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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Appellate Panel of the Full Commission

Claim Number: 1013312

RECEIVED

JUN 18 2012

SC COURT OF APPEALS

Dustin Griffith, EmployeeRespondent.

v.

Meadow River Lumber Company, Employer,.....Respondent.

J & A and Sons Recycling, Inc., Employer,.....Respondent.

South Carolina Uninsured Employers' Fund, Carrier,Respondent.

and

Rubber Recovery, Inc., Employer, and Twin City Fire Insurance, Carrier, Appellants.

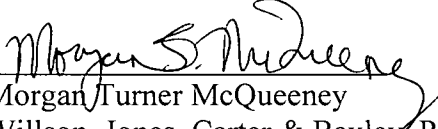
NOTICE OF APPEAL

The Appellants, Rubber Recovery, Inc. and Twin City Fire Insurance, appeal the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission filed on May 15, 2012. Appellants received written notice of entry for this Order on May 17, 2012. As grounds for this appeal, the Appellants raise the following issues:

1. Did the Workers' Compensation Commission err in finding Meadow River was contracted to assist Rubber Recovery in a steel demolition project?
2. Did the Workers' Compensation Commission err in finding that Rubber Recovery undertook the steel demolition project and contracted with Meadow River to assist them with this project?
3. Did the Workers' Compensation Commission err in finding that based on the evidence and the record as a whole, Ross Pirastah and Cal Garland directed the steel demolition project together?
4. Did the Workers' Compensation Commission err in finding that based on the evidence and the record as a whole, managers and subordinates from both Rubber Recovery and Meadow River participated in and were necessary to the successful completion of the steel demolition project?

5. Did the Workers' Compensation Commission err in finding that Rubber Recovery/Twin City is to pay all causally related medicals?
6. Did the Workers' Compensation Commission err in finding that the Uninsured Employers Fund, J & A Recycling, and Meadow River are released as liable parties?
7. Did the Workers' Compensation Commission err in finding that the Claimant has been temporarily and totally disabled from the date of the accident through present and is entitled to TTD in the amount of \$480.02 from June 16, 2010, through present and continuing until further Order of the Commission or by agreement of the parties?
8. Did the Workers' Compensation Commission err in finding that the Defendant Rubber Recovery is to pay temporary benefits from June 15, 2010, and continuing?
9. Did the Workers' Compensation Commission err in finding that the first and second *Woodard v. Westvaco Corp.*, 315 S.C. 329 (S.C. App. 1993) factors are met?
10. Did the Workers' Compensation Commission err in finding that the controlling law set forth in *Wright v. Westvaco Corp.*, 522 F.Supp. 775 (D.S.C. 1981) applies in this claim?
11. Did the Workers' Compensation Commission err in finding that the third *Woodard* factor is met by viewing the testimony and other evidence in the record as a whole and specifically by considering the overwhelming testimony from both Meadow River and Rubber Recoveries employees in addition to the other evidence that Rubber Recovery participated in the steel demolition project from start to finish providing labor and equipment necessary to the successful completion of the project?
12. Did the Workers' Compensation Commission err in finding that Twin City Fire Insurance Company shall pay for, provide, and direct all the past, present, and future medical expenses that are reasonable and necessary and causally related to Claimant's injuries?

June 14, 2012


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THE STATE OF SOUTH CAROLINA

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APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Claim Number: 1013312

RECEIVED JUN 18 2012 SC COURT OF APPEALS

Dustin Griffith, Employee Respondent.

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J & A and Sons Recycling, Inc., Employer, Respondent.

South Carolina Uninsured Employers' Fund, Carrier, Respondent.

and

Rubber Recovery, Inc., Employer, and Twin City Fire Insurance, Carrier, Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by depositing a copy of the document in the United States mail, first class postage prepaid, on June 14, 2012, to counsel of record for Dustin Griffith, David L. Hoffman, Jr., Esquire, Hoffman Law Firm, 7087 Rivers Avenue, N. Charleston, SC 29406; counsel of record for South Carolina Uninsured Employers' Fund, Lisa C. Glover, Esquire, Uninsured Employers' Fund, 100 Executive Center Drive, Suite 101, Columbia, SC 29210; counsel of record for Meadow River Lumber Company, T. Jeff Goodwyn, Jr., Esquire, Goodwyn Law Firm, LLC, 2519 Devine Street, Ste A., Columbia, SC 29205; pro se Respondent, Mr. Jimmy Brow, J and A & Sons Recycling, Inc., 810 S. Lee St., Suwanee, GA 31548; and Ms. Virginia L. Crocker, Judicial Director, South Carolina Workers' Compensation Commission, P.O. Box 1715, Columbia, SC 29202-1715.

June 14, 2012

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June 14, 2012

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

Re: Dustin Griffith vs. Rubber Recovery/J & A and Sons Recycling, Inc./ Meadow River Lumber Company/South Carolina Uninsured Employers' Fund
WCC File No.: 1013312 DOI: 6/15/2010
Carrier: Twin City Fire Insurance Company & South Carolina Uninsured Employers' Fund
Claim No.: YZE31437C
WJC&B File No.: 0100.01203

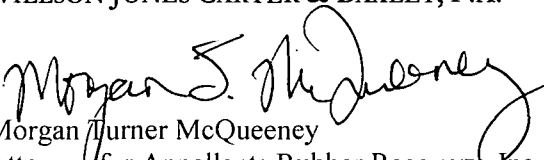
Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

- (1) Proof of Service on the Notice of Appeal on the Respondents.
- (2) A copy of the Order which is to be challenged on appeal.
- (3) A filing fee of \$100.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.


