, if Mr. Brown was told that he was going to be making .50 (fifty) cents per mile that is inaccurate?

A: I do not know of anyone that would have told him that, even the terms of employment would not have said that he made .50 (fifty) cents per mile. Mr. Brown would receive per diem pay if he were on overnight travel, but that does not -- it is not included in average weekly wage as it is reimbursement of expenses, and so. If he was driving the longer routes, his checks would have been bigger but it would have included reimbursement. But, at no time would his wages been any more than .42 (forty-two) cents a mile. (Emphasis added).

Mr. McDaniel:

Nothing further for this witness."

(Tr. p. 45, ll. 3-24).

6. That after the testimony of Ms. Reese, Mr. Brown was recalled on rebuttal and testified that he could not remember the person's name that had hired him but that he was over orientation in the Safety Department. He was hired in Charleston at a Bulldog facility and it was his understanding that he would be paid .50 (fifty) cents per mile if he came to work with them. He further testified that he did not know if had signed an employee contract but that he signed a bunch of papers and that again, the reason he came to Bulldog/Peoplease was because of the .50 (fifty) cents per mile and because, "that was a pretty good deal." (Tr. p. 46, l. 10 - p. 47, l. 9). Copies of all Transcript pages are attached hereto and incorporated herein by reference, along with the cover page for the Transcript.

7. That in his Order, the Commissioner noted in his Statement of the Case that:

"He (Mr. Brown) testified that he was told when he began work for Bulldog that he would make .50 cents per mile. However, he did not produce any witness to that effect nor did he produce any documentation to that effect. . . .

Ms. Monica Reese disagreed as to the mileage rate at which drivers were paid and testified that drivers did not make .50 cent per mile and then testified as to the range at which they were paid. . . .

Therefore, there is no documentary evidence to support the Claimant's testimony of having been promised .50 cent per mile and he did not identify the exact person that told him that at the time of employment."

8. That in his notes requesting a proposed Order, the Commissioner specifically noted,

"There is no documentary evidence to support the Claimant's testimony of having been paid .50 (fifty) cents per mile. He could not even identify who told him that. . . . So, I accept the testimony from Ms. Reese and use that number to calculate the average weekly wage."

9. That subsequent to the hearing at the direction of Counsel for the Claimant, Claimant went through his records and then while going through records in preparation for a subsequent hearing requesting a lump sum payment of benefits, the Claimant found a card that he was given at the time that he applied for employment with Bulldog Hiway Express. (A color copy of that card is attached hereto and is incorporated herein by reference.) That card clearly states on the back of the card that,

"Run legal: .50 cents per loaded mile."

(Emphasis added).

The original of that card is in the possession of the Claimant and will be submitted to/filed with the Court upon request.

10. That clearly the Hearing Commissioner in his notes and in his formal Order discounted the testimony of the Claimant

because the Claimant failed to produce documentary evidence to support his testimony but chose to believe and rely on the testimony of corporate counsel which was contrary to the Claimant's testimony (whose testimony also was not supported by documentary evidence) and relied on that testimony in reaching a determination of the average weekly wage and applicable compensation rate at a rate less than requested by the Claimant.

11. That based upon a review of this additional evidence and the original decision of the Hearing Commissioner and his reliance in both his notes and his Order on the testimony submitted, and the lack of documentary evidence to support the testimony of the Claimant, that the Claimant/Appellant would respectfully submit to the Court that this additional evidence which has been found subsequent to the hearing is material. Further, there is good reason for the Claimant not to submit this documentary evidence in support of his testimony not only due to the fact that he could not locate it and did not know it would be necessary to present at the hearing, but more importantly it was not until an amended Pre-Hearing Brief and Notice of Witnesses was filed which was only filed on October 14th, eight (8) days prior to the hearing (which was untimely), that Ms. Monica Reese was specifically listed as a representative who would testify and was it made known to the Claimant that the Defendants would actually present wage information from similar employees and a Form 20 concerning the

wages of similar employees concerning the average weekly wage and compensation rate. Therefore, the Claimant had no reason to believe that his testimony and the documentary evidence he presented concerning the average weekly wage issue would be specifically challenged until this late filing. (A copy of the amended Pre-Hearing Brief is attached hereto and incorporated herein by reference.)

Wherefore, the Claimant believes that the above-referenced documentary evidence is material and may have resulted in a different result concerning the average weekly wage issue and would have lent credibility to the Claimant's testimony, which was obviously discounted by the Commissioner due to his perception of the Claimant's failure to produce documentary evidence to support his testimony. Therefore, the Appellant believes that there is good cause for such documentary evidence not to have been submitted or for the Claimant/Appellant to have known that there was a necessity of producing documentary evidence to support his testimony, the lack of which the Commissioner would use to discredit his testimony and believe the unsupported testimony of another witness over his testimony. The Claimant/Appellant would respectfully request that this Court remand this matter to the Commission for the submission of this additional evidence and would request that this Court stay the appeal pending that remand.

Respectfully submitted,



Preston F. McDaniel, Esquire
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1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Employee/Claimant
/Appellant

July 27, 2011

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

EMPLOYEE/CLAIMANT: THOMAS BROWN

EMPLOYER: PEOPLELEASE

INSURER: ARCH INSURANCE COMPANY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF THE WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 22ND
DAY OF OCTOBER, 2010, COMMENCING AT THE HOUR OF 12:31
PM IN WALTERBORO, SOUTH CAROLINA, ATTENDED BY
COUNSEL AS FOLLOWS:

KATHRYN BOSTROM,
VERBATIM COURT REPORTER

COPY

BOSTROM REPORTING

109 KYLE AVENUE
INMAN, S.C. 29349
803-446-7040

1 TIME. I REALLY COULDN'T PINPOINT IN PARTICULAR.

2 Q WITH THE PROBLEMS YOU ARE HAVING, IS THERE ANY JOB -
3 - COOKING, RECEIVING, TRUCK DRIVING, THAT YOU'VE GOT
4 A BACKGROUND EXPERIENCE IN, IS THERE ANY JOB OUT
5 THERE THAT YOU'VE GOT A BACKGROUND EXPERIENCE IN
6 THAT YOU COULD GO BACK TO DOING, IN YOUR OPINION, IN
7 YOUR CURRENT CONDITION?

8 A NO, NOT THAT I KNOW OF.

9 Q WOULD YOU LOVE TO BE WORKING?

10 A I WOULD, YES.

11 Q LET'S NOW GO BACK AND TALK JUST A MINUTE ABOUT BOYD
12 BROTHERS. WE PUT IN THE AMOUNT OF MONEY THAT YOU
13 WERE MAKING WHICH WAS ABOUT OVER \$40,000 AT BOYD
14 BROTHERS. WHY DID YOU LEAVE BOYD BROTHERS AND GO TO
15 BULLDOG?

16 A WELL, WHEN I LEFT BOYD BROTHERS, THEY WAS PAYING ME,
17 I THINK, ABOUT 39 CENTS A MILE. AND, BULLDOG WAS
18 OFFERING, I THINK, 50 CENT A MILE AND IT WAS AN
19 OPPORTUNITY TO, AS TIME GOES ON, INCREASE MY PAY.

20 Q FROM THE TIME YOU STARTED WITH BULLDOG, UNTIL THE
21 TIME OF THE ACCIDENT, WHAT HAPPENED TO YOUR
22 PAYCHECKS? DID THEY REMAIN THE SAME, DID THEY GET
23 MORE, OR LESS?

24 A WELL, THEY INCREASED A LITTLE BIT. THEY -- I WAS
25 WANTING TO EVENTUALLY GET ON SOME LONG RUNS THAT

1 MR. MCDANIEL:

2 NOTHING FURTHER.

3 COMMISSIONER HUFFSTETLER:

4 ANYTHING ELSE FOR THIS WITNESS?

5 MR. MCDANIEL:

6 NOTHING FURTHER FOR THIS WITNESS.

7 COMMISSIONER HUFFSTETLER:

8 ANYTHING ELSE FOR THE CLAIMANT?

9 MR. MCDANIEL:

10 NOTHING ELSE, THAT'S THE CLAIMANT'S CASE.

11 MR. GARRETT:

12 I HAVE ONE WITNESS FOR JUST A COUPLE OF
13 QUESTIONS. I CALL MONICA L REESE.

14 * * * * * * * * * * * * * * * *

15 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
16 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
17 MATTER HEREIN:

18 * * * * * * * * * * * * * * * *

19 MONICA REESE,

20 BEING FIRST DULY SWORN OR AFFIRMED, TESTIFIED ON HIS
21 OATH AS FOLLOWS:

22 DIRECT EXAMINATION

23 BY MR. GARRETT:

24 Q MONICA, WHAT IS YOUR JOB AT PEOPLELEASE?

25 A I'M CORPORATE COUNSEL.

1 Q AND, YOU HAVE SEEN THE REPORT THAT'S ALREADY BEEN
2 INTRODUCED AS DEFENDANT'S EXHIBIT 1 --

3 A YES.

4 Q -- SHOWING MR. BROWN'S EARNINGS BY THE WEEK,
5 CORRECT?

6 A CORRECT.

7 Q AND, IS THAT REPRESENTATIVE OF ANY OF THE DRIVERS
8 OUT THERE IN BULLDOG WHO HAVE THOSE TYPE OF ROUTES?

9 MR. MCDANIEL:

10 I'M GOING TO OBJECT TO THAT QUESTION, IT CALLS
11 FOR SPECULATION ON BEHALF OF THE WITNESS.
12 THERE HASN'T BEEN ANY FOUNDATION BEEN
13 ESTABLISHED CONCERNING THE OTHER DRIVERS?

14 COMMISSIONER HUFFSTETLER:

15 YOU HAVEN'T LAID GROUNDWORK OF HOW CORPORATE
16 COUNSEL WOULD HAVE ACCESS AND KNOWLEDGE,
17 PERSONAL KNOWLEDGE OF THAT.

18 MR. GARRETT:

19 I'LL LAY THAT.

20 Q DO YOU, ARE YOU INVOLVED IN DAY-TO-DAY RUNNING OF
21 OPERATIONS OF PEOPLEASE?

22 A YES.

23 Q IN ADDITION TO YOUR ACTIONS AS CORPORATE COUNSEL?

24 A YES, I AM.

25 Q AND, IN PART OF YOUR ROLE AS CORPORATE COUNSEL, ARE

1 YOU ASSIGNED TO MANAGE AND OPERATE AS THE SUPERVISOR
2 OF ALL THE WORKERS' COMPENSATION CLAIMS?

3 A YES, I AM.

4 Q AND, IN THAT CAPACITY, ARE YOU FAMILIAR WITH THE
5 RULES AND CALCULATIONS ON AVERAGE WEEKLY WAGE AND
6 COMPENSATION RATE?

7 A YES.

8 Q AND, YOU WERE AWARE THROUGH ME THAT THERE WAS AN
9 ISSUE IN THIS CASE REGARDING AVERAGE WEEKLY WAGE AND
10 COMPENSATION, CORRECT?

11 A YES.

12 Q AND, DID YOU LOOK UP WHAT --

13 MR. MCDANIEL:

14 I'M GOING TO OBJECT TO LEADING AT THIS POINT.

15 COMMISSIONER HUFFSTETTLER:

16 BE CAREFUL WITH YOUR PHRASING.

17 Q DID YOU --

18 COMMISSIONER HUFFSTETTLER:

19 WHAT HE'S COMING TO IS THE CENTRAL QUESTION AND
20 THAT IS, TO PUT IT BLUNTLY, HOW DO YOU KNOW?
21 OF YOUR OWN KNOWLEDGE, HOW DO YOU KNOW WHAT
22 DRIVERS MAKE?

23 MS. REESE:

24 BECAUSE I REVIEW EVERY EMPLOYMENT CONTRACT AND
25 MAKE SURE THAT WE ARE IN COMPLIANCE WITH THE

1 FEDERAL AND STATE --

2 COMMISSIONER HUFFSTETLER:

3 WE'RE NOT TALKING CONTRACT, WE ARE TALKING
4 ABOUT PAYROLL.

5 MS. REESE:

6 IN PREPARATION FOR EVERY WORKER'S COMPENSATION
7 CLAIM, I'M THE ONE WHO COMPLETES THE FORM 20
8 AND WHEN I WAS MADE AWARE OF THIS ISSUE, I
9 CHECKED THE PAYROLL OF EVERY DRIVER THAT WAS IN
10 A SIMILAR POSITION TO MR. BROWN AT THE TIME OF
11 HIS ACCIDENT. SO, I WENT THROUGH 60 DRIVERS'
12 PAYROLL TO BE SPECIFIC.

13 COMMISSIONER HUFFSTETLER:

14 OKAY.

15 Q IF YOU EXTRAPOLATE MR. BROWN'S WAGES FOR THE ENTIRE
16 YEAR OF 2008, IT COMES OUT TO WHERE HE WAS EARNING
17 APPROXIMATELY \$26,000, OKAY?

18 A UH-HUH.

19 Q IS THAT A FAIR AVERAGE OF WHAT THE PEOPLEASE DRIVERS
20 WORKING FOR BULLDOG EARN?

21 A YES, IT IS.

22 MR. MCDANIEL:

23 I'M GOING TO OBJECT TO THE QUESTION, THE BASIS
24 AGAIN, THERE IS NOT BEEN A FOUNDATION LAID AS
25 TO - I MEAN WE HAVE -- I OBJECT THAT THERE HAS

1 MR. MCDANIEL:

2 IF I COULD HAVE JUST A MOMENT.

3 RE CROSS EXAMINATION

4 BY MR. MCDANIEL:

5 Q MA'AM, I WANT TO MAKE ABSOLUTELY SURE OF SOMETHING.
6 YOU ARE SAYING THAT BULLDOG DOES NOT PAY ANY DRIVERS
7 OVER FORTY-CENTS OR THEY DON'T PAY PEOPLE IN HIS
8 CLASSIFICATION OVER FORTY-TWO CENTS.

9 A THEY DON'T PAY ANY DRIVER OVER FORTY-TWO CENTS.

10 Q SO, IF MR. BROWN WAS TOLD THAT HE WAS GOING TO BE
11 MAKING FIFTY-CENTS A MILE, THAT'S INACCURATE?

12 A I DO NOT KNOW OF ANYONE THAT WOULD HAVE TOLD HIM
13 THAT, EVEN THE TERMS OF EMPLOYMENT WOULD NOT HAVE
14 SAID THAT HE MADE FIFTY CENTS PER MILE. MR. BROWN
15 WOULD RECEIVE PER DIEM PAY IF HE WAS ON OVERNIGHT
16 TRAVEL, BUT THAT DOES NOT -- IT IS NOT INCLUDED IN
17 AVERAGE WEEKLY WAGE AS IT IS REIMBURSEMENT OF
18 EXPENSES, AND SO. IF HE WAS DRIVING THE LONGER
19 ROUTES, HIS CHECKS WOULD HAVE BEEN BIGGER, BUT IT
20 WOULD HAVE INCLUDED REIMBURSEMENT. BUT, AT NO TIME
21 WOULD HIS WAGES BEEN ANY MORE THAN FORTY-TWO CENTS A
22 MILE.

23 MR. MCDANIEL:

24 NOTHING FURTHER FOR THIS WITNESS.

25 MR. GARRETT:

1 NOTHING FURTHER.

2 COMMISSIONER HUFFSTETLER:

3 IS THERE ANYTHING ELSE?

4 MR. MCDANIEL:

5 ONE QUESTION FOR THE CLAIMANT.

6 COMMISSIONER HUFFSTETLER:

7 LET ME REMIND YOU YOU ARE STILL UNDER OATH.

8 MR. BROWN:

9 OKAY.

10 REDIRECT EXAMINATION

11 BY MR. MCDANIEL:

12 Q THOMAS, LET ME ASK YOU THIS. WHO HIRED YOU WHEN YOU
13 WENT TO WORK FOR PEOPLEASE FOR BULLDOG? DO YOU
14 REMEMBER THE PERSON'S NAME?

15 A I'M TRYING TO THINK. HE WAS OVER IN ORIENTATION.
16 THEY WAS OVER IN THE SAFETY DEPARTMENT.

17 Q WHERE WERE YOU ACTUALLY HIRED TO WORK WITH THEM?

18 A IN CHARLESTON, AT THE BULLDOG FACILITY.

19 Q ALL RIGHT, WHEN YOU WERE HIRED, WHAT WAS YOUR
20 UNDERSTANDING THAT YOU WERE GOING TO BE PAID PER
21 MILE?

22 A FIFTY-CENT.

23 Q DID YOU SIGN ANY KIND OF EMPLOYEE CONTRACT?

24 A I SIGNED SO MANY DIFFERENT PAPERS, I DON'T KNOW FOR
25 SURE, BUT A LOT OF THE OTHER DRIVERS AT BOYD WANTED

1 TO COME TO BULLDOG BECAUSE OF THE FIFTY CENT PER
2 MILE, BECAUSE THAT WAS A PRETTY GOOD DEAL.

3 Q AND, SO, THE REASONS YOU LEFT, AGAIN, BOYD WAS TO
4 HAVE MORE LOCAL ROUTES INSTEAD OF RUNNING ALL THE
5 WAY ACROSS THE COUNTRY AND ALSO BECAUSE OF THE
6 AMOUNT OF MONEY YOU WOULD BE PAID PER MILE.

7 MR. GARRETT:

8 I OBJECT.

9 A RIGHT.

10 MR. GARRETT:

11 YOU'VE ALREADY HAD A CHANCE AT HIM ON THIS ON
12 RE-DIRECT.

13 MR. MCDANIEL:

14 THAT'S FINE.

15 COMMISSIONER HUFFSTETLER:

16 IS THERE ANYTHING ELSE?

17 MR. MCDANIEL:

18 NOTHING FURTHER.

19 COMMISSIONER HUFFSTETLER:

20 IF NOT, THEN THAT CONCLUDES THE HEARING.

21 (THERE BEING NO FURTHER QUESTIONS, THIS
22 HEARING WAS CONCLUDED AT THE HOUR OF 1:21
23 PM.)

24

25



3388 Bulfinch Ave.
N. Charleston, S.C. 29418
www.bulldogway.com

800-846-4032
843-744-1851
Fax: 843-829-3048

SEE BACK

Run Legal: 50¢ per loaded mile
Average \$1150.00 per week
(92% of miles loaded)
- Weekends out average 1 every 2 months
- \$1000.00 sign on Bonus for experienced driver's
- Health Insurance & Benefits available



ATTORNEYS AT LAW

Reply To
SCOTT B. GARRETT
Direct Dial: (803) 227-2224
sgarrett@mgclaw.com
COLUMBIA

October 14, 2010

VIA HAND DELIVERY

Commissioner David W. Huffstetler
S. C. WORKERS' COMPENSATION COMMISSION
1333 Main Street, Suite 500
Columbia, South Carolina 29201

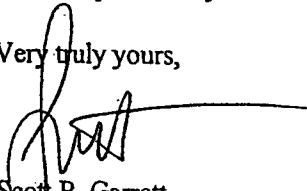
RE: Thomas Brown v. Peoplease Corporation/ Bulldog Highway Express and Arch Insurance
Company c/o Arrowpoint Capital Corp
Date of Accident: May 2, 2008
WCC File No.: 0809238
Our File No.: 2098.08421
Claim No.: 003289-000282-WC-01

Dear Commissioner Huffstetler:

Please find enclosed our **Amended Pre-Hearing Brief and Amended Notice of Witnesses and Written Medical Reports** for filing in the above captioned matter.

By copy of this letter to Preston F. McDaniel, Esquire, the claimant's attorney, we are notifying him of these submissions and serving copies of the same upon him by mail.

Very truly yours,



Scott B. Garrett

SBG/jjp
Enclosures

cc: Tara Potter, Gallagher Bassett Services, Inc. (via email only)
Monica L. Reese, Peoplease Corporation
Clyde C. Dean, Jr., Esquire, Dean Law Firm
Preston F. McDaniel, Esquire



Thomas Lee Brown
Claimant's Name
SSN
Address City State Zip
Home Phone #
Work Phone #
Scott B. Garrett
Preparer's Name

Peoplelease Corporation
Employer's Name
210 Wingo Way, Suite 400
Mount Pleasant, South Carolina 29464
Address City State Zip
Arch Insurance Company c/o Arrowpoint Capital Corp
Insurance Carrier
(803) 227-2224
Phone Number

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

- Comp. Rate: \$393.14 2. AWW: \$ 589.69 Date of Injury May 2, 2008
- Type of injury and body part(s): neck.
- Facts in controversy: What is the extent of permanent partial disability to the Claimant's neck pursuant to Section 42-9-30? The Defendants deny the Claimant is permanently and totally disabled. The Defendants deny the Claimant has sustained loss of more than 50% of the use of his back. The Claimant has been released by the treating physician and allowed to perform medium to heavy duty work. This has been confirmed by the functional capacity evaluation. The Claimant's work history is varied and there are many jobs he has done before to which he could return.
- Legal issues involved: See Number 4.
- Unusual aspects: None anticipated.
- Witnesses: (designate if expert) Representatives of Peoplelease Corporation may be called to testify. Monica Reese and other representataives of Peoplelease may be called to testify.
- Exhibits: Excerpts from Claimant's personnel file may be introduced. Wage information from similar employees of Peoplelease may be introduced regarding the average weekly wage and compensation rate issue. Form 20/Wage Statements from similar employees may be introduced regarding the average weekly wage issue.
- Medical evidence: (Indicate report pursuant to R.67-612; deposition or appearance) Records of Dr. Scott Boyd dated 4-19-10 through 9-28-10 consisting of three pages; records of Carolina Therapy Solutions LLC dated 6-10-10 through 6-14-10 consisting of five pages.
- Name, address, and specialty, if any, of the treating physician: Dr. Scott Boyd, Columbia Neurosurgical Associates, P.A., 720 Rabon Road, Columbia, South Carolina 29203
- Impairment rating(s); body part(s); physician and date of opinion: 27% loss of use to whole person from Dr. Boyd dated 9-28-10.
- I am amending my Form 50/51 in the following manner: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

SIGNATURE

Email: sgarrett@mqclaw.com

DATE OF HEARING: October 22, 2010

Time needed for hearing: 1 hour

On behalf of ☐ Claimant ☒ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
Commissioners reserve the right to admit expert witnesses at hearings.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0809238

THOMAS LEE BROWN,

Employee,

Claimant,

vs.

PEOPLELEASE CORPORATION,

Employer,

AND

ARCH INSURANCE COMPANY C/O
ARROWPOINT CAPITAL CORP,

Carrier,

Defendants.

AMENDED NOTICE OF WITNESSES
AND
WRITTEN MEDICAL REPORTS
TO BE INTRODUCED AS
DIRECT EVIDENCE ON BEHALF
OF DEFENDANT

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND PRESTON
F. MCDANIEL, ESQUIRE, ESQUIRE:

YOU ARE NOTIFIED that the Defendants, pursuant to the provisions of the South
Carolina Workers' Compensation Act and Section 1-23-330 of the South Carolina Code of Laws
(Cum. Supp. 1988) submit the following medical records and other documents as evidence:

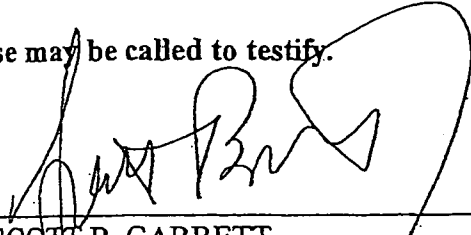
APA#	DOCTOR	PRACTICE	DATES	PAGES
1.	Scott S. Boyd	Columbia Neurosurgical Associates, P.A.	4-19-10 to 9-28-10	1-3
2.		Columbia Therapy Solutions, LLC	6-10-10 to 6-14-10	4-8

YOU ARE FURTHER NOTIFIED that you have the right to cross-examine or otherwise
oppose this evidence and, should you desire to exercise this right, you are to promptly schedule

the deposition of any provider whose records are submitted, for the purposes of cross-examination, or otherwise promptly submit opposing medical records into evidence.

YOU ARE FURTHER NOTIFIED that these records, or photocopies of the same, will be provided to the South Carolina Workers' Compensation Commission for insertion in their file and for consideration as evidence on behalf of the Defendants.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Defendants: representatives of Peoplelease Corporation may be called to testify. **Monica Reese and other representatives of Peoplelease may be called to testify.**



SCOTT B. GARRETT
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
700 Gervais St. Suite 300
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 14, 2010

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0809238

THOMAS LEE BROWN,

Employee,

Claimant,

vs.

PEOPLELEASE CORPORATION,

Employer,

AND

ARCH INSURANCE COMPANY C/O
ARROWPOINT CAPITAL CORP,

Carrier,

Defendants.

CERTIFICATE
OF
SERVICE

The undersigned certifies that she is an employee at MCANGUS GOUDELOCK & COURIE, and that she has served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

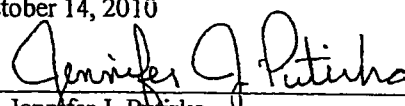
TO: Preston F. McDaniel, Esquire
The McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201

Clyde C. Dean, Jr., Esquire
Dean Law Firm
Post Office Box 1405
Orangeburg, South Carolina 29116-1405

VIA HAND DELIVERY
S. C. WORKERS' COMPENSATION
COMMISSION
1333 Main Street, Suite 500
Columbia, South Carolina 29201

DOCUMENT: Amended Pre-Hearing Brief and Amended Notice of
Witnesses and Written Medical Reports

DATE OF MAILING: October 14, 2010


Jennifer J. Putirka
Legal Secretary to Scott B. Garrett

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

WCC File No. 0809238

Thomas Lee Brown, ... Claimant/Appellant

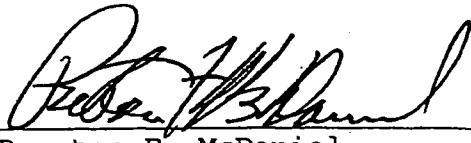
v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc. Defendants/Respondents.

PROOF OF SERVICE

I certify that I have served the MOTION PURSUANT TO S.C. CODE §1-23-380(3) FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE AND TO STAY THE APPEAL FILED IN THIS MATTER PENDING FURTHER HEARING OF THE S.C. WORKERS' COMPENSATION COMMISSION with MEMORANDUM IN SUPPORT by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2011, addressed to: Ms. Virginia L. Crocker, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202 and also serving a copy upon Scott B. Garrett, Esquire, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211.

Dated: July 27th, 2011


Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211
Attorney for Claimant/Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Panel
Commissioners Derrick L. Williams, Avery B. Wilkerson, Jr., T. Scott Beck

WCC File No. 0809238

Thomas Lee Brown, Employee/Claimant,.....Appellant,

v.

Peoplease Corp., Employer, and
Arch Insurance Company
c/o Gallagher Bassett Services, Inc..... Respondents.

**RESPONDENTS' RETURN IN OPPOSITION TO APPELLANT'S MOTION FOR LEAVE
TO SUBMIT ADDITIONAL EVIDENCE AND TO STAY THE APPEAL**

Pursuant to SCACR Rule 240¹ and S.C. Code § 1-23-380(3), Respondents Peoplease Corp. ("Employer") and Arch Insurance Company c/o Gallagher Bassett Services, Inc. submit this Return in Opposition to Appellant Thomas Lee Brown's Motion Pursuant to S.C. Code § 1-23-380(3) for Leave to Submit Additional Evidence and to Stay the Appeal Filed in this Matter Pending Further Hearing of the S.C. Workers' Compensation Commission, dated July 27, 2011 ("Motion"). This Court should deny Appellant's Motion on the grounds that: 1) the proffered evidence is not material, and 2) Appellant has not presented good reasons for his failure to present this evidence at the

¹ Although Appellant cites Rule 241, SCACR, in his Motion, that Rule applies generally to a stay of relief ordered by the lower tribunal while an appeal is pending, and does not appear to apply to this situation, where Appellant is requesting that his simultaneously-filed appeal be stayed.

RECEIVED AUG 05, 2011

hearing before the Single Commissioner. In the alternative, if this Court grants Appellant's Motion to remand this matter to the Workers' Compensation Commission to take additional evidence, in the interest of fairness; Respondents should be granted an opportunity to submit evidence in response to Appellant's proffered evidence. In addition, if this matter is remanded, this appeal should be dismissed pending further resolution of this matter by the Commission.

BACKGROUND

This is an admitted injury case. Respondents admitted that Claimant suffered a compensable injury to his cervical spine, which aggravated his underlying diabetes, in an accident that occurred on May 2, 2008. The only issues to be determined by the Commission were the average weekly wage, which determines Claimant's compensation rate, and the extent of permanency. (Hr'g Tr. p. 5, line 3 – p. 6, line 12, **Attachment A**) (see also Order and Award of the Single Commissioner, dated November 23, 2010, p. 8, **Attachment B**). Claimant's Pre-Hearing Brief clearly shows that he was aware that the compensation rate was at issue. (Claimant's Form 58 Pre-Hearing Brief, with Attachment, dated October 7, 2010, **Attachment C**). To this end, Claimant submitted his payroll records as part of his APA submission. (Claimant's APA submission, pp. 125-129, **Attachment D**).

Although Claimant's Motion refers to Bulldog Trucking, Inc. as his employer, Claimant was actually employed by Peoplease Corp., a fact Claimant readily admitted at the hearing before the Single Commissioner. (Hr'g Tr. p. 21, lines 9-13, **Attachment A**). Claimant testified that he left his previous employer, Boyd Brothers, to work for Bulldog as an employee of Peoplease for a number of reasons, including that he would

not have to drive such long distances, that the Charleston, South Carolina terminal was closer to his home than was the Boyd Brothers' Birmingham Alabama terminal, and that he would not have to perform loading and unloading. (Hr'g Tr. p. 23, line 20 – p. 25, line 8, **Attachment A**). Claimant did not testify definitively that he had been promised any particular wage; instead, he testified that he “thought” or “understood” he was going to receive 50 cents per mile for driving for Bulldog. (Hr'g Tr. p. 18, lines 16-19, **Attachment A**) (Hr'g Tr. p. 46, lines 19-22, **Attachment A**). In contrast, Ms. Monica Reese, corporate counsel for Peoplease, confirmed that she was familiar with the employment contracts and wages paid to drivers in positions similar to Claimant's. (Hr'g Tr. p. 32, line 19 – p. 33, line 21, **Attachment A**). She confirmed that no drivers for Bulldog are paid over 42 cents per mile and that she did not know of anyone who would have told Claimant that he would make 50 cents per mile: “At no time would his wages [have] been any more than forty-two cents a mile.” (Hr'g Tr. p. 45, lines 5-22, **Attachment A**).

The Single Commissioner agreed with Appellant that exceptional circumstances exist for the Commission to determine an average weekly wage and resulting compensation rate that is fair and reasonable to all the parties, stating that the average weekly wage calculation looks to the future. (Order and Award of the Single Commissioner, p. 3, **Attachment B**). The Single Commissioner noted that Claimant did not produce any witnesses or produce any documentation showing he had been promised a pay rate of 50 cents per mile, nor could he identify the person who told him that when he was hired. (Order and Award of the Single Commissioner, p. 4, **Attachment B**). Although Claimant testified to varying weekly paychecks, (see Hr'g Tr. p. 21, line 21 –

p. 22, line 17, **Attachment A**), the Single Commissioner based his compensation rate on “the salary and income that a top producer for Bulldog would be making per year, or \$38,500.00 per year, which results in an average weekly wage of \$740.38 with a resulting compensation rate of \$493.84.” (Order and Award of the Single Commissioner, pp. 4-5, 8-9, **Attachment B**). The Full Commission upheld the Single Commissioner’s findings of fact regarding the wage calculation and affirmed the order and award of the Single Commissioner in its entirety. (Decision and Order of the Full Commission, dated June 29, 2011, pp. 5, 6, **Attachment E**).

ARGUMENT

Appellant’s Motion must be denied because the evidence he proposes to introduce before the Commission does not meet the test of Section 1-23-380(3). That section provides, in relevant part, that “If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.” S.C. Code Ann. § 1-23-380(3). The general rule prohibiting the Commission from admitting additional evidence on remand without an order of the Court is intended to prevent a party from “afford[ing] itself two bites at the apple.” Parker v. South Carolina Pub. Serv. Comm’n, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986).

First, the evidence – the card Appellant alleges “he was given at the time that he applied for employment with Bulldog Hiway Express” – is not material to the issue of what his wages were. In order for evidence to be material, “there must be a rational

connection to a proposition in issue.” Knight v. South Carolina Dept. of Health & Env. Control, 1998 SC ENV LEXIS 69, Docket No. 97-ALJ-07-0746-CC, *14 (May 29, 1998), *citing* 31 A C.J.S. Evidence § 202 (1996). The evidence Appellant wishes to introduce is not material for the simple reason that Claimant was employed by Peoplelease, not Bulldog. The proffered card does not mention Peoplelease in any way. Furthermore, there is no indication of where or when Claimant obtained the card, who created it and/or who it was intended to apply to.

The Commission’s decision is supported by substantial evidence in the record, and there is no indication that inclusion of the proffered card would alter the Commission’s decision. In Byers v. South Carolina Alcoholic Bev. Contr. Comm’n, 305 S.C. 243, 405 S.E.2d 653 (1991), the South Carolina Supreme Court overturned a circuit court’s grant of a motion under the predecessor of Section 1-23-380(3) based on the fact that the proffered evidence was not material. The Court held that, “the Commission could properly have denied petitioner’s application [in an off-premises wine and beer permit proceeding] based solely on” evidence that had already been submitted regarding the proximity of the store to a church, school and residence. 305 S.C. at 246, 405 S.E.2d at 655. As a result, consideration of the factors that the applicant proposed to submit additional evidence on (the level of police protection and the amount of vandalism, littering and drag racing in the community) “were not necessary and are immaterial. Since such factors are not necessary and material to the Commission’s determination, there would be no benefit to allowing further evidence to be presented on these factors.” Id., 405 S.E.2d at 655. Similarly, a card with the name of an entity other than Claimant’s employer is not material to what his wages with Peoplelease were.

The substantial evidence in this case that supports the Commission's decision includes Claimant's testimony that he did not know who told him he would be paid 50 cents per mile, that he agreed he had been paid varying amounts of pay, as well as Ms. Reese's straightforward testimony that no drivers for Bulldog are paid over 42 cents per mile. Appellant highlights certain language that he argues indicates the Single Commissioner might have ruled otherwise had this card been in the record; however, he also notes that Ms. Reese did not present any documentation of her testimony either. Instead, the Single Commissioner and the Commission accepted the testimony of Ms. Reese over that of Claimant, who could not even remember who allegedly had told him he would be paid 50 cents per mile, and adopted the income that a "top producer" hired by Peoplease to work for Bulldog would have been making as the average weekly wage.

(Order and Award of the Single Commissioner, p. 5, **Attachment B**) (Decision and Order of the Full Commission, pp. 5, 6, **Attachment E**). In addition, as Claimant's counsel acknowledged in the hearing before the Full Commission, he had submitted evidence that he claimed supported his request for an average weekly wage of 50 cents per mile, (*see* Transcript of Hearing before the Full Commission, March 21 2011, p. 8, line 2 – p. 10, line 5, **Attachment F**) (*Id.* p. 14, lines 15-23), which would make the proffered evidence merely cumulative. Therefore, based on the reasons set forth above, the proffered evidence is not material and Appellant's Motion should be denied.

