

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

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AUG 15 2013

S.C. Supreme Court

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Petitioner.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Michael Jarrard,

Claimant/Respondent,

vs.

Federal Express,

Employer and Self-Insured/Petitioner.

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FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WOOD

IN THE CIRCUIT COURT

Case No. 10-CP-23-7077

ORDER

(Non-Jury Appeal from Workers' Compensation
Commission)

INTRODUCTION

In this non-jury appeal from an Order of the Full Commission of the Workers' Compensation Commission, this matter comes before this Court on Petitioner's appeal concerning the Respondent's entitlement to ongoing medical care and other treatment and whether the 3-member panel of the Workers' Compensation Commission properly affirmed the decision of the Single Commissioner.

Counsel for the Employer & Petitioner, Federal Express, and the Claimant & Respondent, Michael Jarrard, submitted memoranda of law related to the present appeal, which the court has considered.

A hearing was held on July 25, 2011. At the hearing, the Claimant & Respondent was represented by C. Daniel Vega. The Petitioner & Employer was represented by Russell T. Infinger.

STATEMENT OF THE CASE

This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard (hereinafter, "Respondent"), WCC No.: 0217907. The Respondent sustained work-related

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injuries due to exposure to chemical products resulting in damage to his pulmonary system and brain damage due to the aggravation of a pre-existing brain tumor. In a July 14, 2006 Order, Commissioner Childs found that the Respondent was entitled to full-time attendant care pursuant to a Life Care Plan. The Full Commission affirmed this Order in its entirety on January 8, 2007. In an Order dated October 3, 2008, Judge James R. Barber, III found that the "Full Commission rightly determined Claimant suffered injury by accident in the course of scope of employment." After the Petitioner failed to appeal that Order to the court of appeals, Commissioner Childs' initial Order became the controlling law of the claim.

A hearing was held on August 27, 2009, to determine the rate at which the Respondent's wife should be compensated for the attendant care Respondent's wife had been providing since November 2002 and whether the Respondent was entitled to bathroom repairs to better accommodate his disability. In his January 4, 2010 Order, Commissioner Wilkerson found Respondent's wife was entitled to payment for attendant care administered from November 14, 2002, to the present and continuing for the rest of the Respondent's life (affirming the July 14, 2006 Order). Respondent's wife was awarded payment at a rate of \$12.00 per hour, 20 hours per day, 7 days per week in order to compensate her for the full-time attendant care she provides for her husband. Commissioner Wilkerson also found Respondent was entitled to have his bathroom remodeled in order to accommodate the special needs that are the result of his disability. The Petitioner appealed the decision of the Commissioner Wilkerson to the Full Commission, where it was affirmed in its entirety in an order dated July 21, 2010.

Now, Petitioner, pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, petitions this court for judicial review of the Order of the South Carolina Workers' Compensation Commission dated July 21, 2010, and by reference the Order of July 14, 2006. Petitioner alleges the Commission made errors of law in finding Respondent was entitled to compensation for the

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attendant care his wife provides and that Respondent was entitled to repairs to his bathroom to suit his needs in light of his disability. Respondent contends the Commission's order was entirely in compliance with the Act and, therefore, Respondent is entitled to back payment of attendant care and payment for bathroom repairs.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this Court can reverse or modify the decision of the Workers' Compensation Commission if the substantial rights of the appellant 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. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

The Commission is the ultimate fact finder in workers' compensation cases. *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 541, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

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FINDINGS

After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court makes the following findings of law:

The totally disabling brain injury suffered by the Respondent entitles him to lifetime compensation and medical care, pursuant to S.C. Code Ann. § 42-15-60 (C). In coming to the decision to allow the attendant care in his January 4, 2010 Order, Commissioner Wilkerson reviewed a Life Care Plan prepared by Sarah Lustig, a Registered Nurse and Certified Life Care Planner. Nurse Lustig collaborated with the Respondent's treating physician, Dr. Edwin Scott, in forming this plan. Nurse Lustig and Dr. Scott agreed after extensive observation and collaboration that the Respondent was in need of full-time attendant care and that his wife was well-qualified to provide it. Upon a review of the cost of attendant care services in the surrounding area, Nurse Lustig concluded these services would cost \$12.00 per hour. Finally, Respondent's wife testified at the hearing she used all of her waking time to provide care for her husband, sleeping 4.5 interrupted hours per night. Defendants offered no contradicting evidence and the Full Commission found the witnesses to be credible and the plans of the medical professionals to be in accordance with substantial evidence. Therefore, Respondent was awarded attendant medical care to be provided by his wife at the rate of \$12.00 per hour for 20 hours per day and 7 days per week from November 14, 2002 to the present and continuing for the rest of the Respondent's life.

Additionally, in her Life Care Plan, Nurse Lustig testified Respondent would need remodeling work done on his bathroom in order to make it functional in light of his disabilities. Petitioner offered no contradicting evidence on this point. Like the award of the attendant care,

Commissioner Wilkerson found this award to be entirely reasonable and in accordance with substantial evidence.

Section 42-15-60 (C) of the South Carolina Code provides "[i]n cases in which total and permanent disability results, reasonable and necessary nursing services . . . and other treatment . . . shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit." S.C. Code Ann. § 42-15-60. Therefore, unlike other types of medical care where the Defendants have the right to control the medical provider, attendant care gives the employer less control. Additionally, the medical professionals in charge of the Respondent's case determined that the attendant care to be provided by his wife was entirely reasonable and necessary. The Full Commission reviewed this award and determined that it was in compliance with the statute in its July 21, 2010 Order.

In its appeal, Petitioner also alleges Respondent is not entitled to an award of attendant medical care from November 14, 2002, because the Respondent did not request this care until 2009. Petitioner contends an employee cannot receive back payment for medical care unless the employee has requested this care and the employer has notice of that request. The claimant contends, and a review of the Commission file demonstrates, claimant alleged entitlement to attendant care on multiple Form 58 pre-hearing briefs dated March 9, 2004 and May 18, 2004. The Order of Commissioner Childs issued July 14, 2006 included an award for attendant care with which defendants refused to comply. For this reason, the Claimant sought a hearing before Commissioner Wilkerson, who issued his Order granting the Claimant attendant care on January 4, 2010. This Order was later affirmed in its entirety by the Full Commission.

The Claimant also contends § 42-15-60 of the South Carolina Code requires employer to provide medical care "as reasonably may be required" once a compensable injury has occurred. S.C. Code Ann. § 42-15-60. The court of appeals has determined the commission is "not outside



its discretion in ordering the [employer] to pay for [medical treatment], once it determined the treatment was medically necessary." *Clark v. Aiken County Gov't*, 366 S.C. 102, 114, 620 S.E.2d 99, 100 (Ct. App. 2005). This is regardless of whether employer had notice of the treatment or the employee has requested that treatment. *Id.*

Neither the Workers' Compensation Act nor the case law reveals any interpretation in accordance with the Petitioner's reading of the requirements for notice in order for Claimant to receive compensable medical care. Once the employer has notice that the accident occurs, pursuant to § 42-15-20, it is obligated to provide reasonably necessary medical care to the employee, if the injury is a compensable one. S.C. Code Ann. § 42-15-20. In *Clark*, the employee received medical care without requesting it from his employer or giving his employer notice that he was to receive the care. *Clark* at 106-107, 620 S.E.2d at 101. However, because the treatment was determined to be medically necessary, neither prior notice nor a prior request was required in order for the Commission to order the employer to pay for the care. *Id.* at 114, 620 S.E.2d at 100. In the present case, the Commission found, as an uncontroverted fact, the attendant care is reasonably and medically necessary.