Morgan Turner McQueeney
Attorney for Appellants Rubber Recovery, Inc.
and Twin City Fire Insurance Company

MTM/Ins
Enclosures

cc: Virginia Crocker, Judicial Director, SC Workers' Compensation Commission
David L. Hoffman, Jr., Esquire
Lisa C. Glover, Esquire
T. Jeff Goodwyn, Jr., Esquire
Mr. Jimmy Brow of J & A and Sons Recycling, Inc.
Mr. Chase Carter (via facsimile)

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SC Court of Appeals

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SOUTH CAROLINA COURT OF APPEALS
1015 SUMTER STREET
P.O. BOX 11629
COLUMBIA, SC 29211

STATEMENT OF THE CASE

This matter came before the South Carolina Workers' Compensation Full Commission on January 17, 2011, on appeal from the Amended Decision and Order of Commissioner G. Bryan Lyndon dated July 19, 2011. The Claimant contends that he sustained an accidental injury to his left arm, left shoulder, back, right arm, right shoulder, left leg, right foot, disfigurement when he was cutting steel I-beams with a torch 10 feet in the air. The I-beam sprung on Claimant knocking him to the ground landing on the previously cut steel beams on June 15, 2010. Claimant asserted he has not reached Maximum Medical Improvement (MMI). It is the Claimant's position that he is not a subcontractor or an independent contractor. The Claimant asserts that he is a direct employee of J & A and Sons Recycling, Inc. ("J&A") or Meadow River ("Meadow River"). Meadow River's position is that this job was sub-contracted to J&A and that the Claimant is an independent contractor or a direct employee of J&A. J&A's position is that this job was not sub-contracted to it and that Jimmy Brow, owner of J&A, was simply an employee of Meadow River. If Claimant is not found to be a direct employee of Meadow River or J&A, Claimant asserts that he is a statutory employee of Rubber Recovery, Inc. ("Rubber Recovery"). Meadow River's position is that if it is found to be the employer of the Claimant, Rubber Recovery is also liable as the upstream contractor pursuant to S.C. Code §42-1-400 as interpreted in Woodard v. Westvaco Corp., 315 S.C. 329 (S.C. App. 1993). South Carolina Uninsured Employer's Fund joined in Meadow River's position on this issue. Rubber Recovery's position is that it is not the employer of the Claimant and is not liable as an upstream contractor pursuant to S.C. Code §42-1-400 and as interpreted in *Wright v. Westvaco Corporation Defendants*, 522 F.Supp. 775 (D.C.S.C. 1981), *Glass v. Dow Chemical Company*,

316 S.C. 116, 447 S.E.2d 209 (S.C.App. 1994), and *Raines v. Gould, Incorporated*, 288 S.C. 541, 343 S.E.2d 655 (Ct.App. 1986).

If the Commission determines the Claimant is not a statutory employee of Rubber Recovery, then the Claimant asserts that the responsibility for payment of the claim rests with the WC Uninsured Employers' Fund as J&A and Meadow River were uninsured at the time of his accident. The Claimant asserts that he has not reached maximum medical improvement, is entitled to any and all causally related medical treatment and care, and that he is entitled to weekly workers' compensation TTD benefits from June 15, 2010 through present and continuing until further Order of the Commission.

By appeal, Rubber Recovery argues the following:

1. That the Single Commissioner erred in finding Meadow River was contracted to assist Rubber Recovery in a steel demolition project, the error being that Rubber Recovery was not in the trade, business, or occupation of demolition.
2. That the Single Commissioner erred in finding that on the issue of the level of Rubber Recovery's involvement in the steel demolition project, I gave little weight to the testimony of Ross Pirasteh, while I gave great weight to the consistent, corroborating testimony of the Claimant, Cal Garland, Scott Johnson, and Jimmy Brow, the error being there is no evidence to support such finding.
3. That the Single Commissioner erred in finding that Rubber Recovery undertook the steel demolition project and contracted with Meadow River to assist them with this project, the error being that Rubber Recovery was not in the trade, business, or occupation of demolition.
4. That the Single Commissioner erred in finding that based on the evidence and the record as a whole, Ross Pirastah and Cal Garland Directed the steel demolition project together, the error being there is no evidence to support such finding.
5. That the Single Commissioner erred in finding that based on the evidence and the record as a whole, managers and subordinates from both Rubber Recovery and Meadow River participated in and were necessary to the successful completion of the steel demolition project, the error being that Rubber Recovery was not in the trade, business; or occupation of demolition.

6. That the Single Commissioner erred in finding that Rubber Recovery/Twin City is to pay all causally related medicals, the error being there is no evidence to support such finding.
7. That the Single Commissioner erred in finding that the Uninsured Employers Fund, J&A Recycling, and Meadow River are released as liable parties, the error being there is no evidence to support such finding.
8. That the Single Commissioner erred in finding that the Claimant's average weekly wage is \$720.00, resulting in a compensation rate of \$480.02, the error being there is no evidence to support such finding.
9. That the Single Commissioner erred in finding that the Claimant has been temporarily and totally disabled from the date of the accident through present and is entitled to TTD in the amount of \$480.02 from June 16, 2010, through present and continuing until further Order of the Commission or by agreement of the parties, the error being there is no evidence to support such finding.
10. That the Single Commissioner erred in finding that the Defendant Rubber Recovery is to pay temporary benefits from June 15, 2010, and continuing, the error being there is no evidence to support such finding.
11. That the Single Commissioner erred in finding that the first and second *Woodard v. Westvaco Corp.*, 315 S.C. 329 (S.C. App. 1993) factors are met, the error being that Rubber Recovery is not in the trade, business, or occupation of demolition, and did not participate in demolition.
12. That the Single Commissioner erred in finding that the controlling law set forth in *Wright v. Westvaco Corp.*, 522 F.Supp. 775 (D.S.C. 1981) applies in this claim, the error being that this claim is distinguished from *Wright* in that the old equipment in the Rubber Recovery plant was not replaced with new equipment, in that Rubber Recovery's employees had never done jobs of similar magnitude and were not capable of proceeding with the demolition, and in that Rubber Recovery's employees were not in the trade, business, or occupation of demolition.
13. That the Single Commissioner erred in finding that the third *Woodard* factor is met by viewing the testimony and other evidence in the record as a whole and specifically by considering the overwhelming testimony from both Meadow River and Rubber Recoveries employees in addition to the other evidence that Rubber Recovery participated in the steel demolition project from start to finish providing labor and equipment necessary to the successful completion of the project, the error being that there is no evidence to support such finding.
14. That the Single Commissioner erred in finding that Twin City Fire Insurance Company shall pay for, provide, and direct all the past, present, and future medical