Second, Appellant has not demonstrated a good reason for his failure to present this evidence at the proceeding before the Single Commissioner. Although there does not appear to be a specific test for demonstrating "good reason" under Section 1-23-380(3), clearly some showing beyond the fact that Claimant had not looked carefully

enough through his own files to locate the evidence does not constitute good reason. See Bowick v. South Carolina Dept. of Rev., 1995 S.C. Tax LEXIS 235, Docket No. 95-ALJ-17-0480-CC (Dec. 8, 1995) (refusing to remand for the submission of additional evidence where “the evidence . . . could have been discovered by the exercise of due diligence” before the hearing); see also Knight at *13, 17 (requiring that “new” evidence be demonstrated in order to show that “good cause” exists to remand the case). Here, the proffered evidence is not “new” – Appellant admits it was in his possession but he simply failed to locate it. (Motion, p. 6 (noting that, “subsequent to the hearing at the direction of Counsel for the Claimant, Claimant went through his records and then while going through records in preparation for a subsequent hearing requesting a lump sum payment of benefits, the Claimant found a card that he was given at the time that he applied for employment with Bulldog Hiway Express”)). Clearly, where a party has had an opportunity to fully present his case before a tribunal, there is no good reason to re-open the record for the submission of additional evidence. Green v. E.B. Gresham Co., 168 S.C. 395, 407, 167 S.E.2d 659, 663 (1933).

Appellant’s arguments that he was notified only eight days prior to the hearing that Ms. Reese would testify on Respondents’ behalf are unavailing. (Motion pp. 7-8). First, Claimant himself raised the issue of the average weekly wage in his own Pre-Hearing Brief, so he knew this would be an issue at the hearing.² Second, he knew prior to the hearing that Ms. Reese would testify to the wage issue and failed to object to her testimony in a timely fashion. (Hr’g. Tr. p. 38, line 13 – p. 39, line 9, **Attachment A**). Thus, Appellant waived any objections he may have had to the timeliness of Ms. Reese’s

² See Claimant’s Form 58 Pre-Hearing Brief, **Attachment C**; see also Claimant’s APA submission, pp. 125-129, **Attachment D**.

testimony at the hearing before the Single Commissioner. See Washington v. Whitaker, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994) (holding that "it is well settled that a contemporaneous objection must be made to preserve an argument for appellate review"). Thus, Claimant was aware that his average weekly wages would be an issue – in fact one of the central issues – of the hearing before the Single Commissioner and had full opportunity to present his case to the Commission at that time.

Cases that have remanded so the lower tribunal could admit and consider additional evidence generally have done so because there has been a lapse of time between the initial hearing and the appeal, during which the relevant circumstances have changed, Massey v. City of Greenville Bd. of Zoning Adj., 341 S.C. 193, 532 S.E.2d 885 (Ct. App. 2000); or because the record below was otherwise insufficient, Cisson Constr., Inc. v. Reynolds & Assoc., Inc., 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993). The instant case is easily distinguishable, as Appellant admits he had the evidence in his files at the time of the hearing but simply had not performed a thorough search which would have located it.

Furthermore, Workers' Compensation Commission's Regulation 67-612(J) provides that "[a]ll available evidence and testimony shall be presented at the scheduled hearing or a party must move for an adjournment according to R. 67-613." S.C. Code Regs. § 67-612(J). Regulation 67-707 provides that, in order to present additional and newly discovered evidence, the moving party must establish that the new evidence is of the same nature and character required for granting a new trial and show that "the evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of

the new evidence is being brought to the attention of the Commission immediately upon its discovery.” S.C. Code Regs. § 67-707. As this Court succinctly stated, “the evidence must not be known to the party and could not have been secured by reasonable diligence.” Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). As noted above, Claimant knew or should have known he had this evidence in his possession at the time of hearing. To allow him to supplement the record at this late date would allow him two bites at the same apple, which would be patently unfair to Respondents, and would open the door for workers’ compensation claimants, as well as other applicants before administrative bodies, to pursue their cases with less than due diligence, knowing they can ask this Court to remand for admission of additional evidence they uncover once they carefully search their files. Any such search could and should have been performed prior to the hearing. At a minimum, Claimant could have moved at the hearing before the Single Commissioner to hold the record open for additional evidence if Claimant felt the need to supplement his testimony in any way. See Martin, 369 S.C. at 287, 631 S.E.2d at 552. Because Appellant has not presented any good reason why he should be allowed to supplement the record at this late date, his Motion should be denied.

In the alternative, should this Court grant Appellant’s motion to remand for the admission of his proffered evidence, Section 1-23-380(3) provides that this Court can place conditions on such a remand. Respondents ask that, if this case is remanded to the Commission, it be remanded with instructions that, in the interest of fairness, Respondents are also afforded an opportunity to supplement the record with testimony or documentation, or both, specifically on this issue.

Finally, in the event this Court grants Appellant's Motion to remand, Respondents request that this Court dismiss the pending appeal. Generally, "once a case is remanded from the appellate body to the adjudicatory body, the appeal ends along with the appellate jurisdiction." Knight, at *16, citing 5 C.J.S. Appeal and Error § 861 (1993). If this matter is remanded so that the Commission can consider Appellant's proffered evidence, the Commission's decision is not final for purposes of appellate review as there will be further substantive consideration of the issues below. See Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994) (noting that South Carolina courts "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable"). Therefore, in the event this Court grants Appellant's Motion to remand, Respondents move that this Court also dismiss the pending appeal pending the Commission's further resolution of this matter.

Respectfully submitted,



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Attachment A

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

EMPLOYEE/CLAIMANT: THOMAS BROWN

EMPLOYER: PEOPLEASE

INSURER: ARCH INSURANCE COMPANY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF THE WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 22ND
DAY OF OCTOBER, 2010, COMMENCING AT THE HOUR OF 12:31
PM IN WALTERBORO, SOUTH CAROLINA, ATTENDED BY
COUNSEL AS FOLLOWS:

KATHERYN BOSTROM,
VERBATIM COURT REPORTER

COPY

BOSTROM REPORTING

109 KYLE AVENUE
INMAN, S.C. 29349
803-446-7040

APPEARANCES

FOR THE CLAIMANT:

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FOR THE EMPLOYER/
CARRIER:

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EXHIBITS

EXHIBIT NUMBER ONE	22
(WAGE EARNINGS)	

1 MR. GARRETT:

2 NONE FROM THE DEFENSE.

3 COMMISSIONER HUFFSTETLER:

4 WITHOUT OBJECTION, THE COMMISSION FILE BECOMES
5 PART OF THE RECORD, WITH THE EXCEPTION OF SELF-
6 SERVING DECLARATIONS AND UNSTIPULATED MEDICAL
7 REPORTS. THE CLAIMANT TAKES POSITION HE
8 SUFFERED INJURIES TO HIS CERVICAL SPINE, HIS
9 LUMBAR SPINE, BOTH HANDS, BOTH ARMS AND ALSO AN
10 AGGRAVATION OF AN UNDERLYING DIABETES. HE
11 SEEKS AN AWARD OF COMPENSATION FOR PERMANENT
12 AND TOTAL DISABILITY. HE IS NOT SEEKING A
13 DECISION AT THIS TIME ON A LUMP SUM REWARD.

14 THE PARTIES STIPULATE TO MAXIMUM MEDICAL
15 IMPROVEMENT ON SEPTEMBER 28, 2010. THE DEFENSE
16 ADMITS AN INJURY TO THE CERVICAL SPINE ONLY.
17 THEY SEEK CREDIT AFTER MAXIMUM MEDICAL
18 IMPROVEMENT AND THEY CONCEDE SOME PERMANENT
19 PARTIAL DISABILITY TO THE BACK ONLY. IS THAT
20 CORRECT?

21 MR. GARRETT:

22 EVALUATION OF THE DIABETES.

23 COMMISSIONER HUFFSTETLER:

24 YOU ADMIT THE AGGRAVATION OF THE DIABETES.

25

1 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
2 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
3 MATTER HEREIN:

4 * * * * *

5 THOMAS BROWN,

6 BEING FIRST DULY SWORN OR AFFIRMED, TESTIFIED ON HIS
7 OATH AS FOLLOWS:

8 COMMISSIONER HUFFSTETLER:

9 LET ME JUST REPEAT WHAT I SAID BEFORE WE
10 STARTED. IT APPEARS THAT THE TWO ISSUES IN
11 DISPUTE ARE AVERAGE WEEKLY WAGE AND EXTENT OF
12 PERMANENCY. MR. MCDANIEL?

13 DIRECT EXAMINATION

14 BY MR. MCDANIEL:

15 Q NOW, MR. BROWN, COMMISSIONER, THE MEDICATIONS HE'S
16 ON ARE IN THE RECORD ALSO, BUT VERY BRIEFLY, THOMAS,
17 HOW OLD ARE YOU, SIR?

18 A I JUST TURNED 60.

19 Q AND, I BELIEVE YOUR TREATING FAMILY DOCTOR IS DR.
20 ALGOOD?

21 A YES.

22 Q AND, THEN YOUR AUTHORIZED TREATING DOCTOR WAS DR.
23 SCOTT BOYD?

24 A YES.

25 Q AND, YOU ALSO SAW DR. HALTON?

1 TIME. I REALLY COULDN'T PINPOINT IN PARTICULAR.

2 Q WITH THE PROBLEMS YOU ARE HAVING, IS THERE ANY JOB -
3 - COOKING, RECEIVING, TRUCK DRIVING, THAT YOU'VE GOT
4 A BACKGROUND EXPERIENCE IN, IS THERE ANY JOB OUT
5 THERE THAT YOU'VE GOT A BACKGROUND EXPERIENCE IN
6 THAT YOU COULD GO BACK TO DOING, IN YOUR OPINION, IN
7 YOUR CURRENT CONDITION?

8 A NO, NOT THAT I KNOW OF.

9 Q WOULD YOU LOVE TO BE WORKING?

10 A I WOULD, YES.

11 Q LET'S NOW GO BACK AND TALK JUST A MINUTE ABOUT BOYD
12 BROTHERS. WE PUT IN THE AMOUNT OF MONEY THAT YOU

13 WERE MAKING WHICH WAS ABOUT OVER \$40,000 AT BOYD

14 BROTHERS. WHY DID YOU LEAVE BOYD BROTHERS AND GO TO
15 BULLDOG?

16 A WELL, WHEN I LEFT BOYD BROTHERS, THEY WAS PAYING ME,
17 I THINK, ABOUT 39 CENTS A MILE. AND, BULLDOG WAS
18 OFFERING, I THINK, 50 CENT A MILE AND IT WAS AN
19 OPPORTUNITY TO, AS TIME GOES ON, INCREASE MY PAY.

20 Q FROM THE TIME YOU STARTED WITH BULLDOG, UNTIL THE
21 TIME OF THE ACCIDENT, WHAT HAPPENED TO YOUR
22 PAYCHECKS? DID THEY REMAIN THE SAME, DID THEY GET
23 MORE, OR LESS?

24 A WELL, THEY INCREASED A LITTLE BIT. THEY -- I WAS
25 ~~WANTING TO EVENTUALLY GET ON SOME LONG RUNS THAT~~

1 MR. BROWN:

2 SEVERAL YEARS. I'D SAY WELL OVER SEVEN, YES.

3 COMMISSIONER HUFFSTETLER:

4 MR. GARRETT?

5 MR. GARRETT:

6 YES, COMMISSIONER.

7 CROSS EXAMINATION

8 BY MR. GARRETT:

9 Q YOU'VE TESTIFIED ABOUT YOUR EARNINGS THROUGH BULLDOG
10 WHICH IS ACTUALLY YOU WERE EMPLOYED THROUGH
11 PEOPLELEASE. I DIDN'T WANT TO CONFUSE -- YOUR
12 PAYCHECK CAME FROM PEOPLELEASE, CORRECT?

13 A YES.

14 Q LET ME SHOW YOU RIGHT NOW, THIS IS A PRINT-OUT OF
15 YOUR ACTUAL WAGES. YOU CAN LOOK AT THAT ONE
16 TOGETHER.

17 MR. MCDANIEL:

18 I THINK I'VE ALREADY GOT THAT ONE, BUT WE'LL GO
19 AHEAD AND LOOK AT --

20 MR. GARRETT:

21 THAT'S A PRINT-OUT OF YOUR ACTUAL WAGES UP TO
22 AND UNTIL THE TIME THAT YOU STOPPED. I'D OFFER
23 THAT AS DEFENDANT'S EXHIBIT 1.

24 COMMISSIONER HUFFSTETLER:

25 DO YOU HAVE ANY OBJECTION?

1 MR. MCDANIEL:

2 WITHOUT OBJECTION.

3 (WHEREUPON, A WAGE PRINT-OUT WAS MARKED AS
4 DEFENDANT'S EXHIBIT NUMBER ONE FOR
5 IDENTIFICATION.)

6 Q AND, IT'S A LITTLE BIT DIFFERENT THAN YOUR
7 TESTIMONY, I THINK MR. BOYD (SIC), IN THAT THE
8 AMOUNT OF MONEY THAT YOU WERE EARNING EVERY WEEK, TO
9 PUT IT FRANKLY, IT JUST VARIED EVERY WEEK. SOME
10 WEEKS YOU MADE \$700 AND OTHER WEEKS YOU MADE \$400
11 AND SOME WEEKS YOU MADE \$340. IS THAT FAIR?

12 A YES.

13 Q AND, EVEN UP TOWARDS THE END THERE WERE SOME WEEKS
14 WHERE YOU MADE \$400 AND THERE WAS A WEEK WHERE YOU
15 MADE \$177. SO, IT REALLY WASN'T GRADUALLY
16 INCREASING AS YOU PREVIOUSLY TESTIFIED, WAS IT?

17 A IT WAS VARYING.

18 COMMISSIONER HUFFSTETLER:

19 LOOKING ON THAT THAT'S BEEN OFFERED AS AN
20 EXHIBIT, WHO DID THIS HANDWRITTEN CALCULATION
21 AT THE BOTTOM?

22 MR. GARRETT:

23 I DID, COMMISSIONER. YOU'RE WELCOME TO CHECK
24 MY MATH, PRESTON.

25 MR. MCDANIEL:

1 I'VE GOT ONE THAT DOESN'T HAVE --

2 COMMISSIONER HUFFSTETTLER:

3 I JUST WANT TO ESTABLISH FOR THE RECORD, I DID
4 NOT DO IT.

5 MR. GARRETT:

6 I JUST DID IT WITH A CALCULATOR. YOU'RE
7 WELCOME TO --

8 MR. MCDANIEL:

9 I'VE ACTUALLY GOT ONE THAT, IF YOU DON'T MIND,
10 I WOULD PREFER THAT THE --

11 COMMISSIONER HUFFSTETTLER:

12 I JUST WANTED TO ESTABLISH THAT I DID NOT WRITE
13 THAT DOWN, AND IT DID NOT COME FROM THE
14 EMPLOYER. I JUST WANTED TO ESTABLISH WHO WROTE
15 IT.

16 MR. MCDANIEL:

17 THAT'S FINE. THAT'S FINE.

18 MR. GARRETT:

19 I DID IT. I DID IT FOR EVERYBODY'S CONVENIENCE.

20 Q AND, YOU TESTIFIED ALSO, A MINUTE AGO, AS TO YOUR
21 REASON WHY YOU LEFT BOYD BROTHERS. DO YOU REMEMBER
22 ME ASKING YOU ABOUT WHY YOU LEFT BOYD BROTHERS BACK
23 IN YOUR DEPOSITION WHEN I TOOK IT THE FIRST TIME
24 BACK IN 2008, DO YOU REMEMBER THAT?

25 A TO GET A BETTER JOB, I THINK.

1 Q ACTUALLY WHAT YOU TOLD ME WAS YOU LEFT BULLDOG
2 BECAUSE YOU DIDN'T WANT TO DO THOSE CROSS-COUNTRY
3 RUNS ANYMORE AND THAT'S WHY YOU CAME TO WORK FOR
4 BULLDOG. YOU WANTED A PLACE THAT WAS MORE LOCAL SO
5 YOU DIDN'T HAVE TO DRIVE THOSE LONG DISTANCES. DO
6 YOU REMEMBER TELLING ME THAT?

7 A I MAY HAVE TOLD YOU THAT.

8 Q ALSO, BECAUSE BOYD BROTHER TERMINAL WAS IN
9 BIRMINGHAM, ALABAMA, IS THAT RIGHT?

10 A YES.

11 Q SO, YOU HAD TO GO FROM ORANGEBURG TO BIRMINGHAM TO
12 START YOUR RUNS, CORRECT?

13 A UH-HUH.

14 Q IS THAT RIGHT?

15 A IT WOULD VARY. SOMETIMES I WOULD BE AT HOME OR
16 WHEREVER I WAS AT.

17 Q BUT, BULLDOG WAS A LOT CLOSER IN CHARLESTON?

18 A YES.

19 Q AND, THAT WAS ONE OF THE OTHER REASONS YOU LEFT TO
20 GO TO WORK FOR BULLDOG?

21 A CORRECT.

22 Q AND, THE OTHER THING IS, YOU DIDN'T HAVE TO DO ANY
23 LOADING AND UNLOADING WORKING WITH BULLDOG, DID YOU?
24 YOU WERE JUST DRIVING THE TRUCK? WHEN YOU GOT

25 THERE, SOMEBODY ELSE DID THE LOADING AND UNLOADING

1 WITH BULLDOG?

2 A YES.

3 Q AND, WITH BOYD, YOU HAD TO DO SOME OF THE WORK --

4 A SOMETIMES.

5 Q OKAY. AND, THAT WAS ANOTHER REASON THAT YOU

6 SWITCHED. IT WAS EASIER PHYSICAL WORK, WORKING FOR

7 BULLDOG.

8 A WELL, THIS IS MORE LOCAL.

9 Q OKAY.

10 A OR, SHOULD I SAY REGIONAL.

11 Q YOU WERE DOING THE RUN FROM CHARLESTON DOWN TO

12 SAVANNAH, AND SOMETIMES DOWN INTO FLORIDA, IS THAT

13 RIGHT?

14 A YES, WITH BULLDOG.

15 Q THAT WAS YOUR TYPICAL RUN?

16 A YES.

17 Q I THINK YOU TESTIFIED EARLIER ABOUT YOUR -- YOU

18 HAVEN'T HAD ANY SURGERY, ANY MEDICAL TREATMENT ON

19 YOUR LOWER BACK, HAVE YOU?

20 A NO, I HAVEN'T.

21 Q DR. BOYD'S DONE ALL OF THE MEDICAL TREATMENT JUST ON

22 YOUR NECK, CORRECT?

23 A YES.

24 Q HE'S BEEN THE ONE PRIMARILY IN CHARGE OF YOUR CARE,

25 IS THAT FAIR TO SAY?

1 YOU ASSIGNED TO MANAGE AND OPERATE AS THE SUPERVISOR
2 OF ALL THE WORKERS' COMPENSATION CLAIMS?

3 A YES, I AM.

4 Q AND, IN THAT CAPACITY, ARE YOU FAMILIAR WITH THE
5 RULES AND CALCULATIONS ON AVERAGE WEEKLY WAGE AND
6 COMPENSATION RATE?

7 A YES.

8 Q AND, YOU WERE AWARE THROUGH ME THAT THERE WAS AN
9 / ISSUE IN THIS CASE REGARDING AVERAGE WEEKLY WAGE AND
10 COMPENSATION, CORRECT?

11 A YES.

12 Q AND, DID YOU LOOK UP WHAT --

13 MR. MCDANIEL:

14 I'M GOING TO OBJECT TO LEADING AT THIS POINT.

15 COMMISSIONER HUFFSTETLER:

16 BE CAREFUL WITH YOUR PHRASING.

17 Q DID YOU --

18 COMMISSIONER HUFFSTETLER:

19 WHAT HE'S COMING TO IS THE CENTRAL QUESTION AND
20 THAT IS, TO PUT IT BLUNTLY, HOW DO YOU KNOW?
21 OF YOUR OWN KNOWLEDGE, HOW DO YOU KNOW WHAT
22 DRIVERS MAKE?

23 MS. REESE:

24 BECAUSE I REVIEW EVERY EMPLOYMENT CONTRACT AND
25 MAKE SURE THAT WE ARE IN COMPLIANCE WITH THE

RECEIVED AUG 05 2011

1 FEDERAL AND STATE --

2 COMMISSIONER HUFFSTETTLER:

3 WE'RE NOT TALKING CONTRACT, WE ARE TALKING
4 ABOUT PAYROLL.

5 MS. REESE:

6 IN PREPARATION FOR EVERY WORKER'S COMPENSATION
7 CLAIM, I'M THE ONE WHO COMPLETES THE FORM 20
8 AND WHEN I WAS MADE AWARE OF THIS ISSUE, I
9 CHECKED THE PAYROLL OF EVERY DRIVER THAT WAS IN
10 A SIMILAR POSITION TO MR. BROWN AT THE TIME OF
11 HIS ACCIDENT. SO, I WENT THROUGH 60 DRIVERS'
12 PAYROLL TO BE SPECIFIC.

13 COMMISSIONER HUFFSTETTLER:

14 OKAY.

15 Q IF YOU EXTRAPOLATE MR. BROWN'S WAGES FOR THE ENTIRE
16 YEAR OF 2008, IT COMES OUT TO WHERE HE WAS EARNING
17 APPROXIMATELY \$26,000, OKAY?

18 A UH-HUH.

19 Q IS THAT A FAIR AVERAGE OF WHAT THE PEOPLEASE DRIVERS
20 WORKING FOR BULLDOG EARN?

21 A YES, IT IS.

22 MR. MCDANIEL:

23 I'M GOING TO OBJECT TO THE QUESTION, THE BASIS
24 AGAIN, THERE IS NOT BEEN A FOUNDATION LAID AS

25 TO - I MEAN WE HAVE -- I OBJECT THAT THERE HAS

1 I WISH WE HAD HEARD THAT OBJECTION BEFORE WE
2 GOT SO FAR INTO THE TESTIMONY. THE EXHIBIT IS
3 NOT TIMELY FILED; SO I AM GOING TO SUSTAIN HIS
4 OBJECTION AND RETURN THAT TO YOU. OKAY, IS
5 THERE ANYTHING ELSE?

6 MR. MCDANIEL:

7 NOTHING FURTHER, COMMISSIONER.

8 MR. GARRETT:

9 I'VE GOT SOME MORE QUESTIONS FOR HER.

10 COMMISSIONER HUFFSTETLER:

11 HE'S OBJECTED TO THE WITNESS.

12 MR. GARRETT:

13 SHE'S ALREADY STARTED TESTIFYING. HE WAIVED
14 THAT OBJECTION WHEN SHE STARTED.

15 MR. MCDANIEL:

16 I DON'T KNOW THAT YOU WAIVE AN OBJECTION BY --
17 AT ANY POINT IN TIME, COMMISSIONER. AS TO HER
18 TESTIFYING, I DID NOT KNOW WHEN SHE WAS PUT UP
19 WHAT SHE WAS GOING TO BE TESTIFYING TO.

20 COMMISSIONER HUFFSTETLER:

21 THIS IS WHY YOU OBJECT BEFORE SHE STARTS. THAT
22 OBJECTION, I THINK YOU MAKE SOME INTERESTING
23 ARGUMENTS. IF YOU'D OBJECTED TO THE TESTIMONY
24 BEFORE SHE STARTED, I WOULD HAVE DISQUALIFIED
25 HER AS A WITNESS. SHE IS NOT TIMELY

1 IDENTIFIED. BUT, I HOPE I SAY THIS THE RIGHT
2 WAY. I'LL OFTEN SAY THINGS THE WRONG WAY.
3 BUT, I DON'T THINK EITHER PARTY CAN WAIT UNTIL
4 THEY HEAR WHAT SOMEBODY SAYS AND THEY DON'T
5 LIKE WHAT THEY SAID --

6 MR. GARRETT:

7 AND, THEN OBJECT.

8 MR. MCDANIEL:

9 I AGREE.

10 COMMISSIONER HUFFSTETLER:

11 SO, I'M GOING TO LET HIM FINISH HIS QUESTIONING
12 AND YOU CAN CROSS-EXAMINE.

13 Q IN YOUR EXAMINATION OF THE DRIVERS, EMPLOYED BY
14 PEOPLEASE AT BULLDOG, WHO HAD SIMILAR ROUTES TO THE
15 ROUTE THAT MR. BROWN WAS ASSIGNED, WHAT, IN YOUR
16 ESTIMATION, AFTER LOOKING AT THE DOCUMENT. WHAT'S
17 THE HIGH-END OF WHAT SOMEBODY WOULD MAKE?
18 A THE HIGH-END IS \$38,500 AND THAT IS BECAUSE THEY
19 EARN A MAXIMUM MILE, PER MILE PAY OF FORTY-TWO CENTS
20 A MILE. THAT'S THE MAXIMUM AMOUNT THAT CAN BE
21 OFFERED. ALL EMPLOYEES, INCLUDING MR. BROWN AT THE
22 TIME OF HIS INJURY START OFF MAKING THIRTY-TWO CENTS
23 PER MILE THAT GRADUALLY INCREASES UP TO FORTY-TWO
24 CENTS WHICH MAKES A RANGE OF PAY BETWEEN \$20,000 AND
25 \$38,500.

1 MR. MCDANIEL:

2 IF I COULD HAVE JUST A MOMENT.

3 RECROSS EXAMINATION

4 BY MR. MCDANIEL:

5 Q MA'AM, I WANT TO MAKE ABSOLUTELY SURE OF SOMETHING.

6 YOU ARE SAYING THAT BULLDOG DOES NOT PAY ANY DRIVERS
7 OVER FORTY-CENTS OR THEY DON'T PAY PEOPLE IN HIS
8 CLASSIFICATION OVER FORTY-TWO CENTS.

9 A THEY DON'T PAY ANY DRIVER OVER FORTY-TWO CENTS.

10 Q SO, IF MR. BROWN WAS TOLD THAT HE WAS GOING TO BE
11 MAKING FIFTY-CENTS A MILE, THAT'S INACCURATE?

12 A I DO NOT KNOW OF ANYONE THAT WOULD HAVE TOLD HIM

13 THAT, EVEN THE TERMS OF EMPLOYMENT WOULD NOT HAVE

14 SAID THAT HE MADE FIFTY CENTS PER MILE. MR. BROWN

15 WOULD RECEIVE PER DIEM PAY IF HE WAS ON OVERNIGHT

16 TRAVEL, BUT THAT DOES NOT -- IT IS NOT INCLUDED IN

17 AVERAGE WEEKLY WAGE AS IT IS REIMBURSEMENT OF

18 EXPENSES, AND SO. IF HE WAS DRIVING THE LONGER

19 ROUTES, HIS CHECKS WOULD HAVE BEEN BIGGER, BUT IT

20 WOULD HAVE INCLUDED REIMBURSEMENT. BUT, AT NO TIME

21 WOULD HIS WAGES BEEN ANY MORE THAN FORTY-TWO CENTS A

22 MILE.

23 MR. MCDANIEL:

24 NOTHING FURTHER FOR THIS WITNESS.

25 MR. GARRETT:

1 NOTHING FURTHER.

2 COMMISSIONER HUFFSTETLER:

3 IS THERE ANYTHING ELSE?

4 MR. MCDANIEL:

5 ONE QUESTION FOR THE CLAIMANT.

6 COMMISSIONER HUFFSTETLER:

7 LET ME REMIND YOU YOU ARE STILL UNDER OATH.

8 MR. BROWN:

9 OKAY.

10 REDIRECT EXAMINATION

11 BY MR. MCDANIEL:

12 Q THOMAS, LET ME ASK YOU THIS. WHO HIRED YOU WHEN YOU

13 WENT TO WORK FOR PEOPLEASE FOR BULLDOG? DO YOU

14 REMEMBER THE PERSON'S NAME?

15 A I'M TRYING TO THINK. HE WAS OVER IN ORIENTATION.

16 THEY WAS OVER IN THE SAFETY DEPARTMENT.

17 Q WHERE WERE YOU ACTUALLY HIRED TO WORK WITH THEM?

18 A IN CHARLESTON, AT THE BULLDOG FACILITY.

19 Q ALL RIGHT, WHEN YOU WERE HIRED, WHAT WAS YOUR

20 UNDERSTANDING THAT YOU WERE GOING TO BE PAID PER

21 MILE?

22 A FIFTY-CENT.

23 Q DID YOU SIGN ANY KIND OF EMPLOYEE CONTRACT?

24 A I SIGNED SO MANY DIFFERENT PAPERS, I DON'T KNOW FOR

25 SURE, BUT A LOT OF THE OTHER DRIVERS AT BOYD WANTED

Attachment B

ORDER AND AWARD

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0809238

THOMAS LEE BROWN,

Employee/Claimant,

v.

PEOPLELEASE CORP.,

Employer,

and

ARCH INSURANCE COMPANY c/o
GALLAGHER BASSETT SERVICES, INC.,

Carrier,

Defendant(s).

HEARING:	Date: October 22, 2010 Location: Walterboro, South Carolina
APPEARANCES:	Claimant represented by Preston F. McDaniel, Esquire Defendant(s) represented by Scott B. Garrett, Esquire
PURPOSE OF HEARING:	This matter came before the Commissioner on a Form 50 and 51
COMMISSIONER:	David W. Huffstetler
ELECTRONICALLY FILED:	November 23, 2010

STIPULATIONS

The parties have stipulated to jurisdiction and venue. The Commission File with the exception of self-serving declarations and unstipulated medicals is made a part of the Record.

STATEMENT OF THE CASE

At the time for Hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission, the parties have made records and reports from the following a part of the Record without objection: Dr. Denise Algood, Family Health Center; Orangeburg Regional Medical Center; Dr. Mahmoud Abu-Ata, Neurology & Pain Clinic; Dr. Scott Boyd, Columbia Neurosurgical Associates; Lexington Medical Center; Dr. Blake Moore; Dr. Brian Cuddy, Charleston Neurosurgical Associates; Dr. Leonard Forrest, Southeastern Spine Institute; Columbia Rehabilitation Clinic; Ms. Harriett Fowler, Vocational Expert; Claimant's Payroll and Tax Records; Social Security Disability Award; and Carolina Therapy Solutions. In addition, at the hearing various exhibits were offered and a ruling as to those exhibits is set forth in the Record; those exhibits that were admitted were considered and those exhibits which were excluded were not. Testimony was taken from the Claimant, Mr. Thomas Lee Brown, and Ms. Monica Reese for the Employer, Bulldog/Peoplease (hereinafter "Bulldog"), on the issue of the compensation rate.

First, as to the compensation rate, the evidence establishes

that the Claimant had only been working for Bulldog for a short period of time prior to the injury; a period of approximately 16 weeks. Due to the shortness of time with the employer, his income expectations and his immediate previous income as a truck driver, the Claimant took the position and asserted to the Commission that exceptional circumstances exists for the Commission to determine an average weekly wage and resulting compensation rate that is fair and reasonable to all parties. Based on my review of the evidence submitted, I agree with the position of the Claimant to the extent that exceptional circumstances exists for this Commission to determine an average weekly wage and resulting compensation rate that is fair and reasonable to all parties concerned. I also note for the Record that our Appellate Courts have ruled that the average weekly wage looks to the future. The Claimant submitted evidence which established that prior to going to work for Bulldog that he worked for Boyd Brothers Trucking throughout the entire year of 2007 and that, assuming he worked the entire 52 weeks during that year, based on his income as reported, on this W-2 he would have an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73. He testified that the reason that he left Boyd Brothers to work with Bulldog was to have routes that were closer to home and because he would be making more money per mile. He testified that he was told when he began work for Bulldog that he

would make 50 cents per mile. However, he did not produce any witness to that effect nor did he produce any documentation to that effect. He also presented evidence and testimony to the effect that his weekly pay was ever increasing after he went to work with Bulldog. It was his intent to obtain more favorable runs as he continued his employment and that as you ran more favorable runs his salary would increase.

Ms. Monica Reese disagreed as to the mileage rate at which drivers were paid and testified that drivers did not make .50 cent per mile and then testified as to the range at which they were paid. She also testified that she had reviewed all the drivers salaries with Bulldog and that the top drivers were making \$38,500.00 per year. Based on this evidence, the average weekly wage determination looks to the future and assuming the past is a predictor of the future, then the Claimant would reach that level as he earned more than that prior to his employment with Bulldog. Therefore, there is no documentary evidence to support the Claimant's testimony of having been promised 50 cents per mile and he did not identify the exact person that told him that at the time of employment. The documents on a co-worker that was presented by the Employer is only for one (1) employee so I accept the testimony from Ms. Reese and the testimony and evidence presented by the Claimant concerning his past wages and have determined that a fair determination of the applicable

average weekly wage and resulting compensation rate is to calculate the average weekly wages based on the salary and income that a top producer for Bulldog would be making per year, or \$38,500.00 per year, which results in an average weekly wage of \$740.38 with a resulting compensation rate of \$493.84.

Next, in reference to the disability that the Claimant has suffered as a result of this injury, testimony was taken from the Claimant, and it appears based on a review of the testimony of the Claimant, the medical evidence, the physical therapist's functional capacity evaluation, and the vocational evaluation evidence, the evidence establishes that Mr. Brown is 60 years old and has a high school education. Following high school, he was in the Army, which is classified as a very heavy physical demand category under the DOT (Dictionary of Occupational Titles). After leaving the Army, he worked as a cook in both skilled and unskilled jobs until he went to work for Oakridge Associated Universities in Oakridge, Tennessee as a shipping and receiving clerk and truck driver. In 2000, after obtaining his commercial driver's license, he has worked as a truck driver from 2000 to 2008.

The Claimant testified that he could not return to any of the jobs in which he had a background and experience and that in his opinion he had lost over 60% of the use of his back to do work requiring the physical use of his back. He testified .

extensively as to the problems that he is having from his injuries which include two (2) separate cervical spine fusions resulting in fusing his back from the C3-4 level through the C5-6 levels of the spine. Dr. Scott Boyd, the authorized treating physician, stated that the Claimant's cervical spine injury alone has a 27% whole person impairment under the AMA Guides and that he has been left with cervical myelopathy with resultant problems including coordination. His problems with coordination and gait stance are noted throughout the records and the evaluations of the various doctors involved. Dr. Boyd also opined that due to his cervical spine fusions and the results that in his opinion Mr. Brown cannot safely operate a truck; specifically including his range of motion problems and the cervical myelopathy with resultant problems of coordination. The Claimant confirmed and demonstrated that he cannot move particularly in one direction (range of motion), and actually has to have a person in the car to assist him in looking safely in that direction. He avoids any type of heavy traffic or complicated traffic situation due to that problem and only drives without somebody with him when absolutely necessary.

One of the functional capacity evaluations submitted addresses the opinion of the physical therapist as to the work category into which he most appropriately fits. In the opinion of that physical therapist Mr. Brown only qualifies for the full

range of jobs that fall in the sedentary work category under the Dictionary of Occupational Titles and does not fit into the category of either light duty or medium duty physical demand jobs.