While South Carolina appellate courts have never decided a case regarding the payment of back benefits for attendant care, the Court of Appeals of North Carolina has upheld the retroactive payment of attendant care benefits. Like South Carolina, North Carolina does not require pre-approval of attendant care performed by a family member in a Workers' Compensation case. The court stated "N.C.G.S. § 97-90(a) does not require pre-approval of fees charged by health care providers, except for physicians, hospitals, or other medical facilities. Plaintiff's brother does not fit into the exceptions for N.C.G.S. § 97-90(a). This interpretation is consistent with our case law, which has allowed compensation to health care providers similar to plaintiff's brother, without the Commission's pre-approval." *Boylan v. Verizon Wireless*, 201

N.C. App. 81, 86, 685 S.E.2d 155, 159 (Ct. App. 2009) (quoting *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 253-54 (Ct. App. 2002)).

Boylan and its line of reasoning was favorably adopted in a case in the Court of Common Pleas of South Carolina, *McDaniel v. Hans Lenger, LLC*, 2011-CP-46-0464 (2011). In *McDaniel*, the Commissioner found Claimant required 24-hour attendant care since the date of the injury in 2006, but failed to award attendant care benefits until they were requested in 2009. *Id.* The court found that because Claimant was entitled to treatment and care between 2006 and 2009, the Commission committed an error of law in failing to award those benefits during that time. *Id.*

The final argument of Petitioner is that the Full Commission improperly affirmed the Order of the Single Commissioner because it did not come to a majority opinion in making this determination. Section 42-3-20 of the South Carolina Code allows three-member panels to review decisions of the Single Commissioner. S.C. Code Ann. § 42-3-20. It also states that "[t]he decisions of three-member panels have the same force and effect as full commission reviews." *Id.* The process by which these appeals take place is laid out in Regulation 67-709. S.C. Code Ann. Regs. 67-709. (2010). Subsection (E) allows for the Commission to modify the findings of the Single Commissioner but notes that "a vote to affirm and modify is deemed a vote to affirm." *Id.*

In the Full Commission's 2010 Order, Commissioner Huffstetler voted to affirm, Commissioner Williams voted to provide the benefits from 2005, and Commissioner Beck voted to provide the benefits from 2009. While the Commissioners noted their position on these issues, the Full Commission nevertheless affirmed the Single Commissioner's decision *in its entirety*. These other opinions did not affect the Commission's decision to affirm the award of attendant care benefits from 2002, and Commissioners Williams and Beck voted to affirm and

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modify. Regardless of this fact, the rulings of Commissioners Beck and Williams to award benefits only from the date of the request for that medical care is not in accordance with the previously discussed case law.

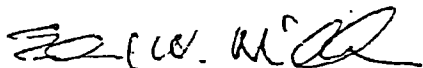
CONCLUSION

After due deliberation, review of the memoranda, case law, exhibits, and argument of counsel, the Court makes the following rulings:

Because the decision of the Full Commission in affirming Commissioner Wilkerson's 2010 Order was made in accordance with substantial evidence and without error of law, the Petitioner's appeal to overturn the award of Claimant's bathroom repairs and attendant care is **DENIED**;

The Order of the Full Commission, dated July 21, 2010, and by reference the Order of July 14, 2006, is hereby **AFFIRMED** by this Court, and the Claimant is entitled to bathroom repairs and attendant care; the attendant care is to be provided by his wife in accordance with the July 21, 2010 Order of Commissioner Wilkerson;

AND IT IS SO ORDERED!



The Honorable Edward W. Miller
Circuit Court Judge

Greenville, SC

Date: November 3, 2011

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Michael Jarrard,

Claimant/Respondent,

vs.

Federal Express,

Employer and Self-Insured/Petitioners.

2011 NOV - 7

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Case No. 11-CP-23-898

ORDER

(Non-Jury Appeal from Workers' Compensation
Commission)

INTRODUCTION

In this non-jury appeal from an Order of the Full Commission of the Workers' Compensation Commission, this matter comes before this Court on Petitioner's appeal concerning the Respondent's entitlement to a partial lump sum award as part of his Workers' Compensation claim.

Counsel for the Employer & Petitioner, Federal Express, and the Claimant & Respondent, Michael Jarrard, submitted memoranda of law related to the present appeal, which the court has considered.

A hearing was held on July 25, 2011. At the hearing, the Claimant & Respondent was represented by C. Daniel Vega. The Petitioner & Employer was represented by Russell T. Infinger.

STATEMENT OF THE CASE

This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard (hereinafter, "Respondent"), WCC No.: 0217907. The Respondent sustained injuries due to exposure to chemical products on the job resulting in damage to his pulmonary system and brain;

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and damage due to the aggravation of a pre-existing brain tumor. The Respondent was awarded lifetime medical care and treatment pursuant to § 42-9-10 for his physical brain injury, including full-time attendant care to be provided by his wife. The Respondent requested a partial lump sum payment in order to pay his attorney's fees and make repairs and additions to his home.

In an Order dated April 22, 2010, Commissioner Barden found that the Respondent's home is in need of repair after the Respondent submitted contractor bids detailing this repair and its cost. Commissioner Barden granted the fee petition for the Respondent's legal fees in this same Order. Ultimately, Commissioner Barden awarded \$9,900.00 for roof repair; replacement of the storage attachment, and replacement of windows at the Respondent's house; \$908.00 for the removal and replacement of the lavatory at the Respondent's house; \$5,500.00 for the installation of an HVAC unit at the Respondent's house; and \$169,253.27 for payment of the Respondent's legal fees. The Full Commission affirmed the Single Commissioner's decision and sustained the Order of the Single Commissioner in its entirety in its own Order, dated January 7, 2011.

The Petitioners, pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, petitioned this court for judicial review of the Orders of the South Carolina Workers' Compensation Commission dated April 22, 2010 and January 7, 2011. The Petitioners allege the Commission made errors of law in finding the partial lump sum payment was in the best interest of the Respondent and not prejudicial to the defendant, the evidence did not support a finding that Petitioner must make a partial lump sum payment to cover the Respondent's legal costs, and the legal requirements for lump sum attorney fees were not supported by the Order.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

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Under the APA, this Court can reverse or modify the decision of the Workers' Compensation Commission if the substantial rights of the appellant 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. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

The Commission is the ultimate fact finder in workers' compensation cases. *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 541, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

FINDINGS

After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court makes the following findings of law:

In Workers' Compensation cases the Claimant is entitled to recover a lump sum payment from the Defendant following an order of the Commission. South Carolina Code § 42-9-301 provides that lump sum benefits can be ordered by the Commission when it is deemed "not to be contrary to the best interest of the employee or his dependents." S.C. Code Ann. § 42-9-301 (2011). Illustrative of this principle is the ruling of the Court of Appeals in *Cox v. Mills*. *Cox v. Mills*, 286 S.C. 226, 332 S.E.2d 562 (Ct. App. 1985). In that case, the Court of Appeals found

that where the Claimant needed a lump sum payment to conduct repairs on his house and showed an ability to handle large sums of money in a prudent fashion, the Commission acted properly in granting his lump sum award request. Furthermore, the court held it had a limited scope of review in this situation, requiring only an analysis as to whether "there is substantial evidence of record to support the award." *Id.* at 227, 332 S.E.2d at 562 (citing *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981)). While S.C. Code § 42-9-10 states "no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits," the Claimant only requests the funds needed to make repairs, not a total lump sum award for his lifetime benefits. S.C. Code Ann. § 42-9-10 (2011).

In the present case, the Respondent submitted substantial evidence regarding his home repairs to the Commission, including plans and specific costs pertaining to the anticipated repairs. The Respondent only requests a partial lump sum payment for these needs, and has clearly and specifically outlined the specific reasons for his request. Like the Claimant in *Cox*, the Respondent needs a partial lump sum payment in order to make repairs to his house, which he otherwise would have made, but for his condition. In order to prevent the house from falling further into disrepair, the Respondent has shown that the award of this partial lump sum is in accordance with his best interest.