expenses that are reasonable and necessary and causally related to Claimant's injuries, the error being that there is no evidence to support such finding.

15. That the Single Commissioner erred in finding that the Claimant injured his left shoulder, back, right arm, right shoulder, left leg, and right foot in a compensable work-related accident that arose out of and in the course of his employment, the error being that there is no evidence to support such finding.

EVIDENCE OF THE CASE

The evidence includes the live oral testimony of Dustin Griffith, Jimmy Brow, Scott Vincent and Scott Johnson, the deposition testimony of Cal Garland, Ross Pirastah, Scott Johnson and Dustin Griffith, as well as the evidence submitted jointly through the APAs and exhibits is summarized as follows:

The Claimant was injured doing a steel demolition project at a damaged factory in Moncks Corner that was owned by Rubber Recovery. Rubber Recovery had contracted with Meadow River to assist them with the demolition. Meadow River is owned by Cal Garland and Rubber Recovery is owned by Ross Pirastah. The terms of the contract were that Meadow River and Rubber Recovery were to split the profits of the sale of the scrap steel after expenses were paid and these terms were set forth in an email between Cal Garland and Ross Pirastah dated April 9, 2010 (Meadow River's APA's, Exhibit #4).

Before the project began, Cal Garland of Meadow River approached Jimmy Brow of J&A to assist them in the demolition work. This assistance included providing employees to perform labor on the site and providing the necessary torching equipment. At some point during the demolition, but before the Claimant's accident, Jimmy Brow left this job. The employees Jimmy Brow originally provided stayed on as employees of Meadow River to complete the demolition. At the time of the Claimant's accident, he claimed he was working for Meadow River, however Meadow River had no workers' compensation insurance. If the Claimant and the

other workers originally provided by Jimmy Brow are considered as employees of Meadow River, Meadow River had four or more employees.

The Claimant was called as a witness and testified that is twenty-eight years old and is not married. He completed the ninth grade of high school, however dropped out in the tenth grade and earned his GED. (Hrg. Tr. p. 16). After dropping out of school following the ninth grade, the Claimant has worked manual labor. As far as prior work experience the Claimant indicated that he worked at Rainbow Irrigation for five years.

The Claimant came to work in South Carolina with one of the Defendants, Jimmy Brow, to do a demolition for Rubber Recovery (Hrg. Tr. p. 17). This was at the Rubber Recovery job site in Moncks Corner, South Carolina. The Claimant also indicated that more people came up with him to South Carolina along with Jimmy Brow, specifically Scott Vincent, Brock Powell, a guy named Mikey and a guy named Robbie. (Hrg. Tr. p. 18). The Claimant also indicated that in June of 2010, the time of his accident, he believed that he was working for Meadow River, because after Jimmy left they said that he was working for them now. The Claimant got his paychecks from Meadow River (Hrg. Tr. p. 18). At some point during the job at the Rubber Recovery site in Moncks Corner when Jimmy Brow advised the Claimant that he wasn't going to come back to work on the site. The Garlands advised Claimant that they would continue working the employees. (Hrg. Tr. p. 19). The Claimant indicated that while Jimmy had originally hired him, Cal Garland rehired him. (Hrg. Tr. p. 19).

During the time that Claimant worked at the Rubber Recovery site, his supervisor was Laurin Larson. Laurin Larson is affiliated with Meadow River (Hrg. Tr. p. 19). Also during this time Brian Garland of Meadow River supervised the Claimant. Also there during this time was an individual the Claimant only knew as Brandon, who was a guy at the Rubber Recovery plant

who helped with the clean out and getting things ready to be demolished (Hrg. Tr. p. 20). The Claimant also indicated there was a crane operator there as well as Scott Johnson, who was the plant manager. The Claimant indicated that Scott supplied tools, made sure that they had their torches and gasses and gasses and everything the employees needed to continue the job (Hrg. Tr. p. 21). The other employees there Brock, Scott, Robbie, Mike, and the others were employees just like the Claimant (Hrg. Tr. p. 21). The Claimant indicated that there was nothing different about the way they were paid compared to him. He was paid hourly, making \$15.00 an hour. The Claimant was required to keep track of his hours and Laurin Larson of Meadow River also kept track of the hours. (Hrg. Tr. p. 21). The Claimant indicated that the hours were then reported to Cal Garland.

The Claimant indicated he had no supervisory responsibilities whatsoever on the job site and that Meadow River provided all the tools needed to do the job. The claimant also indicated that Meadow River provided the forklift and the front end loader which Claimant operated and was necessary for him to do his job, while Rubber Recovery had their crane there (Hrg. Tr. p. 22).