In addition to the limitations that Mr. Brown has due to the injury to his neck, Mr. Brown, prior to the time of this accident, had been diagnosed with diabetes which was controlled simply taking oral medication. Since the accident and specifically after the surgeries, Mr. Brown has become an insulin dependent diabetic and is excluded from driving a truck or any commercial vehicle due to being insulin dependent. The authorized treating physician, Dr. Denise Algood, stated the opinion which is concurred in by Dr. Moore that Mr. Brown's diabetic condition was aggravated by the physical stress placed on Mr. Brown by his injuries and the surgery necessary to correct those injuries and that that aggravation of his diabetes has resulted in a heightened level of care wherein he became an insulin dependent diabetic. The Claimant testified concerning his diabetes and the treatment and the amounts of insulin and the number of times per day that he has to inject insulin at this time. Therefore, the undisputed evidence is that the injury and its aftermath aggravated his diabetic condition causing him to become an insulin dependent diabetic and causing all of the severe conditions and problems and treatment he has at this time

due to that condition.

In addition to the testimony concerning his physical limitations and his diabetic condition, the professional vocational opinion evidence that was submitted by and through Mr. Harriet Fowler, who opined the Claimant is unable to return to gainful employment. This opinion is not refuted by other expert opinions.

Wherefore, after review of the testimony and evidence submitted and as summarized above, I find that the Claimant has established by a preponderance of the evidence that he is permanently and totally disabled, based on the combination of his cervical injury and aggravation of his underlying diabetes.

FINDINGS OF FACT

1. That this is an admitted accident and that the only issues before this Commissioner are a determination of the disability award to which he is entitled as a result of his injuries sustained as a result of the accident and as to the average weekly wage and resulting compensation rate which will apply in this matter.

2. I find that exceptional circumstances exists to determine a fair and reasonable average weekly wage and resulting compensation rate for all parties involved and which will properly represent the Claimant's loss of earning capacity into the future. The average weekly wage of \$740.38 with a resulting

compensation rate of \$493.84 should apply.

3. That the Claimant has requested an award for total and permanent disability benefits based on either a total loss of earning capacity and/or for having lost more than 50% of the use of his back. In reference to an award simply being based under §42-9-30 for the loss of use of the back, the case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work. The Claimant suffered a cervical injury with multi-level fusions and aggravation of his underlying diabetes.

4. That based upon the decision that the Claimant is totally and permanently disabled, he is entitled to lifetime causally-related medical care his cervical spine and diabetes.

5. That the Claimant is currently receiving weekly temporary total disability benefits. Based on the decision that the Claimant's condition is total and permanent and that he is entitled to an Award for such, the Claimant shall continue to receive weekly benefits at the compensation rate of \$493.84 per this Award until the balance of the 500 weeks of compensation is paid. A lump sum request was withdrawn by the Claimant at the time of the hearing. Such lump sum request may be renewed and decided by the Commission at a later date and is subject to

subsequent order of the Commission. The attorney's fees and costs in this matter may be requested and taken off the back end and paid in a lump sum.

6. That Mr. Brown was determined to have reached maximum medical improvement per the determination of Dr. Scott Boyd on April 19, 2010.

CONCLUSIONS OF LAW

Pursuant to S.C. Code §42-17-40, the following Conclusions of Law apply in this case.

1. That under §42-1-40, the determination is made as to the average weekly wage and resulting compensation rate.

2. That under §42-9-10 and §42-1-120, the determination is made as to the Claimant's entitlement to an award for total and permanent disability for total loss of earning capacity.

3. That under §42-15-60, the determination is made as to the Claimant's entitlement to medical care and based on the decision that he is entitled to an award for total and permanent disability, the Claimant is entitled to lifetime, causally-related medical care for his cervical spine and diabetes.

ORDER AND AWARD

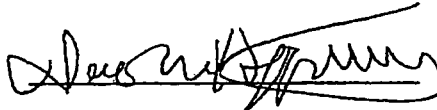
THEREFORE IT IS ORDERED that the Defense shall pay the Claimant benefits consistent with permanent and total disability.

IT IS FURTHER ORDERED that the Defense shall provide the

Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetes.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

A handwritten signature in black ink, appearing to read 'David W. Huffstetler', written over a horizontal line.

David W. Huffstetler, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

November 23, 2010

By: Kellie Lindler, Administrative Assistant to Commissioner Huffstetler

Attachment C

South Carolina Workers' Compensation Commission
1612 Marion Street • P. O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov

WCC File # 0809238
Carrier File # _____
Carrier Code # _____
Employer FEIN # _____

Claimant's Name: Thomas Brown SSN: _____ Employer's Name: Bulldog Hlway Express d/b/a Peopleplease Corp.
Address: _____ Address: Post Office Box 40247
City: _____ State: _____ Zip: _____ City: Charleston State: SC Zip: 29423
Home Phone: _____ Work Phone: _____ Insurance Carrier: Arch Insurance Company
Preparer's Name: Preston F. McDaniel Law Firm: McDaniel Law Firm Preparer's Phone #: 803-771-7211

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury by Accident ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$ to be determined - see attached 2. AWW: \$ to be determined - see attached Date of Injury: 5/2/08
3. Type of injury and body part(s): neck/back/arm/hand; whole person due to the aggravation of the diabetic condition
4. Facts in controversy: See Attachment
5. Legal issues involved: See Attachment
6. Unusual aspects: _____
7. Witnesses (designate if expert)*: See Notice of Witnesses
8. Exhibits: Claimant requests that WCC File Number 0809238 be made a part of the Record; Claimant's earnings records may be submitted at the Hearing
9. Medical evidence: (Indicate report pursuant to R.67-612; deposition or appearance) Family Health Center, Orangeburg Regional Medical Center; Dr. Mohammad Abu-Ata Neurology & Pain Center; Dr. Scott Boyd, Columbia Neurosurgical Associates; Lexington Medical Center; Dr. Blake Moore; Dr. Sweet, USC Specialty Clinics; Dr. Brian Caddy, Charleston Neurosurgical Assoc.; Carolina Therapy Solutions; DR. Leonard Forrest, Southeastern Spine Institute; Columbia Rehabilitation Clinic; and Harriet Fowler, Vocational Expert
10. Name, address, and specialty, if any, of the treating physician: Dr. Scott Boyd, Columbia Neurosurgical Associates, Columbia, SC; Dr. Algood, Family Health Center, Orangeburg, SC
11. Impairment rating(s); body part(s); physician and date of opinion: On 10/6/10 Harriet Fowler states that the Claimant is totally disabled as based on his age, education, significant restrictions/limitations, and his work history that he would be unable to obtain or maintain employment of any kind; On 9/20/10 Tracy Hill of Columbia Rehabilitation states the Claimant fits best into the sedentary category as he cannot do all the requirements in light or medium duty categories; On 9/15/10 Dr. Forest states that the Claimant has lost more than 50% of the use of his back to do work and states that he is not at MMI and needs additional treatment for neck and back; On 4/19/10 Dr. Boyd rates 27% whole person impairment; On 3/27/09 Dr. Denise Algood states that the aggravation to his diabetes was caused by the surgery and the physical stress put on the body due to the injuries sustained in the accident; and On 3/6/09 Dr. Blake Moore rates 36% to the whole person and also states that the Claimant is in need of additional treatment and is not at MMI and that the aggravation to his diabetes was caused by the surgery and pain which was as a result of this accident.
12. I am amending my form 50/51 in the following manner: #6 a - adding treatment for his diabetes in with the lifetime medical care; #10 a although the Claimant lists the AWW that the Form 20 shows, the Claimant is still asserting that AWW and Comp Rate are an issue.

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature: Preston F. McDaniel

Email: mcdanielaw@hotmail.com

Date of Hearing: 10/22/10

Time Needed for Hearing: 1 hr.

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.

*Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form #58.

Rev. Date 9/07

58

PRE-HEARING BRIEF

ATTACHMENT TO FORM 58

Thomas Brown v. Bulldog Hiway Express, d/b/a Peoplease Corp.

WCC FILE NO: 0809238

1 & 2: The Claimant requests that the Compensation Rate be based on his income for 52 weeks prior to the date of the injury. The evidence will show that the Claimant was working for Boyd Brothers prior to changing employment to go to work for Bulldog/Peoplease because Bulldog was closer to his home. He worked for Boyd Brothers throughout the entire year of 2007 and began work with Bulldog on January 7, 2008. The records from Boyd Brothers establishes that throughout the year of 2007 the Claimant made \$46,152.50 which gives him an AWW of \$887.55 with a resulting compensate rate of \$591.73. The Claimant then went to work for Bulldog on January 7, 2008 and the records of Bulldog indicate an ever increasing compensation rate while working for them. According to the pay stubs that will be placed into evidence from January 7 2008 through January 27, 2008 the Claimant had an AWW of \$486.96. From January 27, 2008 - March 29, 2008 it shows that the Claimant had an AWW of \$604.07 and then from March 29, 2008 - June 21, 2008 the Claimant had an AWW of \$644.11. Therefore, the evidence is clear that the Claimant's AWW was continuing to increase as he worked with Bulldog. According to the records the Claimant worked for Bulldog/Peoplease from January 7, 2008 - to the date of the accident on May 2, 2008 for a period of 16 weeks during which time the Claimant made \$9,434.00 with a resulting AWW of \$589.69 and a resulting compensation rate of \$393.15. Since the Claimant worked for a period of 16 weeks prior to the date of the accident with Bulldog that would leave 36 weeks to complete 52 weeks prior to the date of the accident. At the AWW of \$887.55 that would mean that during that 36 week period he would have ~~income of \$31,951.80 and when that is added to the amount of money~~ he made for the 16 weeks with Bulldog in the total amount of \$9,435.00 that means for the period of 52 weeks prior to the date of the accident he made \$41,386.80. Dividing that amount by 52 weeks equals an AWW of \$795.90 with a resulting compensation rate of \$530.63. The Claimant would submit that this is an appropriate AWW for the Claimant based on his work for both the employer and another employer for 52 weeks prior to the date of the accident. The evidence also establishes clearly that the Claimant had an ever-increasing AWW the longer he worked for Bulldog. Therefore, this is an appropriate AWW which fairly represents the AWW that the Claimant would be making but for the injury. AWW and Comp Rate are determined under \$42-1-40 and R. 67-1603.

4. a. While Claimant filed for a PTD award since Dr. Forrest's opinion is that he is not at MMI, Claimant's entitlement to continuing medical care for back/leg/arm/hand and aggravation of pre-existing diabetes per Dr. Algood and Dr. Blake Moore;

b. Claimant's entitlement to continuing temporary total disability benefits and for the difference in the compensation rate as stated above for all periods of TT that have previously been paid;

c. If the Commission determines that further medical care will not tend to lessen the period of disability, then Claimant's entitlement to an award for total and permanent disability based on:

1. The facts will establish Claimant's injury is not limited to a single member and therefore, his entitlement to an award for total loss of earning capacity. The Claimant is 60 years old; his work restrictions are limited light-limited medium duty; he has a background and experience in heavy duty types of work; his educational background is high school with some technical college; he has physical limitations on the use of neck/back, arm and hand and has impairment ratings due to his physical limitations. Based on all of the above, the services he can perform are so limited in quality, quantity or dependability that a reasonably stable job market for them does not exist and he has suffered a total loss of earning capacity.

2. Having lost 50% or more of the use of his spine (back/neck).

d. ~~Claimant's entitlement to lifetime medical care for his neck/back, arm and hand as well as for medications and treatment for the aggravation to his pre-existing condition of diabetes;~~

e. While it is the Claimant's position that he is entitled to an award for permanent total disability, in the alternative if the Commission does not find the Claimant to be totally and permanently disabled, then the Claimant's entitlement to an award for permanent residual disability to his neck/back, arm and hand as well as the whole person due to the worsening of his diabetic condition;

f. While it is the Claimant's position that he is entitled to an award for permanent total disability, in the further alternative, the Claimant has permanent partial loss of earning capacity as he is severely restricted to the type of work he can now perform which will greatly decrease his earning capacity; and

g. The Claimant requests a lump sum award if a final conclusion of the case is reached, with appropriate Social Security Language.

5: IN CORRELATION WITH RESPONSES UNDER NUMBER 4:

a. §42-15-60 provides for the Claimant's entitlement to medical care;

b. §42-9-10 provides for the Claimant's entitlement to continuing temporary total disability benefits and §42-1-120 defines disability;

c. 1) §42-9-10 and §42-1-120 defines total disability under §42-9-10; Coleman v. Quality Concrete Products, Inc., 245 S.C. 645, 142 S.E.2d 43 (1965); Colvin v. E.I. Dupont DeNemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699;

2) §42-9-30(19) Linen v. Ruscon Construction Company, 286 S.C. 67, 332 S.E.2d 211 (1985); Lyles v. Quantum Chemical Company, 315 S.C. 440, 434 S.E.2d 292 (S.C. App. 1993); Bateman v. Town & Country Furniture, 287 S.C. 158, 336 S.E.2d 890 (S.C. App 1985);

d. Claimant's entitlement to lifetime medical care under §42-15 60 due to total & permanent disability, or under Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646; and Dodge v. Bruccoli, et al., 334 S.C. 574, 514 SE2d 593 (SC App 1999);

e. In the alternative, Claimant's entitlement to scheduled member awards under S.C. Code §42-9-30 for permanent residual disability;

f. Permanent loss of earning capacity as provided in §42-9-20; Bowen v. Chiquola Mfg. Co., 238 S.C. 322, 120 S.E.2d 99 (1961); Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978); and

g. Claimant's entitlement to a lump sum award pursuant to S.C. Code §42-9-301 and R. 67-1605 with language in the award that such lump sum as awarded by the Commission is being ordered to be paid in lieu of the Claimant's entitlement to payments of compensation being made on a per week basis spread over the Claimant's lifetime (as established by the South Carolina Mortality Table, S.C. Code of Laws §19-1-150) which payment method the Commission may order under SC Code of Laws §42-9 240:

"The first installment of compensation payable under the terms of our award shall become due seven days from the date of such an award. Thereafter compensation shall be paid in installments weekly, except when the Commission determines that payment shall be made monthly OR in some other manner."

(Such language will be helpful to the claimant in avoiding any Social Security Setoff and is an Order of payment that can be made by the Commission).

Respectfully Submitted,



Preston F. McDaniel
Attorney for Claimant

10/7, 2010

Attachment D

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)
) BEFORE THE
) SOUTH CAROLINA
) WORKERS' COMPENSATION COMMISSION
) WCC File No: 0809238

THOMAS BROWN,
Employee-Claimant,

v.

PEOPLEASE CORP., as
Employer and ARCH INS.
CO., as Carrier,
Defendants.

NOTICE OF WITNESSES AND
WRITTEN REPORT(S)/PHYSICIAN
OR OTHER EVIDENCE TO BE
INTRODUCED ON BEHALF OF
CLAIMANT, THOMAS BROWN

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND
SCOTT B. GARRETT, ATTORNEY FOR THE EMPLOYER/CARRIER

YOU ARE HEREBY NOTIFIED THAT THE Claimant, Thomas
Brown, pursuant to the provisions of the South Carolina
Workers' Compensation Act and South Carolina Code Section
1-23-330 (1976, as amended), herewith submits the following
reports/physician or other evidence on behalf of the
Claimant, to wit:

NAME OF REPORT(S)/PHYSICIAN OR OTHER EVIDENCE	DATE OF REPORT(S)	PAGE #
Dr. Denise Algood Family Health Center	2/22/08-3/27/09	1-21
Orangeburg Regional Med. Ctr.	7/6/08-7/25/08	22-30
Dr. Mahmoud Abu-Ata Neurology & Pain Clinic	7/10/08-10/23/08	31-43
Dr. Scott Boyd Columbia Neurosurgical Assoc.	8/4/08-4/19/10	44-61
Lexington Medical Center	9/2/08-4/19/10	62-72
Dr. Blake Moore	4/4/09	73-79
Dr. Brian Cuddy Charleston Neurosurgical Assoc.	10/29/09	80-81
Dr. Leonard Forest Southeastern Spine Institute	9/15/10	82-85
Columbia Rehab, Clinic	9/16/10-9/20/10	86-98
Harriet Fowler, Voc. Expert	10/6/10	99-124
Payroll Records		125-129
Social Security Disability Award	7/3/10	130-133

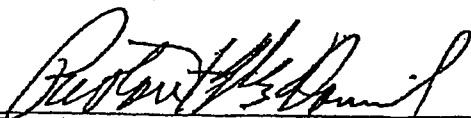
YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s), whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Claimant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Claimant:

The Claimant; any witness listed, named or called by the Defendants; and other lay witnesses to be named.

Respectfully submitted,



Preston F. McDaniel
Attorney for Claimant
1315 Elmwood Avenue
Columbia, SC 29201

10/7

, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON) BEFORE THE
WORKERS' COMPENSATION COMMISSION
WCC File No: 0809238

THOMAS BROWN,
Employee-Claimant,
v.

DATE OF HEARING: 10/22/10

PEOPLEASE CORP., as
Employer and ARCH INS.
CO., as Carrier,
Defendants.

APA SUBMISSIONS

Pursuant to South Carolina Code §1-23-330 and Commission Rule. 67-612 Preston F. McDaniel, the Attorney for the Claimant, submits the following report(s) in support of and on behalf of the Claimant in this matter:

<u>NAME OF REPORT(S)/PHYSICIAN OR OTHER EVIDENCE</u>	<u>DATE OF REPORT(S)</u>	<u>PAGE #</u>
1) Dr. Denise Algood Family Health Center	2/22/08-3/27/09	1-21
2) Orangeburg Reg. Med. Ctr.	7/6/08-7/25/08	22-30
3) Dr. Mahmoud Abu-Ata Neurology & Pain Clinic	7/10/08-10/23/08	31-43
4) Dr. Scott Boyd Columbia Neurosurgical Assoc.	8/4/08-4/19/10	44-61
5) Lexington Medical Center	9/2/08-4/19/10	62-72
6) Dr. Blake Moore	4/4/09	73-79
7) Dr. Brian Cuddy Charleston Neurosurgical Assoc.	10/29/09	80-81
8) Dr. Leonard Forest Southeastern Spine Institute	9/15/10	82-85
9) Columbia Rehab Clinic	9/16/10-9/20/10	86-98
10) Harriet Fowler, Voc. Expert	10/6/10	99-124
11) Payroll Records		125-129
12) Social Security Disability Award	7/3/10	130-133

MESSAGE TO YOU

THOMAS L BROWN

~~FOYLEASE CORPORATION~~

THE FACE OF THIS CHECK HAS A COLORED BACKGROUND ON WHITE PAPER. THE BACK A UNIQUE CHECK IDENTITY BAR CODE AND A WATER MARK. HOLD AT AN ANGLE TO VIEW.

Bulldog Airway Express
PEOPLESAFE CORPORATION
210 Wingo Way Suite 400
Mt Pleasant, SC 29464-1805

Wingate Bank of SC, N.A.
Charleston, SC

Date
June 27, 2008

Amount
\$0.00

Pay
zero and 00 / 100 Dollars

To
O THOMAS L BROWN
Cash

VOID

125

NON-NEGOTIABLE

Bulldog Hiway Express
PEOPLEASE CORPORATION

MESSAGE TO YOU

MESSAGE TO ALL EMPLOYEES

THOMAS L. BROWN

PEOPLEASE CORPORATION

M010BROT		THOMAS L. BROWN		4/4/2008	Single	5	XXX-XX-3474	3/23/2008	3/29/2008
FILES	\$1.00	474.25	\$474.25	FICA					
VERDIE	\$260.00		\$260.00	MEDICARE	\$6.88	\$94.97	ADV	\$150.00	\$1,455.50
				SOC. SEC.	\$29.40	\$406.07	FEE	\$1.00	\$8.00
				FEDERAL	\$8.68	\$258.88	GRN	\$24.99	\$199.92
				STATE					
				SC	\$8.63	\$172.68			
				LOCAL					
								\$6,549.50	\$6,897.48
TOTAL:				474.25	\$734.25	\$53.59	\$175.99		\$504.67
ACH Direct Deposit								Actual Deposit Amount	
053201607 CHECKING Acct *****3560 Remainder of Netpay(\$504.67)								\$504.67	
Total Deposits								\$504.67	

THE FACE OF THE CHECK HAS A COLORED BACKGROUND OR WHITE PAPER THE BACK A UNIQUE CHECK IDENTIFY BARCODE AND A WATERMARK. HOLD AT AN ANGLE TO VIEW ANK

Bulldog Hiway Express
PEOPLEASE CORPORATION
4210 Wingo Way Suite 400
ML Pleasant, SC 29464-1805

Wachovia Bank of SC, N.A.
200
Charleston, SC

Date
April 4, 2008

Amount
\$0.00

Pay
zero and xx / 100 Dollars

To The
THOMAS L. BROWN

VOID

7126

NON NEGOTIABLE

MESSAGE TO YOU

MESSAGE TO ALL EMPLOYEES

~~PEOPLE'S CORPORATION~~

127

Bulldog Highway Express
PEOPLE'S CORPORATION
210 Wingo Way Suite 400
Mt. Pleasant, SC 29464-1805

Wingo Road
Charleston, SC

50458070
577082

February 1, 2008

Amount

\$0.00

Pay

zero and xx/100 Dollars

VOID

To The
Order Of

THOMAS BROWN

NON NEGOTIABLE

128

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

Form **W-2 Wage and Tax Statement** 2007

896

c Employer's name, address, and ZIP code

BOYD BROTHERS TRANSPORTATION
3275 HWY 30

CLAYTON AL 36016-3003

e Employee's name, address, and ZIP code

THOMAS L BROWN

7 Social security tips

8 Allocated tips

9 Advance EIC payment

10 Dependent care benefits

13 ☐ Statutory employee ☐ Retirement plan ☐ Third-party sick pay

b Employer identification number (EIN)
636006515

a Employee's social security no.

1 Wages, tips, other comp
46152.50

3 Social security wages
46152.50

5 Medicare wages and tips
46152.50

11 Nonqualified plans

14 Other
125P 3380.00

2 Federal income tax withheld
5093.75

4 Social security tax withheld
2861.46

6 Medicare tax withheld
669.21

12a See instructions for box 12

12b

12c

12d

15 State

Employer's state ID no

25329056-7

16 State wages, tips, etc.

46152.50

17 State income tax

2409.57

18 Local wages, tips, etc.

19 Local income tax

20 Locality name

Copy C For EMPLOYEE'S RECORDS (See Notice to Employee on back of Copy B)

OMB No. 1545-0048

Dept. of the Treasury - IRS
Visit the IRS Web Site at www.irs.gov/wf2

129

Attachment E

APPELLATE PANEL
DECISION AND ORDER
OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0809238

THOMAS LEE BROWN,

EMPLOYEE
CLAIMANT/APPELLANT,

vs.

PEOPLEASE CORPORATION,

EMPLOYER,

AND

ARCH INSURANCE COMPANY c/o
GALLAGHER BARRITT SERVICES, INC.,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in
Columbia, South Carolina on March 21, 2011.

APPEARANCES: Claimant/Appellant represented by Preston F. McDaniel, Esquire
of Columbia, SC.

Defendants/Respondents represented by Scott E. Garrett, Esquire
of Columbia, SC.

RECEIVED AUG 8 2011

STATEMENT OF THE CASE

This claim arises out of an admittedly compensable injury which occurred on May 2, 2008. The parties were heard by the Single Commissioner on October 22, 2010 in Walterboro, South Carolina on the Forms 50 and 51. The Claimant maintained that he was permanently and totally disabled as a result of the work-related accident. Specifically, the Claimant maintained that he sustained injuries to his cervical spine, lumbar spine, bilateral upper extremities, and an aggravation of his underlying diabetic condition in his capacity as a truck driver with the Employer. In addition, the Claimant also sought a determination for a deviation in the calculation of his average weekly wage.

The Defendants admit the Claimant sustained a compensable injury by accident arising out of and in the course of his employment on May 2, 2008 resulting in an injury to his cervical spine with an aggravation to the Claimant's underlying diabetic condition. The Defendants denied that the Claimant sustained injuries to the lumbar spine or bilateral upper extremities, and that the Claimant was not entitled to an award of permanent and total disability benefits on the basis that the medical records do not support such a finding. Both parties agreed that the Claimant reached maximum medical improvement on September 28, 2010.

In an Order dated November 23, 2010, the Single Commissioner determined that the Claimant sustained a compensable injury to his cervical spine with aggravation of his underlying diabetic condition. The Single Commissioner further ordered that the Claimant is entitled to an award of permanent and total disability with lifetime, causally-related medical care as a result of loss of earning capacity pursuant to Section 42-9-10 and Section 42-9-120 of the Act. The Single Commissioner further determined that the

Claimant's average weekly wage is \$740.38 with a corresponding compensation rate of \$493.84.

In reaching his Order the State Commissioner found and ruled as follows:

IT IS HEREBY ORDERED that the Defendants shall pay the Claimant benefits consistent with permanent total disability.

IT IS FURTHER ORDERED that the Defendants shall provide the Claimant with lifetime causally-related medical treatment for his cervical spine and diabetes.

Within the statutory period, counsel for the Claimant filed an Application for Review in this case setting forth his reasons, copies of which were furnished to all interested parties prior to the scheduled oral argument presented before the Appellate Panel on March 21, 2011.

By appeal, Claimant respectfully submitted the Hearing Commissioner erred in the following:

1. That the Hearing Commissioner erred by not specifically awarding the Claimant lifetime medical care for his low back and legs where the undisputed facts are that the Defendants did not contest that the Claimant has sustained injury to and/or which affected his low back and legs and where the uncontested medical evidence from the authorized treating physicians establishes that from the date of the accident forward he was treated for problems with his low back and legs and where those and other doctors stated the opinion that these injuries and need for treatment to these body parts stemmed from the work-related automobile accident.

2. That the Hearing Commissioner erred as a matter of law by failing to designate the previously authorized treating physicians as the physicians to continue to provide treatment at least until such time as the Defendant specifically designate and/or provide medical care through physicians of their choice for his continuing problems under the award of lifetime medical benefits to effect a cure or provide relief from the Claimant's disabling symptoms stemming from the accident.

3. That the Claimant requests a review by the Commission on the specific and limited issue as to whether or not the average weekly wage and resulting compensation rate as awarded by the Commissioner should be further raised to an average weekly wage of \$887.53 with a resulting compensation rate of \$591.73, which is based on the uncontrasted evidence of a full year of employment with his previous employer prior to the Claimant coming to work with the Employer and further based on the pay stubs that were submitted into the record which supports the testimony of the Claimant that he was to make at least \$1.50/mile and is contrary to the testimony of the Employer representative that the maximum rate was \$.39/mile wherein those pay stubs reflect that he was to be paid \$1.00/mile, specifically as set out on pages 125, 126 and 127 of the Claimant's APA submissions.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered to the individual members of the Appellate Panel and have since been under study and consideration.

In the Appellate Review, the Appellate Panel shall, pursuant to B.C. Code Ann. §42-17-50 (1989), review the award, weigh the evidence as presented at the initial

hearing, and, if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner.

Thus, the Appellant and Respondents were present for oral argument on March 21, 2011 before the Appellate Panel. Therefore, based upon all submitted documentary evidence, the Record on Appeal, the Commissioner's file and Appellate Briefs, the Appellate Panel, by and through its statutory and inherent power, entered into its decision pursuant to S.C. Code Ann. §42-17-30. After careful review of the instant case, the Commission, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, the Appellate Panel has stated that the following Findings of Fact and Conclusions of Law shall become the law of the case and, therefore, the Decision and Order of the Hearing Commissioner is AFFIRMED in its entirety.

FINDINGS OF FACT

After hearing able arguments from counsel for the parties, a reading of the parties' respective Motions and Responses and Briefs, and a thorough analysis of the applicable statutes and regulations, the Appellate Panel concludes that Commissioner Hollister's Findings and Conclusions in his Order dated November 29, 2010, are correct as stated. Specifically, we the Appellate Panel find the following as fact:

1. That this is an admitted accident and that the only issues before this Appellate Panel are a determination of the disability award to which the Claimant is entitled as a result of his injuries sustained as a result of the accident and as to the average weekly wage and resulting compensation rate which will apply in this matter.

2. We find that exceptional circumstances exist to determine a fair and reasonable average weekly wage and resulting compensation rate for all parties involved and which will properly represent the Claimant's loss of earning capacity into the future. The average weekly wage of \$740.38 with a resulting compensation rate of \$493.84 should apply.

3. That the Claimant has requested an award for total and permanent disability benefits based on either a total loss of earning capacity and/or for having lost more than 50% of the use of his back. In reference to an award simply being based under Section 42-9-30 of the Act for loss of use of the back, the case of Mitland v. Rigby calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work. The Claimant suffered a cervical injury with minor level fractures and aggravation of his underlying diabetic condition.

4. That, based upon the decision that the Claimant is totally and permanently disabled, he is entitled to lifetime, causally-related medical care to his cervical spine and diabetes.

5. That the Claimant is currently receiving weekly temporary total disability benefits. Based on the decision that the Claimant's condition is total and permanent and that he is entitled to an award for such, the Claimant shall continue to receive weekly benefits at the compensation rate of \$493.84 per this award until the balance of the 500 weeks of compensation is paid. A lump sum request was withdrawn by the Claimant at the time of the hearing. Such lump sum request may be renewed and decided by the Commission at a later date and is subject to subsequent Order of the Commission. The

attorney's fees and costs in this matter may be requested and taken off the back end and paid in a lump sum.

6. That the Claimant was determined to have reached maximum medical improvement per the determination by Dr. Scott Boyd on April 19, 2010.

CONCLUSIONS OF LAW

In view of these Findings of Fact, and as provided in the South Carolina Code of Laws, we the Appellate Panel conclude the following as matters of law:

1. That under Section 42-1-40, the determination is made as to the average weekly wage and resulting compensation rate.

2. That under Section 42-9-10 and Section 42-1-120, the determination is made as to the Claimant's entitlement to an award for total and permanent disability for total loss of earning capacity.

3. That under Section 42-15-60, the determination is made as to the Claimant's entitlement to medical care and, based on the decision that he is entitled to an award for total and permanent disability, the Claimant is entitled to lifetime, causally-related medical care for his cervical spine and diabetic condition.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Appellate Panel hereby ORDERS, ADJUDGES AND DECREES:

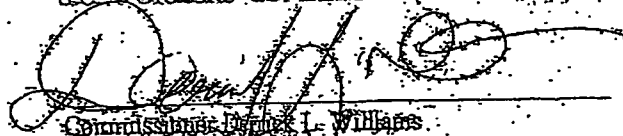
IT IS HEREBY ORDERED that the Defendants shall pay the Claimant benefits consistent with permanent and total disability.

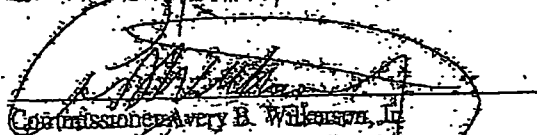
IT IS FURTHER ORDERED that the Defendants shall provide the Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetic condition.

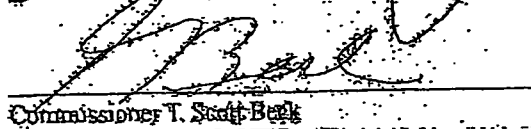
AND IT IS SO ORDERED.

The Hearing Commissioner's Order is AFFIRMED IN FULL by the Appellate Panel of the South Carolina Workers' Compensation Commission.

SC WORKERS' COMPENSATION COMMISSION


Commissioner Daniel L. Williams


Commissioner Avery B. Walmsley, Jr.


Commissioner T. Scott Beck

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to the cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties and by depositing a copy hereof postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Dellerra on June 28, 2011

Preston F. McDaniel
Scott B. Garrett
Clyde C. Dean Jr

Mary Jo Ann Leazer
Latanya Edwards

Attachment F

1

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

THOMAS BROWN,	)	
	)	
CLAIMANT,	)	FULL COMMISSION HEARING
	)	PANEL A
VS.	)	
	)	COMMISSIONER BECK
PEOPLEASE CORPORATION,	)	COMMISSIONER WILLIAMS
	)	COMMISSIONER WILKERSON-CHAIR
EMPLOYER,	)	
	)	
and	)	<u>TRANSCRIPT</u>
	)	
ARCH INSURANCE COMPANY,	)	
	)	
CARRIER,	)	
DEFENDANTS.	)	
_____	)	

WORKERS' COMPENSATION COMMISSION HEARING TAKEN BEFORE
CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR THE STATE OF
SOUTH CAROLINA, COMMENCING AT THE HOUR OF 4:20 PM ON
MONDAY, MARCH 21, 2011, SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION, 1333 MAIN STREET, COLUMBIA, SOUTH
CAROLINA, 20201.

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

APPEARANCES

FOR THE CLAIMANT

PRESTON F. McDANIEL, ESQUIRE
 McDANIEL LAW FIRM
 1315 ELMWOOD AVENUE
 COLUMBIA, SOUTH CAROLINA 29201
 (803) 771-7211

FOR THE DEFENDANTS

SCOTT B. GARRETT, ESQUIRE
 McANGUS, GOUDELOCK & COURIE, LLC
 POST OFFICE BOX 12519
 COLUMBIA, SOUTH CAROLINA 29211
 (803) 227-2224

REPORTED BY
 CORA ELLIS BRUTON - COURT REPORTER
 131 BROWNING COURT
 LEXINGTON, SOUTH CAROLINA 29073
 (803) 397-0189

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CERTIFICATE.	17

(EXHIBITS)

No Exhibits Proffered

CORA ELLIS BRUTON - COURT REPORTER
 131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
 803-397-0189

1 the previous company, Boyd Brothers --

2 COMMISSIONER WILKERSON: What evidence did you
3 put into the record other than the Claimant's
4 testimony? Was there any agreement or handwritten
5 anything or --

6 MR. MCDANIEL: Well Commissioner, I'm glad you
7 asked that, because that's what I'm actually -- I
8 found -- we tried to see if there were any records or
9 whatever beyond that, but -- and in going back through
10 the thing I noticed because when she testified it was
11 a late decision that when -- to bring in a witness
12 from the Employer and when they did and she testified
13 that \$.42 cents was the max that anybody made, the
14 Commissioner went with the max salary that she said
15 people made. But if you'll look in the documents that
16 are in our Pre-hearing Brief we submitted copies of
17 his check and on his check -- the four or five copies
18 of the check we submitted it said that he was making
19 \$1.00 dollar an hour. So --

20 COMMISSIONER WILKERSON: \$1.00 dollar an hour?

21 MR. MCDANIEL: Excuse me, \$1.00 dollar a mile.

22 Pardon me. Thank you, Commissioner, I misspoke there.
23 But in other words not only does it support my
24 client's testimony that he was going to make \$.50
25 cents an hour, that's -- Boyd Brothers is long

1 distance all across the United States. He was hoping
2 to get closer to home and -- and eventually work into
3 more favorable routes where he could be at home and do
4 more local driving and that's why he took the job. He
5 -- he was -- you'll see that he was making ever
6 increasing income. You'll see where -- she testified
7 there were two types of drivers, but she said the type
8 of driver that he was that this was the max salary.
9 Then she testified again and it's on page -- I quoted
10 it from out of her testimony and it's on page 9 of the
11 Brief; I believe it's page 9. Excuse me, it's on page
12 10 of the Brief, and she said that he -- that the most
13 anybody made was \$.42 cents. I ask you to look at the
14 paychecks that are in there and it says he would make
15 \$1.00 dollar per mile. Now -- so we have testimony --
16 I mean documentary evidence that not only does it not
17 support my client, it doubles it, but it does not
18 support her testimony that it was only \$.42 cents a
19 mile. That was, you know, as I said, Ms. Reese was a
20 late submission as far as -- I mean, not -- not that
21 -- it was proper and she properly testified, but --
22 but I would ask you to review that. The Commissioner
23 really based it on the credibility of my client from
24 the standpoint that we didn't submit anything to
25 support their position. They didn't support any

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 position to say that he was going to make \$.42 cents a
2 mile and we actually have documentary evidence in the
3 record that says he would make -- was making and they
4 paid him a \$1.00 dollar -- excuse me -- \$1.00 dollar a
5 mile.