S.C. Regulation 67-1207 permits the Claimant's attorney to recover fees if the award is more than 100 weeks and there are not sufficient accrued weeks to pay the attorney's fee. S.C. Code Ann. Regs. 67-1207 (2011). The Claimant in *Glover by Cauthen v. Suitt Construction Company*, who was also receiving lifetime benefits, requested lump sum attorney's fees pursuant to S.C. Regulation 67-1207 and S.C. Code § 42-9-10. *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 468, 458 S.E.2d 535, 537 (1995). The court ruled "[t]he statute and regulation, when read together, clearly evince a legislative intent to permit recovery of lump sum attorney's

fee to any claimant who receives benefits in excess of one hundred weeks." *Id.* at 469, 458 S.E.2d at 538. The court noted the profound policy implications of refusing to allow claimants access to the funds with which to pay their attorney's fees, finding "this result would have a tremendous chilling effect on the ability of the most severely injured employees to obtain the services of adequate counsel." *Id.* at 470, 458 S.E.2d at 538 (citing *Corson v. Brown Products*, 120 N.H. 665, 421 A.2d 1005 (N.H. 1980)).

In the present case, the Order of the Commission is entirely in accordance with the relevant regulations, statutes, and case law. The Respondent has received a lifetime benefit award and the accrued benefits of the Respondent are not enough to cover his legal costs. The Petitioners have offered no other reason as to why the attorney fee award should be overturned upon judicial review.

CONCLUSION

After due deliberation, review of the memoranda, case law, exhibits, and argument of counsel, the Court makes the following rulings:

Because the Respondent submitted substantial evidence detailing the need for significant home repairs that will both help his home from falling into further disrepair and help in the aid of his medical care, the Petitioner's appeal to overturn the partial lump sum award for the Respondent's home repairs is DENIED;

Because the Respondent received a lifetime benefit award and the accrued benefits of the Respondent are not enough to cover his legal fees, the Petitioner's appeal to overturn the partial lump sum award for the Respondent's home repairs is DENIED;

The Order of Commissioner Barden, dated April 22, 2010, and the Order of the Full Commission, dated January 7, 2011, affirming the prior Order of Commissioner Barden, are hereby AFFIRMED by this Court, and the Respondent is entitled to a partial lump sum payment

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from the Petitioner for the costs as specified in the April 22, 2010 Order of Commissioner

Barden.

AND IT IS SO ORDERED!

A handwritten signature in black ink, appearing to read 'E. W. Miller', written in a cursive style.

The Honorable Edward W. Miller
Circuit Court Judge

Greenville, SC

Date: November 3, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS

2011-CP-23-898

ORIGINAL

MICHAEL JARRARD)

PLAINTIFF)

vs.)

TRANSCRIPT OF RECORD

FEDERAL EXPRESS)

DEFENDANT)

July 25, 2011
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, Judge.

A P P E A R A N C E S:

C. DANIEL VEGA, ESQ.
Attorney for the Plaintiff

RUSSELL T. INFINGER, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

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There were no witnesses.

There were no Exhibits.

Certificate of Reporter 33

1 THE COURT: All right, tell me about this.

2 MR. INFINGER: I'm the moving party.

3 THE COURT: Okay.

4 MR. INFINGER: Judge, I represent Federal
5 Express in this workers' compensation case. By way of
6 very brief background, Mr. Jarrard was injured back in
7 2002. He was involved in a process where he was taking
8 some packages -- well he was working for Federal Express.
9 These packages had some chemicals in them. And he alleged
10 that the chemicals in the packaging created or aggravated
11 a pre-existing brain tumor he had, caused him to have
12 physical brain damage. The Defendant's admitted that the
13 accident occurred but, of course -- should say, of course,
14 but we did deny that he had physical brain damage as a
15 result of his inhalation of these chemicals. We tried the
16 case before then Commissioner Michelle Childs.

17 THE COURT: Wow, this has been around, hasn't
18 it?

19 MR. INFINGER: Yes, sir. In any event we tried
20 it before her and she did award a brain injury in the
21 case. Which under workers' compensation that means he
22 receives lifetime medical benefits but he also receives
23 lifetime weekly benefits. We did appeal that decision and
24 it went up to the full commission. And back then it was
25 still the Circuit Court. And this matter originally was

1 in Columbia, Judge Barber down in Columbia heard it. And
2 he affirmed the Commission's award that Mr. Jarrard had
3 physical brain damage and was entitled to lifetime
4 benefits. We didn't appeal that decision. So we have
5 been paying, we, Federal Express, has been paying him
6 weekly benefits. And we will have to continue to pay
7 weekly benefits throughout his life.

8 ~~The issues we have here today are attended care~~
9 ~~and lump sum or partial lump sums.~~ Under the -- under the
10 statute, if you have a physical brain injury, you're not
11 entitled to a total lump sum of your benefits. In other
12 words, you can't say to the Commissioner, My life
13 expectancy is 37 years and the commuted value of that
14 would be ex amount of dollars, give it to me. However,
15 you may, get a partial lump sum. Of the two orders that
16 we're here today about in the Commission, the second Order
17 from Commissioner Barber that was affirmed by the Full
18 Commission, gave the claimant two things. First of all,
19 gave him a lump sum to pay his attorney's fees, which was
20 \$169,253.27. It also gave him some -- he needed a new air
21 conditioner for his home and he needed some other repairs
22 around his home. So that lump sum, that partial lump sum
23 award was \$185,561.27.

24 Now, we appealed the decision of the lump sum.
25 In one of the -- the statute says that The Claimant is

1 entitled to a lump sum if it's in his best interest, it's
2 not prejudicial to the defendant. This is a case that the
3 Commissioner didn't take testimony. She had evidence in
4 the record and so there's no transcript there for that.
5 But she awarded the partial lump sum of the 16,000 and she
6 awarded the partial lump sum of 169.

7 One of the issues that we have about that
8 decision is that if you -- if you -- the way the statute
9 allows a person to get partial lump sum, yet he's entitled
10 to lifetime benefits, if you say, Well he's going to get
11 benefits for life and you're giving him some of it up
12 front, how do you get your money back? The way the case
13 law statute allows you to do that is you have to look at
14 how much that lump sum is worth and then when you get to
15 the back end of your award -- in other words, if he makes
16 it through his life expectancy then you can start not
17 paying him and take it off the life expectancy. If he
18 continues to live, you cannot pay him and if he continues
19 to live some more, you can pay him again. So it's kind of
20 an unusual way of happening but that's just the way
21 everything works.

22 And if you take that \$185,000.00, that would be
23 about seven years worth of benefits that he would not
24 receive at the end of his award. So the question becomes
25 is would that be in the best interest of the Claimant to

1 receive that money now instead of seven years down the
2 road he just wouldn't have a check at all. And the
3 whole -- our position was, in a very brief memorandum, I
4 said, The statute says that workers' comp is really in
5 lieu of paying a person's compensation benefits. So it's
6 more better for the claimant to have his money. Again, we
7 checked.

8 And I'm aware that there is a case, and the
9 Claimant's attorney has put it in there, that he's allowed
10 to have partial lump sum if he wants to do home repairs.
11 And then there's, not so recent case but fairly recent, in
12 the last 10 years, where the Court did allow the attorney
13 to take their lump sum fee on the back end. However, our
14 position is it still will give him seven years of reduced
15 benefits. So we've appealed the decision of a lump sum.

16 The other issue is a little bit more involved.
17 He had -- this injury was -- occurred like in November --
18 occurred in October of '01 but he had the surgery in
19 November of 2002. And once he had the surgery where he
20 was -- the neurosurgeon actually dealt with the tumor on
21 his brain, it was after that surgery that the Claimant
22 just became -- he really had his brain injury manifested.
23 He was in a wheelchair, he had a difficult time with
24 memory, everything else that you might imagine somebody
25 who has a brain tumor that surgery doesn't fix it.

1 So what the Commission said is that his wife
2 would be entitled to -- his wife would be paid attendant
3 care on his behalf. Now, again, we don't deny that the
4 Claimant is entitled to attended care when he got lifetime
5 benefits. The crux of our argument regarding the
6 Commission and the Full Commission's decision is that they
7 went -- they gave -- they awarded the wife \$12.00 an hour
8 for 20 hours a day. So that her \$12.00 and 20 hours a day
9 is \$240.00 a day or \$1680.00 a week. Now our position was
10 that first, we think that the Commission was -- it was
11 unreasonable that they would award the wife as attendant
12 care provider 20 hours a day. I think it's unreasonable
13 to expect someone to only sleep for four hours a day.