With regards to the right to fire, Claimant indicated that Laurin and the Garlands had the right to fire, and in fact they fired Mikey and Robbie. The Claimant recalled that Laurin Larson or one of the Garlands asked Robbie and Mike not to come back, that they didn't need their help any longer, and he also had a conversation with Cal Garland where Cal indicated that he had finally gotten rid of them. (Hrg. Tr. p. 23). The Claimant also indicated that people would inspect his work as well as tell them to do it again and tell him how to do it. The Claimant indicated that Laurin Larson and Brian Garland would direct the employees on what they wanted salvaged, how to cut it, and where to place it so that buyers could look at it. They also advised

him what to cut, when to cut it, and how to cut it. (Hrg. Tr. p. 24). The Claimant also indicated that Cal Garland himself was at the jobsite approximately two times a week (Hrg. Tr. p. 24).

The Claimant also indicated that if he wanted vacation or any kind of time off he would have to ask Laurin Larson for permission. Laurin would relay the request to the Garlands. This happened a couple of times when the Claimant would come up to the jobsite from Georgia, leaving Monday and showing up a couple hours late. The Claimant indicated that he would have to call Laurin Larson and let him know (Hrg. Tr. p. 24). Laurin also advised what time the Claimant would have to be there every day.

The Claimant indicated that he was never considered a subcontractor or an independent contractor, and that no one ever asked him to provide his own insurance. The Claimant did not have his own insurance at this job site and also indicated that he has never had his own insurance (Hrg. Tr. p. 25). The Claimant recalls a conversation that he had with Cal Garland after Jimmy Brow left the jobsite in which Cal Garland advised him that he was working for him and under his insurance (Hrg. Tr. p. 26). The Claimant also indicated that he was working approximately forty-five or more hours per week (Hrg. Tr. p. 26). The Claimant was asked to identify his paychecks that were submitted into evidence which he confirmed were checks that he had received while he was working for Meadow River on the Moncks Corner jobsite where he got injured (Hrg. Tr. p. 27). The Claimant also indicated that he had personally observed the other employees being paid checks on Meadow River's account.

The Claimant indicated that prior to this accident he had never had problems with his back, shoulders, arms, or legs that took him out of work or required any kind of extensive treatment (Hrg. Tr. p. 28). He also indicated that he couldn't recall ever filing a workers' compensation claim or a personal injury claim before this one (Hrg. Tr. p. 29).

The Claimant was asked to describe the accident that occurred on June 15, 2010. The Claimant indicated that he was probably about a story or so up cutting a mezzanine loose from the structure. The mezzanine had a bunch of pressure on it and once cut it sprung him off into cartwheels into a pile of metal. The Claimant indicated that Laurin Larson had advised him to cut that particular part because they had baggers there beside the mezzanine that they had actually sold and they wanted the baggers down. The Claimant indicated that following the accident he was having severe arm pains and back pains. The Claimant indicated that they had in the break room and they were trying to keep in from going into shock while waiting for the ambulance. The ambulance transported the Claimant to Trident in Moncks Corner where x-rays were taken of his arm, after which he was transported to MUSC. Dr. Shealy treated the Claimant through MUSC and has treated the Claimant from that point forward (Hrg. Tr. p. 30). The Claimant indicated that at the time of the hearing he is still pending on two surgeries, after having approximately ten to thirteen surgeries. The initial surgery was to his left elbow, left wrist, and he's also had surgery on the right arm as well (Hrg. Tr. p. 31). The Commissioner noted that the Claimant has prominent scars particularly on his left elbow and on his right wrist (Hrg. Tr. p. 32). The Claimant also indicated that his arm had gotten a lot smaller. When asked to describe all body parts affected, the Claimant indicated that his shoulder blades rub really bad, he has a lot of back pain in his shoulder blades, as well as his left elbow and his right wrist. The Claimant indicated that his left wrist is getting better. He has had a pin put in it but it's better than his right wrist, although he is still having problems with his left wrist as well. The Claimant also indicated he has a big indentation on his left leg where a piece of metal went across it and that has been indented since his accident (Hrg. Tr. p. 33). The Commissioner asked the Claimant to

observe his left arm and noted that it was viewable that his left arm looked smaller or was atrophied compared to his right (Hrg. Tr. p. 34).

The Claimant indicated that he has not worked since the accident and has had no kind of income. He also indicated that he hardly gets any use out of his left arm and his right arm is limited. He is still waiting on surgery for the right arm for a screw that's poking out and touching on the bones. The Claimant understands that his current work status from Dr. Shealy is that he is out of work (Hrg. Tr. p. 35).

With respect to whether Rubber Recovery participated in the steel demolition project, the Claimant testified that the steel demolition was a joint operation between Rubber Recovery and Meadow River (Hrg. Tr., pp. 47-51). The highlights of this testimony are below:

Q. Okay. So, it's your understanding that Ross [Pirastah] and Cal [Garland] were working together on this operation?

A. Yes.

(p. 48, ll 1-3).

Q: Can you read that for me and just repeat his question and answer.

A: (reading his prior deposition testimony) Question, "Were Rubber Recovery employees helping with your work? Answer, "Yes, sir." "Were they all along helping you with your work?" Answer was "Yes, sir." Question, "So, it was kind of a joint operation with Rubber Recovery and Meadow River?" "Yes, sir."

Q: Okay. And is that your testimony today?

A: Yes, sir.

Q: It's your opinion that it was a joint operation between you and the workers you were with, depending on what the Commissioner decides who you actual employer was, and the Rubber Recovery staff?