6 So I'd ask you to consider increasing that
7 compensation rate to be fair to the Claimant because
8 his disability -- his career is over and I would ask
9 you to increase that. But here again, the major focus
10 is we'd ask you to award him lifetime medical care for
11 the back. The back out of all the problems is the
12 lesser problem but he should be entitled to that
13 medical care and we would ask you to grant him that.

14 Thank you, Commissioners.

15 THE COURT: Mr. Garrett.

16 BY MR. GARRETT: Yes, Commissioners.

17 I'll address the average weekly wage first. If
18 you look at my Respondent's Brief I included as
19 Exhibit A of that Brief a statement of the Claimant's
20 actual earnings and -- and we submitted at the
21 hearing, and I'm not trying to argue the case because
22 I did not appeal the finding of average weekly wage so
23 you can't bring it back down. But I would submit to
24 you that the best evidence of what he earned is the
25 statement I attached is what he actually earned. And

1 COMMISSIONER WILKERSON: Okay. That's fine.

2 BY MR. McDANIEL: Commissioner Huffstetler gave
3 us that option. And -- and very simply I -- I don't
4 really disagree with much of anything that Scott said
5 except for the fact that the Commissioner, you know,
6 made the decision on the comp rate. Here again, I
7 mean he's very -- not critical. I mean the
8 Commissioner said well, you didn't put up any evidence
9 to support the fact that you say the reason he went to
10 this job and the reason I'm going to find exceptional
11 circumstances is how much money you were making last
12 year with Boyd Brothers. All right. Which shows that
13 he was making enough money to where his compensation
14 rate would have been at the max compensation rate. I
15 think it was \$890 dollars. I just looked it up again.
16 And then found exceptional circumstances but then said
17 well I'm going to rely on this lady's testimony and --
18 and he said we didn't put anything to support \$.50
19 cents and she testified she's going -- he's going to
20 make \$.42 cents and it's right there in the record,
21 you know, that he was paid \$1.00 dollar a mile. So I
22 -- I think that -- you could -- you can divide it by
23 two and it supports my client's testimony. But the --
24 but the bottom line is I would ask you to consider
25 that. However, here again, the records are very

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Panel
Commissioners Derrick L. Williams, Avery B. Wilkerson, Jr., T. Scott Beck

WCC File No. 0809238

Thomas Lee Brown, Employee/Claimant, ... Appellant,

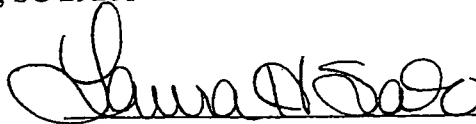
v.

Peoplease Corp., Employer, and
Arch Insurance Company
c/o Gallagher Bassett Services, Inc. Respondents.

PROOF OF SERVICE

I certify that on the 4th day of August 2011, I served the Respondents' Return in Opposition to Appellant's Motion for Leave to Submit Additional Evidence and to Stay the Appeal on Thomas Lee Brown by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Preston F. McDaniel, Esq.
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201



Laura H. Sabo
Paralegal to Weston Adams, III
McAngus, Goudelock & Courie LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300
*Attorneys for Respondents Peoplease Corp. and
Arch Insurance Company c/o Gallagher Bassett
Services, Inc.*

RECEIVED AUG 05 2011

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

EMPLOYEE/CLAIMANT: THOMAS BROWN

EMPLOYER: PEOPLELEASE

INSURER: ARCH INSURANCE COMPANY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF THE WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 22ND
DAY OF OCTOBER, 2010, COMMENCING AT THE HOUR OF 12:31
PM IN WALTERBORO, SOUTH CAROLINA, ATTENDED BY
COUNSEL AS FOLLOWS:

KATHRYN BOSTROM,
VERBATIM COURT REPORTER

COPY

BOSTROM REPORTING

109 KYLE AVENUE
INMAN, S.C. 29349
803-446-7040

APPEARANCES

FOR THE CLAIMANT:

PRESTON F. MCDANIEL, ESQUIRE
MCDANIEL LAW FIRM
1315 ELMWOOD AVENUE
COLUMBIA, SC 29201

FOR THE EMPLOYER/
CARRIER:

SCOTT B. GARRETT, ESQUIRE
MCANGUS GOUDELOCK & COURIE, LLC
PO BOX 12519
COLUMBIA, SC 29211

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WITNESS #2 MONICA REESE

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EXHIBITS

EXHIBIT NUMBER ONE 22

(WAGE EARNINGS)

1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN WALTERBORO,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * *

6 COMMISSIONER HUFFSTETLER:

7 THIS IS WORKERS' COMPENSATION FILE NO. 0809238
8 IN THE CASE OF THE CLAIMANT THOMAS BROWN VERSUS
9 THE EMPLOYER PEOPLEASE CORPORATION, AND THE
10 CARRIER IS ARCH INSURANCE COMPANY. THE
11 CLAIMANT IS PRESENT. HE IS REPRESENTED BY
12 ATTORNEY PRESTON F. MCDANIEL. THE
13 EMPLOYER/CARRIER IS REPRESENTED BY SCOTT B.
14 GARRETT. THE CASE IS SET TO CONSIDER ISSUES
15 OUTLINED IN FORMS 50 AND 51. THERE IS A
16 DISPUTE ON THE AVERAGE WEEKLY WAGE. THE
17 DEFENSE TAKES POSITION THE AVERAGE WEEKLY WAGE
18 IS \$589.69 WITH A COMPENSATION RATE OF \$393.14.
19 THE CLAIMANT TAKES POSITION HIS AVERAGE WEEKLY
20 WAGE IS \$887.55 WITH A COMPENSATION RATE OF
21 \$591.73. DATE OF ACCIDENT IS MAY 2, 2008. ANY
22 OBJECTION TO THOSE ITEMS, JURISDICTION, VENUE
23 OR ANY OF THE APA SUBMISSIONS?

24 MR. MCDANIEL:

25 NONE, COMMISSIONER.

1 **MR. GARRETT:**

2 NONE FROM THE DEFENSE.

3 **COMMISSIONER HUFFSTETLER:**

4 WITHOUT OBJECTION, THE COMMISSION FILE BECOMES
5 PART OF THE RECORD, WITH THE EXCEPTION OF SELF-
6 SERVING DECLARATIONS AND UNSTIPULATED MEDICAL
7 REPORTS. THE CLAIMANT TAKES POSITION HE
8 SUFFERED INJURIES TO HIS CERVICAL SPINE, HIS
9 LUMBAR SPINE, BOTH HANDS, BOTH ARMS AND ALSO AN
10 AGGRAVATION OF AN UNDERLYING DIABETES. HE
11 SEEKS AN AWARD OF COMPENSATION FOR PERMANENT
12 AND TOTAL DISABILITY. HE IS NOT SEEKING A
13 DECISION AT THIS TIME ON A LUMP SUM REWARD.
14 THE PARTIES STIPULATE TO MAXIMUM MEDICAL
15 IMPROVEMENT ON SEPTEMBER 28, 2010. THE DEFENSE
16 ADMITS AN INJURY TO THE CERVICAL SPINE ONLY.
17 THEY SEEK CREDIT AFTER MAXIMUM MEDICAL
18 IMPROVEMENT AND THEY CONCEDE SOME PERMANENT
19 PARTIAL DISABILITY TO THE BACK ONLY. IS THAT
20 CORRECT?

21 **MR. GARRETT:**

22 EVALUATION OF THE DIABETES.

23 **COMMISSIONER HUFFSTETLER:**

24 YOU ADMIT THE AGGRAVATION OF THE DIABETES.

25 * * * * * * * * * * * * * * * *

1 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
2 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
3 MATTER HEREIN:

4 * * * * * * * * * * * * * *

5 THOMAS BROWN,

6 BEING FIRST DULY SWORN OR AFFIRMED, TESTIFIED ON HIS
7 OATH AS FOLLOWS:

8 COMMISSIONER HUFFSTETLER:

9 LET ME JUST REPEAT WHAT I SAID BEFORE WE
10 STARTED. IT APPEARS THAT THE TWO ISSUES IN
11 DISPUTE ARE AVERAGE WEEKLY WAGE AND EXTENT OF
12 PERMANENCY. MR. MCDANIEL?

13 DIRECT EXAMINATION

14 BY MR. MCDANIEL:

15 Q NOW, MR. BROWN, COMMISSIONER, THE MEDICATIONS HE'S
16 ON ARE IN THE RECORD ALSO, BUT VERY BRIEFLY, THOMAS,
17 HOW OLD ARE YOU, SIR?

18 A I JUST TURNED 60.

19 Q AND, I BELIEVE YOUR TREATING FAMILY DOCTOR IS DR.
20 ALGOOD?

21 A YES.

22 Q AND, THEN YOUR AUTHORIZED TREATING DOCTOR WAS DR.
23 SCOTT BOYD?

24 A YES.

25 Q AND, YOU ALSO SAW DR. HALTON?

1 A YES, I DID.

2 Q OF COURSE YOU HAVE HAD TWO SURGERIES AS A RESULT OF
3 THIS ACCIDENT, BUT IF YOU WOULD, TELL ME -- I
4 BELIEVE AT THE TIME OF THE ACCIDENT, YOU WERE
5 ACTUALLY ON MEDICATION FOR DIABETES, BUT NOW YOU ARE
6 INSULIN DEPENDENT. IS THAT CORRECT?

7 A YES.

8 Q TELL ME HOW MUCH MEDICATION YOU ARE TAKING AT THIS
9 TIME?

10 A I TAKE LAMIR, IT'S INSULIN AND IT'S FOR MY DIABETES
11 AND I TAKE 40 UNITS AT 6 O'CLOCK IN THE MORNING AND
12 THEN ANOTHER 40 UNITS AT 6 PM IN THE EVENING. AND,
13 IN REFERENCE TO YOUR CONDITION, LET'S JUST GO AHEAD
14 AND TALK ABOUT IT. EVERYTHING IS ADMITTED, YOU'VE
15 HAD TWO SURGERIES ON YOUR CERVICAL SPINE. TELL ME
16 ABOUT THE PROBLEMS YOU ARE HAVING WITH YOUR NECK,
17 YOUR ARMS AND YOUR SHOULDERS RIGHT NOW?

18 A WELL, I HAVE PAIN IN MY NECK AND IT RUNS UP AND DOWN
19 MY BACK AND A LOT OF TIMES IT GOES INTO MY LEGS,
20 DOWN TO MY TOES. ALSO THE SAME IS LIKE WITH MY
21 UPPER ARMS. IT WILL RUN DOWN THROUGH MY ARMS TO MY
22 FINGERTIPS AND JUST HERE RECENTLY THE PAIN, IT
23 VARIES. SOME DAYS IT MAY BE INTENSE. SOME DAYS IT
24 MAY JUST BE LIKE ELECTRICAL SHOCK. SOMETIMES IT'S
25 NUMB. AS HERE RECENTLY THE OTHER DAY, TUESDAY

1 EVENING, I WAS GETTING OUT OF THE BATHTUB AND I HIT
2 MY TOE UP AGAINST THE BASEBOARD AND I DIDN'T EVEN
3 KNOW THAT IT WAS BROKE BECAUSE OF THE PAIN THAT I
4 ALWAYS EXPERIENCE WITHIN MY FEET AND HANDS. SO, I
5 LOOKED DOWN LATER ON AT MY FOOT AND I SEEN MY BABY
6 TOE SITTING OVER TO THE SIDE LIKE THAT AND THE REST
7 OF THE WAS LIKE THIS, AND I SAID "THAT CAN'T BE
8 RIGHT." SO, I WENT OUT TO THE EMERGENCY ROOM AND
9 THEY SAID THERE WASN'T NOTHING THEY COULD DO ABOUT
10 IT, SO I WENT TO MY --

11 COMMISSIONER HUFFSTETLER:

12 PODIATRIST?

13 A PODIATRIST, YES, THAT I GO TO ON A REGULAR BASIS AND
14 THEY DID X-RAYS OF IT AND SAID "YES, IT WAS BROKE."
15 BUT, THE EMERGENCY ROOM SUGGESTED I GO TO HIM, THEY
16 REALLY DIDN'T WANT TO DEAL WITH IT. THEY SAID THERE
17 WASN'T NOTHING THEY COULD DO ABOUT IT. SO, NOW I
18 HAVE TO WEAR THIS SHOE. AND, EVEN NOW, I DON'T KNOW
19 IF IT'S MY BABY TOE HURTING OR IS THE REST OF MY
20 FOOT HURTING. IT'S JUST SO LIKE THAT OFTEN. IT'S
21 INDESCRIBABLE. SOMETIMES, LIKE I SAY, IT BE PAIN
22 AND THEN SOMETIMES IT BE LIKE ELECTRICAL SHOCK.
23 SOMETIMES IT MAY BE NUMB. IT'S JUST DIFFERENT
24 THINGS. I HAVE LIKE IT KEEPS ME FROM SLEEPING AT
25 NIGHTS SOMETIMES. I COULD BE UP ALL HOURS OF THE

1 NIGHT AND IF I GET FIVE HOURS OF SLEEP I'M DOING
2 GOOD. I'D EVEN WISH FOR TWO, THREE HOURS OF SLEEP.
3 IT'S JUST INCONSISTENT EVER SINCE THE ACCIDENT. I
4 MEAN, IF I PUT A PILLOW TO LAY ON A CERTAIN WAY, I
5 HAD TO CHANGE IT UP THE NEXT 15-20 MINUTES. I'M
6 JUST TOSSING AND TURNING ALL NIGHT. IT'S JUST BEEN
7 KIND OF LIKE STRANGE TO ME.

8 Q YOU TALKED A LOT ABOUT YOUR LEGS. HOW ABOUT YOUR
9 ARMS? HOW'S THIS AFFECTED YOUR ARMS?

10 A WELL, WITH MY ARMS, THE PAIN, IT RUNS DOWN FROM SAY
11 THE MIDDLE OF MY NECK HERE DOWN TO MY SHOULDERS,
12 DOWN MY ARM AND LIKE, RIGHT INTO MY FINGER TIPS.
13 AFTER THE FIRST SURGERY, IT DID IMPROVE A LITTLE BIT
14 TO ABOUT TO HERE. THE PAIN USED TO BE ALL UP MY ARM
15 UP AND DOWN. BUT, LIKE I TOLD THE DOCTOR, I SAID
16 "IT DID FEEL A LOT BETTER." AND, THEN NOW, I CAN'T
17 EVEN LIKE TURN A MAYONNAISE JAR OR SOMETHING LIKE
18 THAT, OR USE A CAN OPENER. I HAD TO GET ME SOME POP
19 TOP CANS LIKE IF I WANT TO OPEN SOME PORK AND BEANS,
20 INSTEAD OF USING A CAN OPENER, I'LL GET ONE OF THOSE
21 TOPS THAT'S KIND OF LIKE THE SODA CAN AND I CAN PULL
22 THOSE UP. BUT, USING A CAN OPENER IS KIND OF
23 DIFFICULT AND STUFF LIKE THAT NOW. I SEE A
24 DIFFERENCE.

25 Q LET'S GO BACK AND TALK, YOU KNOW, LIKE I SAID THE

1 MEDICINES ARE IN THE FILE AND, OF COURSE, WHAT ARE
2 YOU SUPPOSED TO DO FOR ADDITIONAL -- I BELIEVE IN
3 ADDITION TO -- YOU TRY TO TAKE ALEVE, YOU TRY TO
4 AVOID TAKING THE OXYCONTIN. YOU'VE GOT A
5 PRESCRIPTION FOR OXYCONTIN, IS THAT RIGHT, FROM DR.
6 BOYD?

7 A WELL, DR. BOYD GAVE ME SOME OXYCONTIN.

8 Q WHEN DO YOU TAKE THAT?

9 A I TAKE THEM WHEN THE PAIN IS REAL INTENSE. I TRY TO
10 STAY AWAY FROM THEM BECAUSE THEY JUST DO MY MIND SO
11 BAD, IT'S LIKE HALLUCINATING -- I WANT TO GO TO
12 SLEEP OR DOZE OFF AT THE WHEEL AND I REALLY DON'T
13 WANT TO BE DRIVING WITH THAT, SO HE SUGGESTED THAT I
14 TAKE ALEVE OR EITHER MOTRIN, AND THAT'S WHAT I'VE
15 BEEN DOING. AND, THEN IF I HAVE MORE COMPLICATIONS,
16 I'M TO GET BACK WITH HIM.

17 Q SO, WHENEVER YOU NEED ANY MEDICATIONS, YOU CALL HIM?

18 A YES.

19 Q NOW, YOU SAW DR. ALGOOD, SHE'S SEEING YOU FOR YOUR
20 DIABETES, SHE FOLLOWS YOUR DIABETES.

21 A YES.

22 Q SHE'S YOUR FAMILY DOCTOR?

23 A RIGHT.

24 Q AND, SHE WAS AUTHORIZED TO TREAT YOU. I THINK
25 THAT'S WHERE YOU WENT ORIGINALLY.

1 A YES.

2 Q AND, THEN SHE SENT YOU TO DR. AHATO AND DR. OTTATO,
3 IS THAT CORRECT?

4 A WELL, THE WAY I GOT TO DR. AHATO, I WENT TO THE
5 EMERGENCY ROOM --

6 Q AND, THEY SENT YOU?

7 A AND, THEY SENT ME TO DR. AHATO. AND, THEN HE
8 REFERRED ME TO DR. BOYD.

9 Q AND, DR. BOYD, OF COURSE, IS IN COLUMBIA?

10 A YES.

11 Q AND, THE REASON I ASK YOU THAT IS, THE COMMISSIONER
12 IS GOING TO DESIGNATE, HAS THE RIGHT AND COULD
13 DESIGNATE -- WHO WOULD YOU LIKE TO SEE? YOU LIKE
14 DR. BOYD?

15 A YES.

16 Q YOU LIKE DR. AHATO, IS THAT CORRECT?

17 A YES.

18 Q NOW, DR. ALGOOD AND DR. AHATO, THEY'RE BOTH IN
19 ORANGEBURG, IS THAT RIGHT?

20 A YES.

21 Q AND, DR. BOYD IS IN COLUMBIA?

22 A YES, HE IS.

23 Q TELL ME ABOUT THE TRIPS TO COLUMBIA. HAS THAT
24 CAUSED YOU ANY PROBLEM?

25 A YES, SINCE THE ACCIDENT, I'M REALLY SCARED TO GET IN

1 BIG TRAFFIC OR BUMPER TO BUMPER TYPE TRAFFIC.
2 SOMETIME MY LEG, IF I'M GOING FOR THE BREAK, IT
3 MIGHT QUIVER ON ME AND GET NUMB AND I CAN'T REALLY
4 FEEL IF I'M ON THE BREAK PEDAL OR NOT WITH A
5 SUFFICIENT ENOUGH FORCE.

6 COMMISSIONER HUFFSTETLER:

7 WHERE DO YOU LIVE?

8 A I STAY IN ORANGEBURG.

9 Q WOULD YOU BE FOLLOWED BY DR. AHATO FOR ANY PAIN
10 MEDICATIONS, ANYTHING NON-SURGICAL IF THE
11 COMMISSIONER OR IF THE DEFENDANTS WILL AGREE TO
12 THAT?

13 A YES, BECAUSE HE'S A LOT CLOSER TO WHERE I LIVE AT
14 AND HE'S --

15 COMMISSIONER HUFFSTETLER:

16 DO YOU DISAGREE WITH THAT?

17 MR. GARRETT:

18 WELL, THE AUTHORIZED TREATING PHYSICIAN, WITH
19 EXCEPTION TO THE DIABETES, HAS STATED HE
20 DOESN'T NEED ANY FUTURE MEDICAL CARE. THAT'S
21 DR. BOYD.

22 COMMISSIONER HUFFSTETLER:

23 IF HE REQUIRES FUTURE MEDICAL TREATMENT, DO YOU
24 OBJECT TO THAT BEING DR. AHATO?

25 MR. GARRETT:

1 I HAVE NO OBJECTION TO SOMEONE WHO IS MORE
2 CLOSER. I DON'T WANT TO DESIGNATE DR. AHATO.

3 COMMISSIONER HUFFSTETLER:

4 BU YOU AGREE TO SOMEBODY WITHIN A REASONABLE
5 DISTANCE OF HIS HOME?

6 MR. GARRETT:

7 YES, COMMISSIONER.

8 BY MR. MCDANIEL:

9 Q MR. BROWN, I THINK YOU PRETTY WELL TOLD US -- CAN
10 YOU JUST -- YOU TOLD US ABOUT HOW IT AFFECTS YOUR
11 SLEEP AND ALL THAT. AND, I'M NOT GOING TO GO MUCH
12 FURTHER IN -- JUST ON A DAILY BASIS, DOES IT ALSO
13 AFFECT -- I MEAN, YOU HAVE PROBLEMS LIFTING THINGS
14 AND PROBLEMS WITH TURNING ANY TYPE -- ANYTHING THAT
15 REQUIRES THE STRENGTH OF YOUR ARMS. HOW IS THE
16 STRENGTH IN THOSE ARMS RIGHT NOW COMPARED TO WHAT IT
17 WAS BEFORE?

18 A YES, I WAS MORE CONFIDENT IN MY STRENGTH BEFORE,
19 LIKE THE ACCIDENT, I WAS A LOT STRONGER. NOW, I MAY
20 HAVE TO LIKE HAVE HELP. I ALWAYS WANTED TO MAYBE GO
21 BACK TO TRUCKING OR SOMETHING, BUT COULDN'T DO IT
22 ANYMORE. I'M LIMITED TO -- IF I TURN TO THE RIGHT
23 SIDE, I HAD TO HAVE SOMEBODY OVER THERE TO TELL ME
24 IF SOMETHING IS COMING. I REALLY CAN'T SEE.

25 Q WHY DON'T YOU SHOW THE COMMISSIONER ABOUT THAT.

1 LET'S TALK ABOUT YOUR RANGE OF MOTION IN YOUR NECK
2 JUST A MINUTE.

3 A OKAY.

4 Q JUST TELL THEM ABOUT THE KIND OF PROBLEMS YOU HAVE.

5 A WELL, IF I TURN TO THE RIGHT, I CAN -- I'M ONLY
6 LIMITED TO A CERTAIN DISTANCE THAT I CAN TURN MY
7 NECK. BUT, I'M PRETTY GOOD AT GOING TO THE LEFT
8 THOUGH. BUT, TO SEE TRAFFIC COMING FROM THE RIGHT,
9 I HAD TO JACK MY VEHICLE AROUND TO WHERE I CAN SEE
10 TRAFFIC COMING, ONCOMING, IN KIND OF -- I SAY A
11 DANGEROUS POSITION. I'D HAVE TO BE KIND OF LIKE
12 THIS WITH MY CAR AT THE STOP SIGN OR LIGHT, WHEREVER
13 I'M AT BEFORE I CAN MAKE THAT TURN.

14 Q WHEN YOU CAN, HOW DO YOU COMPENSATE FOR THAT?

15 A WELL, THAT'S WHAT I DO. I'LL HAVE -- SOMETIME I'LL
16 HAVE A PASSENGER AND I'LL SAY, "WHAT DOES IT LOOK
17 LIKE OVER THERE, WHAT'S COMING?" AND, THEY SAY "YOU
18 GOT TO BE KIDDING ME" AND I SAID "NO, I CAN'T SEE
19 OVER THERE". YOU KNOW.

20 Q NOW, I'M GOING TO TRY TO GO THROUGH THIS AS FAST AS
21 I CAN, BUT I BELIEVE YOU GRADUATED FROM HIGH SCHOOL?

22 A YES.

23 Q AND, THEN AFTER THAT WENT IN THE ARMY?

24 A YES.

25 Q AND, THEN AFTER THE ARMY I BELIEVE FOR MANY, MANY

1 YEARS, YOU WERE IN THE RESTAURANT BUSINESS COOKING?

2 A YES.

3 Q AND, THEN AFTER THAT YOU GOT A JOB WITH OAKRIDGE,

4 TENNESSEE. WHAT UNIVERSITY WAS THAT THERE?

5 A ORAU.

6 Q AND, WHAT DID YOU DO FOR THEM?

7 A I WAS A SHIPPING AND RECEIVING CLERK.

8 Q AND, YOU DID THAT FOR ABOUT HOW MANY YEARS?

9 A FOURTEEN AND A HALF YEARS.

10 Q ALL RIGHT, AND THEN FROM THERE YOU WENT INTO WHAT

11 BUSINESS?

12 A THE TRUCK DRIVING.

13 Q AND, THE REST OF THE TIME, THE REST OF YOUR LIFE

14 YOU'VE SPENT IN THE TRUCK DRIVING BUSINESS?

15 A YES.

16 Q AND, OF COURSE, THAT'S WHERE YOU WERE HURT?

17 A RIGHT.

18 Q AND, THE YEAR BEFORE THIS, YOU WERE WORKING FOR BOYD

19 BROTHERS, IS THAT RIGHT?

20 A YES.

21 Q AND, I WANT TO SHOW YOU A DOCUMENT, COMMISSIONER,

22 THIS IS AT PAGE 133, OR EXCUSE ME, I'M SORRY, I'M

23 GOING TO SHOW YOU WHAT'S BEEN MARKED AS 129. IS

24 THAT YOUR W-2 FROM BOYD BROTHERS?

25 A YES, IT IS.

1 Q THAT'S FOR 2007, THE YEAR BEFORE THE ACCIDENT?

2 A UH-HUH.

3 Q AND, THEN IN 2008, YOU CHANGED TO GOING TO WORK FOR
4 BULLDOG?

5 A YES.

6 Q I WANT TO TALK ABOUT THAT IN JUST A MINUTE, BUT
7 FIRST OFF, WE TALKED ABOUT WHAT YOU DID IN THE PAST.
8 COULD YOU GO BACK TO DOING YOUR JOB, DOING A JOB,
9 ANY OF THE JOBS YOU HELD AS A COOK?

10 A I WOULD LOVE TO, BUT IN ALL HONESTY, NO, I DON'T
11 THINK I COULD BECAUSE THERE'S A LOT OF LIFTING AND
12 MY MOBILITY IS NOT LIKE IT WAS. YOU'VE GOT TO BE
13 AGILE TO SOME OF THE THINGS THAT ARE CALLED FOR
14 WORKING IN A KITCHEN OR EITHER DOING THE TRUCK
15 DRIVING NOW. THE CLUTCH, DOING THE SHIFTING --

16 Q NOW, YOU'RE TALKING ABOUT THE TRUCK DRIVING. THAT'S
17 WHY YOU COULDN'T GO BACK TO DOING COOKING?

18 A YES.

19 Q HOW ABOUT SHIPPING AND RECEIVING, DID YOU HAVE TO DO
20 LIFTING, THAT TYPE THING, REACHING?

21 A YES, YOU DROVE A FORKLIFT TO PUT THINGS UP ON THE
22 SHELVES, YOU PICKED UP BOXES, SOMETIMES YOU WOULD
23 PICK UP ABOUT 100 POUNDS, SOMETIMES IT WOULD BE 50,
24 OR WHATEVER.

25 Q COULD YOU GO BACK TO DOING THAT JOB?

- 1 A IT'S LIKE, ONCE AGAIN, IT'S MOBILITY. YOU KNOW IT'S
2 -- NO.
- 3 Q DO YOU KNOW WHEN THIS WEAKNESS IS GOING TO HIT YOU
4 IN YOUR LEGS NORMALLY?
- 5 A NO, THEY JUST COME OUT OF NOWHERE, BUT LIKE IF I SIT
6 FOR EXTENDED PERIODS OF TIME, THE PAIN STARTS
7 RESONATING AND COMING IN THEN. IF I STAND UP AND
8 WALK FOR SHORT DISTANCES, IT RELIEVES THAT AND I
9 FEEL A LOT BETTER.
- 10 Q OKAY. ONE THING WE DIDN'T TALK ABOUT EARLIER ALSO
11 IS, I THINK, IT'S CLEARLY AT THE ACCIDENT YOU, OF
12 COURSE, HAD THE PROBLEMS WITH YOUR NECK, AND THEN, I
13 THINK, MOST OF THE TREATMENT'S BEEN FOCUSED ON YOUR
14 NECK AFTER THAT, IS THAT RIGHT?
- 15 A YES.
- 16 Q AND, THEN, BUT YOU ALSO REPORTED PROBLEMS WITH YOUR
17 LOW BACK. WHAT KIND OF PROBLEMS ARE YOU HAVING WITH
18 YOUR LOW BACK?
- 19 A WELL, THAT'S BEEN ONGOING, THE PAIN IT GOES UP AND
20 DOWN MY BACK.
- 21 Q DOES SOME OF IT EMANATE FROM YOUR LOW BACK, THOUGH,
22 AND DOES IT START THERE?
- 23 A WELL, IT SEEMS LIKE IT STARTS FROM THE BACK OF MY
24 NECK AND GOES DOWN AND THEN SOMETIMES IT VARIES
25 ALSO. IT BE COMING UP, IT FEELS DIFFERENT ALL THE

1 TIME. I REALLY COULDN'T PINPOINT IN PARTICULAR.

2 Q WITH THE PROBLEMS YOU ARE HAVING, IS THERE ANY JOB -
3 - COOKING, RECEIVING, TRUCK DRIVING, THAT YOU'VE GOT
4 A BACKGROUND EXPERIENCE IN, IS THERE ANY JOB OUT
5 THERE THAT YOU'VE GOT A BACKGROUND EXPERIENCE IN
6 THAT YOU COULD GO BACK TO DOING, IN YOUR OPINION, IN
7 YOUR CURRENT CONDITION?

8 A NO, NOT THAT I KNOW OF.

9 Q WOULD YOU LOVE TO BE WORKING?

10 A I WOULD, YES.

11 Q LET'S NOW GO BACK AND TALK JUST A MINUTE ABOUT BOYD
12 BROTHERS. WE PUT IN THE AMOUNT OF MONEY THAT YOU
13 WERE MAKING WHICH WAS ABOUT OVER \$40,000 AT BOYD
14 BROTHERS. WHY DID YOU LEAVE BOYD BROTHERS AND GO TO
15 BULLDOG?

16 A WELL, WHEN I LEFT BOYD BROTHERS, THEY WAS PAYING ME,
17 I THINK, ABOUT 39 CENTS A MILE. AND, BULLDOG WAS
18 OFFERING, I THINK, 50 CENT A MILE AND IT WAS AN
19 OPPORTUNITY TO, AS TIME GOES ON, INCREASE MY PAY.

20 Q FROM THE TIME YOU STARTED WITH BULLDOG, UNTIL THE
21 TIME OF THE ACCIDENT, WHAT HAPPENED TO YOUR
22 PAYCHECKS? DID THEY REMAIN THE SAME, DID THEY GET
23 MORE, OR LESS?

24 A WELL, THEY INCREASED A LITTLE BIT. THEY -- I WAS
25 WANTING TO EVENTUALLY GET ON SOME LONG RUNS THAT

1 THEY HAD GOING UP TO CANADA WHICH WOULD HAVE BEEN
2 EVEN MORE. IT SEEMED LIKE A GOOD DEAL.

3 Q DID YOU EXPECT TO MAKE MORE WITH BULLDOG THAN YOU
4 DID WITH BOYD?

5 A YES, I DID, PLUS ALSO BULLDOG WAS MORE LOCAL THAN
6 BOYD WAS. AND, IT WOULD PUT ME AT HOME MORE OFTEN.

7 Q THE LONGER RUNS THAT YOU HAD WITH BULLDOG, WHERE
8 WERE THEY TO? TOWARDS THE END?

9 A THE FURTHEREST RUN WAS LIKE TO PENSACOLA, FL TO THE
10 CHARLESTON PORT.

11 Q DID YOU LIKE THOSE BIG RUNS?

12 A THEY WAS REAL NICE, YEAH, THEY WERE GOOD.

13 Q ACCORDING TO WHAT I'VE GOT IN THE RECORD, IT LOOKS
14 LIKE DURING THE FIRST THIRTEEN WEEKS THAT YOU WERE
15 WITH BULLDOG THROUGH APRIL 5TH OF 2008, YOU MADE
16 ABOUT \$7,395?

17 A YES.

18 Q AND, THEN THE LAST THREE WEEKS YOU MADE OVER \$2,000?

19 A UH-HUH.

20 Q SO, YOUR PAYCHECKS WERE GETTING MORE FROM THE TIME
21 YOU BEGAN?

22 A YES, IT'S KIND OF LIKE AN INCUBATION PERIOD THAT YOU
23 GET UNTIL THEY SEE THAT YOU CAN DO THE MILES THAT
24 THEY GIVE YOU.

25 Q THE LONGER YOU ARE WITH THEM, THE BETTER RUNS THEY

1 GIVE YOU?

2 A YES. YES.

3 Q TELL ME, IF YOU WOULD MR. BROWN, WERE YOU HAVING ANY
4 PROBLEM WITH YOUR NECK AND BACK OR LOW BACK, LEGS,
5 ARMS THAT ANY WAY LIMITED WHAT YOU COULD DO WITH
6 YOUR BACK AND YOUR NECK PRIOR TO THIS ACCIDENT?

7 A NO.

8 Q NOW, YOU TALKED ABOUT ALL THE PROBLEMS YOU HAVE NOW,
9 OKAY. AND, YOU TALKED ABOUT INABILITY TO SLEEP, THE
10 PROBLEM OPENING JARS, THE PROBLEMS YOU'VE GOT WITH
11 LIFTING, REACHING, THE WEAKNESS YOU HAVE IN YOUR
12 LEGS AND YOUR ARMS. IF YOU CONSIDER ZERO PERCENT
13 MEANING THAT YOU'VE GOT, BEFORE THIS ACCIDENT, YOU
14 HAD ZERO PERCENT LOSS OF USE OF YOUR NECK AND BACK
15 TO DO WORK REQUIRING THE USE OF YOUR NECK AND BACK,
16 AND IF YOU CONSIDER THE PROBLEMS YOU ARE HAVING NOW,
17 WHAT PERCENTAGE OF THE LOSS OF USE OF YOUR NECK AND
18 BACK TO DO WORK, DO YOU FEEL LIKE YOU'VE LOST AS A
19 RESULT OF THIS ACCIDENT?