14 The other issue we had was the \$12. They had an
15 expert who testified that there was a CNA or some other
16 nursing assistant that they would receive \$12.00 a day.

17 THE COURT: An hour.

18 MR. INFINGER: An hour. I'm sorry.

19 THE COURT: That's all right.

20 MR. INFINGER: She would receive \$12.00 an hour.
21 The Commissioner awarded her \$12.00 an hour based on that
22 testimony but clearly that evidence -- that expert said
23 these were certified folks, these were nursing people,
24 this is his wife.

25 THE COURT: Right.

1 MR. INFINGER: You know, grant it, as his wife,
2 she has certain things she can do for him but it would
3 be -- I think it's unreasonable to award her \$12.00 an
4 hour. At the same level she would award somebody who, she
5 testified as a certified or nursing specialist. So those
6 were the two points that I want to make.

7 First of all, \$12.00 is unreasonable, 20 hours a
8 day is unreasonable. But what really is the crux here is
9 that the Commission awarded this retroactively back to
10 November 2002. Now, if they--

11 THE COURT: Was this the Full Commission?

12 MR. INFINGER: The Single Commissioner --

13 THE COURT: Okay.

14 MR. INFINGER: -- awarded her benefits back to
15 2002. Now, if they -- if Federal Express pays her what
16 they've asked her to pay, my client's calculations
17 basically would be -- that would be eight and a half years
18 of benefits at \$87,360 a year. So we owe her a check
19 right now for \$7,4256.00. Now, we argued before the Full
20 Commission that while attendant care might be available,
21 it was unreasonable and prejudicial to the Defendant's to
22 expect them to go back to 2002 and pay. Because the case
23 was being litigated. It was not even -- it was not even a
24 brain damage case until after Judge Barber heard it. So
25 that, if -- you know, we're basically having to pay the

1 wife to do this at 20 hours a week, 12 hours a day back
2 during that time frame when we weren't even -- it was not
3 even within our ability to take care of the situation.

4 Interestingly enough -- and this is in the
5 record, if I may approach?

6 THE COURT: Yeah.

7 MR. INFINGER: I just want to, because I don't
8 know if it's -- the Full Commission affirmed that the
9 Single Commission's award -- I just wanted to let you know
10 that two of the Commissioners on the panel had differing
11 views on what they would believe the retroactivity would
12 be. But since the Full Commission panel had three
13 different ideas about what the retroactivity would be, the
14 decision of the Single Commission was affirmed.

15 So our concern here today, or our appeal here
16 today, on the attendant care issue is that, three things
17 really. First of all, that asking us to pay 20 hours a
18 day for the wife to be his attended care giver is
19 unreasonable. We're having her to receive \$12.00 hour
20 which is -- was testified to is a nursing person's salary
21 or certified nursing assistant. Somebody with some
22 medical expertise is unreasonable. And most importantly,
23 asking the Defendants to go back to the year 2002 and pay
24 \$700,000.00 to the wife for the care she had when we were
25 not even allowed to be involved in giving care in no way

1 during the time the case going on.

2 THE COURT: Well let me ask you this, what
3 evidence or testimony was presented that he needed 20
4 hours a day?

5 MR. INFINGER: They had an expert, the same
6 expert talk about the different awards or hours that
7 different certified nurses or nursing people would get.

8 THE COURT: Uh-huh.

9 MR. INFINGER: The wife testified that she spent
10 about 20 hours a day tending to him. And their expert
11 said that wouldn't be unreasonable because risk of fall,
12 like in the middle of the night he had to get up and go to
13 the bathroom. So the testimony was that the wife said it
14 took her about 20 hours day. And I think if you look on
15 the first part of that Order I just handed up to you.

16 THE COURT: Yeah.

17 MR. INFINGER: Where it says, Findings of Fact.
18 It says, That the wife testified that she was working --
19 she was working 20 hours. And like I said, their expert
20 said that would not be unreasonable.

21 Certainly, Your Honor, our position was that he
22 may require -- she may have to get up in the middle of the
23 night and help him to the bathroom. She may have to give
24 him some assistance in the middle of the day. But to
25 realistically believe that for the year from 2002 to 2011,

1 his wife had only gotten four hours of sleep every day of
2 her life and she would therefore be entitled to 20 hours--

3 THE COURT: Well, isn't that -- you're asking me
4 to rule on the credibility of the testimony. And I'm not
5 sure I'm allowed to do that.

6 MR. INFINGER: It's not so much that you would
7 rule on the credibility of the testimony as you would --
8 it would be -- it's just unreasonable -- it's unreasonable
9 under the medical statute to ask -- to require the
10 Defendant to pay 20 hours a day.

11 THE COURT: Okay.

12 MR. INFINGER: For one person to be there.

13 THE COURT: Okay. Let me ask you this too, is
14 there testimony in the record that he needs that level of
15 care?

16 MR. INFINGER: Their experts -- I'm sorry.

17 THE COURT: And is his condition worsening?
18 Because, you know, generally speaking, people start out
19 needing less care and as time progresses, condition
20 worsens and the level of care has to be increased. As we
21 all know, as you increase the level of care, the costs
22 goes up. So I'm just curious, is there any evidence in
23 the record that addresses that issue?

24 MR. INFINGER: Well the only evidence is the
25 wife's testimony that she was spending 20 hours working on

1 him. The expert, you know, she didn't come in until long
2 after this issue arose. So, I mean, she didn't have any
3 opportunity or didn't have any first-hand knowledge about
4 what care she gave or what kind of treatment he needed up
5 until about, I think, back in 2009. So it was all
6 speculation on her behalf as to what happened or what
7 didn't happen. She testified that she was there one day
8 and watched the wife do the attendant care activities but
9 this wasn't until she actually saw him in 2009.

10 So, you know, whether it was up or down, there's
11 really no expert testimony that says -- she just said that
12 I think that once he had the surgery he needed care. And
13 again, it was sort of --

14 THE COURT: Right.

15 MR. INFINGER: -- Pig-tailing or going against
16 this or going against that. I just think the Commissioner
17 and certainly the Court has the opportunity to determine
18 what's reasonable under the medical statute. And what's
19 reasonable and what's prejudicial to the Defendant to
20 require them to pay 20 hours and \$12.00 to the wife in the
21 sum of \$700,000.00 is just unreasonable.

22 And I think that's why the two other
23 Commissioners put in there that they're -- about the
24 retroactivity thing. They understood that that was an
25 unreasonable request. And the other thing that -- I don't

1 know that -- it's not my -- it's not my problem but it's
2 certainly going to be the problem of the wife. If she
3 gets all this money, if she gets the \$700,000.00 check
4 today, she's going to have significant tax consequences.
5 Because this is not -- you know, workers' comp, the
6 claimant's money is -- that's the -- but she's going to
7 basically become his medical provider.

8 THE COURT: Right.

9 MR. INFINGER: And, of course, you know, we
10 don't have any opportunity -- she doesn't have their
11 admission and medical malpractice liens so anything she
12 does, you know, if something happens, Federal Express has
13 that responsibility of that -- what happens to him as a
14 result of her negligent supervision. I think that's
15 another reason that you look the whole -- is 20 hours at
16 \$12.00 truly reasonable?

17 THE COURT: Well let me ask you this, what, you
18 know, what -- is there worker's comp law that allows a
19 family member to be paid as an attendant?

20 MR. INFINGER: The law does allow attended care.
21 The attended care can be through, you know, members --
22 people other than medical providers.

23 THE COURT: Okay.

24 MR. INFINGER: Basically the wife becomes the
25 medical provider. But -- but the difference is, you know,

1 what you would expect and what you would pay for under a
2 medical provider. Like a nurse.