A: Yes, sir.

(Hrg. Tr., p. 48, l. 9 – p. 49, l. 1).

Q: Can you explain a little more for the Commissioner as who – who from Rubber Recovery were you working with on a day-to-day basis?

A: Scott, the plant manager.

Q: Scott Johnson?

A: Yes, sir.

Q: And that is who is in the back of the room?

A: Yes, sir.

Q: Okay.

A: And the crane operator; I'm not sure who he was, and a kid named Brandon and pretty much everybody – it was a joint thing. You know, we would go move to the next thing and tear it down, we would have to clean all the tire and stuff out from underneath of it, so...

Q: And who would help you clean the tires out?

A: It was Lonnie, Brandon, and –

Q: Some of the Rubber Recovery staff?

A: Yes, sir.

(Hrg. Tr., p. 49, ll. 2- 20).

The Claimant also testified that Rubber Recovery's plant manager, Scott Johnson, was his "go-to guy to get any kind of materials we needed" (Hrg. Tr., p. 50, ll. 10-11). The Claimant also testified that only Rubber Recovery employees operated the crane that was necessary to lower the larger pieces of steel from the mezzanines in the plant since Meadow River had no one qualified to operate the crane. (Hrg. Tr., p. 51, ll. 22-24).

Cal Garland's testimony confirmed the Claimant's testimony that the crane used in the operation was owned by Rubber Recovery and operated by a Rubber Recovery employee (Depo. of Cal Garland, p. 63, l.18 – p. 64, l. 7). Mr. Garland's testimony also confirmed the Claimant's testimony that the steel demolition operation was joint in nature and that the owner of Rubber Recovery, Ross Pirastah, was actively involved in directing the operation throughout (Depo. of Cal Garland, p. 63, l.18 – p. 64, l. 7).

The plant manager for Rubber Recovery, Scott Johnson, was also called to testify. He testified that Ross Pirastah "would handle all the management, supervision of the job." (Depo. of Scott Johnson, p. 18, l. 8). Mr. Johnson also confirmed Cal Garland's testimony that Ross Pirastah would direct the project with Cal Garland by walking through the plant together and deciding what the next item to be removed would be (Hrg. Tr., p. 100, ll. 1 – 4). Mr. Johnson's testimony also confirmed the Claimant's testimony that he did make himself available to the

Meadow River employees for obtaining various tools and equipment they would need on the job (Depo. of Scott Johnson, p. 13, l. 20 – p. 14, l. 3). Mr. Johnson's testimony confirmed that it was Rubber Recovery that provided both the crane and crane operator that we essential to the completion of the steel demolition operation (Hrg. Tr., p. 99, ll. 23-25). Scott Johnson also had Cal Garland fire a Meadow River employee based on a report that he was smoking marijuana on the job site (Depo. of Scott Johnson, p. 15, l. 13 – p. 16, l. 3).

Ross Pirastah testified that he knew little to nothing about virtually every important aspect of this case. Scott Vincent was also called as a witness. Scott Vincent testified that he is thirty-seven years old, single, and got his GED. Mr. Vincent has primarily done heavy labor since leaving high school. Mr. Vincent indicated that he is acquainted with the Claimant after meeting him on the Rubber Recovery job in Moncks Corner, South Carolina. Before the date of the hearing, the last time that Mr. Vincent saw the Claimant or spoke to the Claimant was the day of the accident (Hrg. Tr. p. 57).

With regard to how he came to work in South Carolina, Scott Vincent indicated that he went to Jimmy Brow's shop looking for work. Jimmy Brow needed workers in South Carolina so Vincent came up here to work. Mr. Vincent indicated that he was actually present when the Claimant was injured in June of 2010 at which time he indicated he was an employee of Meadow River. When asked to explain how he started with Jimmy and ended up with Meadow River Lumber Co., Mr. Vincent explained that they started with Jimmy and after Jimmy left then Meadow River hired them. Mr. Vincent indicated that Laurin Larson of Meadow River hired him as well as Cal Garland of Meadow River Lumber Co (Hrg. Tr. p. 59). Mr. Vincent also indicated that Laurin Larson was his supervisor at the time of the Claimant's accident, and had been his supervisor from the beginning, even when he started with Jimmy Brow. Mr. Vincent

indicated that no one else supervised him during that time. Mr. Vincent indicated his job duties while working for Meadow River were cutting down mezzanines, putting them in dumpsters, labor work, or whatever they needed him to do. (Hrg. Tr. p. 60). Mr. Vincent indicated the other employees there at the time were the Claimant, Laurin Larson, Brock Powell, Scott, Brandon, the crane operator, Robbie, and Mikey. Mr. Vincent indicated that these names listed were employees just like him. Mr. Vincent indicated that there was nothing different in the way those employees were paid compared to him and they were all doing the same kind of work as laborers (Hrg. Tr. p. 61). He also indicated that all employees had the same supervisor who was Laurin Larson (Hrg. Tr. p. 62). With regard to pay, Mr. Vincent indicated that he was started out at \$10.00 an hour, and after Jimmy left and he started working for Meadow River they gave him \$12.00 an hour. He also confirmed that Laurin Larson kept track of the hours he worked and sent them in to Meadow River Lumber Co. (Hrg. Tr. p. 62). Scott Vincent observed all employees getting checks which he was able to see were Meadow River checks (Hrg. Tr. p. 63).