20 A I'D SAY AT LEAST 60%, SOMEWHERE AROUND IN THERE.

21 MR. MCDANIEL:

22 COMMISSIONER, I DON'T HAVE ANY FURTHER
23 QUESTIONS.

24 COMMISSIONER HUFFSTETLER:

25 HOW LONG HAVE YOU BEEN A TRUCK DRIVER?

1 MR. BROWN:

2 SEVERAL YEARS. I'D SAY WELL OVER SEVEN, YES.

3 COMMISSIONER HUFFSTETLER:

4 MR. GARRETT?

5 MR. GARRETT:

6 YES, COMMISSIONER.

7 CROSS EXAMINATION

8 BY MR. GARRETT:

9 Q YOU'VE TESTIFIED ABOUT YOUR EARNINGS THROUGH BULLDOG
10 WHICH IS ACTUALLY YOU WERE EMPLOYED THROUGH
11 PEOPLEPLEASE. I DIDN'T WANT TO CONFUSE -- YOUR
12 PAYCHECK CAME FROM PEOPLEPLEASE, CORRECT?

13 A YES.

14 Q LET ME SHOW YOU RIGHT NOW, THIS IS A PRINT-OUT OF
15 YOUR ACTUAL WAGES. YOU CAN LOOK AT THAT ONE
16 TOGETHER.

17 MR. MCDANIEL:

18 I THINK I'VE ALREADY GOT THAT ONE, BUT WE'LL GO
19 AHEAD AND LOOK AT --

20 MR. GARRETT:

21 THAT'S A PRINT-OUT OF YOUR ACTUAL WAGES UP TO
22 AND UNTIL THE TIME THAT YOU STOPPED. I'D OFFER
23 THAT AS DEFENDANT'S EXHIBIT 1.

24 COMMISSIONER HUFFSTETLER:

25 DO YOU HAVE ANY OBJECTION?

1 **MR. MCDANIEL:**

2 WITHOUT OBJECTION.

3 (WHEREUPON, A WAGE PRINT-OUT WAS MARKED AS
4 DEFENDANT'S EXHIBIT NUMBER ONE FOR
5 IDENTIFICATION.)

6 Q AND, IT'S A LITTLE BIT DIFFERENT THAN YOUR
7 TESTIMONY, I THINK MR. BOYD (SIC), IN THAT THE
8 AMOUNT OF MONEY THAT YOU WERE EARNING EVERY WEEK, TO
9 PUT IT FRANKLY, IT JUST VARIED EVERY WEEK. SOME
10 WEEKS YOU MADE \$700 AND OTHER WEEKS YOU MADE \$400
11 AND SOME WEEKS YOU MADE \$340. IS THAT FAIR?

12 A YES.

13 Q AND, EVEN UP TOWARDS THE END THERE WERE SOME WEEKS
14 WHERE YOU MADE \$400 AND THERE WAS A WEEK WHERE YOU
15 MADE \$177. SO, IT REALLY WASN'T GRADUALLY
16 INCREASING AS YOU PREVIOUSLY TESTIFIED, WAS IT?

17 A IT WAS VARYING.

18 **COMMISSIONER HUFFSTETLER:**

19 LOOKING ON THAT THAT'S BEEN OFFERED AS AN
20 EXHIBIT, WHO DID THIS HANDWRITTEN CALCULATION
21 AT THE BOTTOM?

22 **MR. GARRETT:**

23 I DID, COMMISSIONER. YOU'RE WELCOME TO CHECK
24 MY MATH, PRESTON.

25 **MR. MCDANIEL:**

1 I'VE GOT ONE THAT DOESN'T HAVE --

2 COMMISSIONER HUFFSTETLER:

3 I JUST WANT TO ESTABLISH FOR THE RECORD, I DID
4 NOT DO IT.

5 MR. GARRETT:

6 I JUST DID IT WITH A CALCULATOR. YOU'RE
7 WELCOME TO --

8 MR. MCDANIEL:

9 I'VE ACTUALLY GOT ONE THAT, IF YOU DON'T MIND,
10 I WOULD PREFER THAT THE --

11 COMMISSIONER HUFFSTETLER:

12 I JUST WANTED TO ESTABLISH THAT I DID NOT WRITE
13 THAT DOWN, AND IT DID NOT COME FROM THE
14 EMPLOYER. I JUST WANTED TO ESTABLISH WHO WROTE
15 IT.

16 MR. MCDANIEL:

17 THAT'S FINE. THAT'S FINE.

18 MR. GARRETT:

19 I DID IT. I DID IT FOR EVERYBODY'S CONVENIENCE.

20 Q AND, YOU TESTIFIED ALSO, A MINUTE AGO, AS TO YOUR
21 REASON WHY YOU LEFT BOYD BROTHERS. DO YOU REMEMBER
22 ME ASKING YOU ABOUT WHY YOU LEFT BOYD BROTHERS BACK
23 IN YOUR DEPOSITION WHEN I TOOK IT THE FIRST TIME
24 BACK IN 2008, DO YOU REMEMBER THAT?

25 A TO GET A BETTER JOB, I THINK.

1 Q ACTUALLY WHAT YOU TOLD ME WAS YOU LEFT BULLDOG
2 BECAUSE YOU DIDN'T WANT TO DO THOSE CROSS-COUNTRY
3 RUNS ANYMORE AND THAT'S WHY YOU CAME TO WORK FOR
4 BULLDOG. YOU WANTED A PLACE THAT WAS MORE LOCAL SO
5 YOU DIDN'T HAVE TO DRIVE THOSE LONG DISTANCES. DO
6 YOU REMEMBER TELLING ME THAT?

7 A I MAY HAVE TOLD YOU THAT.

8 Q ALSO, BECAUSE BOYD BROTHER TERMINAL WAS IN
9 BIRMINGHAM, ALABAMA, IS THAT RIGHT?

10 A YES.

11 Q SO, YOU HAD TO GO FROM ORANGEBURG TO BIRMINGHAM TO
12 START YOUR RUNS, CORRECT?

13 A UH-HUH.

14 Q IS THAT RIGHT?

15 A IT WOULD VARY. SOMETIMES I WOULD BE AT HOME OR
16 WHEREVER I WAS AT.

17 Q BUT, BULLDOG WAS A LOT CLOSER IN CHARLESTON?

18 A YES.

19 Q AND, THAT WAS ONE OF THE OTHER REASONS YOU LEFT TO
20 GO TO WORK FOR BULLDOG?

21 A CORRECT.

22 Q AND, THE OTHER THING IS, YOU DIDN'T HAVE TO DO ANY
23 LOADING AND UNLOADING WORKING WITH BULLDOG, DID YOU?
24 YOU WERE JUST DRIVING THE TRUCK? WHEN YOU GOT
25 THERE, SOMEBODY ELSE DID THE LOADING AND UNLOADING

1 WITH BULLDOG?

2 A YES.

3 Q AND, WITH BOYD, YOU HAD TO DO SOME OF THE WORK --

4 A SOMETIMES.

5 Q OKAY. AND, THAT WAS ANOTHER REASON THAT YOU

6 SWITCHED. IT WAS EASIER PHYSICAL WORK, WORKING FOR

7 BULLDOG.

8 A WELL, THIS IS MORE LOCAL.

9 Q OKAY.

10 A OR, SHOULD I SAY REGIONAL.

11 Q YOU WERE DOING THE RUN FROM CHARLESTON DOWN TO

12 SAVANNAH, AND SOMETIMES DOWN INTO FLORIDA, IS THAT

13 RIGHT?

14 A YES, WITH BULLDOG.

15 Q THAT WAS YOUR TYPICAL RUN?

16 A YES.

17 Q I THINK YOU TESTIFIED EARLIER ABOUT YOUR -- YOU

18 HAVEN'T HAD ANY SURGERY, ANY MEDICAL TREATMENT ON

19 YOUR LOWER BACK, HAVE YOU?

20 A NO, I HAVEN'T.

21 Q DR. BOYD'S DONE ALL OF THE MEDICAL TREATMENT JUST ON

22 YOUR NECK, CORRECT?

23 A YES.

24 Q HE'S BEEN THE ONE PRIMARILY IN CHARGE OF YOUR CARE,

25 IS THAT FAIR TO SAY?

1 A OVERALL, YES, EXCEPT FOR THE DIABETES PART.

2 Q AND YOU LIKE DR. BOYD?

3 A YES, HE'S ALL RIGHT.

4 Q AND, YOU TRUST DR. BOYD?

5 A YES.

6 Q AND, DR. BOYD SENT YOU FOR A FUNCTIONAL CAPACITY

7 EVALUATION THAT SHOWED THAT YOU COULD WORK IN THE

8 MEDIUM TO HEAVY DUTY CATEGORY. DID YOU SEE THAT?

9 DR. BOYD AGREED WITH THAT. DR. BOYD ESSENTIALLY

10 SAID YOU COULD GO BACK TO WORK, DID YOU KNOW THAT?

11 A DID HE SAY THAT?

12 Q HE DID. YOU DIDN'T KNOW THAT?

13 A YES.

14 Q AND, I REALIZE THAT YOUR NECK MAKES IT DIFFICULT FOR

15 YOU TO DRIVE A BIG TRUCK. BUT, I WANT TO BE CLEAR

16 THAT FOR MOST OF YOUR ADULT LIFE, I THINK YOU

17 TESTIFIED IN YOUR DEPOSITION THAT FOR ABOUT 25 YEARS

18 YOU WERE A COOK?

19 A YES.

20 Q AND, I GUESS SOME PEOPLE WOULD EVEN CALL IT A CHEF.

21 I THINK YOU TESTIFIED IN YOUR DEPOSITION THAT YOU

22 WORKED AT A, YOU CALLED IT A WHITE TABLE RESTAURANT.

23 A WHITE TABLECLOTH RESTAURANT, IS THAT RIGHT?

24 A AT VARIOUS TIMES, YES.

25 Q AND, YOU ACTUALLY MADE IT UP WORKING IN THE

1 RESTAURANT BUSINESS WHERE YOU WERE EVEN A
2 SUPERVISOR?
3 A YES.
4 Q OVER THE WHOLE KITCHEN?
5 A UH-HUH.
6 Q AND, SO YOU HAD SOUS CHEFS AND PREP COOKS AND ALL
7 KIND OF THOSE PEOPLE WORKING UNDERNEATH YOU, IS THAT
8 CORRECT?
9 A NO, I DIDN'T MAKE THAT HIGH, BUT I'VE HAD
10 SUPERVISORY ROLES.
11 Q BUT, YOU HAVEN'T EVEN TRIED TO FIND A JOB DOING WHAT
12 YOU DID FOR 25 YEARS WHICH IS WORKING IN THE
13 RESTAURANT BUSINESS, HAVE YOU?
14 A I HAVE LOOKED AROUND, YES.
15 Q YOU HAVEN'T MADE ANY JOB APPLICATIONS THOUGH, HAVE
16 YOU, SINCE YOU FINISHED UP YOUR SURGERY?
17 A I HAVE BEEN LOOKING. THE JOB MARKET JUST AIN'T
18 THERE RIGHT NOW.
19 Q SO, YOU COULD DO THAT JOB IF YOU FOUND ONE?
20 A I HAVE BEEN OFFERED ONE AT A DIFFERENT PLACE.
21 Q DID YOU GO TRY IT?
22 A NO. IT HADN'T OPENED UP YET.
23 Q ARE YOU GOING TO GO TRY IT WHEN IT OPENS UP?
24 A IF THEY WOULD HIRE ME, I WOULD.
25 MR. GARRETT:

1 THAT'S ALL I'VE GOT.

2 REDIRECT EXAMINATION

3 BY MR. MCDANIEL:

4 Q ACTUALLY, MR. BROWN, THE LAST TIME DR. BOYD SAW YOU,
5 I BELIEVE HE INDICATED HE INDICATED THAT YOU STILL
6 HAD WEAKNESS AND YOU HAD PROBLEMS WITH YOUR GAIT?

7 A YES.

8 Q AND, HE ALSO INDICATED YOU HAD RESTRICTIONS ON YOUR
9 RANGE OF MOTION?

10 A YES.

11 Q AND, I BELIEVE ALSO, DID HE CONVEY TO YOU THAT HE
12 HAD GREAT CONCERNS ABOUT YOUR SAFETY IN OPERATING A
13 TRUCK CONSIDERING HIS RANGE OF MOTION AND YOUR
14 CERVICAL MYELOPATHY AND ALSO WITH YOUR RESULT AND
15 PROBLEMS WITH COORDINATION.

16 A YES.

17 Q I KNOW YOU GOT THIS BOOT ON NOW, BUT YOU ACTUALLY
18 HAVE PROBLEMS WALKING, DON'T YOU?

19 A YES, I DO.

20 Q YOU SORT OF STAGGER?

21 A YES.

22 Q AND THIS HAS BEEN EVERY SINCE YOUR ACCIDENT?

23 A RIGHT.

24 Q DO YOU HAVE ANY IDEA - I KNOW YOU'VE TOLD COUNSEL
25 THAT YOU HAVE, I THINK, TAKEN YOUR DEPOSITION THREE

1 DIFFERENT TIMES AND EVERY TIME, YOU WANT TO WORK,
2 YOU WOULD LOVE TO GO BACK TO WORK, WOULDN'T YOU?

3 A YES.

4 Q AND, IF SOMEBODY OFFERED YOU A JOB, YOU'RE GOING TO
5 TRY IT, AREN'T YOU?

6 A YES.

7 Q DO YOU KNOW WHETHER OR NOT YOU COULD DO THAT JOB,
8 THOUGH?

9 A NO, I DON'T.

10 Q I BELIEVE AFTER DR. BOYD SAW YOU FOR THE LAST TIME
11 IN 2010, YOU HAD ANOTHER FUNCTIONAL CAPACITY
12 EVALUATION, DIDN'T YOU?

13 A YES.

14 Q AND, I BELIEVE THEY FOUND THAT YOU WERE ONLY
15 QUALIFIED FOR SEDENTARY WORK, AND YOU COULD DO SOME
16 LIFTING IN THE LIGHT DUTY RANGE, IS THAT RIGHT?

17 A CORRECT.

18 Q AND, I BELIEVE THAT ONE WAS JUST CONDUCTED NOT LONG
19 AGO -- ON ABOUT 9/16/2010, IS THAT RIGHT?

20 A YES.

21 Q THE OTHER ONE WAS BACK IN 2009, WASN'T IT?

22 A UH-HUH.

23 MR. GARRETT:

24 THAT'S INCORRECT.

25 Q I STAND CORRECTED, IT WAS IN MAY, EXCUSE ME.

1 MR. MCDANIEL:

2 NOTHING FURTHER.

3 COMMISSIONER HUFFSTETLER:

4 ANYTHING ELSE FOR THIS WITNESS?

5 MR. MCDANIEL:

6 NOTHING FURTHER FOR THIS WITNESS.

7 COMMISSIONER HUFFSTETLER:

8 ANYTHING ELSE FOR THE CLAIMANT?

9 MR. MCDANIEL:

10 NOTHING ELSE, THAT'S THE CLAIMANT'S CASE.

11 MR. GARRETT:

12 I HAVE ONE WITNESS FOR JUST A COUPLE OF
13 QUESTIONS. I CALL MONICA L REESE.

14 * * * * * * * * * * * * * * * *

15 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
16 WHOLE TRUTH AND NOTHING BUT THE TRUTH CONCERNING THE
17 MATTER HEREIN:

18 * * * * * * * * * * * * * * * *

19 MONICA REESE,

20 BEING FIRST DULY SWORN OR AFFIRMED, TESTIFIED ON HIS
21 OATH AS FOLLOWS:

22 DIRECT EXAMINATION

23 BY MR. GARRETT:

24 Q MONICA, WHAT IS YOUR JOB AT PEOPLEASE?

25 A I'M CORPORATE COUNSEL.

1 Q AND, YOU HAVE SEEN THE REPORT THAT'S ALREADY BEEN
2 INTRODUCED AS DEFENDANT'S EXHIBIT 1 --

3 A YES.

4 Q -- SHOWING MR. BROWN'S EARNINGS BY THE WEEK,
5 CORRECT?

6 A CORRECT.

7 Q AND, IS THAT REPRESENTATIVE OF ANY OF THE DRIVERS
8 OUT THERE IN BULLDOG WHO HAVE THOSE TYPE OF ROUTES?

9 MR. MCDANIEL:

10 I'M GOING TO OBJECT TO THAT QUESTION, IT CALLS
11 FOR SPECULATION ON BEHALF OF THE WITNESS.

12 THERE HASN'T BEEN ANY FOUNDATION BEEN
13 ESTABLISHED CONCERNING THE OTHER DRIVERS?

14 COMMISSIONER HUFFSTETLER:

15 YOU HAVEN'T LAID GROUNDWORK OF HOW CORPORATE
16 COUNSEL WOULD HAVE ACCESS AND KNOWLEDGE,
17 PERSONAL KNOWLEDGE OF THAT.

18 MR. GARRETT:

19 I'LL LAY THAT.

20 Q DO YOU, ARE YOU INVOLVED IN DAY-TO-DAY RUNNING OF
21 OPERATIONS OF PEOPLEASE?

22 A YES.

23 Q IN ADDITION TO YOUR ACTIONS AS CORPORATE COUNSEL?

24 A YES, I AM.

25 Q AND, IN PART OF YOUR ROLE AS CORPORATE COUNSEL, ARE

1 YOU ASSIGNED TO MANAGE AND OPERATE AS THE SUPERVISOR
2 OF ALL THE WORKERS' COMPENSATION CLAIMS?

3 A YES, I AM.

4 Q AND, IN THAT CAPACITY, ARE YOU FAMILIAR WITH THE
5 RULES AND CALCULATIONS ON AVERAGE WEEKLY WAGE AND
6 COMPENSATION RATE?

7 A YES.

8 Q AND, YOU WERE AWARE THROUGH ME THAT THERE WAS AN
9 ISSUE IN THIS CASE REGARDING AVERAGE WEEKLY WAGE AND
10 COMPENSATION, CORRECT?

11 A YES.

12 Q AND, DID YOU LOOK UP WHAT --

13 MR. MCDANIEL:

14 I'M GOING TO OBJECT TO LEADING AT THIS POINT.

15 COMMISSIONER HUFFSTETLER:

16 BE CAREFUL WITH YOUR PHRASING.

17 Q DID YOU --

18 COMMISSIONER HUFFSTETLER:

19 WHAT HE'S COMING TO IS THE CENTRAL QUESTION AND
20 THAT IS, TO PUT IT BLUNTLY, HOW DO YOU KNOW?
21 OF YOUR OWN KNOWLEDGE, HOW DO YOU KNOW WHAT
22 DRIVERS MAKE?

23 MS. REESE:

24 BECAUSE I REVIEW EVERY EMPLOYMENT CONTRACT AND
25 MAKE SURE THAT WE ARE IN COMPLIANCE WITH THE

1 FEDERAL AND STATE --

2 COMMISSIONER HUFFSTETLER:

3 WE'RE NOT TALKING CONTRACT, WE ARE TALKING
4 ABOUT PAYROLL.

5 MS. REESE:

6 IN PREPARATION FOR EVERY WORKER'S COMPENSATION
7 CLAIM, I'M THE ONE WHO COMPLETES THE FORM 20
8 AND WHEN I WAS MADE AWARE OF THIS ISSUE, I
9 CHECKED THE PAYROLL OF EVERY DRIVER THAT WAS IN
10 A SIMILAR POSITION TO MR. BROWN AT THE TIME OF
11 HIS ACCIDENT. SO, I WENT THROUGH 60 DRIVERS'
12 PAYROLL TO BE SPECIFIC.

13 COMMISSIONER HUFFSTETLER:

14 OKAY.

15 Q IF YOU EXTRAPOLATE MR. BROWN'S WAGES FOR THE ENTIRE
16 YEAR OF 2008, IT COMES OUT TO WHERE HE WAS EARNING
17 APPROXIMATELY \$26,000, OKAY?

18 A UH-HUH.

19 Q IS THAT A FAIR AVERAGE OF WHAT THE PEOPLEASE DRIVERS
20 WORKING FOR BULLDOG EARN?

21 A YES, IT IS.

22 MR. MCDANIEL:

23 I'M GOING TO OBJECT TO THE QUESTION, THE BASIS
24 AGAIN, THERE IS NOT BEEN A FOUNDATION LAID AS
25 TO - I MEAN WE HAVE -- I OBJECT THAT THERE HAS

1 BEEN NO FOUNDATION LAID. IT CALLS FOR HEARSAY.
2 NO DOCUMENTS, NO EVIDENCE HAS BEEN PLACED IN
3 EVIDENCE.

4 MR. GARRETT:

5 I'LL OFFER THIS AS DEFENDANT'S EXHIBIT 2.

6 Q DID YOU PROVIDE ME A COPY OF THE WAGES OF ULYSSES
7 ROBINSON, JR.?

8 A YES, I DID.

9 Q IS ULYSSES ROBINSON, JR. EMPLOYED THROUGH PEOPLELEASE
10 AT BULLDOG?

11 A YES, HE IS.

12 Q DOES HE RUN THE SAME ROUTE THAT MR. BROWN WAS
13 RUNNING?

14 A YES, HE DOES.

15 MR. MCDANIEL:

16 COMMISSIONER -- I'M GOING TO OBJECT IN THAT
17 THIS IS CHERRY-PICKING ONE INDIVIDUAL. THERE
18 IS NO EVIDENCE TO ESTABLISH THIS IS A SIMILAR
19 EMPLOYEE. IF I CAN HAVE JUST A MOMENT,
20 COMMISSIONER. COMMISSIONER, IN FACT, THIS
21 WITNESS IS NOT LISTED AS A WITNESS TO TESTIFY.
22 I WAS NOT PLACED ON NOTICE OF THIS WITNESS, NOR
23 THAT THERE WOULD BE ANY EXHIBITS PUT INTO THE
24 RECORD. THE ONLY THING LISTED UNDER EXHIBITS
25 IS EXCERPTS FROM THE CLAIMANT'S PERSONNEL FILE

1 MAY BE INTRODUCED. I'M GOING TO OBJECT TO ANY
2 EXHIBITS AND ANY FURTHER TESTIMONY ON BEHALF OF
3 THIS WITNESS.

4 MR. GARRETT:

5 IF YOU WOULD LOOK AT MY SUPPLEMENTAL BRIEF. I
6 LISTED THERE WOULD BE EXHIBITS REGARDING
7 SIMILAR EMPLOYEES, A REPRESENTATIVE OF BULLDOG
8 WAS LISTED IN THE ORIGINAL BRIEF. MONICA WAS
9 LISTED SPECIFICALLY IN THE SUPPLEMENTAL BRIEF.
10 YOU'RE THE ONE THAT ASKED FOR WAGES OF ANOTHER
11 EMPLOYEE. THAT'S WHY I INTRODUCED --

12 COMMISSIONER HUFFSTETLER:

13 YOU'RE TALKING ABOUT A BRIEF DATED OCTOBER 22ND.
14 IS THAT WHAT YOU'RE TALKING ABOUT? WHAT'S THE
15 HEARING DATE, I'M SORRY.

16 MR. GARRETT:

17 NO, THE SUPPLEMENTAL BRIEF.

18 COMMISSIONER HUFFSTETLER:

19 I DON'T SEE IT. THE BRIEF I HAVE, THE ONE IN
20 THE FILE HAS WITNESS REPRESENTATIVE IN THE
21 PEOPLEASE CORPORATION. AND, UNDER EXHIBITS IT
22 SAYS EXACTLY WHAT MR. MCDANIEL SAID, EXCERPTS
23 FROM THE CLAIMANT'S PERSONNEL FILE. THERE IS A
24 BRIEF --

25 MR. GARRETT:

1 THAT'S IT, COMMISSIONER.

2 COMMISSIONER HUFFSTETLER:

3 HERE'S A BRIEF THAT APPEARS TO HAVE BEEN
4 RECEIVED OCTOBER 15, WHICH IS WHAT ABOUT A WEEK
5 AGO?

6 MR. GARRETT:

7 CORRECT.

8 COMMISSIONER HUFFSTETLER:

9 IT'S NOT TEN DAYS PRIOR TO THE HEARING.

10 MR. GARRETT:

11 CORRECT.

12 MR. MCDANIEL:

13 I DO HAVE THE AMENDED ON OCTOBER 22ND, LISTING
14 MS. REESE AS A WITNESS. AND, IT --

15 COMMISSIONER HUFFSTETLER:

16 THE ONE STAMPED RECEIVED OCTOBER 15TH HAS THIS
17 WITNESS IDENTIFIED AND HAS WAGE INFORMATION
18 FROM SIMILAR EMPLOYEE. TODAY IS THE 22ND I
19 BELIEVE, SO THAT WOULD HAVE BEEN A WEEK AGO.

20 MR. MCDANIEL:

21 COMMISSIONER, THE REAL PROBLEM I HAVE IS I HAVE
22 NO RECORDS, THIS IS -- I GUESS IT GOES TO
23 WEIGHT. I OBJECT TO IT ON THE BASIS THAT IT
24 DOESN'T SPECIFY WHO THOSE SIMILAR EMPLOYEES
25 ARE. THERE'S BEEN NO FORM 20. THERE'S BEEN NO

1 STATEMENT THAT THEY WERE GOING TO SUBMIT
2 SIMILAR EMPLOYEES ON A FORM 20 OR CLAIM THAT AS
3 A BASIS FOR THIS. THROUGH CHALLENGES, THEY
4 HAVE BEEN AWARE. IN 2008 WE CHALLENGED THE
5 COMPENSATION RATE, WHEN THE HEARING WAS SET IN
6 2009, THE SAME IDENTICAL LANGUAGE WAS ON THAT
7 AT THAT TIME, AND WE HAVE NEVER BEEN ADVISED
8 PRIOR TO A COUPLE DAYS AGO THAT THERE WOULD BE
9 ANY SIMILAR EMPLOYEES AND WE HAVE NOTHING, IT'S
10 NOT IN ACCORDANCE WITH THE REGULATIONS FOR THE
11 SUBMISSION OF SIMILAR EMPLOYEES. IT'S SUPPOSED
12 TO BE TWO SIMILAR EMPLOYEES ON TOP OF THAT.
13 SO, I WOULD OBJECT TO THE TESTIMONY COMING IN
14 ON THAT BASIS.

15 **MR. GARRETT:**

16 HE ASKED FOR IT. HE OPENED THE DOOR. HE SAID
17 THERE HAS NOT BEEN ANY OTHER EMPLOYEES OFFERED.
18 I WASN'T GOING TO OFFER UNTIL HE ASKED FOR IT.

19 **COMMISSIONER HUFFSTETLER:**

20 WELL, SAYING THAT SOMETHING HAS NOT BEEN
21 SUBMITTED DOESN'T MEAN YOU ARE ASKING FOR IT.
22 HE DIDN'T SAY "I WOULD LIKE YOU TO SUBMIT IT."
23 IT DOESN'T SAY HE WAS ASKING FOR IT. THE
24 SUPPLEMENTAL PRE-HEARING BRIEF WAS NOT TIMELY
25 FILED. IT'S NOT TEN DAYS PRIOR TO THE HEARING.

1 I WISH WE HAD HEARD THAT OBJECTION BEFORE WE
2 GOT SO FAR INTO THE TESTIMONY. THE EXHIBIT IS
3 NOT TIMELY FILED, SO I AM GOING TO SUSTAIN HIS
4 OBJECTION AND RETURN THAT TO YOU. OKAY, IS
5 THERE ANYTHING ELSE?

6 MR. MCDANIEL:

7 NOTHING FURTHER, COMMISSIONER.

8 MR. GARRETT:

9 I'VE GOT SOME MORE QUESTIONS FOR HER.

10 COMMISSIONER HUFFSTETLER:

11 HE'S OBJECTED TO THE WITNESS.

12 MR. GARRETT:

13 SHE'S ALREADY STARTED TESTIFYING. HE WAIVED
14 THAT OBJECTION WHEN SHE STARTED.

15 MR. MCDANIEL:

16 I DON'T KNOW THAT YOU WAIVE AN OBJECTION BY --
17 AT ANY POINT IN TIME, COMMISSIONER. AS TO HER
18 TESTIFYING, I DID NOT KNOW WHEN SHE WAS PUT UP
19 WHAT SHE WAS GOING TO BE TESTIFYING TO.

20 COMMISSIONER HUFFSTETLER:

21 THIS IS WHY YOU OBJECT BEFORE SHE STARTS. THAT
22 OBJECTION, I THINK YOU MAKE SOME INTERESTING
23 ARGUMENTS. IF YOU'D OBJECTED TO THE TESTIMONY
24 BEFORE SHE STARTED, I WOULD HAVE DISQUALIFIED
25 HER AS A WITNESS. SHE IS NOT TIMELY

1 IDENTIFIED. BUT, I HOPE I SAY THIS THE RIGHT
2 WAY. I'LL OFTEN SAY THINGS THE WRONG WAY.
3 BUT, I DON'T THINK EITHER PARTY CAN WAIT UNTIL
4 THEY HEAR WHAT SOMEBODY SAYS AND THEY DON'T
5 LIKE WHAT THEY SAID --

6 MR. GARRETT:

7 AND, THEN OBJECT.

8 MR. MCDANIEL:

9 I AGREE.

10 COMMISSIONER HUFFSTETLER:

11 SO, I'M GOING TO LET HIM FINISH HIS QUESTIONING
12 AND YOU CAN CROSS-EXAMINE.

13 Q IN YOUR EXAMINATION OF THE DRIVERS, EMPLOYED BY
14 PEOPLE AT BULLDOG, WHO HAD SIMILAR ROUTES TO THE
15 ROUTE THAT MR. BROWN WAS ASSIGNED, WHAT, IN YOUR
16 ESTIMATION, AFTER LOOKING AT THE DOCUMENT. WHAT'S
17 THE HIGH-END OF WHAT SOMEBODY WOULD MAKE?

18 A THE HIGH-END IS \$38,500 AND THAT IS BECAUSE THEY
19 EARN A MAXIMUM MILE, PER MILE PAY OF FORTY-TWO CENTS
20 A MILE. THAT'S THE MAXIMUM AMOUNT THAT CAN BE
21 OFFERED. ALL EMPLOYEES, INCLUDING MR. BROWN AT THE
22 TIME OF HIS INJURY START OFF MAKING THIRTY-TWO CENTS
23 PER MILE THAT GRADUALLY INCREASES UP TO FORTY-TWO
24 CENTS WHICH MAKES A RANGE OF PAY BETWEEN \$20,000 AND
25 \$38,500.

1 Q IN 2008, WHAT IS THE HIGH-END OF SOMEBODY RUNNING
2 THE ROUTE HE WAS RUNNING?

3 A \$38,000-ISH.

4 Q WHAT'S THE LOW?

5 A \$20,000.

6 Q SO, MR. BROWN EARNING \$26,000 OR \$27,000 WOULD BE
7 ABOUT AN AVERAGE?

8 A YES, IT WOULD.

9 Q FOR SOMEBODY IN HIS SIMILAR SITUATION?

10 A CORRECT.

11 MR. GARRETT

12 THAT'S ALL I HAVE.

13 CROSS EXAMINATION

14 BY MR. MCDANIEL:

15 Q DO YOU HAVE ANY RECORDS WITH YOU TODAY TO ESTABLISH
16 THAT THE PERSON MAKING \$20,000 WORKED 52 WEEKS?

17 A I DIDN'T PREPARE THOSE TO BRING TODAY, NO, I DO NOT.

18 Q NOW, YOU KNEW YOU WERE COMING HERE TO TESTIFY
19 CONCERNING WHAT THE AVERAGE PERSON WOULD MAKE, WHAT
20 THE LOW-END AND WHAT THE HIGH-END WOULD BE?

21 A CORRECT.

22 Q DID YOU BRING THE HIGH-END PERSON'S WAGES?

23 A NO, I DID NOT.

24 Q DID YOU BRING THE LOW-END PERSON'S?

25 A NO, I DID NOT.

1 Q HAVE YOU CALCULATED AN AVERAGE WEEKLY WAGE PURSUANT
2 -- YOU SAID THAT YOU ARE RESPONSIBLE AS A CORPORATE
3 COUNSEL FOR PROVIDING THE FORM 20s IN ALL CASES, IS
4 THAT CORRECT?

5 A CORRECT.

6 Q ARE YOU AWARE OF THE REGULATION CONCERNING IF YOU
7 ARE GOING TO SUBMIT A FORM 20 BASED ON A SIMILARLY
8 SITUATED EMPLOYEE?

9 A I AM.

10 Q WHAT DOES IT REQUIRE YOU TO DO?

11 A THAT YOU MUST SUBMIT THOSE --

12 MR. GARRETT:

13 OBJECT. WE DIDN'T SUBMIT A FORM 20. I OBJECT
14 ON THE RELEVANCE.

15 A I MEAN, FIRST --

16 COMMISSIONER HUFFSTETLER:

17 MA'AM, I HAVE AN OBJECTION TO DEAL WITH. DO
18 YOU HAVE A RESPONSE? HE'S OBJECTED TO YOUR
19 QUESTION.

20 MR. MCDANIEL:

21 THE RESPONSE IS HE HAS INTRODUCED EVIDENCE
22 CONCERNING WHAT THE SIMILAR SITUATED EMPLOYEES
23 WERE. AND, I --

24 COMMISSIONER HUFFSTETLER:

25 ONLY TESTIMONY. I REJECTED THE DOCUMENTARY

1 EVIDENCE.

2 MR. MCDANIEL:

3 OH, I'M SORRY. THAT WOULD BE MY RESPONSE
4 COMMISSIONER. MY QUESTION WAS SIMPLY WAS, DID
5 SHE PREPARE A FORM 20 IN ACCORDANCE WITH A
6 SIMILAR SITUATED EMPLOYEE AND SHE ANSWERED NO.

7 COMMISSIONER HUFFSTETLER:

8 ANY OTHER QUESTIONS?

9 Q HOW MANY TOTAL DRIVERS DOES BULLDOG HAVE WITH
10 PEOPLEASE?

11 A TOTAL THROUGHOUT NATION-WIDE, 260.

12 Q SO, WHEN YOU REFER TO SIXTY SIMILARLY SITUATED
13 EMPLOYEES, WHAT ARE YOU REFERRING TO WITH BEING
14 SIMILARLY SITUATED?