3 THE COURT: They would have insurance.

4 MR. INFINGER: Correct.

5 THE COURT: And so if that they -- so what
6 you're telling me is that if the wife messes up and drops
7 him and he gets injured as a result that, Federal Express
8 is going to be responsible for that?

9 MR. INFINGER: It would be just like him going
10 to a doctor and the doctor dropping him. If the doctor
11 does something, you know, like sometimes for example,
12 occasionally somebody's in physical therapy. The physical
13 therapist might put the treadmill on too high or they're
14 going to the office of the physical therapist and they
15 have an automobile accident. When those folks get injured
16 as a result of having medical treatment provided, then it
17 becomes part of a claim. So when that physical therapist
18 goosed up the -- the--

19 THE COURT: Okay.

20 MR. INFINGER: You know, when they did that and
21 he was injured in a greater degree, we were responsible.

22 THE COURT: Then you -- so then that increased
23 your client's liability.

24 MR. INFINGER: It would be some third party.

25 THE COURT: There would be a subrogated

1 interest, correct?

2 MR. INFINGER: Right. There could be some third
3 party, it would be like medical malpractice.

4 THE COURT: Right.

5 MR. INFINGER: You know, if the doctor messes
6 somebody up, then the com-carrier gets -- or gets itself
7 insured but the employer gets stuck with the bill. But
8 they at least have an opportunity to move forward.

9 THE COURT: And so you --

10 MR. INFINGER: Because a lot of times what
11 happens is the claimant will say it was medical
12 malpractice and they'll sue the doctor. And we'll have a
13 subrogation under that--

14 THE COURT: Right. Then -- but in this
15 instance, if you were to -- if this were to happen as a
16 result of the attendant's neglect, then your action would
17 be against the attendant, which would, in effect, be
18 against the claimant. For all intense purposes. I mean,
19 if you were to recover it -- let's say the only asset they
20 had was the home -- wow, looks like you guys get no --
21 yeah, okay.

22 All right yes, sir.

23 MR. VEGA: Thank you, Your Honor, my name is
24 Daniel Vega, I represent the Plaintiff, Michael Jarrard
25 and his wife. And Mr. Infinger is correct in saying that

1 Mr. Jarrard is very bad off. He has coughing fits,
2 seizures, trimmers, loss of memory, essentially has no
3 short time memory.

4 THE COURT: I don't doubt any of that.

5 MR. VEGA: Yes, sir. And there are seven orders
6 in this case prior to today. Initially on November 2002
7 there was a Consent Order entered into by Mr. Infinger in
8 which they admitted the exposure and admitted the
9 pulmonary competent. There was a second Consent Order on
10 September 13th, 2004 in which a hearing was postponed but
11 the same issues were admitted by the Defendants. Now --

12 THE COURT: Let me ask you, just so -- I'm
13 trying to take some notes, that the Consent Order was an
14 admission with the November '02 -- what did -- I didn't
15 get -- what did you say?

16 MR. VEGA: November 2002 was an admission to the
17 exposure.

18 THE COURT: Okay.

19 MR. VEGA: To the toxic chemical in addition to
20 the injury to the lungs.

21 THE COURT: Okay.

22 MR. VEGA: Essentially making a pulmonary claim.

23 THE COURT: Okay.

24 MR. VEGA: September 2004 there was a
25 postponement of the hearing but the same issues were

1 stipulated by the Defendants.

2 THE COURT: Okay.

3 MR. VEGA: Now Commissioner Childs heard the
4 case and she rendered her Order on July 14th, 2006. In
5 that claim she awarded the brain injury, the permanent
6 total disability and medical care and treatment pursuant
7 to the life care plan of Leander Hollenbeck.

8 THE COURT: Okay.

9 MR. VEGA: The Order of Commissioner Childs was
10 affirmed on January 2007. And was affirmed by Judge
11 Barber on October of 2008.

12 THE COURT: So the Full Commission did it
13 January of '07?

14 MR. VEGA: Yes, sir.

15 THE COURT: Okay.

16 MR. VEGA: Now, the issue that Mr. Infinger
17 brings up today, first of all, it would be our position
18 that the issue is mute. Because the Order of Judge Barber
19 is unappealed. And in her Order, Commissioner Childs,
20 awarded the attendant care pursuant to the life care plan.
21 The life care plan, done by Leander Hollenbeck, was
22 reviewed and signed by the primary care physician. And in
23 that plan, Leander Hollenbeck found that Mr. Jarrard has
24 needed and continues to need 16 to 24 hours of attended
25 care do to his physical problems.

1 THE COURT: So 20 hours was an average of the
2 doctors...

3 MR. VEGA: Yes, sir.

4 THE COURT: Okay.

5 MR. VEGA: It's an average of what he would
6 receive in a home or nursing facility.

7 THE COURT: Right.

8 MR. VEGA: Now, the Defendants complain -- well,
9 let me -- let me rephrase that. After the Order of Judge
10 Barber, we sought again to have attended care provided.
11 Because up until 2008 attended care had not been provided.
12 We filed a new Form 50. The case went to Commissioner
13 Wilkerson and on January of 2010, he specifically ordered
14 the attended care retroactive.

15 THE COURT: All right, that date again?

16 MR. VEGA: January of 2010.

17 THE COURT: Okay.

18 MR. VEGA: And we specifically asked for, in our
19 Form 50, we asked for both future and past attendant care.

20 THE COURT: So when was that, when was your Form
21 50 filed?

22 MR. VEGA: It would have been a few months prior
23 to that, Your Honor.

24 THE COURT: Okay.

25 MR. VEGA: I don't have a date.

1 THE COURT: Okay. All right.

2 MR. VEGA: Now, in July of 2010, the Full
3 Commission affirmed the Order of Commissioner Wilkerson.
4 Now Mr. Infinger raises the issue that the Commissioners
5 would have modified the Order and not made the payment
6 retroactive. The reason they did that is Mr. Infinger
7 complained that the Claimant had not raised the issue
8 prior to Commissioner Wilkerson's Order.

9 Now, regulation 67-709(E), addresses a vote to
10 affirm and modify is a vote to affirm. So the Order of
11 the Full Commission as it stands is an affirmation of
12 Commissioner Wilkerson's decision.

13 THE COURT: Okay.

14 MR. VEGA: Now, I have handed up some -- my
15 brief and some additional issues that are found within the
16 commission file. The issue of attended care was not
17 raised in 2009. If you look at what I've marked as
18 Exhibit D, Your Honor.

19 THE COURT: All right. Hang on. Is that in the
20 record on appeal?

21 MR. VEGA: Yes, sir. It's part of the
22 Commission file, Your Honor.

23 THE COURT: Okay. All right.

24 MR. INFINGER: Judge, if I may? I think
25 Mr. Vega submitted additional records today and it would

1 be in the records that he submitted as opposed to the ones
2 that we filed on Friday.

3 THE COURT: Not that.

4 MR. INFINGER: He submitted some additional
5 records.

6 MR. VEGA: Yes, sir, what I handed up --

7 THE COURT: Okay.

8 MR. VEGA: There's an Exhibit D. E and F. And
9 I would like to address those.

10 THE COURT: Okay.

11 MR. VEGA: The reason I am presenting these is
12 that if you look at the pre-hearing brief, which according
13 to the Administrative Procedures Act, allows us to tell
14 the Commission what we are seeking when we go to a
15 hearing. Under Subjection 7 it says, Claimant's Spouse
16 provides attended care and requests reimbursement. That
17 was to signed by Mark Harbin, March 9th, 2004.

18 Later on, May 18th, 2004, I filed a subsequent
19 pre-hearing brief under Subjection 7, Claimant's spouse
20 provides attendant care and requests reimbursement.
21 That's May 18th, 2004. In 2005, in anticipation -- and
22 this would be Exhibit F.

23 THE COURT: Okay.

24 MR. VEGA: In anticipation of the hearing before
25 Commissioner Childs, I submitted a brief on the issue of

1 attended care. It's a seven page brief and it outlines
2 the law both in this state and North Carolina and other
3 states that have addressed attended care.