Mr. Vincent testified that Meadow River provided the tools such as torches, forklifts, and lulls, and that the Claimant did not provide any of his own tools. With regard to the right to fire, Scott Vincent indicated that Laurin was his boss so he supposed he could fire and hire who he wanted and confirmed that Laurin Larson and Call Garland had fired Robbie and Mike. He also went on to state that Laurin was the supervisor so he told them what to cut down and where to put it daily. This was for the Claimant as well. He also indicated that if you wanted vacation time off you would have to ask somebody and that Laurin Larson told them what time to be there. (Hrg. Tr. p. 65). Scott Vincent never heard Cal Garland or anyone else ever ask the Claimant for his insurance paperwork (Hrg. Tr. p. 66). He also agreed that he had never heard the Claimant state that he was a subcontractor or an independent contractor. In fact, Scott

Vincent never heard at any point allegations raised that the Claimant was an independent contractor or a subcontractor (Hrg. Tr. p. 67).

Jimmy Brow, the owner of J & A and Sons Recycling was unrepresented at the time of the hearing, however was called to testify at the time of the hearing. Mr. Brow testified that he was thirty-three years old and married and is currently living in Kingsland, Georgia. Mr. Brow testified that he knew the Claimant because he has actually worked with him doing demolition jobs in the past. The Claimant had worked with him doing a demolition job at a paper plant where he was the foreman of the job (Hrg. Tr. p. 75). Mr. Brow was asked to explain how he came to work in South Carolina, to which he explained that Cal Garland had called him approximately thirty days before the project started and asked if he was interested in doing a project with him. Mr. Brow came up, looked at the job, and advised him that he would. Mr. Brow estimated that Cal Garland called him approximately fifteen to twenty days after that meeting and advised that he wasn't interested in doing the project with him, but that he would like him to come up and assist in getting the project started and make sure that it happened relatively quickly. Mr. Brow indicated that this was as an employee; that he got a salary of \$1,500.00 per week (Hrg. Tr. p. 76).

Mr. Brow reviewed paystubs and confirmed the employees were Brock, the Claimant, himself, Mike, Robert, and Scott and that these employees were present at the time (Hrg. Tr. p. 78). Jimmy Brow indicated that his supervisor who he reported to was Cal Garland, and that Laurin Larson was the guy who ran everything on the floor and told everybody what had to come out first and how it had to be taken out. (Hrg. Tr. p. 79) Mr. Brow also indicated that Cal Garland was on site approximately twice a week.

At some point, Mr. Brow did not like the way they were doing the job, feeling that it was unsafe and unorganized. He also confirmed the employees doing demolition work at the same time were Robbie, Scott, Brock, the Claimant, himself, Laurin Larson, and a gentlemen who drove around on the forklift. Mr. Brow indicated that all of these people were supervised by Laurin Larson regardless of how they got to that particular job site. Mr. Brow indicated that he had supervisory responsibilities over the Claimant while he was there, however he couldn't really tell anyone what to do because Laurin Larson oversaw him (Hrg. Tr. p. 81).

Mr. Brow indicated that the Claimant was never considered a subcontractor or an independent contractor, but that after the Claimant had fallen Cal Garland called him stating that he did not have insurance on him and that he hoped the Claimant had subcontractor insurance. Mr. Brow could not think of any way that Cal Garland would have thought the Claimant would have subcontractor insurance because they were all working for Meadow River and they should have had insurance on all of them. In fact, Jimmy Brow's understanding was that Meadow River did have insurance on him (Hrg. Tr. p. 82). Jimmy Brow indicated that after the accident Cal Garland also approached him asking where his insurance was to which did not reply. When asked to explain, he went on to state that that was because he had not been on the job at all, meaning that J & A and Sons Recycling had nothing to do with that job ever. The only thing that should have been with J & A and Sons Recycling's name on it was a paper where they had the Claimant and other people sign torches off J & A and Sons Recycling torches, which was not property of J & A and Sons Recycling (Hrg. Tr. p. 83). Mr. Brow explained a paper submitted by Rubber Recovery which stated the Claimant was picking up three torches, two victors, and one harrison on behalf of J & A and Sons Recycling, was after the Claimant had his accident and that they were not the property of J & A and Sons Recycling. Mr. Brow believed

that Cal Garland had the Claimant sign something on July 8th to cover himself and that is why he put property of J & A and Sons Recycling on the form (Hrg. Tr. p. 84).

With regard to the right to fire, Jimmy Brow indicated that Laurin Larson had the right to fire everybody and, in fact, fired his brother-in-law while he was working there. Mr. Brow also indicated that Laurin Larson would come through an inspect work and to tell them how to do it and what they wanted to be taken down (Hrg. Tr. p. 85). Mr. Brow indicated that even if he needed a day off he would have to ask permission and that he was never considered a subcontractor or an independent contractor. He also confirmed that no one ever asked him to provide his own insurance (Hrg. Tr. p. 86).

Jimmy Brow indicated that he had done several of these demolition jobs on his own and has provided insurance over the past ten years but it was not necessary on this job because he was working for Meadow River. He was not using J & A and Sons Recycling, he was an employee. Jimmy Brow also indicated that he had never heard Cal Garland or anyone else ask the Claimant for insurance paperwork, nor did he ever hear the Claimant say that he was a subcontractor or an independent contractor (Hrg. Tr. p. 86).

With regard to the joint nature of the project and the involvement of Rubber Recovery, Jimmy Brow testified that Ross Pirastah and Cal Garland both actively participated in the direction of the operation and that they would argue about how the operation should proceed (Hrg. Tr., p. 87, ll. 13 – 21). When asked if Rubber Recovery participated in the operation, Mr. Brow testified, “My honest opinion is they worked together on the whole operation.” (Hrg. Tr., p. 87, l. 22 – p. 88, l. 1).