15 A INTERSTATE TRUCK DRIVERS, WHICH MEANS THAT THEY GO
16 ACROSS STATE LINES, DISPATCHED OUT OF THE CHARLESTON
17 OFFICE BECAUSE THEY ARE ACTUALLY IN MULTIPLE
18 LOCATIONS WITH BULLDOG, THAT LIVE WITHIN THE STATE
19 OF SOUTH CAROLINA AS THEIR EMPLOYEES. AS MR. BROWN
20 TESTIFIED THAT WILL LIVE IN ALABAMA, VIRGINIA,
21 EVERYTHING ELSE AND STILL DRIVE DOWN TO GET
22 DISPATCHED OUT OF CHARLESTON. SOMETIMES THE
23 SITUATED MEANS THE SAME, YOU KNOW, THOSE IN THE --

24 Q SAME TERMINAL?

25 A SAME TERMINAL, SAME AREA OF TRAVEL, SAME --

- 1 Q OKAY, ALL RIGHT. NOW, DO DIFFERENT EMPLOYEES THERE
2 HAVE DIFFERENT ROUTES LIKE DOWN TO FLORIDA, UP TO
3 CANADA?
- 4 A ACTUALLY, THEY DON'T GO TO CANADA, NO, BUT THERE ARE
5 VARIOUS ROUTES BECAUSE THERE IS NO DEDICATED ROUTE.
6 THEY WORK FOR A SHIPPING COMPANIES PICKING UP
7 TRANSPORTS, SO THEY HAVE TO PICK UP FROM ONE YARD
8 AND DROP OFF AT ANOTHER, VARYING EVERYDAY.
- 9 Q DID YOU DO THE ORIGINAL FORM 20 IN THIS CASE?
- 10 A I DID.
- 11 Q THE ONE THAT'S HANDWRITTEN?
- 12 A YES.
- 13 Q AND, THEN YOU WOULD READILY AGREE THAT YOU ONLY DID
14 IT THROUGH APRIL?
- 15 A I DID. I FELT THAT IT WOULD BE MOST REPRESENTATIVE
16 OF MR. BROWN'S WAGES TO USE HIS OWN SINCE EACH
17 DRIVER MAKES A DIFFERENT AMOUNT. AT NO TWO TIMES
18 WILL YOU FIND TWO DRIVERS THAT MAKE THE SAME AMOUNT
19 IN ANY CHECK THAT WAS MORE REPRESENTATIVE WHAT MR.
20 BROWN MADE, CONSIDERING HE DID HAVE A LEAST ONE FULL
21 COMPLETED QUARTER.
- 22 Q AND, THEN, BUT THERE WAS ACTUALLY AN EXTRA THREE
23 WEEKS IN THERE --
- 24 A CORRECT.
- 25 Q -- THAT YOU REPORTED SEPARATELY?

1 A BECAUSE I PROVIDED AS I CHECKED THE BOX, A
2 REPRESENTATION OF ALL OF MR. BROWN'S WAGES.

3 Q AND, THE DOCUMENT THAT WE REFERRED TO EARLIER, THAT
4 GOES ALL THE WAY AFTER THE ACCIDENT, WHILE HE WAS
5 UNDER MEDICAL TREATMENT?

6 A THAT'S BECAUSE IT GOES BY CHECK DATE AND NOT -- THE
7 LAST CHECK WOULD BE THE LAST WEEK THAT HE WAS
8 WORKING ON THE DATE HE GOT INJURED. SO, THE CHECK
9 DATE IS AFTER THAT DATE OF INJURY WHICH IS WHY THE
10 CHECK DATE GOES PAST IT, BUT IT'S NOT THE ACTUAL
11 REPRESENTATIVE OF THE WEEK THAT HE WORKED.

12 Q WELL, ACTUALLY, THIS GOES ALL THE WAY THROUGH AUGUST
13 AND HE WAS INJURED IN MAY.

14 A WELL, CORRECT, HE CONTINUED WORKING, I APOLOGIZE.

15 Q AND, YOU WERE AWARE HE WAS UNDER MEDICAL TREATMENT
16 AFTER THAT AND LIMITED IN THE AMOUNT OF DUTIES, OFF
17 WORK, THAT TYPE OF THING?

18 A NO, I WAS NOT. TO MY KNOWLEDGE HE WAS WORKING FULL-
19 DUTY AND CONTINUING HIS NORMAL JOB. HE WAS NOT
20 TAKEN OFF OF WORK OR LIMITED IN ANY CAPACITY UNTIL
21 HIS SURGERY.

22 MR. MCDANIEL:

23 NOTHING FURTHER.

24 COMMISSIONER HUFFSTETLER:

25 ANYTHING ELSE?

1 MR. MCDANIEL:

2 IF I COULD HAVE JUST A MOMENT.

3 RECROSS EXAMINATION

4 BY MR. MCDANIEL:

5 Q MA'AM, I WANT TO MAKE ABSOLUTELY SURE OF SOMETHING.
6 YOU ARE SAYING THAT BULLDOG DOES NOT PAY ANY DRIVERS
7 OVER FORTY-CENTS OR THEY DON'T PAY PEOPLE IN HIS
8 CLASSIFICATION OVER FORTY-TWO CENTS.

9 A THEY DON'T PAY ANY DRIVER OVER FORTY-TWO CENTS.

10 Q SO, IF MR. BROWN WAS TOLD THAT HE WAS GOING TO BE
11 MAKING FIFTY-CENTS A MILE, THAT'S INACCURATE?

12 A I DO NOT KNOW OF ANYONE THAT WOULD HAVE TOLD HIM
13 THAT, EVEN THE TERMS OF EMPLOYMENT WOULD NOT HAVE
14 SAID THAT HE MADE FIFTY CENTS PER MILE. MR. BROWN
15 WOULD RECEIVE PER DIEM PAY IF HE WAS ON OVERNIGHT
16 TRAVEL, BUT THAT DOES NOT -- IT IS NOT INCLUDED IN
17 AVERAGE WEEKLY WAGE AS IT IS REIMBURSEMENT OF
18 EXPENSES, AND SO. IF HE WAS DRIVING THE LONGER
19 ROUTES, HIS CHECKS WOULD HAVE BEEN BIGGER, BUT IT
20 WOULD HAVE INCLUDED REIMBURSEMENT. BUT, AT NO TIME
21 WOULD HIS WAGES BEEN ANY MORE THAN FORTY-TWO CENTS A
22 MILE. .

23 MR. MCDANIEL:

24 NOTHING FURTHER FOR THIS WITNESS.

25 MR. GARRETT:

1 NOTHING FURTHER.

2 COMMISSIONER HUFFSTETLER:

3 IS THERE ANYTHING ELSE?

4 MR. MCDANIEL:

5 ONE QUESTION FOR THE CLAIMANT.

6 COMMISSIONER HUFFSTETLER:

7 LET ME REMIND YOU YOU ARE STILL UNDER OATH.

8 MR. BROWN:

9 OKAY.

10 REDIRECT EXAMINATION

11 BY MR. MCDANIEL:

12 Q THOMAS, LET ME ASK YOU THIS. WHO HIRED YOU WHEN YOU
13 WENT TO WORK FOR PEOPLEASE FOR BULLDOG? DO YOU
14 REMEMBER THE PERSON'S NAME?

15 A I'M TRYING TO THINK. HE WAS OVER IN ORIENTATION.
16 THEY WAS OVER IN THE SAFETY DEPARTMENT.

17 Q WHERE WERE YOU ACTUALLY HIRED TO WORK WITH THEM?

18 A IN CHARLESTON, AT THE BULLDOG FACILITY.

19 Q ALL RIGHT, WHEN YOU WERE HIRED, WHAT WAS YOUR
20 UNDERSTANDING THAT YOU WERE GOING TO BE PAID PER
21 MILE?

22 A FIFTY-CENT.

23 Q DID YOU SIGN ANY KIND OF EMPLOYEE CONTRACT?

24 A I SIGNED SO MANY DIFFERENT PAPERS, I DON'T KNOW FOR
25 SURE, BUT A LOT OF THE OTHER DRIVERS AT BOYD WANTED

1 TO COME TO BULLDOG BECAUSE OF THE FIFTY CENT PER
2 MILE, BECAUSE THAT WAS A PRETTY GOOD DEAL.

3 Q AND, SO, THE REASONS YOU LEFT, AGAIN, BOYD WAS TO
4 HAVE MORE LOCAL ROUTES INSTEAD OF RUNNING ALL THE
5 WAY ACROSS THE COUNTRY AND ALSO BECAUSE OF THE
6 AMOUNT OF MONEY YOU WOULD BE PAID PER MILE.

7 MR. GARRETT:

8 I OBJECT.

9 A RIGHT.

10 MR. GARRETT:

11 YOU'VE ALREADY HAD A CHANCE AT HIM ON THIS ON
12 RE-DIRECT.

13 MR. MCDANIEL:

14 THAT'S FINE.

15 COMMISSIONER HUFFSTETLER:

16 IS THERE ANYTHING ELSE?

17 MR. MCDANIEL:

18 NOTHING FURTHER.

19 COMMISSIONER HUFFSTETLER:

20 IF NOT, THEN THAT CONCLUDES THE HEARING.

21 (THERE BEING NO FURTHER QUESTIONS, THIS

22 HEARING WAS CONCLUDED AT THE HOUR OF 1:21

23 PM.)

24

25

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

EMPLOYEE/CLAIMANT: THOMAS BROWN

EMPLOYER: PEOPLEASE

INSURER: ARCH INSURANCE COMPANY

I, KATHRYN B BOSTROM, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 47 PAGES REPRESENT A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF THOMAS BROWN TAKEN ON THE 22ND DAY OF OCTOBER, 2010

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND OFFICIAL SEAL THIS 19TH DAY OF JANUARY, 2011.

Kathryn B Bostrom

KATHRYN B BOSTROM
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8-5-2012

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

THOMAS BROWN,	)	
	)	
CLAIMANT,	)	FULL COMMISSION HEARING
	)	PANEL A
VS.	)	
	)	COMMISSIONER BECK
PEOPLELEASE CORPORATION,	)	COMMISSIONER WILLIAMS
	)	COMMISSIONER WILKERSON-CHAIR
EMPLOYER,	)	
	)	
and	)	<u>TRANSCRIPT</u>
	)	
ARCH INSURANCE COMPANY,	)	
	)	
CARRIER,	)	
DEFENDANTS.	)	
	)	

WORKERS' COMPENSATION COMMISSION HEARING TAKEN BEFORE
CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR THE STATE OF
SOUTH CAROLINA, COMMENCING AT THE HOUR OF 4:20 PM ON
MONDAY, MARCH 21, 2011, SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION, 1333 MAIN STREET, COLUMBIA, SOUTH
CAROLINA, 20201.

APPEARANCES

FOR THE CLAIMANT

PRESTON F. McDANIEL, ESQUIRE
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 1315 ELMWOOD AVENUE
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FOR THE DEFENDANTS

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REPORTED BY

CORA ELLIS BRUTON - COURT REPORTER
 131 BROWNING COURT
 LEXINGTON, SOUTH CAROLINA 29073
 (803) 397-0189

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(EXHIBITS)

No Exhibits Proffered

1 THE COURT REPORTER: Today is March 21st, 2011.
2 This is South Carolina Workers' Compensation Case
3 Number 0809238. This is the case of Thomas Brown,
4 Claimant versus Peoplease Corporation, Employer and
5 Arch Insurance Company is the Carrier.

6 The Appellant is the Claimant represented by
7 Attorney Preston F. McDaniel. The Respondent is
8 represented by Attorney Scott B. Garrett. Each side
9 is allowed ten minutes for oral argument and the
10 Appellant three minutes in reply. You are requested
11 to argue the grounds of exception and stay within the
12 record.

13 THE COURT: Mr. McDaniel.

14 BY MR. McDANIEL: Commissioner, we're here on two
15 issues and actually both are asking you simply to
16 amend the Order of the hearing Commissioner.

17 What happened in this case is Mr. Brown is
18 driving an 18 wheeler on -- down the interstate and a
19 car decided, believe it or not didn't have vision or
20 whatever, but literally pulled in underneath his 18
21 wheeler. It was struck and then the car veered across
22 the interstate back into the median and grass.
23 Claimant tried to keep working. He was thrown forward
24 and had a lot of problems with his neck and his back
25 and eventually had to go -- was authorized or was sent

1 to Dr. Algood. Dr. Algood treated him and he kept
2 having problems more and more, kept trying to work and
3 then about four to six weeks into the -- after the
4 accident he had to stop working; had to go to the
5 emergency room. The emergency room, and that's quoted
6 on my -- in my Brief, the first thing I'm asking you
7 to do is grant us lifetime medical care for the low
8 back and the legs. I -- it can be read that the
9 Commissioner included, due to the neck injury --
10 because what happened was is -- you'll find this on
11 page, I believe it's on page 2 is where the Commission
12 -- they finally again at page -- after that at page 5
13 of the Brief, but when he went to the emergency room
14 the emergency room recorded the history of the
15 automobile accident and it said that he was having
16 complaints after the accident and that he had been
17 trying to work and he had developed pain and that he
18 had -- did a lot of heavy lifting at work and he
19 believes he has exacerbated the pain and he was
20 reporting sharp shooting pains down both legs with
21 lumbar spine strain and sciatica was the diagnosis of
22 the doctor. That's on page 6. They referred him to
23 Dr. Ahatoo-- Ogbonnaya, excuse me, Dr. Ogbonnaya said,
24 look I want to get an MRI and -- of both the neck and
25 of the low back and he'd been treated for both the

1 neck and the low back as you'll see up until that
2 time. He got a call from Dr. Ogbonnaya, I've got you
3 an appointment with a neurosurgeon, sent him to Dr.
4 Scott Boyd. Dr. Scott Boyd said you're going to do --
5 I'm going to do emergency surgery on your cervical
6 spine, did a cervical spine fusion because of the
7 instability and severe condition of the Claimant's
8 neck. Thereafter everybody, I think, would agree. I
9 think Mr. Garrett would agree with me that the focus
10 -- the treatment was thereafter directed towards the
11 cervical spine. My client has wound up -- he then had
12 to have a second cervical spine fusion later on and
13 after that he has weakness in both arms and he has a
14 myelopathy into his arm. He also has weakness in his
15 legs. You'll see that Dr. Scott Boyd on page 6, I
16 have quoted this, and then on page 7, he said that in
17 his opinion to a reasonable degree of medical
18 certainty his problems with his neck and back stem
19 from the automobile accident. The Commissioner, and
20 again that's on page -- I believe it's on page 2,
21 you'll find that -- you'll find also that on page 7 or
22 8 of my Brief, but the bottom line is, is also we sent
23 him to doctor for an impairment evaluation and
24 evaluation on all of his problems to Dr. Forest at
25 Southeastern Spine and he said that in his opinion he

1 was at maximum medical improvement concerning the
2 neck, but it looked like the treatment had been
3 directed towards the neck and he recommended more
4 treatment on the low back. Well as a result of that
5 the Commissioner, you'll find on page 2, found that
6 there was no medical -- and he based his opinion, he
7 said, "There is no specific medical report that ties
8 the lumbar problems to the injury at work." What
9 we're asking for we believe, you know, Dr. Boyd said
10 it, Dr. Ogbonnaya and Dr. Forest, he awarded us
11 lifetime medical care, total perm disability and
12 lifetime medical care for all problems related to his
13 back and arms and you can read it to include the
14 weakness in his legs. But the Commissioner didn't
15 award us the -- out of all the problems that he has he
16 also awards lifetime medical care for the high blood
17 pressure and for the diabetes, both which were
18 aggravated by the accident. He didn't include the
19 lumbar spine. We're simply asking the Commission to
20 amend the Order and grant us lifetime medical care for
21 any problems related to the lumbar spine and to the
22 legs. As I said, I believe you can include the legs
23 as coming from the neck, but clearly Commissioner
24 misunderstood the record or just missed it that we
25 have expert medical opinion even though that's not

1 required. My client testified about the problems he's
2 having in his low back.

3 In reference to the comp rate he found there were
4 exceptional circumstances. My client left the job
5 working and this is -- the reason we're appealing on
6 this issue is simply because we're appealing on the
7 other one and asking for amendment of that Order.
8 Since it wasn't -- he did not grant us the maximum
9 compensation rate, which we requested and he based his

10 -- his decision on the lady's testimony that came from
11 the Employer that said that nobody in their company
12 made more than \$.42 cents a mile. My client had
13 testified that the reason he had left the company that
14 he was with which resulted in a compensation rate of
15 about -- let me see. His comp rate was \$890,
16 resulting in a max compensation rate when you consider
17 his salary for the company left. He had only been
18 with this -- Bulldog a short period of time. We ask
19 for the maximum compensation rate. He did increase
20 it, but he did not increase it to the maximum. We
21 would ask you to consider doing that. He based his
22 decision on the fact that we had submitted no evidence
23 to support my client's testimony that he went there
24 with the understanding he was going to make \$.50 cents
25 a mile, that he was making \$.39 cents a mile with

1 the previous company, Boyd Brothers --

2 COMMISSIONER WILKERSON: What evidence did you
3 put into the record other than the Claimant's
4 testimony? Was there any agreement or handwritten
5 anything or --

6 MR. McDANIEL: Well Commissioner, I'm glad you
7 asked that, because that's what I'm actually -- I
8 found -- we tried to see if there were any records or
9 whatever beyond that, but -- and in going back through

10 the thing I noticed because when she testified it was
11 a late decision that when -- to bring in a witness
12 from the Employer and when they did and she testified
13 that \$.42 cents was the max that anybody made, the
14 Commissioner went with the max salary that she said
15 people made. But if you'll look in the documents that
16 are in our Pre-hearing Brief we submitted copies of
17 his check and on his check -- the four or five copies
18 of the check we submitted it said that he was making
19 \$1.00 dollar an hour. So --

20 COMMISSIONER WILKERSON: \$1.00 dollar an hour?

21 MR. McDANIEL: Excuse me, \$1.00 dollar a mile.
22 Pardon me. Thank you, Commissioner, I misspoke there.
23 But in other words not only does it support my
24 client's testimony that he was going to make \$.50
25 cents an hour, that's -- Boyd Brothers is long

1 distance all across the United States. He was hoping
2 to get closer to home and -- and eventually work into
3 more favorable routes where he could be at home and do
4 more local driving and that's why he took the job. He
5 -- he was -- you'll see that he was making ever
6 increasing income. You'll see where -- she testified
7 there were two types of drivers, but she said the type
8 of driver that he was that this was the max salary.
9 Then she testified again and it's on page -- I quoted
10 it from out of her testimony and it's on page 9 of the
11 Brief; I believe it's page 9. Excuse me, it's on page
12 10 of the Brief, and she said that he -- that the most
13 anybody made was \$.42 cents. I ask you to look at the
14 paychecks that are in there and it says he would make
15 \$1.00 dollar per mile. Now -- so we have testimony --
16 I mean documentary evidence that not only does it not
17 support my client, it doubles it, but it does not
18 support her testimony that it was only \$.42 cents a
19 mile. That was, you know, as I said, Ms. Reese was a
20 late submission as far as -- I mean, not -- not that
21 -- it was proper and she properly testified, but --
22 but I would ask you to review that. The Commissioner
23 really based it on the credibility of my client from
24 the standpoint that we didn't submit anything to
25 support their position. They didn't support any

1 position to say that he was going to make \$.42 cents a
2 mile and we actually have documentary evidence in the
3 record that says he would make -- was making and they
4 paid him a \$1.00 dollar -- excuse me -- \$1.00 dollar a
5 mile.

6 So I'd ask you to consider increasing that
7 compensation rate to be fair to the Claimant because
8 his disability -- his career is over and I would ask
9 you to increase that. But here again, the major focus

10 is we'd ask you to award him lifetime medical care for
11 the back. The back out of all the problems is the
12 lesser problem but he should be entitled to that
13 medical care and we would ask you to grant him that.

14 Thank you, Commissioners.

15 THE COURT: Mr. Garrett.

16 BY MR. GARRETT: Yes, Commissioners.

17 I'll address the average weekly wage first. If
18 you look at my Respondent's Brief I included as
19 Exhibit A of that Brief a statement of the Claimant's
20 actual earnings and -- and we submitted at the
21 hearing, and I'm not trying to argue the case because
22 I did not appeal the finding of average weekly wage so
23 you can't bring it back down. But I would submit to
24 you that the best evidence of what he earned is the
25 statement I attached is what he actually earned. And

1 this is a statement of -- of his paychecks. Now, what
2 Commissioner Huffstetler did was, as he's allowed to
3 do, he looked forward to see, well if he had stayed
4 there for several years he might have been able to max
5 out. And what my Employer representative testified
6 was the most any driver makes working for them is
7 \$42,500 a year under any circumstances. However you
8 want to calculate it by the mile or whatever, that's
9 the maximum and that's what Commissioner Huffstetler
10 did. And he gave the Claimant as high an average
11 weekly wage as he could give. And I would still
12 submit that based on this documentary evidence
13 submitted if you look backwards it's far less than
14 that and it was the average weekly wage that we had
15 been paying him all along. But there's -- there's
16 more than substantial evidence in the record to
17 support it going downward. There's really no evidence
18 to support an upward departure of what Commissioner
19 Huffstetler already did, which was bump him up to, I
20 believe, the highest level that he could.

21 The second issue is the back. What happened in
22 this case, and it was a difficult case for the
23 Employer from the outset because this gentleman's
24 driving an 18 wheeler down the interstate and the car
25 that pulled over, as Preston said, pulled over --

1 changed lanes and pulled over underneath it and it
2 didn't cause the vehicles to stop, okay. It did not
3 cause the 18 wheeler to stop and Mr. Brown testified
4 that he felt a jolt, okay, but -- but he didn't know
5 what had happened, okay. He continued going down the
6 road, he put on his brakes and pulled over. Now the
7 car disengaged from him and as Mr. McDaniel said went
8 off over into the median. But the problem and the --
9 and the Claimant continued to work, continued on his
10 -- on his route that day, drove on, delivered what he
11 was supposed to deliver down to Florida. And it came
12 to be a problem of a neck case and a neck surgery and
13 it was originally denied. And the reason why it was
14 denied was if you're driving an 18 wheeler from a
15 physics standpoint and a -- I can't remember the make
16 of the car, but it was a -- a compact car pulled over.
17 It didn't cause that 18 wheeler, you know, to lose
18 much of its speed when it's traveling down the
19 interstate. But ultimately we lost that fight because
20 we could not deny that there was an accident. So we
21 wound up he said he got a little bit of a jolt, he was
22 strapped in and so we wound up with a neck case --
23 neck claim which is conceivable, okay. Low back,
24 probably not conceivable that he would have had an
25 injury to his lower back because of feeling a little

1 jolt when you're an 18 wheeler. Regardless of that,
2 he had two neck surgeries. We paid for all that.
3 There's not any mention other than what Mr. McDaniel
4 said about treatment of his back in all these medicals
5 except for his IME he sent to Dr. Forest. Dr. Forest
6 does say in there maybe he needs some more back
7 evaluation, okay. Doesn't say to a reasonable degree
8 of medical certainty he's going to need lifetime
9 medical care. Doesn't say anything specific because
10 at the hearing it was not contested that he was at
11 maximum medical improvement; they weren't asking for
12 additional medical care. They contended that he was
13 at MMI, he was done with his treatment, they wanted a
14 finding of permanent and total and that's what they
15 got. It's a neck claim. It's always been a neck
16 claim, it's not a back claim, there's not any evidence
17 to substantiate a finding of lifetime medical care for
18 his lower back.

19 COMMISSIONER WILKERSON: Lump sum he didn't ask
20 for?

21 MR. GARRETT: He did not ask for a lump sum.

22 COMMISSIONER WILKERSON: Okay. I saw that.

23 MR. McDANIEL: We withdrew that request. This
24 was tried a week before a particular decision came out
25 by the Supreme Court.

1 COMMISSIONER WILKERSON: Okay. That's fine.

2 BY MR. McDANIEL: Commissioner Huffstetler gave
3 us that option. And -- and very simply I -- I don't
4 really disagree with much of anything that Scott said
5 except for the fact that the Commissioner, you know,
6 made the decision on the comp rate. Here again, I
7 mean he's very -- not critical. I mean the
8 Commissioner said well, you didn't put up any evidence
9 to support the fact that you say the reason he went to
10 this job and the reason I'm going to find exceptional
11 circumstances is how much money you were making last
12 year with Boyd Brothers. All right. Which shows that
13 he was making enough money to where his compensation
14 rate would have been at the max compensation rate. I
15 think it was \$890 dollars. I just looked it up again.
16 And then found exceptional circumstances but then said
17 well I'm going to rely on this lady's testimony and --
18 and he said we didn't put anything to support \$.50
19 cents and she testified she's going -- he's going to
20 make \$.42 cents and it's right there in the record,
21 you know, that he was paid \$1.00 dollar a mile. So I
22 -- I think that -- you could -- you can divide it by
23 two and it supports my client's testimony. But the --
24 but the bottom line is I would ask you to consider
25 that. However, here again, the records are very

1 clear. I mean from the get go, from the very start of
2 this case you look at the emergency room records and
3 the doctor's final diagnosis and primary diagnosis was
4 lumbar strain and sciatica, pain shooting down both
5 legs, and that was on July 6th, pain -- was in a motor
6 vehicle accident. Then Dr. Ogbonnaya's, you know,
7 here again he says that he has a history of neck and
8 back trauma after a motor vehicle accident and then he
9 gives a diagnosis of that he needs treatment for
10 bilateral arm and leg numbness and foot and hand
11 numbness. And he has not had an MRI and he ordered an
12 MRI of both the cervical and lumbar spine. And
13 there's no question at that point what happened was --
14 and -- and I am not here to tell -- again, the major
15 injury -- this man has had two cervical fusions and
16 has myelopathy in his arms, okay. I mean so the -- no
17 question about that, but that doesn't deny the fact
18 that or belay the fact that he should be entitled to
19 medical care for his lumbar spine which has always
20 been cited in the records. Dr. Boyd whenever he saw
21 him said that he needs treatment for and found that he
22 had a causally related problem with his neck and his
23 back and we just simply ask you to award the medical
24 care. You know, not that weight has anything to do
25 with it, but I think the vast majority of the expense

1 is going to be on the diabetes, high blood pressure
2 and the cervical spine and the myelopathy. However,
3 just because it's a problem that they may not have to
4 spend a bunch of money I would ask the Commission to
5 simply amend the order to include that he get medical
6 care, whatever it is he needs for his lumbar spine.
7 And I would disagree with Mr. Garrett again, that not
8 only do we have Dr. Forest's opinion, but the
9 Commissioner said the reason I'm not doing this is I
10 don't see any medical opinion, not that that's
11 required. But here again, appreciate your
12 consideration.

13 THE COURT: Thank you. That concludes the
14 hearing.

15 (The hearing concluded at 4:37 p.m.)
16
17
18

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON) CERTIFICATE

BE IT KNOWN THAT I TOOK THE FOREGOING WORKERS'
 COMPENSATION HEARING;

THAT I WAS THEN AND THERE A NOTARY PUBLIC IN AND
 FOR THE STATE OF SOUTH CAROLINA-AT-LARGE;

THE FOREGOING TRANSCRIPT CONSISTING OF 16
 TYPEWRITTEN PAGES REPRESENTS A TRUE, ACCURATE AND
 COMPLETE TRANSCRIPTION OF THE TESTIMONY SO GIVEN AT
 THE TIME AND PLACE AFORESAID TO THE BEST OF MY SKILL
 AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY
 OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF
 ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES
 HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

WITNESS MY HAND AND SEAL THIS 30th DAY OF JULY,
 2011.

CORA ELLIS BRUTON
 NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES JANUARY 18, 2015

People's Comp 2007-2008 Employee Earnings - Summary

Employee: 01-010-BROT
Start Date: 12/31/9999

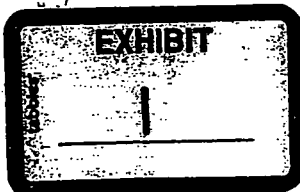
Legend: More than one wage level in school

Check Date	Wage	Wage/Hrs	Rept. Tips	FICA/SS	FICA/MD	SET	ETC	State	Suppl	Debit/Trans	Net Wages
1/18/2008	\$557.00	\$0.00	\$22.13	\$5.33	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$459.84
2/5/2008	\$557.00	\$0.00	\$22.13	\$5.33	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$459.84
2/19/2008	\$557.00	\$0.00	\$22.13	\$5.33	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$459.84
2/26/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
3/5/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
3/12/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
3/19/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
3/26/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
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4/16/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
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5/7/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
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10/22/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
10/29/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
11/5/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
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11/19/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
11/26/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
12/3/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
12/10/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
12/17/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
12/24/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59
12/31/2008	\$537.75	\$0.00	\$21.74	\$5.34	\$0.00	\$0.00	\$0.00	\$2.85	\$0.00	\$75.00	\$446.59

Employee Totals: 01-010-BROT Thomas Brown
\$17,617.25 \$0.00 \$1,062.29 \$248.44 \$762.93 \$0.00 \$493.28 \$0.00 \$5,384.80 \$17,049.51

17,617 ²⁵ = 30 = 587 ²⁹

ANW



DATE: 5/15/2010
TIME: 12:00:00 AM

Revised: August 2003-2004
Employee Handbook - Summary

USEC 54.1

Kangas
Kangas Base - 0/0/0000
Kangas Base - 0/0/0000

[illegible]

Brown 0809238.doc

From: **Lindler, Kellie** (klindler@wcc.sc.gov)

Sent: Mon 10/25/10 7:25 PM

To: Scott Garrett (sgarrett@mgclaw.com); mcdaniellaw@hotmail.com (mcdaniellaw@hotmail.com)

Cc: rcmcdlaw@hotmail.com (rcmcdlaw@hotmail.com); scapers5091@yahoo.com (scapers5091@yahoo.com); cdean5091@yahoo.com (cdean5091@yahoo.com)

WCC File No. 0809238

Thomas Brown v. Peoplease

To: Preston F. McDaniel, Esq.

cc: Scott B. Garrett, Esq.

Dear Mr. McDaniel:

After reviewing the evidence I have reached a decision in the case captioned above, and I would appreciate your help in drawing a proposed order. Please see my notes below. **If you are unable to prepare the order within 30 days, or if my decision makes it uncomfortable for you to participate, please let me know and I will draw the order myself.**

Please excuse any typographical errors.

Thank you for your help on this.

David W. Huffstetler
SC Workers' Compensation Commission

Court Reporter: Kathryn Bostrom
109 Kyle Avenue
Inman, SC 29349
803-446-7040

Please submit the proposed order in electronic format (Word) without any paper copies

AWW: \$740.38

D/A: 5/2/08

CR: \$493.84

Let's start with average weekly wage. Ms. Reese testified the top-end for truck drivers at

- 4485 -

Peoplease (through Bulldog) is \$38,500 per year. Average weekly wage looks to the future. If the past is a predictor of the future, then the claimant would reach that level, as he earned more than that prior to his employment with Peoplease. There is no documentary evidence to support the claimant's testimony of having been promised 50 cents per mile. He could not even identify who told him that. The documents on a co-worker is only for one employee. So, I accept the testimony from Ms. Reese and use that number to calculate the average weekly wage.

The case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions on those kinds of cases. There is no medical report that ties any lumbar problems to the injury at work. Therefore, we have a cervical injury with multi-level fusion, pain and numbness into the arms and hands, and an aggravation of the underlying diabetes. The claimant is not limited to recovery under 42-9-30. There is no separate injury to the arms and hands, but he does have aggravation of the diabetes; therefore, this is not just a single-member injury.

The claimant testified that he wants to work, and would try a job if he could find one. I congratulate him on that spirit, but it doesn't mean he could return to work. All his prior jobs involve use of his hands, standing, or driving a truck (turning his neck and use of the arms). The claimant testified concerning his limitations, and I have no reason to doubt him.

Decision

Claimant is permanently and totally disabled under 42-9-10.

The attorney's fees may be paid from the back end of the award.

The claimant does not seek a lump-sum award at this time.

Lifetime medical treatment for the neck, radicular symptoms, and aggravation of diabetes.

Note to Mr. Garrett: With case like this some attorneys give notice to the Second Injury Fund at least 20 days before the hearing. If they don't appear, they are bound by the findings in the order. That way you don't have to have two hearings to determine whether they are liable.

Brown 0809238 Order

From: **Lindler, Kellie** (klindler@wcc.sc.gov)

Sent: Tue 11/23/10 6:02 PM

To: Scott Garrett (sgarrett@mgclaw.com); mcdaniellaw@hotmail.com (mcdaniellaw@hotmail.com)

Cc: rcmcdlaw@hotmail.com (rcmcdlaw@hotmail.com); cdean5091@yahoo.com (cdean5091@yahoo.com); scapers5091@yahoo.com (scapers5091@yahoo.com); Fern Potter (FPotter@mgclaw.com); Valerie Cash (VCash@mgclaw.com); Valerie Rhinehart (valerie.rhinehart@mgclaw.com)

1 attachment

Brown 0809238 Order.pdf (114.3 KB)

Brown order.

Kellie,

I made numerous changes to the proposed order. Some of the language was very troubling to me and appeared to have designs that I never intended. I never meant to name a treating physician for the unrelated problems, like the lumbar spine. If Mr. McDaniel feels the average weekly wage should be higher and that the order should include additional body parts, then his remedy is a form 30, not seeding the order with language I did not request. I will not trouble him in the future with requests for proposed orders.

DH

ORDER AND AWARD

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0809238

THOMAS LEE BROWN,

Employee/Claimant,

v.

PEOPLEASE CORP.,

Employer,

and

ARCH INSURANCE COMPANY c/o
GALLAGHER BASSETT SERVICES, INC.,

Carrier,

Defendant(s).

HEARING:

Date: October 22, 2010

Location: Walterboro, South Carolina

APPEARANCES:

Claimant represented by
Preston F. McDaniel, Esquire

Defendant(s) represented by
Scott B. Garrett, Esquire

PURPOSE OF HEARING:

This matter came before the Commissioner
on a Form 50 and 51

COMMISSIONER:

David W. Huffstetler

ELECTRONICALLY FILED:

November 23, 2010

STIPULATIONS

The parties have stipulated to jurisdiction and venue. The Commission File with the exception of self-serving declarations and unstipulated medicals is made a part of the Record.

STATEMENT OF THE CASE

At the time for Hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission, the parties have made records and reports from the following a part of the Record without objection: Dr. Denise Algood, Family Health Center; Orangeburg Regional Medical Center; Dr. Mahmoud Abu-Ata, Neurology & Pain Clinic; Dr. Scott Boyd, Columbia Neurosurgical Associates; Lexington Medical Center; Dr. Blake Moore; Dr. Brian Cuddy, Charleston Neurosurgical Associates; Dr. Leonard Forrest, Southeastern Spine Institute; Columbia Rehabilitation Clinic; Ms. Harriett Fowler, Vocational Expert; Claimant's Payroll and Tax Records; Social Security Disability Award; and Carolina Therapy Solutions. In addition, at the hearing various exhibits were offered and a ruling as to those exhibits is set forth in the Record; those exhibits that were admitted were considered and those exhibits which were excluded were not. Testimony was taken from the Claimant, Mr. Thomas Lee Brown, and Ms. Monica Reese for the Employer, Bulldog/Peoplease (hereinafter "Bulldog"), on the issue of the compensation rate.

First, as to the compensation rate, the evidence establishes

that the Claimant had only been working for Bulldog for a short period of time prior to the injury; a period of approximately 16 weeks. Due to the shortness of time with the employer, his income expectations and his immediate previous income as a truck driver, the Claimant took the position and asserted to the Commission that exceptional circumstances exists for the Commission to determine an average weekly wage and resulting compensation rate that is fair and reasonable to all parties. Based on my review of the evidence submitted, I agree with the position of the Claimant to the extent that exceptional circumstances exists for this Commission to determine an average weekly wage and resulting compensation rate that is fair and reasonable to all parties concerned. I also note for the Record that our Appellate Courts have ruled that the average weekly wage looks to the future. The Claimant submitted evidence which established that prior to going to work for Bulldog that he worked for Boyd Brothers Trucking throughout the entire year of 2007 and that, assuming he worked the entire 52 weeks during that year, based on his income as reported, on this W-2 he would have an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73. He testified that the reason that he left Boyd Brothers to work with Bulldog was to have routes that were closer to home and because he would be making more money per mile. He testified that he was told when he began work for Bulldog that he

would make 50 cents per mile. However, he did not produce any witness to that effect nor did he produce any documentation to that effect. He also presented evidence and testimony to the effect that his weekly pay was ever increasing after he went to work with Bulldog. It was his intent to obtain more favorable runs as he continued his employment and that as you ran more favorable runs his salary would increase.