4 So we feel very strongly that the Defendants
5 have had notice of this issue since at least February of
6 2004. They have had the opportunity to provide attended
7 care in which ever manner they choose. They could have
8 provided it through the spouse, they could have provided
9 it through home health care person or they could have
10 offered to have them admitted in the home. They did no
11 such thing. Defense attorney claims that--

12 THE COURT: Well let me interrupt you for a
13 second. The surgery -- the brain surgery occurred when?

14 MR. VEGA: In October -- I believe it was
15 November. The exposure was October 23, 2002. And the
16 surgery was in November of 2002..

17 THE COURT: Wait a minute. I thought the
18 exposure was October of '01?

19 MR. VEGA: No, sir.

20 MR. INFINGER: There were two -- may I? There
21 were two cases. He had an '01 exposure and an '02
22 exposure to like a combination of the two and so --

23 THE COURT: Okay.

24 MR. INFINGER: The two cases have been--

25 THE COURT: Consolidated.

1 MR. INFINGER: Correct.

2 THE COURT: Okay.

3 MR. INFINGER: I'm sorry to interrupt.

4 THE COURT: Okay, so that surgery occurred in
5 '02?

6 MR. VEGA: Yes, sir.

7 THE COURT: And that's when the -- his
8 disability--

9 MR. VEGA: Increased significantly.

10 THE COURT: Okay.

11 MR. VEGA: As the months progressed, the
12 seizures manifested and things of that nature.

13 THE COURT: Okay.

14 MR. VEGA: So we do not believe we were tardy in
15 requesting attendant care as an issue that was raised in
16 2004. We had had discussion with defense counsel about
17 it, Commissioner Childs was aware of it at the time she
18 rendered her decision. And once Judge Barber affirmed the
19 decision and there's been no subsequent appeal; we believe
20 that defense counsel does not have ground really to raise
21 the issue--

22 THE COURT: Don't have standing.

23 MR. VEGA: No, Your Honor.

24 THE COURT: It's the law of the case is what
25 you're saying?

1 MR. VEGA: Yes, sir. In 2009, what we decided
2 to do was to have Mr. Jarrard evaluated again by a
3 separate and distinct nurse case manager in order to
4 ascertain his current condition and his future needs.
5 Because Leander Hollenbeck had made her decision in 2005.

6 THE COURT: Okay.

7 MR. VEGA: So we went through the same
8 procedure. This Sarah Lustick, The Certified Life Care
9 Planner, took the primary care plan to the primary care
10 physician, the primary care physician signed off on the
11 plan. And it was completely reasonable for Commissioner
12 Wilkerson to award into the future what had previously
13 been awarded and to award the past benefits. In other
14 words, it's essentially a reiteration of what had
15 previously been awarded by Commissioner Childs.

16 Now, once again, Sarah Lustick in 2009, when she
17 did her home health care plan, the personal attendant care
18 was signed off at 24 hours a day for life. I would allege
19 that arguing whether the 12 hours -- the \$12.00 an hour,
20 20 hours a day, seven and a half years is being
21 unreasonable, is not present before the Court because that
22 would be a substantial evidence argument. There was no
23 contrary evidence presented by the Defendants. So there's
24 not a competing life care plan that states the attended
25 care should be eight hours a day or 12 versus 20. It's

1 the sole testimony of the case.

2 Now, in my brief, I cited Clark v. Aiken County.

3 In that case Mr. Clark received a permanent partial
4 disability award of 30% disability to the spine. That
5 award was appealed to the Full Commission. During the
6 pendency of the appeal, Mr. Clark sought additional
7 medical care treatment and under went a surgery to the
8 spine. Once the appeal to the Full Commission was
9 completed, Mr. Clark then filed a new 50, alleging a
10 change of conditions. In 2005, the Court of Appeals
11 affirmed the decision of the Single Commissioner, awarding
12 payment of benefits and medical care and treatment that
13 Mr. Clark received during the pendency of the appeal.

14 The Court reasoned that it was medically
15 necessary and the fact that it had not been petitioned to
16 the Defendants was relevant. The fact is Ms. Jarrard has
17 provided the care. And will continue to provide the care.
18 And the fact is that we've sought this care since 2004.
19 The Defendants have failed to provide it.

20 THE COURT: Okay, let me ask you this, why would
21 the care go all the way back to '02 then?

22 MR. VEGA: That's when -- it's to November '02.
23 Essentially it's the date of surgery. Once he came out of
24 surgery he was never able to care for himself.

25 THE COURT: Okay.

1 MR. VEGA: It's barely over a period of a year
2 from the time that we made the request -- now actually I
3 take that back. So it would be all of '03 and part of
4 '04.

5 THE COURT: Okay.

6 MR. VEGA: This issue was also addressed a month
7 ago on June 2, 2011. Judge John Hayes signed the McDaniel
8 v. Hands Langer [ph]. And I know that it's pervasive,
9 Your Honor. But in that case the claimant requested
10 attendant care from 2006 to 2009 then on-going from 2009.
11 In that case the Single Commissioner and the Full
12 Commission stated that he was not -- the spouse was not
13 entitled to attended care from 2006 to 2009 because it
14 wasn't sought during that period. Judge Hayes reversed
15 that decision, stating that under the Workers'
16 Compensation Act, when the claimant's medical care is
17 necessary during the lifetime, 2006 to 2009 is a period of
18 the claimant's lifetime. And the medical care needs to be
19 provided.

20 If I may address briefly the lump sum issue,
21 Your Honor?

22 THE COURT: Yeah.

23 MR. VEGA: There's a limited scope of review on
24 the lump sum awards. Because the statute provides for the
25 lump sum award. So therefore -- there's a clear intent in

1 the writing of the statute to have lump sum awards. There
2 has to be substantial evidence in abuse of discretion. We
3 presented evidence -- we presented contracts and some
4 quotes from contractors who went to the home, inspected
5 the home, spoke of the damage, repair of the home has been
6 awarded routinely by the Commission.

7 With regards to the fee, we did not calculate
8 the fee. We sent a letter to the Commission, the judicial
9 department calculates the fee of a lifetime award, writes
10 us a letter and tells us what the fee is on a lifetime
11 award. And then we submit our fee petition. The fee
12 petition was signed by the Commissioner. The Defendants
13 submitted no evidence, there's no testimony of an abuse of
14 discretion. It's not enough to allege the abuse of
15 discretion. There has to be some testimony by the carrier
16 as to what the abuse of discretion would be.

17 THE COURT: Okay. I didn't get the impression
18 that that was highly contested by the Defendant. But let
19 me ask you this, they're going to -- you know, \$700,000.00
20 is a significant amount of money. And what assurances
21 does the Defendant have when the care's provided by the
22 wife, that if she makes a mistake resulting in injury to
23 the Claimant? And they would be responsible for that.
24 How are they protected? When they would be protected if
25 it was an independent CNA. And then the other question I

1 have, is how is -- how is the wife qualified to receive
2 the same pay as someone who's got a degree and licensed by
3 the State and all that sort of thing?

4 MR. VEGA: Well the life care planner,
5 Ms. Lustick, did testify, she did observe the wife
6 providing the care. And the wife has, in fact, provided
7 the care. When you see Mr. Jarrard, he's well groomed, he
8 has his adult help that he needs. He presents as a person
9 that's been cared for.

10 THE COURT: I don't doubt that. I mean, you
11 know, I don't doubt that someone who's obviously has an
12 emotional investment in it, you know, I'm always glad to
13 hear they would take that -- go the extra mile. That's
14 not my concern. You know, was there evidence presented --
15 was there any evidence presented that she was qualified to
16 get the same pay -- and I don't mean today, because
17 obviously experience is a great teacher, but 2002 did she
18 know what she was doing? You know. Do you understand?

19 MR. VEGA: Yes, sir, Your Honor. Well in
20 response to that, is she's had to learn, obviously she's
21 had to learn.

22 THE COURT: I don't doubt that today she's
23 probably every bit as qualified. Of course, I don't know
24 what exactly the qualifications of a certified nursing
25 assistant are but, you know.