The Claimant was originally seen on the date of accident at Trident Medical Center, with a chief complaint of injury to the left arm that occurred at work. X-rays revealed fracture of the

proximal ulna with dorsal angulation at the fracture site. The Claimant was referred to Orthopaedics.

During the course of the Claimant's treatment he was also seen in October and November of 2010 at Conway Medical Center as well as Nextstep Rehabilitation in September and October of 2010. Primarily the Claimant's treatment has occurred at MUSC under the care of Dr. Gerald Shealy. On the date of the accident, Dr. Gerald Shealy was the attending physician at MUSC and noted the Claimant as being a twenty-seven year old male who fell about six to seven feet landing on a hard surface onto his left elbow. Dr. Shealy noted that the Claimant had a proximal ulna and radius fracture and that it was a type of Monteggia fracture. The Claimant underwent his first operation the following day, an open repair of left proximal radius and ulna fracture with possible replacement of radial head. Claimant underwent another surgery on June 18, 2010, specifically a delayed closure of wound, posterior aspect of left elbow, open reduction and internal fixation of the left scaphoid. The Claimant returned to surgery again on June 23, 2010, stage repair debridement with simple closure of wound left forearm.

MUSC notes of July 23, 2010, as a twenty-seven year old white male who suffered a Monteggia fracture-dislocation of the left elbow as well as a fracture of the left scaphoid that were fixed on June 16, 2010 by Dr. Shealy. Notes also indicate the Claimant underwent radial head replacement with scaphoid screw as well as an ORIF of the proximal ulna. MUSC notes indicate that the Claimant is not progressing very well and is in the elbow brace at the time (Claimant's APA Submission p. 21). On August 20, 2010, MUSC also evaluated the Claimant's right hand, noted tenderness to the tenderness to the dorsum of the hand as well as pain over the proximal pole of the scaphoid. X-rays revealed the Claimant had a scaphoid wrist fracture as well as a nondisplaced triquetrum fracture on the right (Claimant's APA Submission p. 20). The

Claimant underwent surgery for the right arm on September 24, 2010, specifically an open reduction, internal fixation of the right scaphoid and autogenous bone graft from the distal radius (Claimant's APA Submission p. 18).

During the course of the Claimant's treatment with Dr. Shealy and MUSC he remained on a no work status at all times. The last note submitted into evidence was March 24, 2011, which continued the Claimant on a no work status (Claimant's APA Submission p. 1). The Claimant continued to treat with MUSC during this time and up until the time of the hearing. Patient notes indicate that the Claimant was progressing satisfactorily with regard to the left elbow and the right scaphoid fracture was custom fitted with arthosis (Claimant's APA Submission p. 13).

In January of 2011 the Claimant noted swelling and recurrence of pain in his left elbow. X-rays taken indicated that the Claimant had a fracture through the previous fracture of the proximal ulna which needed to be surgically fixed as well (Claimant's APA Submission p. 8). In February of 2011 MUSC notes from Dr. Shealy indicate that clinically and radiographically the ulna is healing however the Claimant's primary complaint is related to his radial head. Dr. Shealy noted the Claimant appeared to have loosening of the radial head prosthesis which was confirmed radiographically (Claimant's APA Submission p. 3).

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1985), 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.

Based upon the stipulations of the parties, the testimony and exhibit evidence received and produced at this hearing, the Full Commission Panel makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF THE FACT

1. That an Employer/Employee relationship existed on the date of accident between Dustin Griffith (Employee) and Meadow River Lumber Company (Employer).
2. That the Claimant injured left arm, left shoulder, back, right arm, right shoulder, left leg, and right foot in a compensable work-related accident that arose out of and in the course of his employment. He also has disfigurement.
3. That notice of the accident was properly given within the time period prescribed by statute.
4. That, based on the record and the evidence as a whole, the Claimant was neither a subcontractor nor an independent contractor. The Claimant was an employee of Meadow River at the time of his accident.
5. That the Claimant worked for Meadow River which was contracted to assist Rubber Recovery in a steel demolition project.
6. That based on the evidence and the record as a whole, Meadow River had the right to exercise and actually exercised control over the details of the Claimant's work and how it was to be performed.
7. That based on the evidence and the record as a whole, Meadow River paid the Claimant weekly, based on time sheets submitted by the Claimant showing hours he had worked.

8. That based on the evidence and the record as a whole, Meadow River provided the tools, supplies and equipment necessary for the Claimant to perform his work.

9. That based on the evidence and the record as a whole, Meadow River had the right to fire the Claimant.

10. That Meadow River had four or more employees employed in South Carolina, and was subject to the Act.

11. That Meadow River was in violation of the Act by having no workers' compensation insurance while Rubber Recovery was insured by Twin City Insurance Company.

12. On the issue of the level of Rubber Recovery's involvement in the steel demolition project, I gave little weight to the testimony of Ross Pirastah while I gave great weight to the consistent, corroborating testimony of the Claimant, Cal Garland, Scott Johnson, and Jimmy Brow.

13. That based on the evidence and the record as a whole, Rubber Recovery undertook the steel demolition project and contracted with Meadow River to assist them with this project.

14. That based on the evidence and the record as a whole, Ross Pirastah and Cal Garland directed the steel demolition project together.

15. That based on the evidence and the record as a whole, managers and subordinates from both Rubber Recovery and Meadow River participated in and were necessary to the successful completion of the steel demolition project.

16. That Rubber Recovery/Twin City is to pay all causally related medicals.

17. That the Uninsured Employers Fund J & A Recycling and Meadow River are released as liable parties.

18. That the Claimant has had multiple surgeries to his left and right arm and has not reached MMI.

19. That the Claimant needs more treatment and that such treatment will tend to lessen the period and degree of his disability.