Ms. Monica Reese disagreed as to the mileage rate at which drivers were paid and testified that drivers did not make .50 cent per mile and then testified as to the range at which they were paid. She also testified that she had reviewed all the drivers salaries with Bulldog and that the top drivers were making \$38,500.00 per year. Based on this evidence, the average weekly wage determination looks to the future and assuming the past is a predictor of the future, then the Claimant would reach that level as he earned more than that prior to his employment with Bulldog. Therefore, there is no documentary evidence to support the Claimant's testimony of having been promised 50 cents per mile and he did not identify the exact person that told him that at the time of employment. The documents on a co-worker that was presented by the Employer is only for one (1) employee so I accept the testimony from Ms. Reese and the testimony and evidence presented by the Claimant concerning his past wages and have determined that a fair determination of the applicable

average weekly wage and resulting compensation rate is to calculate the average weekly wages based on the salary and income that a top producer for Bulldog would be making per year, or \$38,500.00 per year, which results in an average weekly wage of \$740.38 with a resulting compensation rate of \$493.84.

Next, in reference to the disability that the Claimant has suffered as a result of this injury, testimony was taken from the Claimant, and it appears based on a review of the testimony of the Claimant, the medical evidence, the physical therapist's functional capacity evaluation, and the vocational evaluation evidence, the evidence establishes that Mr. Brown is 60 years old and has a high school education. Following high school, he was in the Army, which is classified as a very heavy physical demand category under the DOT (Dictionary of Occupational Titles). After leaving the Army, he worked as a cook in both skilled and unskilled jobs until he went to work for Oakridge Associated Universities in Oakridge, Tennessee as a shipping and receiving clerk and truck driver. In 2000, after obtaining his commercial driver's license, he has worked as a truck driver from 2000 to 2008.

The Claimant testified that he could not return to any of the jobs in which he had a background and experience and that in his opinion he had lost over 60% of the use of his back to do work requiring the physical use of his back. He testified

extensively as to the problems that he is having from his injuries which include two (2) separate cervical spine fusions resulting in fusing his back from the C3-4 level through the C5-6 levels of the spine. Dr. Scott Boyd, the authorized treating physician, stated that the Claimant's cervical spine injury alone has a 27% whole person impairment under the AMA Guides and that he has been left with cervical myelopathy with resultant problems including coordination. His problems with coordination and gait stance are noted throughout the records and the evaluations of the various doctors involved. Dr. Boyd also opined that due to his cervical spine fusions and the results that in his opinion Mr. Brown cannot safely operate a truck; specifically including his range of motion problems and the cervical myelopathy with resultant problems of coordination. The Claimant confirmed and demonstrated that he cannot move particularly in one direction (range of motion), and actually has to have a person in the car to assist him in looking safely in that direction. He avoids any type of heavy traffic or complicated traffic situation due to that problem and only drives without somebody with him when absolutely necessary.

One of the functional capacity evaluations submitted addresses the opinion of the physical therapist as to the work category into which he most appropriately fits. In the opinion of that physical therapist Mr. Brown only qualifies for the full

range of jobs that fall in the sedentary work category under the Dictionary of Occupational Titles and does not fit into the category of either light duty or medium duty physical demand jobs.

In addition to the limitations that Mr. Brown has due to the injury to his neck, Mr. Brown, prior to the time of this accident, had been diagnosed with diabetes which was controlled simply taking oral medication. Since the accident and specifically after the surgeries, Mr. Brown has become an insulin dependent diabetic and is excluded from driving a truck or any commercial vehicle due to being insulin dependent. The authorized treating physician, Dr. Denise Algoood, stated the opinion which is concurred in by Dr. Moore that Mr. Brown's diabetic condition was aggravated by the physical stress placed on Mr. Brown by his injuries and the surgery necessary to correct those injuries and that that aggravation of his diabetes has resulted in a heightened level of care wherein he became an insulin dependent diabetic. The Claimant testified concerning his diabetes and the treatment and the amounts of insulin and the number of times per day that he has to inject insulin at this time. Therefore, the undisputed evidence is that the injury and its aftermath aggravated his diabetic condition causing him to become an insulin dependent diabetic and causing all of the severe conditions and problems and treatment he has at this time

due to that condition.

In addition to the testimony concerning his physical limitations and his diabetic condition, the professional vocational opinion evidence that was submitted by and through Mr. Harriet Fowler, who opined the Claimant is unable to return to gainful employment. This opinion is not refuted by other expert opinions.

Wherefore, after review of the testimony and evidence submitted and as summarized above, I find that the Claimant has established by a preponderance of the evidence that he is permanently and totally disabled, based on the combination of his cervical injury and aggravation of his underlying diabetes.

FINDINGS OF FACT

1. That this is an admitted accident and that the only issues before this Commissioner are a determination of the disability award to which he is entitled as a result of his injuries sustained as a result of the accident and as to the average weekly wage and resulting compensation rate which will apply in this matter.

2. I find that exceptional circumstances exists to determine a fair and reasonable average weekly wage and resulting compensation rate for all parties involved and which will properly represent the Claimant's loss of earning capacity into the future. The average weekly wage of \$740.38 with a resulting

compensation rate of \$493.84 should apply.

3. That the Claimant has requested an award for total and permanent disability benefits based on either a total loss of earning capacity and/or for having lost more than 50% of the use of his back. In reference to an award simply being based under §42-9-30 for the loss of use of the back, the case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work. The Claimant suffered a cervical injury with multi-level fusions and aggravation of his underlying diabetes.

4. That based upon the decision that the Claimant is totally and permanently disabled, he is entitled to lifetime causally-related medical care his cervical spine and diabetes.

5. That the Claimant is currently receiving weekly temporary total disability benefits. Based on the decision that the Claimant's condition is total and permanent and that he is entitled to an Award for such, the Claimant shall continue to receive weekly benefits at the compensation rate of \$493.84 per this Award until the balance of the 500 weeks of compensation is paid. A lump sum request was withdrawn by the Claimant at the time of the hearing. Such lump sum request may be renewed and decided by the Commission at a later date and is subject to

subsequent order of the Commission. The attorney's fees and costs in this matter may be requested and taken off the back end and paid in a lump sum.

6. That Mr. Brown was determined to have reached maximum medical improvement per the determination of Dr. Scott Boyd on April 19, 2010.

CONCLUSIONS OF LAW

Pursuant to S.C. Code §42-17-40, the following Conclusions of Law apply in this case.

1. That under §42-1-40, the determination is made as to the average weekly wage and resulting compensation rate.

2. That under §42-9-10 and §42-1-120, the determination is made as to the Claimant's entitlement to an award for total and permanent disability for total loss of earning capacity.

3. That under §42-15-60, the determination is made as to the Claimant's entitlement to medical care and based on the decision that he is entitled to an award for total and permanent disability, the Claimant is entitled to lifetime, causally-related medical care for his cervical spine and diabetes.

ORDER AND AWARD

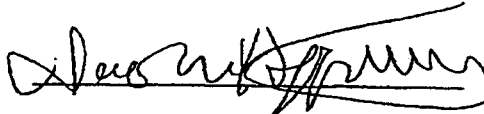
THEREFORE IT IS ORDERED that the Defense shall pay the Claimant benefits consistent with permanent and total disability.

IT IS FURTHER ORDERED that the Defense shall provide the

Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetes.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

A handwritten signature in black ink, appearing to read 'David W. Huffstetler', written over a horizontal line.

David W. Huffstetler, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

November 23, 2010

By: Kellie Lindler, Administrative Assistant to Commissioner Huffstetler

FW: Brown

From: **Preston McDaniel** (mcdaniellaw@hotmail.com)
Sent: Mon 4/04/11 1:07 PM
To: robin (rcmcdlaw@hotmail.com)

From: EHollmon@wcc.sc.gov
To: MCDANIELLAW@HOTMAIL.COM; SGARRETT@MGCLAW.COM
Date: Fri, 1 Apr 2011 16:06:25 -0400
Subject: RE: Brown

Please note the correction of the panel members.

From: Hollmon, Eugenia
Sent: Friday, April 01, 2011 3:40 PM
To: MCDANIELLAW@HOTMAIL.COM; SGARRETT@MGCLAW.COM
Subject: Brown

Attached is a request for a proposed decision and order.

**SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
REQUEST FOR PROPOSED DECISION AND ORDER**

This document is not a Decision and Order. It is a request for a proposed order. The Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order.

**Thomas Brown v Peoplease Corp.
SCWCC: 0809238
Commission Panel: Beck, Williams, Wilkerson; Chair
Order Assigned to Commissioner: William**

Preston F. McDaniel
Scott B. Garrett

Claimant/ Appellant
Defendants/Respondent

This matter was heard before the South Carolina Worker's Compensation Full Commission Appellate Panel during the last term. The Panel has considered the matter and find a **FULL AFFIRMATION** of the Single Commissioner's Decision and Order.

Mr. Garrett prepare a proposed order with copies for each Party; and submit to the Judicial Department within thirty (30) days of this notice. Please make sure the Appellate Panel Decision and Order recites the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order.

If you have any questions, please do not hesitate to email me at vcrocker@wcc.sc.gov or call at 803.737.5739.

Virginia L. Crocker
Judicial Director

Transmitted this 1st day of April, 2011

☒ Via email
Via United States mail



ATTORNEYS AT LAW

SCOTT B. GARRETT
Direct Dial: (803) 227-2224
sgarrett@mgclaw.com
COLUMBIA

May 27, 2011

VIA HAND DELIVERY

Ms. Virginia Crocker
Judicial Department
S. C. WORKERS' COMPENSATION COMMISSION
1333 Main Street, Suite 500
Columbia, South Carolina 29201

RE: Thomas Brown v. PeopLease Corporation/ Bulldog Highway Express and Arch Insurance
Company c/o Gallagher Bassett Services, Inc.
Date of Accident: May 2, 2008
Claim No.: 003289-000282-WC-01
WCC File No.: 0809238
Our File No.: 2098.08421

Dear Ms. Crocker:

Please find enclosed the original and three (3) copies of a proposed Appellate Panel Decision and Order in the above-referenced matter. Please present the Order to the appropriate Commissioners for approval and filing with the Commission.

By copy of this letter to Preston F. McDaniel, Esquire, the claimant's attorney, we are forwarding a copy of the proposed Appellate Panel Decision and Order to him by mail.

Very truly yours,

Scott B. Garrett

SBG/caj

Enclosures

cc: Preston F. McDaniel, Esquire
Monica L. Reese, PeopLease Corporation
Tara Potter, Gallagher Bassett Services, Inc.

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0809238

THOMAS LEE BROWN,

EMPLOYEE,
CLAIMANT/APPELLANT,

vs.

PEOPLEASE CORPORATION,

EMPLOYER,

AND

ARCH INSURANCE COMPANY c/o
GALLAGHER BASSETT SERVICES, INC.,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in
Columbia, South Carolina on March 21, 2011.

Appellate Panel Decision and Order
Filed _____, 2011.

APPEARANCES: Claimant/Appellant represented by Preston F. McDaniel, Esquire
of Columbia, SC.

Defendants/Respondents represented by Scott B. Garrett, Esquire
of Columbia, SC.

STATEMENT OF THE CASE

This claim arises out of an admittedly compensable injury which occurred on May 2, 2008. The parties were heard by the Single Commissioner on October 22, 2010 in Walterboro, South Carolina on the Forms 50 and 51. The Claimant maintained that he was permanently and totally disabled as a result of the work-related accident. Specifically, the Claimant maintained that he sustained injuries to his cervical spine, lumbar spine, bilateral upper extremities, and an aggravation of his underlying diabetic condition in his capacity as a truck driver with the Employer. In addition, the Claimant also sought a determination for a deviation in the calculation of his average weekly wage.

The Defendants admit the Claimant sustained a compensable injury by accident arising out of and in the course of his employment on May 2, 2008 resulting in an injury to his cervical spine with an aggravation to the Claimant's underlying diabetic condition. The Defendants denied that the Claimant sustained injuries to the lumbar spine or bilateral upper extremities, and that the Claimant was not entitled to an award of permanent and total disability benefits on the basis that the medical records do not support such a finding. Both parties agreed that the Claimant reached maximum medical improvement on September 28, 2010.

In an Order dated November 23, 2010, the Single Commissioner determined that the Claimant sustained a compensable injury to his cervical spine with aggravation of his underlying diabetic condition. The Single Commissioner further ordered that the Claimant is entitled to an award of permanent and total disability with lifetime, causally-related medical care as a result of loss of earning capacity pursuant to Section 42-9-10 and Section 42-9-120 of the Act. The Single Commissioner further determined that the

Claimant's average weekly wage is \$740.38 with a corresponding compensation rate of \$493.84.

In reaching his Order, the Single Commissioner found and ruled as follows:

IT IS HEREBY ORDERED that the Defendants shall pay the Claimant benefits consistent with permanent and total disability.

IT IS FURTHER ORDERED that the Defendants shall provide the Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetes.

Within the statutory period, counsel for the Claimant filed an Application for Review in this case setting forth his reasons, copies of which were furnished to all interested parties prior to the scheduled oral argument presented before the Appellate Panel on March 21, 2011.

By appeal, Claimant respectfully submitted the Hearing Commissioner erred in the following:

1. That the Hearing Commissioner erred by not specifically awarding the Claimant lifetime medical care for his low back and legs where the undisputed facts are that the Defendants did not contest that the Claimant has sustained injury to and/or which affected his low back and legs and where the uncontested medical evidence from the authorized treating physicians establishes that from the date of the accident forward he was treated for problems with his low back and legs and where those and other doctors stated the opinions that these injuries and need for treatment to these body parts stemmed from the work-related automobile accident.

2. That the Hearing Commissioner erred as a matter of law by failing to designate the previously authorized treating physicians as the physicians to continue to provide treatment at least until such time as the Defendants specifically designate and/or provide medical care through physicians of their choice for his continuing problems under the award of lifetime medical benefits to effect a cure or provide relief from the Claimant's disabling symptoms stemming from the accident.

3. That the Claimant requests a review by the Commission on the specific and limited issue as to whether or not the average weekly wage and resulting compensation rate as awarded by the Commissioner should be further raised to an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73, which is based on the uncontested evidence of a full year of employment with his previous employer prior to the Claimant coming to work with the Employer and further based on the pay stubs that were submitted into the record which supports the testimony of the Claimant that he was to make at least \$.50/mile and is contrary to the testimony of the Employer representative that the maximum rate was \$.38/mile wherein those pay stubs reflect that he was to be paid \$1.00/mile, specifically as set out on pages 125, 126 and 127 of the Claimant's APA submissions.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered to the individual members of the Appellate Panel and have since been under study and consideration.

In the Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1989), review the award, weigh the evidence as presented at the initial

hearing, and, if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner.

Thus, the Appellant and Respondents were present for oral argument on March 21, 2011 before the Appellate Panel. Therefore, based upon all submitted documentary evidence, the Record on Appeal, the Commission's file and Appellate Briefs, the Appellate Panel, by and through its statutory and inherent power, entered into its decision pursuant to S.C. Code Ann. §42-17-50. After careful review of the instant case, the Commission, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, the Appellate Panel has stated that the following Findings of Fact and Conclusions of Law shall become the law of the case and, therefore, the Decision and Order of the Hearing Commissioner is **AFFIRMED** in its entirety.

FINDINGS OF FACT

After hearing able arguments from counsel for the parties, a reading of the parties' respective Motions and Responses and Briefs, and a thorough analysis of the applicable statutes and regulations, the Appellate Panel concludes that Commissioner Huffstetler's Findings and Conclusions in his Order dated November 23, 2010, are correct as stated. Specifically, we the Appellate Panel find the following as fact:

1. That this is an admitted accident and that the only issues before this Appellate Panel are a determination of the disability award to which the Claimant is entitled as a result of his injuries sustained as a result of the accident and as to the average weekly wage and resulting compensation rate which will apply in this matter.

2. We find that exceptional circumstances exist to determine a fair and reasonable average weekly wage and resulting compensation rate for all parties involved and which will properly represent the Claimant's loss of earning capacity into the future. The average weekly wage of \$740.38 with a resulting compensation rate of \$493.84 should apply.

3. That the Claimant has requested an award for total and permanent disability benefits based on either a total loss of earning capacity and/or for having lost more than 50% of the use of his back. In reference to an award simply being based under Section 42-9-30 of the Act for loss of use of the back, the case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work. The Claimant suffered a cervical injury with multi-level fusions and aggravation of his underlying diabetic condition.

4. That, based upon the decision that the Claimant is totally and permanently disabled, he is entitled to lifetime, causally-related medical care to his cervical spine and diabetes.

5. That the Claimant is currently receiving weekly temporary total disability benefits. Based on the decision that the Claimant's condition is total and permanent and that he is entitled to an award for such, the Claimant shall continue to receive weekly benefits at the compensation rate of \$493.84 per this award until the balance of the 500 weeks of compensation is paid. A lump sum request was withdrawn by the Claimant at the time of the hearing. Such lump sum request may be renewed and decided by the Commission at a later date and is subject to subsequent Order of the Commission. The

attorney's fees and costs in this matter may be requested and taken off the back end and paid in a lump sum.

6. That the Claimant was determined to have reached maximum medical improvement per the determination by Dr. Scott Boyd on April 19, 2010.

CONCLUSIONS OF LAW

In view of these Findings of Fact, and as provided in the South Carolina Code of Laws, we the Appellate Panel conclude the following as matters of law:

1. That under Section 42-1-40, the determination is made as to the average weekly wage and resulting compensation rate.

2. That under Section 42-9-10 and Section 42-1-120, the determination is made as to the Claimant's entitlement to an award for total and permanent disability for total loss of earning capacity.

3. That under Section 42-15-60, the determination is made as to the Claimant's entitlement to medical care and, based on the decision that he is entitled to an award for total and permanent disability, the Claimant is entitled to lifetime, causally-related medical care for his cervical spine and diabetic condition.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Appellate Panel hereby **ORDERS, ADJUDGES AND DECREES:**

IT IS HEREBY ORDERED that the Defendants shall pay the Claimant benefits consistent with permanent and total disability.

IT IS FURTHER ORDERED that the Defendants shall provide the Claimant with lifetime, causally-related medical treatment for his cervical spine and diabetic condition.

AND IT IS SO ORDERED.

The Hearing Commissioner's Order is AFFIRMED IN FULL by the Appellate Panel of the South Carolina Workers' Compensation Commission.

S.C. WORKERS' COMPENSATION COMMISSION

Commissioner Derrick L. Williams

Commissioner Avery B. Wilkerson, Jr.

Commissioner T. Scott Beck

Dated: _____

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 25 years.

Preston F. McDaniel
OF COUNSEL:
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June 3, 2011

VIA EMAIL - vdeller@wcc.sc.gov
AND U.S. MAIL

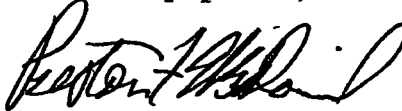
Virginia L. Crocker, Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Thomas Brown v. Bulldog Hiway Express d/b/a Peoplease Corp.
WCC File No. 0809238

Dear Ms. Crocker:

I received a copy of the proposed Appellate Panel Decision and Order in the above-referenced matter. After review, I do not believe it addresses the issues I raised on appeal but also it goes beyond simply affirming the decision of the Single Commissioner as were the directions of the Appellate Panel. I would renew my objection to a party writing an Order for the Commission as the Administrative Procedures Act, the Workers' Compensation Act, our case law and the Rules of the Commission require the Commission to make their own Findings of Fact particularly in a consensus order decision situation. By copy of this letter, I am notifying Mr. Garrett of this communication.

Sincerely yours,



Preston F. McDaniel

PFM/kic

cc: Clyde C. Dean, Jr., Esquire
Scott B. Garrett, Esquire (Via sgarrett@mgclaw.com and U.S. Mail)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

WCC File No. 0809238

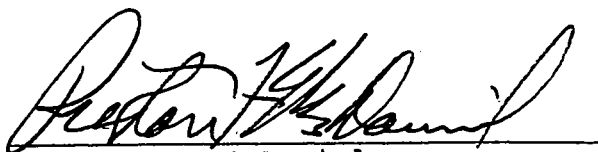
Thomas Lee Brown, ...Appellant,

v.

Peoplease Corporation and ARCH Insurance
Company c/o Gallagher Bassett Services, Inc., ..Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal
contains all material proposed to be included by any of the
parties and not any other materials.



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211
Attorney for Appellant

March 19, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

WCC File No. 0809238

Thomas Lee Brown, ... Appellant

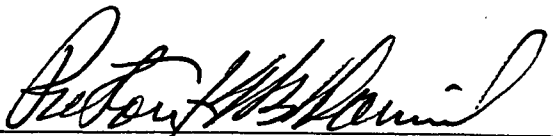
v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc. Respondents.

PROOF OF SERVICE

I certify that I have served the **RECORD ON APPEAL** by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2012, addressed to: Weston Adams, III, Esquire, and Helen F. Hiser, Attorney, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211.

March 19, 2012


Preston F. McDaniel
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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Lee Brown, Appellant,

v.

Peoplease Corporation and ARCH Insurance Company,
c/o Gallagher Bassett Services, Inc., Respondents.

Appellate Case No. 2011-196726

Appeal From The Workers' Compensation Commission

Opinion No. 5082

Heard October 16, 2012 – Filed February 13, 2013

AFFIRMED

Preston F. McDaniel, of the McDaniel Law Firm, of
Columbia, for Appellant.

Weston Adams, III, and Helen Faith Hiser, both of
McAngus Goudelock & Courie, LLC, of Columbia, for
Respondents.

SHORT, J.: In this workers' compensation case arising out of an automobile accident, Thomas Brown appeals, arguing: (1) the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred by (a) not granting him lifetime medical care for his lower back problems, (b) not raising the compensation rate to \$591.73, and (c) not writing its order; and (2) the court of appeals erred by denying Brown's motion for leave to present additional evidence

to the Workers' Compensation Commission (the Commission) pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We affirm.

FACTS

On May 2, 2008, a passenger vehicle collided with the truck Brown was driving. At the time of the accident, Peoplease Corporation employed Brown to drive a truck for Bulldog Trucking, and Brown had been working for the company for approximately 16 weeks. After the accident, doctors treated Brown for pain in the cervical region of his neck and performed two surgeries on his neck. Brown's diabetes also worsened following the accident, and he is now insulin dependent.

Brown filed a Form 50 on July 13, 2012, seeking an award for permanent and total disability benefits with lifetime medical care for his neck, back, and arm pain from the accident. Peoplease Corporation and Arch Insurance Company, c/o Gallagher Bassett Services, Inc., (collectively, Respondents) admitted Brown sustained a compensable injury by accident arising out of and in the course of his employment; however, they denied Brown sustained injuries to his lower back and arms.

On October 22, 2010, the single commissioner heard the matter. In his order, the Commissioner noted the only issues before him were a determination of Brown's entitlement to a disability award and the resulting average weekly wage and compensation rate to be applied. He determined Brown is permanently and totally disabled based on the combination of his cervical injury and the aggravation of his underlying diabetes; however, he found no specific medical report tied Brown's lumbar (lower back) problems to his injury at work. Therefore, he ordered Respondents to provide Brown with lifetime, causally-related medical treatment for his cervical spine and diabetes. The commissioner also found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. Thus, he calculated the average weekly wage based on the salary and income a top producer for Bulldog would make per year. This amounted to \$38,500 per year, resulting in an average weekly wage of \$740.38 and a compensation rate of \$493.84.

Brown appealed to the Appellate Panel, arguing the commissioner erred in not awarding him (1) lifetime medical care for his lower back and legs and (2) a higher average weekly wage and compensation rate. The Appellate Panel heard the matter on March 21, 2011. Thereafter, it affirmed the single commissioner's factual findings and conclusions of law. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). "Where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

LAW/ANALYSIS

I. Lifetime Medical Care

Brown argues the Appellate Panel erred in denying him lifetime medical care for his lower back problems. We disagree.

This court must affirm the Appellate Panel's findings of fact if they are supported by substantial evidence. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* This court may not substitute its judgment for that of the agency's as to the weight of the evidence on questions of fact unless the agency's findings

are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Id.* at 339, 513 S.E.2d at 845. When determining if a claimant has established causation, the Appellate Panel has discretion to weigh and consider all the evidence, both lay and expert. *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Id.* The Appellate Panel has the final determination of witness credibility and the weight to be accorded the evidence. *Id.*

In his order, the commissioner stated that *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984), "calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases." *See id.* at 471, 313 S.E.2d at 41 (noting the back is "a much more complicated area of the body," which requires "a higher degree of expertise than was presented to determine the degree of . . . loss of use"). He then found Brown presented "no specific medical report that ties the lumbar [lower back] problems to the injury at work."

Brown argues the commissioner overlooked or disregarded the undisputed evidence in the record that his lower back problems were caused by and stemmed from the accident. In support of his argument, Brown submits that on July 6, 2008, two months after the accident, he went to the emergency room complaining of lower back pain. The report notes, "History obtained from patient." The admission notes state Brown indicated he was in an automobile accident two months prior to when he developed the pain, and he does a lot of heavy lifting at work, which he thinks exacerbated the pain. However, he denied any back pain when a nurse assessed him. Brown's back was x-rayed, and the hospital discharged him with a lumbosacral strain and prescribed him Percocet, a drug for pain.

On July 10, 2008, Brown saw Dr. Abu-Ata, who noted Brown told him he was in a car accident two months prior, and afterwards, he started having neck and back pain. Brown told Dr. Abu-Ata "he had x-rays for his spine that were negative." Dr. Abu-Ata "did a nerve conduction study/EMG for him that was normal and that showed no evidence of cervical or lumbosacral peri-radculopathy." He then scheduled Brown for a magnetic resonance imaging (MRI) of his cervical spine and lower back. The lower back MRI revealed "mild to moderate degenerative disc disease at L3-4." However, the cervical spine MRI indicated Brown had "moderately severe degenerative disc/osteophyte disease of the cervical spine," and Dr. Abu-Ata gave him an emergency referral to Dr. Scott Boyd, a neurosurgeon.

On August 4, 2008, Dr. Boyd determined Brown had cervical stenosis and scheduled him for an anterior cervical discectomy and fusion on September 2, 2008. In February 2010, Dr. Boyd performed a second cervical fusion on Brown. In relation to his claim for workers' compensation, Brown sent Dr. Boyd a letter that stated:

Is it your opinion to a reasonable degree of medical certainty that the problems that [Brown] has with his neck and back and his need for medical care either stem directly from the automobile accident of May 2, 2008[,] or the accident aggravated and caused to become symptomatic a pre-existing conditions [sic] in his neck and back which resulted in the need for medical care?

Dr. Boyd checked "yes" and signed the letter. However, Dr. Boyd also signed a note excusing Brown from work, which stated: "Mr. Brown is having *back* surgery 09/02/08. He will be out of work until approximately 3 weeks after surgery." (Emphasis added.) Brown's first cervical fusion was on September 2, 2008. Therefore, Respondents contend Dr. Boyd interchangeably used the word "back" to refer to Brown's "neck." Further, Dr. Leonard Forrest did an independent medical evaluation of Brown, and although he notes Brown told him "his neck-related symptoms have always been worse than the low back related symptoms," he stated he did "not see any studies of a lumbar spine." He also stated that although Brown's back problems "certainly seem[] to be related to the motor vehicle accident for the same reason as noted above, [it] has not been evaluated adequately at this point."

Brown's doctors did not perform any surgeries or procedures on his lower back, and the only treatment given to Brown for his lower back was the Percocet given to him at the emergency room. Brown also testified he has not had any surgery or medical treatment to his lower back. When asked about his lower back pain, Brown stated, "[I]t starts from the back of my neck and goes down and then sometimes it varies also. . . . it feels different all the time. I really couldn't pinpoint [it] in particular." Hence, even Brown could not specifically testify he experienced lumbar pain. Also, although "back" pain is referred to in the record, the only medical evidence specifically relating to Brown's lower back pain is the emergency room visit. Therefore, we find the few medical references in the record are insufficient to prove a causal link, and the substantial evidence in the record

supports the Appellate Panel's decision that Brown presented no medical evidence that related his lumbar problems to the accident.

II. Compensation Rate

Brown argues the Appellate Panel erred in not raising his compensation rate to \$591.73. We disagree.

Section 42-1-40 of the South Carolina Code provides four alternative methods for the commission to use to calculate the average wage. S.C. Code Ann. § 42-1-40 (Supp. 2012); see *Pilgrim v. Eaton*, 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). The primary method of calculation requires that the "[a]verage weekly wage" must be calculated by taking the total wages paid for the last four quarters . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40 (Supp. 2012). However, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40 (Supp. 2012). "The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002) (quoting *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

Brown alleged that at the time of the accident, his weekly wages were \$589.69, which resulted in a compensation rate of \$393.14. However, he sought a deviation in the calculation of his average weekly wage. He presented evidence that he worked for Boyd Brothers Trucking prior to working for Peoplease, and based on his income as reported on his W-2, he had an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73. Brown also testified he thought Bulldog was going to pay him a rate of fifty cents per mile; however, he could not identify who at Bulldog told him that. Monica Reese, corporate counsel for Peoplease, testified she reviews every employment contract and completes the Form 20 for every workers' compensation claim. She testified she reviewed the payroll of all sixty similarly-situated drivers and determined Brown's wages would be approximately \$26,000 for the year. She testified the high end of the salary that drivers could earn is forty-two cents per mile, which is approximately \$38,500 per year. She did not know of anyone who would have told Brown he would make fifty cents per mile.

Additionally, Brown submitted paystubs he alleged showed Bulldog was paying him \$1.00 per mile. However, the paystubs indicate the payment on the check was calculated at a "Rate" of "\$1.00" for "*Hours*" of work. (Emphasis added.) Even at the hearing before the Appellate Panel, Brown's counsel stated: "[I]n our Pre-hearing Brief we submitted copies of his check and on his check – the four or five copies of the check we submitted it said that he was making \$1.00 dollar an *hour*." (Emphasis added.) The commissioner asked him if that was correct, and counsel stated: "Excuse me, \$1.00 dollar a *mile*." (Emphasis added.) He then continued to say, "But in other words not only does it support my client's testimony that he was going to make \$.50 cents an *hour*" (Emphasis added.) Therefore, the evidence does not support Brown's argument the record contains evidence showing Bulldog was paying him one dollar per mile.

The commissioner noted Brown presented no documentary evidence to support his testimony that Bulldog promised him fifty cents per mile, and he did not identify the exact person that told him that at the time of employment. Nevertheless, the commissioner found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. As a result, the commissioner determined the fair average weekly wage was \$740.38 with a resulting compensation rate of \$493.84. Therefore, the commissioner assumed Brown would eventually earn the highest amount a driver in his situation could earn and took into account possible future earnings and wage increases in calculating his average weekly wage. We find no error.

III. Order

Brown argues the Appellate Panel erred in not writing its own order. We disagree.

On April 1, 2011, Judicial Director Virginia Crocker emailed a letter to all counsel, stating the Appellate Panel "has considered the matter and find[s] a full affirmation of the Single Commissioner's Decision and Order." The letter requested counsel for Respondents "prepare a proposed order with copies for each Party; and submit to the Judicial Department within thirty (30) days of this notice." It also requested the order "recite[] the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order." Further, the letter stated "the Commissioners reserved the right to modify and/or delete any or all portions of the submitted decision and order."

We find no merit to Brown's argument. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 292 (2011) (noting the "Appellate Panel of the Commission unanimously upheld the commissioner's order and adopted the findings of fact and conclusions of law contained therein in full"); *Matute v. Palmetto Health Baptist*, 391 S.C. 291, 295, 705 S.E.2d 472, 474 (Ct. App. 2011) (discussing without comment the single commissioner's receipt of the claimant's proposed order).

IV. Motion for Remand

Brown argues this court erred in denying his motion for leave to present additional evidence to the Workers' Compensation Commission pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We disagree.

Section 1-23-380 of Administrative Procedures Act provides that a "party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" of the agency decision by filing a petition for review in the court of appeals. S.C. Code Ann. § 1-23-380 (Supp. 2012).¹ Section 1-23-380(3) provides that pursuant to the filing of a petition for review, the party may also apply to the court for leave to present additional evidence, and the court may order the additional evidence to be taken before the agency if "it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." S.C. Code Ann. § 1-23-380(3) (Supp. 2012).

Brown sought leave with the Appellate Panel to introduce a photocopy of a card he found while going through his records, which he claimed someone gave him when he applied with Bulldog. The back of the card states: "Run Legal: 50¢ per loaded mile." Brown asserted the additional evidence was material because, in making his decision, the commissioner relied on the lack of documentary evidence to support Brown's testimony. The Appellate Panel denied Brown's motion. Brown then filed a motion for leave with this court to remand the case to the Appellate Panel to present the additional evidence. By order dated November 2, 2011, this court

¹ This section was amended in 2006 to provide for review by an administrative law judge and appeal to the court of appeals instead of the circuit court. 2006 Act No. 387, § 2, eff. July 1, 2006. Because this case began in 2010, Brown's appeal was to this court.

denied Brown's motion, finding Brown "presented no good reasons for his failure to present the evidence during the hearing before the single commissioner and the Appellate Panel."

In ruling on an application to submit additional evidence, this court should consider two factors: (1) the materiality of the additional evidence; and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. S.C. Code Ann. § 1-23-380(3) (Supp. 2012). After reviewing the record, we find this court correctly determined the additional evidence Brown sought to offer is not material. Additionally, we find this court correctly determined Brown presented no good reason for failing to present the evidence at the hearing before the commissioner and the Appellate Panel. Therefore, this court correctly denied Brown's motion. *See Byers v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 243, 245, 407 S.E.2d 653, 654-55 (1991) (finding the decision to hear additional evidence under section 1-23-380(e), prior to the statute's amendment, was "a matter within the sound decision of the trial judge" and the appellate court's proper standard for review was "whether the circuit judge committed an error of law in remanding the case to the Commission to hear additional evidence"); *id.* (stating that "[i]n ruling on an application under subsection (e), the [c]ircuit [c]ourt should have considered two factors: the materiality of the additional evidence and the existence of a good reason for the failure to introduce such evidence at the original hearing"); *id.* (finding any additional evidence the petitioner sought to offer was not material to the Commission's determination and holding the trial judge was controlled by an error of law in making his determination on the materiality of the additional evidence).

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

RECEIVED
FEB 28 2013

WCC File No. 0809238

SC COURT OF APPEALS

Thomas Lee Brown, ... Appellant

v.

Peoplease Corporation and
ARCH Insurance Company c/o Gallagher
Bassett Services, Inc., ... Respondents.