1 MR. VEGA: Yes, sir. The \$12.00 an hour is on
2 the lower end of the pay for CNA attendant care.

3 THE COURT: Okay.

4 MR. VEGA: It's usually \$15.00 or more.

5 THE COURT: Right.

6 MR. VEGA: It's the number that the Commissioner
7 picked based on the testimony of the life care planner who
8 was present at the hearing and testified. And the spouse
9 testified as to the care that she had provided. Now, into
10 the future, the way that the Defendants can mitigate any
11 exposure, is to provide the care through a trained
12 professional. We would not deny, and, in fact, we would
13 argue that Ms. Jarrard would appreciate the opportunity to
14 have someone, who's a professional, come into the home and
15 help care for her husband. Something that she's done for
16 close to--

17 THE COURT: Well how come that wasn't addressed
18 in one of these seven prior Orders? How come that's
19 not...

20 MR. VEGA: They refused to provide the care,
21 Your Honor.

22 THE COURT: Okay.

23 MR. VEGA: Prior to the Order of Judge Barber,
24 we did not enforce that particular issue because the brain
25 injury was on appeal.

1 THE COURT: Okay.

2 MR. VEGA: So we feel that the first opportunity
3 that we truly had to bring it to the attention of the
4 Commission and say, They have to provide it, it was at the
5 hearing with Commissioner Wilkerson. I still contend that
6 in 2006, Commissioner Childs award the attendant care.
7 The Defendants have simply refused to provide it. Now
8 they're coming into court today and they're asking for
9 leniency when, in fact, they've had ample opportunity.
10 They've had all the pleadings that we have when we pled
11 attendant care in 2004. The certificate of service is to
12 Mr. Infinger.

13 THE COURT: He's not contesting that.

14 MR. VEGA: So they've had ample notice of this
15 issue. They've simply not provided the attended care.
16 And frankly, Your Honor, we believe that it's the law of
17 the case. And for them to allege now that this would be
18 an abuse in discretion to award retroactively simply is
19 not--

20 THE COURT: Okay.

21 All right, Mr. Infinger.

22 MR. INFINGER: Judge Miller, I will say that
23 while that life care plan did in one of, I guess, many,
24 many items you can see in it there, in one of the line she
25 has there there's no -- there was never any specific --

1 unlike, you know, sending him to Dr. Jones for this
2 treatment, she just mentioned he would need attended care.
3 There was never any real effort, there was never any
4 specific requests or never -- anything other than that one
5 statement in her plan to do it. So it wasn't until, you
6 know, it wasn't until sometime later that the wife says
7 I'm now entitled to 20 hours a day for \$12.00 an hour,
8 that it became an issue as far as the amount of what the
9 fee would be. So while there is a -- can you understand
10 that while there is a first real word on that not -- it's
11 not until July 14th, 2006 issue--

12 THE COURT: That was Childs?

13 MR. INFINGER: That was when Childs -- that's
14 the one that was affirmed by Judge Barber in 2008.

15 THE COURT: Right.

16 MR. INFINGER: In 2008 the Defendants no
17 longer -- that was January -- October 2008, that's when
18 the Defendants no longer appealed or--

19 THE COURT: Right.

20 MR. INFINGER: Took the position that he did not
21 have a brain damage case.

22 THE COURT: Okay.

23 MR. INFINGER: But while that statement is in
24 there, there was never any, you know, specific -- there
25 was no doctor to say he should go to this person and have

1 this treatment or this attendant care means that he needs
2 to have on-going nurse show up three times a day or. You
3 know, again, it was a statement in there but it was never
4 anything that was a particular, you know, more specific
5 than that one statement in a laundry list of things on
6 that report on that one individual life care planner or
7 nurse.

8 THE COURT: Okay.

9 Well, anything else? This is the first time
10 I've seen anything in the file so I'm going to have to go
11 through it a little bit. If -- well, at this point the
12 Defendant could, if they're ordered to take care of the
13 attendant care, then you could step in and say you need to
14 hire this, is that right?

15 MR. INFINGER: Well I think actually their
16 position today is that we want to do it today, we can. I
17 mean, actually Commissioner Wilkerson's Order says, that
18 the wife is the attendant care giver and she shall get
19 that from now and continue.

20 THE COURT: Right.

21 MR. INFINGER: I guess we could do a Consent
22 Order that says the wife is no longer the attendant care
23 giver and now it's going to be nurse Smith --

24 THE COURT: Right.

25 MR. INFINGER: From Home Health Care.

1 THE COURT: Well I was just thinking, if she's
2 going to get this \$700,000.00 award and she's got all
3 these tax problems, of course, that's not a bad problem to
4 have -- anyway. All right, well let me just read through
5 all this stuff and I'll have to get in touch with you.

6 MR. VEGA: Thank you, Your Honor.

7 THE COURT: Thank you. It's a pretty
8 interesting case and I really hope it's the last one I
9 ever do.

10 (WHEREUPON, the proceedings were concluded.)

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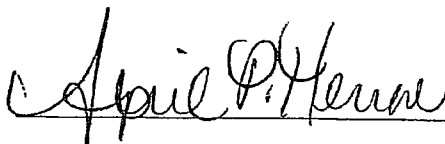
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 25th day of July, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 4, 2012



APRIL P. HERRON, Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

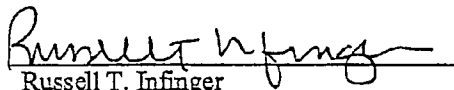
Michael Jarrard.....Respondent,

v.

Federal Express Corporation.....Appellants.

NOTICE OF APPEAL

Federal Express Corporation appeals the Order of The Honorable Edward W. Miller dated November 3, 2011. Appellants received a copy of this Order on November 9, 2011.


Russell T. Infinger
NEXSEN PRUET, LLC
PO Drawer 10648
Greenville, South Carolina 29603
Tel: 864-282-1122
SC Bar No. 2886

rinfinger@nexsenpruet.com

December 2, 2011

Attorney for Appellants

Other Counsel of Record:

C. Daniel Vega, Esquire
Chappell Smith & Arden
P.O. Box 12330
Columbia, SC 29611

Attorney for Respondent

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Michael Jarrard,

Claimant/Respondent,

vs.

Federal Express,

Employer and Self-Insured/Petitioners.

2011 NOV - 7

A 11:30 IN THE CIRCUIT COURT

Case No. 11-CP-23-898

ORDER

(Non-Jury Appeal from Workers' Compensation
Commission)

INTRODUCTION

In this non-jury appeal from an Order of the Full Commission of the Workers' Compensation Commission, this matter comes before this Court on Petitioner's appeal concerning the Respondent's entitlement to a partial lump sum award as part of his Workers' Compensation claim.

Counsel for the Employer & Petitioner, Federal Express, and the Claimant & Respondent, Michael Jarrard, submitted memoranda of law related to the present appeal, which the court has considered.

A hearing was held on July 25, 2011. At the hearing, the Claimant & Respondent was represented by C. Daniel Vega. The Petitioner & Employer was represented by Russell T. Infinger.

STATEMENT OF THE CASE

This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard (hereinafter, "Respondent"), WCC No.: 0217907. The Respondent sustained injuries due to exposure to chemical products on the job resulting in damage to his pulmonary system and brain;

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and damage due to the aggravation of a pre-existing brain tumor. The Respondent was awarded lifetime medical care and treatment pursuant to § 42-9-10 for his physical brain injury, including full-time attendant care to be provided by his wife. The Respondent requested a partial lump sum payment in order to pay his attorney's fees and make repairs and additions to his home.

In an Order dated April 22, 2010, Commissioner Barden found that the Respondent's home is in need of repair after the Respondent submitted contractor bids detailing this repair and its cost. Commissioner Barden granted the fee petition for the Respondent's legal fees in this same Order. Ultimately, Commissioner Barden awarded \$9,900.00 for roof repair; replacement of the storage attachment, and replacement of windows at the Respondent's house; \$908.00 for the removal and replacement of the lavatory at the Respondent's house; \$5,500.00 for the installation of an HVAC unit at the Respondent's house; and \$169,253.27 for payment of the Respondent's legal fees. The Full Commission affirmed the Single Commissioner's decision and sustained the Order of the Single Commissioner in its entirety in its own Order, dated January 7, 2011.