20. That the Claimant's average weekly wage is \$720.00 resulting in a compensation rate of \$480.02.

21. That, the Claimant has been temporarily and totally disabled from the date of the accident through present and is entitled to TTD in the amount of \$480.02 from June 16, 2010, through present and continuing until further Order of the Commission or by agreement of the parties.

22. That the Defendant Rubber Recovery Company/Twin City Fire Insurance is to pay temporary total benefits from June 15, 2010 and continuing.

23. That Twin City is to direct causally related medical treatment.

CONCLUSIONS OF LAW

1. §42-1-40 of the South Carolina Code of Laws is applicable in defining "average weekly wage".

2. §42-1-100 of the South Carolina Code of Laws is applicable in defining "compensation".

3. §42-1-120 of the South Carolina Code of Laws is applicable in defining "disability".

4. §42-9-10 of the South Carolina Code of Laws is applicable in defining “disability”.
5. §42-1-130 of the South Carolina Code of Laws is applicable in defining “employee”.
6. §42-1-140 of the South Carolina Code of Laws is applicable in defining “employer”.
7. §42-1-150 of the South Carolina Code of Laws is applicable in defining “employment”.
8. §42-1-160 of the South Carolina Code of Laws is applicable in defining “injury and personal injury”.
9. §42-15-60 of the South Carolina Code of Laws is applicable in defining “medical, surgical, hospital and other treatment”.
10. §42-15-20 of the South Carolina Code of Laws is applicable in defining “notice of an accident given to employer”.
11. §42-9-30 (13) of the South Carolina Code of Laws is applicable in defining “loss of use of the arm”.
12. §42-9-30 (14) of the South Carolina Code of Laws is applicable in defining “loss of use of the shoulder”.
13. §42-9-30 (21) of the South Carolina Code of Laws is applicable in defining “loss of use of the back”.
14. §42-9-30 (16) of the South Carolina Code of Laws is applicable in defining “loss of use of the leg”.

15. §42-9-30 (23) of the South Carolina Code of Laws is applicable in defining “disfigurement”.

16. §42-9-30 (15) of the South Carolina Code of Laws is applicable in defining “loss of use of the foot”.

17. Meadow River was contracted by Rubber Recovery to assist it in the steel demolition project.

18. §42-1-400 of the South Carolina Code of Laws, as interpreted in Woodard v. Westvaco Corp., 315 S.C. 329 (S.C. App. 1993) is applicable in determining whether Rubber Recovery is a statutory employer as an upstream contractor.

19. Pursuant to Woodard v. Westvaco Corp., 315 S.C. 329 (S.C. App. 1993), if any one of the follow three factor are shown, Rubber Recovery will meet the test to be a statutory employer as an upstream contractor under §42-1-400: 1) Whether the activity is an important part of the trade or business; 2) Whether the activity is a necessary, essential, an integral part of the trade, business or occupation, and 3) Whether the activity has been performed by employees of the principal employer.

20. The first and second *Woodward* factors are met by viewing the testimony and other evidence in the record as a whole and specifically by considering both the fact that Rubber Recovery voluntarily undertook and participated in this steel demolition project and by the controlling law set forth in Wright v. Westvaco Corp., 522 F.Supp.775 (D.S.C. 1981) (the demolition of steel to make room for new equipment and to facilitate maintenance of existing equipment was considered to be an important part of the trade or business of the upstream contractor. *Wright* at 777).

21. The third *Woodward* factor is met by viewing the testimony and other evidence in the record as a whole and specifically by considering the overwhelming testimony from both Meadow River and Rubber Recoveries employees in addition to the other evidence that Rubber Recovery participated in the steel demolition project from start to finish providing labor and equipment necessary to the successful completion of the project.

22. That the Uninsured Employers Fund, J & A Recycling, and Meadow River are released as liable parties.

ORDER

NOW, THEREFORE, IT IS ORDERED

1. That the Claimant is entitled to receive temporary total disability benefits in the amount of \$480.02 from June 16, 2010, through present and continuing until further Order of the Commission or by agreement of the parties.

2. That the Twin City Fire Insurance Company shall pay for, provide and direct the all past, present, and future medical expenses that are reasonable and necessary and causally related to Claimant's injuries. This includes but is not limited to, prescriptions, prosthetic devices, doctors' appointments, diagnostic studies, surgeries, hospital care, physical therapy, and any related mileage incurred as a result thereof for the Claimant's injuries.

3. That the Uninsured Employers Fund, J & A Recycling, and Meadow River Lumber Co. are released as liable parties.

4. All other issues, including but not limited to permanency, are held in abeyance.

IT IS FURTHER ORDERED THAT the Decision and Order of the Hearing Commissioner filed in the above-captioned matter on July 19, 2011, is hereby affirmed in its entirety.

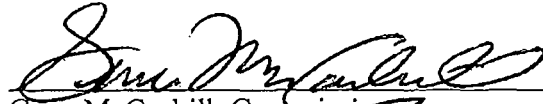
IT IS SO ORDERED.

AFFIRMED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Andrea Pope Roche, Commissioner



Gene McCaskill, Commissioner



T. Scott Beck, Commissioner

Columbia, South Carolina

5/15, 2012.

CERTIFICATE OF SERVICE

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

This 15 day of May 2012

By Valerie D. Keller
Administrative Assistant to the Commissioner

Lisa C. Glover
Morgan T. McPherson
T. Jeff Goodwyn
David L. Hoffman
J And A Soms (Reg. cert.)