PETITION FOR REHEARING

Pursuant to SCACR 221(a) and 240, the Appellant hereby petitions the Court for rehearing as to the Opinion issued in the above-referenced matter filed on February 13, 2013. The Appellant would submit that the Court overlooked or misapprehended the following points in its decision in this matter:

1. In its Opinion, the Court appropriately noted that one of the issues that the Appellant wanted decided was whether or not the Commission had erred by failing to grant him lifetime medical for his lower back problems.

First, one of the facts that is overlooked by the Court in not holding that the Commission should have granted him lifetime benefits for his low back is that in the Court's statement of the facts in the Opinion, the Court states that Brown had, "filed" his Form 50 requesting lifetime medical care for his neck, back and arm pain from the accident thus indicating that the back was a contested issue in the pleadings. However, paragraph one (1) of the Form 50 notes that the body parts affected by the injury are the neck and back and arm and head and under paragraph six (6) of the Form 50 he requested continuing treatment for the neck and the back and the arm pain. (There is a scrivener's error in the Opinion that the Form 50 was filed in 2012 wherein it was filed in 2010.) The Defendants in their Form 51 admitted the allegations contained in paragraph 1 of the Form 50. They only denied under paragraph six (6) that the Claimant was in need of any continuing or further medical care for any body part including the neck or the back or the arm pain. Further, in the Form 58, Pre-Hearing Brief, filed by the Defendants, there is no denial of medical care set out as being an issue.

The same statement is made in the Amended Pre-Hearing Brief where again there is no denial of medical care. Therefore going into the Hearing, there was no notice to the Claimant that the Defendants would be challenging medical care other than the general challenge to the Claimant's need for any further medical care and to an Award for total and permanent disability with accompanying lifetime medical benefits. This is a critical fact at the starting point of the analysis as the injuries were admitted.

Second, the Award made was for total and permanent disability and applying the two applicable construction standards that apply in a workers' compensation case, that being that the Act shall be liberally construed in favor of benefits to the injured worker and that since the Act is in derogation of the common law, the wording of the Statute must be strictly construed leaving it to the Legislature to amend or define any ambiguities; Cox v. BellSouth Communications, 356 S.C. 468, 589 S.E.2d 766, reh. den., cert. denied (SC App. 2003), to the wording under SC Code §42-15-60(C) wherein when a Claimant is determined to have suffered total and permanent disability, the Claimant is entitled to medical care under Subsection C throughout his lifetime for all reasonable and necessary medical care without regard to any limitation. Under that Subsection and under Subsection A,

generally the same criteria is applied to such medical care that it refers to and includes all such medical care and care which will effect a cure or provide relief of the disabling symptoms stemming either directly or indirectly from the injury. Thus the Court misapprehended as did the Commission the fact that where the Commission makes an Award, the only criteria after that in reference to lifetime medical care is a doctor must state that the medical care necessary in his opinion is directly or indirectly related to the injury and will have a tendency to reduce the degree of disability.

There is simply no exclusion for body parts and all that is required is that the medical care when it is offered or determined to be needed meets the criteria that it is based on medical opinion stated to a reasonable degree of medical certainty. For an excellent discussion, see Rice v. Froehling & Robertson, Inc., 267 S.C. 155, 226 S.E.2d 705 (1976) and Munn v. Nucor Steel Div. of Nucor Corp., 336 S.C. 28, 518 S.E.2d, 289 (SC App. 1999). Therefore, the Court misapprehended as did the Commission the effect of lifetime medical care and that the Commission erred by carving out medical care from its provision of lifetime medical care especially where the accident was admitted and the challenge was as to whether or not the Claimant was entitled to an Award for total and permanent disability and thus to whether

or not he was entitled to lifetime medical benefits for that total and permanent disability.

Third ,the Court misapplied the substantial evidence standard in reference to the factual finding made by the Commissioner. While the Court appropriately sets out the standard, it does not apply the standard. Had the Hearing Commissioner fulfilled his obligation under law by making detailed Findings of Fact and Conclusions of Law that are sufficiently detailed and definite enough to allow for judicial review as this Court did in its review of the Record which is nothing more than speculation by the Court as to what the Commissioner may or may not have relied on in making the single, solitary finding that he did in fact make, then we would know what was considered by the Commissioner. However, the only Finding that was actually made by the Hearing Commissioner that was affirmed by the Full Commission and to which this Court can only address itself is the Finding that, "there is no specific medical report that ties the lumbar problems to the injury at work." To add anything to that Finding is to go into the realm of speculation and innuendo. As the Supreme Court stated in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), the Appellate Court reviewing a case cannot and will not imply Findings of Fact as to the basic issues of liability for

compensation for this would impose upon the Court the function of determining such facts from conflicting evidence. This Court has actually stated that it is improper for a reviewing Court to makes its own Findings of Fact on the evidence concerning medical causation. Sigmond v. Dayco Corp., 316 S.C. 260, 449 S.E.2d 497 (SC App. 1994). Again, an Award or Decision by the Commission may not rest upon surmise, conjecture or speculation but must be founded upon substantial evidence. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965). Thus we are left with whether or not there is substantial evidence in the Record to sustain the actual Finding made by the Commissioner that, "there is no specific medical report that ties the lumbar problems to the injury at work." Without recitation to all the evidence that was cited in Appellant's Brief and which is contained in the Record that was either overlooked or misapprehended that refutes this Finding, there is the opinion of Dr. Leonard Forrest and quoting from part of the that report which was not referred to in the Court's Opinion:

"It is certainly most likely that Mr. Brown's ongoing symptoms including those in the neck and upper extremities as well as the low back and lower extremities are the result of the motor vehicle accident of May (08)."
(Emphasis added).

The words "certainly most likely" have been determined by our

Appellate Courts to be synonymous with certainly most probably. Tucker v. Duncan Mills, 218 S.C. 465 63 S.E.2d 314 (1951). Therefore, the substantial evidence in the Record is contrary to the Finding of Fact made by the Hearing Commissioner. The Appellant argued and argues and would submit that the Court overlooked the Finding and the basis for the Finding that the Commissioner made. Further, there is simply no evidence in the actual finding that was made that the evidence that is recited by the Court in its Opinion served as a basis for the Commissioner's Finding.

Based on all the above-referenced misapprehensions and facts overlooked, the Appellant would respectfully request rehearing and an opportunity to argue these issues to the Court from the Record and the law or that the Court reconsider its opinion and based on the law overturn the Decision of the Commission which is erroneous under the law.

2. That the Court in its Opinion overlooked or misapprehended the legal standard and the argument that is being made by the Appellant on the average weekly wage.

In its Opinion, the Court simply looks at the factual evidence presented and whether or not there is a factual basis for the Decision made by the Hearing Commissioner as affirmed by the Full Commission Panel. However, the Court overlooked the principle of law as set forth in the Brief

that whether or not exceptional circumstances exist and the compensation rate those exceptional circumstances justify as defined in the Statute is a matter of law for decision by the Courts as set forth in the case of Booth v. Midland Trane Heating & Air Conditioning, 298 S.C. 251, 379 S.E.2d 730 (SC App. 1989). Thus, whether or not exceptional circumstances exist is a decision for this Court and the compensation rate that is justified under those circumstances is a matter of law for decision by the Court. The Appellant would submit that the Court overlooked this rule of law and would ask that the Court revisit a review of the exceptional circumstances that had been found to exist (that issue was not appealed by the Respondents or the Appellants and therefore it has become the law of the case that exceptional circumstances exist) and the Appellant would submit that under the exceptional circumstances that exist in this case the Court should apply the compensation rate of \$591.73.

In addition, the Court misapprehended the argument that was being made by the Appellant in that the Appellant was arguing to the Court that the Commission failed to apply the law concerning wage calculation in that under the law the objective of wage calculation as found by this Court and by the Supreme Court is to arrive at a fair approximation of the injured worker's probable future earning capacity. Sellers v.

Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 [SC App 2002) (citing and relying on the Supreme Court's decision in Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978)]. As is set out in the Opinion what the Hearing Commissioner did was to set the compensation rate that would apply based on the maximum amount he could make with Bulldog/Peoplease if he stayed with Bulldog/Peoplease and maximized out what he could make with that company. That is simply the wrong comparison and the wrong wage calculation that is to be made to determine future earning capacity loss which has been specifically rejected by our Appellate Courts. The question instead, if a Finding is made that exceptional circumstances exist, is what is the effect on his future earning capacity with any company. For the Commissioner to base his decision on the Appellant staying with Bulldog is simply and clearly a blatant error of law. According to Ms. Reese's testimony, he could never have made as much with Bulldog/Peoplease as he was making with his former employer and based on that testimony alone, if he chose to go back with his former employer the next day he would have been making more than with the Respondent.

Finally based upon the Court's citation in the Opinion as to the testimony of Mr. Brown's unsupported testimony and the Commissioner and the Court's reliance and citation to the

unsupported testimony of Ms. Monica Reese, the Appellant would hope that the Court will reconsider this issue in light of issue #4 as to the Motion to Remand.

3. That the Court misapprehended or overlooked the law concerning the responsibility of the Commission to write its own Orders. Counsel would readily agree that this is one of the weaker cases to make a decision on this issue since the Commission simply affirmed the Decision of the Hearing Commissioner. However, this issue involves fundamental principles going forward concerning the direct handling of the Court of Appeals from the Workers' Compensation Commission: Is this Court going to require strict compliance with the law by the Commission, both the statutes and the precedents this Court has set and where an issue is raised on appeal as to whether the Commission has complied with the requirements of a statute is specifically raised can the bench and bar expect a ruling by the Court setting out that statute and/or precedent and whether the Commission did or did not comply with it? In its Opinion the Court does not refer to the Statutes or make a ruling under the requirements of those statutes that require the Commission to make Findings of Fact. Further the case citations referred to in the Opinion indicate a misapprehension as to the role of this Court now that the Appellate responsibility of the Circuit

Court and this Court's appellate responsibility prior to 2007 have now been merged as one in this Court post 2007. In pre-2007 cases this Court regularly and consistently criticized the Commission for making conclusory Findings of Fact. In addition to the cases decided by the Supreme Court in cases such as Drake v. Raybestos-Manhattan, Inc., supra, and Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970) which require the Commission to make detailed Findings of Fact on every essential factual issue that is presented to the Commission for determination, this Court in its prior 2007 opinions such as in the case of Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (SC App. 1991) consistently criticized and required the Commission to make detailed Findings of Fact and Conclusions of Law and found that where the Commission made what the Court referred to as, "conclusory" Finding that those type of Findings were totally insufficient under the Act. Citing Judge Goolsby's Decision and wording in the Baldwin Opinion,

"generalized, conclusory, or incomplete findings will not suffice as Findings of Fact."

When those decisions which are the law by which the Commission and all parties must abide until changed are coupled with the requirements of SC Code §1-23-340 which provides that when in a contested case the majority of the

officials of the agency who are to render the final Decision, which is what the Appellate Panel is in this case, the Agency at the minimum, and the Appellant would reiterate at the minimum, must prepare a proposal for decision that contains a statement of the reasons as to each issue of fact or law necessary to the proposed decision, "prepared by the person who conducted the hearing or one who has read the Record".

The Appellant would submit since those were specifically raised on appeal this Court should address those. There is nothing in the Workers' Compensation Act or the Administrative Procedures Act that allows for a party to prepare that final Decision and to fill in the blanks. The Appellant would respectfully implore the Court to note that the same issues that were raised before the Court were raised to the Full Commission and that the Full Commission adopted conclusory findings.

Again, this is akin to this Court letting a party before it draft its Order. The Appellant in this matter presented multiple issues to the Commission for review, both as a matter of law and as a matter of fact that were outside and in addition to Findings of Fact and Conclusions of Law that the Hearing Commissioner made. Many of those same issues were presented as arguments to this Court and this Court performed its statutory duty by addressing those issues in a thoroughly

and thoughtful opinion. The Commission, the Appellant would submit, has the same responsibility even where it chooses to affirm the Decision of the Hearing Commissioner and the Appellant would respectfully submit that the Court misapprehended or overlooked the argument that is being made by the Appellant and the requirements of the law for the Full Commission in writing its Orders. We simply do not know the basis from the Commission for their decision on the issues raised to the Appellate Panel for decision. The Appellate Panel of the Full Commission has the same responsibility as this Court does in writing its Decision.

4. That in reference to the admission of after-discovered evidence in a workers' compensation case, first before addressing those principles on a factual basis, the Decision of the Court is just flat wrong. The entire paragraph stating with "Brown sought leave with the Appellate Panel to introduce a photograph of a card he found while going through his records . . ." is not correct. As is set out in the Motion filed with this Court, subsequent to the Decision by the Hearing Commissioner and after this matter had been appealed and briefed to the Full Commission, in a supplemental proceeding when the Claimant was requesting a payment of the Award in a lump sum, the Claimant in going through records in preparation for that hearing found the

documentary evidence as is set out in the Motion. In fact, the Appellant's Motion was to remand the matter to the Full Commission Panel for determination as to whether or not this matter should be submitted as additional evidence under the Workers' Compensation Act and its Rules and Regulations.

While the Appellant fully understands that this situation is confusing due to timing of events, the entire purpose and intent of filing the Motion in this Court was because the Full Commission had already issued its written Decision and there is no provision in the workers' compensation Rules for reconsideration (even though the statute requires one); and to stay an appeal the matter must be pending before this Court and since the time to file the Notice of Intent was running to be filed in this Court, the Notice of Intent had to be filed for this Court to have jurisdiction so this Court could hear the Motion. The Motion was simply again to remand the matter to the Commission to rule on whether or not it would consider this additional evidence pursuant to its Rules. Therefore again this entire paragraph of the Decision is unfortunately wrong. The Commission has never ruled on the submission of this evidence.

Further, there are several principles of law that were overlooked or misconstrued in the Court's decision in this matter.

A. This is a workers' compensation claim and the laws that apply to it must be given a liberal construction.

"Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents from becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws shall be liberally construed in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted and to avoid any incongruous or harsh results." Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

B. The Workers' Compensation Act and the Administrative Procedures Act are statutes in derogation of the common law and especially the constitutional right to trial by jury and this Court has stated, "As workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we must strictly construe such statutes, leaving it to the Legislature to define any ambiguities. Cox v. BellSouth Telecommunications, Inc., supra.

C. The Claimant is entitled to notice both under concepts of due process and under the Commission's Rules and Regulations of the issues for hearing. "If there is such a thing as due process of law, under it a litigant is entitled

to notice of the issues to be met on trial, hearing or appeal. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712; SC Workers' Compensation Rule 67-611(B)(1), requires, "filing a Form 58 and Proof of Service at least ten (10) days before the Hearing with the Hearing Commissioner's office identified on the Hearing Notice. Complete the Form 58 and give the names and addresses of persons known to the parties or counsel known to be witnesses concerning the facts of the case. . . ."

D. The Court should apply the lost document analysis from Lancaster v. Lee, 71 S.C. 280, 51 S.E. 139 (1905) and the analysis from Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (2007); and the analysis and wisdom of the Court's decision in Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117, reh. den., (SC App. 2010) to this request to let the Commission consider this evidence.

Applying these principles to the case at bar, since the workers' right to trial by jury has been taken away, wherein there is a division between the jury which is the finder of fact and the judge which is the finder of the law, and those are merged into one administrative hearing officer, our Appellate Courts have created presumptions and have liberally allowed evidence into the Record to help the injured worker ensure that his case and claim are fully heard. This liberal

construction of the Act in favor of benefits to the injured worker should be applied in reference to all aspects including whether or not the injured worker should be given the opportunity to submit after discovered evidence, in the interest of Justice and where there is no prejudice to the Defendants. Morgan v. JPS Automotive, Inc., 321 S.C. 201, 467 S.E.2d 457, cert. granted, cert. dismissed (SC App. 1996).

This Court has also applied a strict construction to the Act and the Full Commission under the wording of SC Code §42-17-50 is allowed to, "receive further evidence" and under Reg. 67-611 the parties are required to file a Pre-Hearing Brief and to list the witnesses that will be submitted. In this case, in the initial Pre-Hearing Brief the witness who testified contrary to that of the Claimant and challenged his testimony as to how much he would be paid was not even listed on the Defendants' Pre-Hearing Brief. It was not until seven (7) days before the Hearing that she was listed which is in violation of the Commission Regulations. The Claimant was therefore not on notice that anything other than his testimony would be necessary to establish his position. There is absolutely nothing to place him on notice that his testimony and his challenge to the average weekly wage would be challenged.

Further there is no evidence in the Record that the Claimant knew that he had a card or that he still had the card that he sought permission of this Court to remand to the Commission so that the Commission could decide whether or not it would admit that card into evidence as after discovered evidence. The Appellant would respectfully submit that the Court should view this issue under the lost document concept as set forth in our legal precedent in Lancaster v. Lee, supra, wherein the document was found subsequent to the hearing but well within the time that it could be submitted. Further, the Appellant should no more be required to cull through every piece of paper and record that he had to try to find a card that he did not know at the time of the hearing that he had, similar to the holding of the Court in Gecy v. Bagwell, supra, where a party should not be required to cull through the voter records to see if any potential voters could be challenged at an election and especially not in this case where he was not on notice that his credibility and testimony under oath would be challenged in that regard by the Defendants.

Further, even under the standard applied by Judge Pieper in his Order that evidence is material when there is a logical or rational connection between the facts sought to be presented and a matter of fact at issue in a case or as Judge

Pieper recites to from Black's Law Dictionary that it is evidence having some logical connection with the facts of consequence or the issues, this evidence is unquestionably material. Where the Hearing Commissioner in part, based his decision according to the Findings of Fact that he made, on the fact that he discredited the Claimant's testimony concerning the fact that he would be given \$.50 per mile by Bulldog Hiway Express if he came to work for them because the Claimant failed to submit any witness testimony or documentary evidence to support his claim; this documentary evidence of that fact is definitely material under the standard applied by Judge Pieper and that has been applied by this Court. While the Appellant is well aware that this court cites to this in its Opinion, it does not cite any standard that it applied to materiality and would ask the Court to reconsider this in light of the materiality standard that has been applied by the Court as set out in Judge Pieper's Order. If that standard is applied, there is no question that this card (unless it is not real) is material. While the Court cites in the Opinion to the back of the card which confirms the Claimant's testimony of \$.50 per loaded mile, the Court in the Opinion only states that the Claimant "alleges" that he received this card from Bulldog Hiway Express. However the front of the card ought to in fairness be cited in the

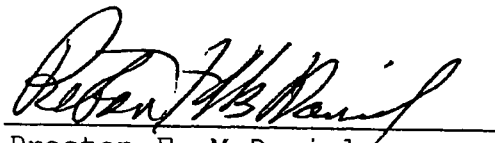
Opinion as well if the Court is going to tell the bench and bar that this evidence is not material, so that the bench and bar will know that the front of the card specifically refers to Bulldog Hiway Express and is on its face a card from that company. Due to the wording of the Opinion, the Appellant is lead to believe the Court overlooked this. Whether it is or not, at least the Claimant and the Commission should be allowed to ask that question of company officials at a hearing under cross-examination.

As to the second prong of the test, that must be applied in light of both a liberal interpretation in favor of benefits to the injured worker and the injured worked being allowed to fully present any evidence available and in accordance with the provisions of the Act which allows the Full Commission Panel to receive further evidence without any other criteria being met other than their decision whether or not to receive that evidence. Further, as to this prong this Court should again apply the lost document concept and the previous precedents of the Court that a litigant is not required to cull through every piece of paper they have at a time that they do not know or have not been placed on notice that their testimony or evidence is going to be challenged on a particular point which would require them to present every such piece of documentary evidence. In reference to this

issue, the Appellant would again request that the Opinion be withdrawn and that the appeal be held in abeyance and this matter remanded to the Commission to consider this additional evidence and to then either modify or reaffirm its decision. That is a decision that should be left up to the Commission and that was and is the only request that the Appellant has made in this matter.

For all the foregoing reasons, the Court should withdraw the Opinion and issue a new or Amended Opinion, or if it finds that the evidence sought to be admitted is material and applies the lost document and discovery analysis of our precedents concerning such documentary evidence and remands this matter to the Commission, the Opinion should be withdrawn and this matter remanded to the Commission for consideration of the additional evidence and then this matter reconsidered in light of the Commission's decision.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Preston F. McDaniel", is written over a horizontal line.

Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Appellant

February 28, 2013

The South Carolina Court of Appeals

Thomas Lee Brown, Appellant,

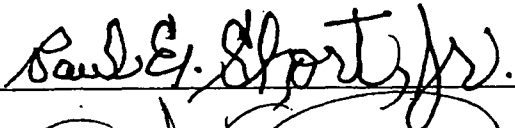
v.

Peoplease Corporation and ARCH Insurance Company
c/o Gallagher Bassett Services Inc., Respondents.

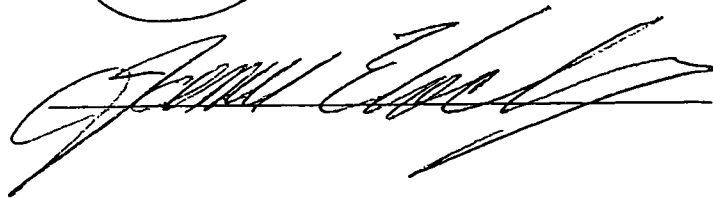
Appellate Case No. 2011-196726

ORDER

After a careful consideration of the Petition for Rehearing, the Court has decided to issue a substituted opinion. It is, therefore, ordered that the Petition for Rehearing be denied and the earlier opinion, Number 5082, be withdrawn and substituted with the attached opinion.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Weston Adams, III
Helen Faith Hiser
Preston F. McDaniel
Virginia L. Crocker

FILED

27 Mar 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Lee Brown, Appellant,

v.

Peoplease Corporation and ARCH Insurance Company,
c/o Gallagher Bassett Services, Inc., Respondents.

Appellate Case No. 2011-196726

Appeal From The Workers' Compensation Commission

Opinion No. 5082

Heard October 16, 2012 – Filed February 13, 2013

Withdrawn, Substituted and Refiled March 27, 2013

AFFIRMED

Preston F. McDaniel, of the McDaniel Law Firm, of
Columbia, for Appellant.

Weston Adams, III, and Helen Faith Hiser, both of
McAngus Goudelock & Courie, LLC, of Columbia, for
Respondents.

SHORT, J.: In this workers' compensation case arising out of an automobile accident, Thomas Brown appeals, arguing: (1) the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred by (a) not granting him lifetime medical care for his lower back problems, (b) not raising the compensation rate to \$591.73, and (c) not writing its order; and (2) the court of

appeals erred by denying Brown's motion for leave to present additional evidence to the Workers' Compensation Commission (the Commission) pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We affirm.

FACTS

On May 2, 2008, a passenger vehicle collided with the truck Brown was driving. At the time of the accident, Peoplease Corporation employed Brown to drive a truck for Bulldog Trucking, and Brown had been working for the company for approximately 16 weeks. After the accident, doctors treated Brown for pain in the cervical region of his neck and performed two surgeries on his neck. Brown's diabetes also worsened following the accident, and he is now insulin dependent.

Brown filed a Form 50 on July 13, 2010, seeking an award for permanent and total disability benefits with lifetime medical care for his neck, back, and arm pain from the accident. Peoplease Corporation and Arch Insurance Company, c/o Gallagher Bassett Services, Inc., (collectively, Respondents) admitted Brown sustained a compensable injury by accident arising out of and in the course of his employment; however, they denied Brown sustained injuries to his lower back and arms.

On October 22, 2010, the single commissioner heard the matter. In his order, the commissioner noted the only issues before him were a determination of Brown's entitlement to a disability award and the resulting average weekly wage and compensation rate to be applied. He determined Brown is permanently and totally disabled based on the combination of his cervical injury and the aggravation of his underlying diabetes; however, he found no specific medical report tied Brown's lumbar (lower back) problems to his injury at work. Therefore, he ordered Respondents to provide Brown with lifetime, causally-related medical treatment for his cervical spine and diabetes. The commissioner also found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. Thus, he calculated the average weekly wage based on the salary and income a top producer for Bulldog would make per year. This amounted to \$38,500 per year, resulting in an average weekly wage of \$740.38 and a compensation rate of \$493.84.

Brown appealed to the Appellate Panel, arguing the commissioner erred in not awarding him (1) lifetime medical care for his lower back and legs and (2) a higher average weekly wage and compensation rate. The Appellate Panel heard the

matter on March 21, 2011. Thereafter, it affirmed the single commissioner's factual findings and conclusions of law. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). "Where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

LAW/ANALYSIS

I. Lifetime Medical Care

Brown argues the Appellate Panel erred in denying him lifetime medical care for his lower back problems. We disagree.

This court must affirm the Appellate Panel's findings of fact if they are supported by substantial evidence. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial

evidence." *Id.* This court may not substitute its judgment for that of the agency's as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Id.* at 339, 513 S.E.2d at 845. When determining if a claimant has established causation, the Appellate Panel has discretion to weigh and consider all the evidence, both lay and expert. *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Id.* The Appellate Panel has the final determination of witness credibility and the weight to be accorded the evidence. *Id.*

In his order, the commissioner stated that *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984), "calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases." *See id.* at 471, 313 S.E.2d at 41 (noting the back is "a much more complicated area of the body," which requires "a higher degree of expertise than was presented to determine the degree of . . . loss of use"). He then found Brown presented "no specific medical report that ties the lumbar [lower back] problems to the injury at work."

Brown argues the commissioner overlooked or disregarded the undisputed evidence in the record that his lower back problems were caused by and stemmed from the accident. In support of his argument, Brown submits that on July 6, 2008, two months after the accident, he went to the emergency room complaining of lower back pain. The report notes, "History obtained from patient." The admission notes state Brown indicated he was in an automobile accident two months prior to when he developed the pain, and he does a lot of heavy lifting at work, which he thinks exacerbated the pain. However, he denied any back pain when a nurse assessed him. Brown's back was x-rayed, and the hospital discharged him with a lumbosacral strain and prescribed him Percocet, a drug for pain.

On July 10, 2008, Brown saw Dr. Abu-Ata, who noted Brown told him he was in a car accident two months prior, and afterwards, he started having neck and back pain. Brown told Dr. Abu-Ata "he had x-rays for his spine that were negative." Dr. Abu-Ata "did a nerve conduction study/EMG for him that was normal and that showed no evidence of cervical or lumbosacral peri-radikulopathy." He then scheduled Brown for a magnetic resonance imaging (MRI) of his cervical spine and lower back. The lower back MRI revealed "mild to moderate degenerative disc disease at L3-4." However, the cervical spine MRI indicated Brown had

"moderately severe degenerative disc/osteophyte disease of the cervical spine," and Dr. Abu-Ata gave him an emergency referral to Dr. Scott Boyd, a neurosurgeon.

On August 4, 2008, Dr. Boyd determined Brown had cervical stenosis and scheduled him for an anterior cervical discectomy and fusion on September 2, 2008. In February 2010, Dr. Boyd performed a second cervical fusion on Brown. In relation to his claim for workers' compensation, Brown sent Dr. Boyd a letter that stated:

Is it your opinion to a reasonable degree of medical certainty that the problems that [Brown] has with his neck and back and his need for medical care either stem directly from the automobile accident of May 2, 2008[,] or the accident aggravated and caused to become symptomatic a pre-existing conditions [sic] in his neck and back which resulted in the need for medical care?

Dr. Boyd checked "yes" and signed the letter. However, Dr. Boyd also signed a note excusing Brown from work, which stated: "Mr. Brown is having *back* surgery 09/02/08. He will be out of work until approximately 3 weeks after surgery." (Emphasis added.) Brown's first cervical fusion was on September 2, 2008. Therefore, Respondents contend Dr. Boyd interchangeably used the word "back" to refer to Brown's "neck." Further, Dr. Leonard Forrest did an independent medical evaluation of Brown, and although he notes Brown told him "his neck-related symptoms have always been worse than the low back related symptoms," he stated he did "not see any studies of a lumbar spine." He also stated that although Brown's back problems "certainly seem[] to be related to the motor vehicle accident for the same reason as noted above, [it] has not been evaluated adequately at this point."

Brown's doctors did not perform any surgeries or procedures on his lower back, and the only treatment given to Brown for his lower back was the Percocet given to him at the emergency room. Brown also testified he has not had any surgery or medical treatment to his lower back. When asked about his lower back pain, Brown stated, "[I]t starts from the back of my neck and goes down and then sometimes it varies also. . . . it feels different all the time. I really couldn't pinpoint [it] in particular." Hence, even Brown could not specifically testify he experienced lumbar pain. Also, although "back" pain is referred to in the record, the only medical evidence specifically relating to Brown's lower back pain is the emergency

room visit. Therefore, we find the few medical references in the record are insufficient to prove a causal link, and the substantial evidence in the record supports the Appellate Panel's decision that Brown presented no medical evidence that related his lumbar problems to the accident.

II. Compensation Rate

Brown argues the Appellate Panel erred in not raising his compensation rate to \$591.73. We disagree.

Section 42-1-40 of the South Carolina Code provides four alternative methods for the commission to use to calculate the average wage. S.C. Code Ann. § 42-1-40 (Supp. 2012); see *Pilgrim v. Eaton*, 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). The primary method of calculation requires that the "[a]verage weekly wage" must be calculated by taking the total wages paid for the last four quarters . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40 (Supp. 2012). However, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40 (Supp. 2012). "The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002) (quoting *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

Brown alleged that at the time of the accident, his weekly wages were \$589.69, which resulted in a compensation rate of \$393.14. However, he sought a deviation in the calculation of his average weekly wage. He presented evidence that he worked for Boyd Brothers Trucking prior to working for Peoplease, and based on his income as reported on his W-2, he had an average weekly wage of \$887.55 with a resulting compensation rate of \$591.73. Brown also testified he thought Bulldog was going to pay him a rate of fifty cents per mile; however, he could not identify who at Bulldog told him that. Monica Reese, corporate counsel for Peoplease, testified she reviews every employment contract and completes the Form 20 for every workers' compensation claim. She testified she reviewed the payroll of all sixty similarly-situated drivers and determined Brown's wages would be approximately \$26,000 for the year. She testified the high end of the salary that drivers could earn is forty-two cents per mile, which is approximately \$38,500 per

year. She did not know of anyone who would have told Brown he would make fifty cents per mile.

Additionally, Brown submitted paystubs he alleged showed Bulldog was paying him \$1.00 per mile. However, the paystubs indicate the payment on the check was calculated at a "Rate" of "\$1.00" for "*Hours*" of work. (Emphasis added.) Even at the hearing before the Appellate Panel, Brown's counsel stated: "[I]n our Pre-hearing Brief we submitted copies of his check and on his check – the four or five copies of the check we submitted it said that he was making \$1.00 dollar an *hour*." (Emphasis added.) The commissioner asked him if that was correct, and counsel stated: "Excuse me, \$1.00 dollar a *mile*." (Emphasis added.) He then continued to say, "But in other words not only does it support my client's testimony that he was going to make \$.50 cents an *hour*" (Emphasis added.) Therefore, the evidence does not support Brown's argument the record contains evidence showing Bulldog was paying him one dollar per mile.

The commissioner noted Brown presented no documentary evidence to support his testimony that Bulldog promised him fifty cents per mile, and he did not identify the exact person that told him that at the time of employment. Nevertheless, the commissioner found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. As a result, the commissioner determined the fair average weekly wage was \$740.38 with a resulting compensation rate of \$493.84. Therefore, the commissioner assumed Brown would eventually earn the highest amount a driver in his situation could earn and took into account possible future earnings and wage increases in calculating his average weekly wage. We find no error.

III. Order

Brown argues the Appellate Panel erred in not writing its own order. We disagree.

On April 1, 2011, Judicial Director Virginia Crocker emailed a letter to all counsel, stating the Appellate Panel "has considered the matter and find[s] a full affirmation of the Single Commissioner's Decision and Order." The letter requested counsel for Respondents "prepare a proposed order with copies for each Party; and submit to the Judicial Department within thirty (30) days of this notice." It also requested the order "recite[] the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order." Further, the letter stated "the

Commissioners reserved the right to modify and/or delete any or all portions of the submitted decision and order."

We find no merit to Brown's argument. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 292 (2011) (noting the "Appellate Panel of the Commission unanimously upheld the commissioner's order and adopted the findings of fact and conclusions of law contained therein in full"); *Matute v. Palmetto Health Baptist*, 391 S.C. 291, 295, 705 S.E.2d 472, 474 (Ct. App. 2011) (discussing without comment the single commissioner's receipt of the claimant's proposed order).

IV. Motion for Remand

Brown argues this court erred in denying his motion for leave to present additional evidence to the Workers' Compensation Commission pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We disagree.

Section 1-23-380 of Administrative Procedures Act provides that a "party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" of the agency decision by filing a petition for review in the court of appeals. S.C. Code Ann. § 1-23-380 (Supp. 2012).¹ Section 1-23-380(3) provides that pursuant to the filing of a petition for review, the party may also apply to the court for leave to present additional evidence, and the court may order the additional evidence to be taken before the agency if "it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." S.C. Code Ann. § 1-23-380(3) (Supp. 2012).

Brown filed his notice of appeal with this court on July 28, 2011. The same day, Brown also filed with this court a motion for leave to present additional evidence to the Workers' Compensation Commission and to stay the appeal pending the remand to the Commission. In his memorandum in support of his motion, Brown sought to introduce a photocopy of a card he found while going through his

¹ This section was amended in 2006 to provide for review by an administrative law judge and appeal to the court of appeals instead of the circuit court. 2006 Act No. 387, § 2, eff. July 1, 2006. Because this case began in 2010, Brown's appeal was to this court.

records, which he claimed someone gave him when he applied with Bulldog. The back of the card states: "Run Legal: 50¢ per loaded mile." Brown asserted the additional evidence was material because, in making his decision, the commissioner relied on the lack of documentary evidence to support Brown's testimony. By order dated November 2, 2011, this court denied Brown's motion, finding Brown "presented no good reasons for his failure to present the evidence during the hearing before the single commissioner and the Appellate Panel."

In ruling on an application to submit additional evidence, this court should consider two factors: (1) the materiality of the additional evidence; and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. S.C. Code Ann. § 1-23-380(3) (Supp. 2012). After reviewing the record, we find this court correctly determined the additional evidence Brown sought to offer is not material. Additionally, we find this court correctly determined Brown presented no good reason for failing to present the evidence at the hearing before the commissioner and the Appellate Panel. Therefore, this court correctly denied Brown's motion. *See Byers v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 243, 245, 407 S.E.2d 653, 654-55 (1991) (finding the decision to hear additional evidence under section 1-23-380(e), prior to the statute's amendment, was "a matter within the sound decision of the trial judge" and the appellate court's proper standard for review was "whether the circuit judge committed an error of law in remanding the case to the Commission to hear additional evidence"); *id.* (stating that "[i]n ruling on an application under subsection (e), the [c]ircuit [c]ourt should have considered two factors: the materiality of the additional evidence and the existence of a good reason for the failure to introduce such evidence at the original hearing"); *id.* (finding any additional evidence the petitioner sought to offer was not material to the Commission's determination and holding the trial judge was controlled by an error of law in making his determination on the materiality of the additional evidence).

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.