The Petitioners, pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, petitioned this court for judicial review of the Orders of the South Carolina Workers' Compensation Commission dated April 22, 2010 and January 7, 2011. The Petitioners allege the Commission made errors of law in finding the partial lump sum payment was in the best interest of the Respondent and not prejudicial to the defendant, the evidence did not support a finding that Petitioner must make a partial lump sum payment to cover the Respondent's legal costs, and the legal requirements for lump sum attorney fees were not supported by the Order.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

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Under the APA, this Court can reverse or modify the decision of the Workers' Compensation Commission if the substantial rights of the appellant 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. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

The Commission is the ultimate fact finder in workers' compensation cases. *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 541, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

FINDINGS

After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court makes the following findings of law:

In Workers' Compensation cases the Claimant is entitled to recover a lump sum payment from the Defendant following an order of the Commission. South Carolina Code § 42-9-301 provides that lump sum benefits can be ordered by the Commission when it is deemed "not to be contrary to the best interest of the employee or his dependents." S.C. Code Ann. § 42-9-301 (2011). Illustrative of this principle is the ruling of the Court of Appeals in *Cox v. Mills*. *Cox v. Mills*, 286 S.C. 226, 332 S.E.2d 562 (Ct. App. 1985). In that case, the Court of Appeals found

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that where the Claimant needed a lump sum payment to conduct repairs on his house and showed an ability to handle large sums of money in a prudent fashion, the Commission acted properly in granting his lump sum award request. Furthermore, the court held it had a limited scope of review in this situation, requiring only an analysis as to whether "there is substantial evidence of record to support the award." *Id.* at 227, 332 S.E.2d at 562 (citing *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981)). While S.C. Code § 42-9-10 states "no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits," the Claimant only requests the funds needed to make repairs, not a total lump sum award for his lifetime benefits. S.C. Code Ann. § 42-9-10 (2011).

In the present case, the Respondent submitted substantial evidence regarding his home repairs to the Commission, including plans and specific costs pertaining to the anticipated repairs. The Respondent only requests a partial lump sum payment for these needs, and has clearly and specifically outlined the specific reasons for his request. Like the Claimant in *Cox*, the Respondent needs a partial lump sum payment in order to make repairs to his house, which he otherwise would have made, but for his condition. In order to prevent the house from falling further into disrepair, the Respondent has shown that the award of this partial lump sum is in accordance with his best interest.

S.C. Regulation 67-1207 permits the Claimant's attorney to recover fees if the award is more than 100 weeks and there are not sufficient accrued weeks to pay the attorney's fee. S.C. Code Ann. Regs. 67-1207 (2011). The Claimant in *Glover by Cauthen v. Suitt Construction Company*, who was also receiving lifetime benefits, requested lump sum attorney's fees pursuant to S.C. Regulation 67-1207 and S.C. Code § 42-9-10. *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 468, 458 S.E.2d 535, 537 (1995). The court ruled "[t]he statute and regulation, when read together, clearly evince a legislative intent to permit recovery of lump sum attorney's

fee to any claimant who receives benefits in excess of one hundred weeks." *Id.* at 469, 458 S.E.2d at 538. The court noted the profound policy implications of refusing to allow claimants access to the funds with which to pay their attorney's fees, finding "this result would have a tremendous chilling effect on the ability of the most severely injured employees to obtain the services of adequate counsel." *Id.* at 470, 458 S.E.2d at 538 (citing *Corson v. Brown Products*, 120 N.H. 665, 421 A.2d 1005 (N.H. 1980)).

In the present case, the Order of the Commission is entirely in accordance with the relevant regulations, statutes, and case law. The Respondent has received a lifetime benefit award and the accrued benefits of the Respondent are not enough to cover his legal costs. The Petitioners have offered no other reason as to why the attorney fee award should be overturned upon judicial review.

CONCLUSION

After due deliberation, review of the memoranda, case law, exhibits, and argument of counsel, the Court makes the following rulings:

Because the Respondent submitted substantial evidence detailing the need for significant home repairs that will both help his home from falling into further disrepair and help in the aid of his medical care, the Petitioner's appeal to overturn the partial lump sum award for the Respondent's home repairs is DENIED;

Because the Respondent received a lifetime benefit award and the accrued benefits of the Respondent are not enough to cover his legal fees, the Petitioner's appeal to overturn the partial lump sum award for the Respondent's home repairs is DENIED;

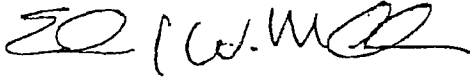
The Order of Commissioner Barden, dated April 22, 2010, and the Order of the Full Commission, dated January 7, 2011, affirming the prior Order of Commissioner Barden, are hereby AFFIRMED by this Court, and the Respondent is entitled to a partial lump sum payment

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from the Petitioner for the costs as specified in the April 22, 2010 Order of Commissioner

Barden.

AND IT IS SO ORDERED!

A handwritten signature in black ink, appearing to read 'E. W. Miller', with a stylized flourish at the end.

The Honorable Edward W. Miller
Circuit Court Judge

Greenville, SC

Date: November 3, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

RECEIVED
MAY 1 2012
COURT OF APPEALS

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

**MOTION FOR LEAVE TO FILE
AMENDED NOTICE OF APPEAL**

Federal Express Corporation hereby moves for leave to amend the Notice of Appeal previously filed on December 2, 2011. The proposed Amended Notice of Appeal is attached to this Motion as Exhibit A. In support of this Motion, Federal Express states as follows:

1. This is a worker's compensation matter. At issue are two orders of the Workers' Compensation Commission. In its order of April 22, 2010, the Commission affirmed an award of a partial lump sum for Respondent to pay his attorney's fees and to make repairs on his home. In its order of July 21, 2010, the Commission affirmed an award of full-time attendant care by Respondent's wife.
2. Federal Express appealed both orders to the circuit court, which

held a single hearing on July 25, 2011. The parties' arguments during the hearing focused almost exclusively on the attendant care order.

3. On November 3, 2011, the circuit court entered two separate orders, one affirming the April 22, 2010 lump-sum award and the other affirming the July 21, 2010 attendant-care order.

4. Federal Express filed its Notice of Appeal on December 2, 2011. As required by Rule 203(d)(2), SCACR, Federal Express attached a copy of the circuit court decision affirming the April 22, 2010 lump-sum award, but it inadvertently did not attach a copy of the decision affirming the July 21, 2010 attendant-care award.

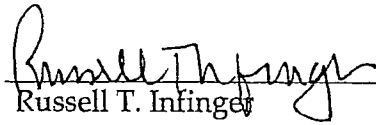
5. Undersigned counsel discovered the oversight in the course of drafting the brief, and accordingly now moves for leave to file an Amended Notice of Appeal to which both decisions of November 3, 2011 are attached.

6. Respondent will not be prejudiced by the granting of this Motion. The July 21, 2010 attendant-care award was the primary focus of the circuit court hearing, and thus there is no undue surprise. Further, Respondent will have the full 30 days allotted by Rule 208(a)(2) to file his initial brief. *See Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435-36 (Ct. App. 1995) (forgiving appellant's error in neglecting to appeal one of a series of cases tried together and holding that a non-prejudicial clerical error is not fatal to an appeal).

Accordingly, Federal Express respectfully requests leave to file an

Amended Notice of Appeal.

May 9, 2012



Russell T. Infinger

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Tel: 864-282-1122

SC Bar No. 2886

rinfinger@nexsenpruet.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

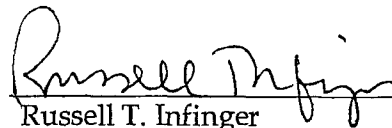
Case No. 2011-CP-23-898

Michael Jarrard, ... Respondent,
v.
Federal Express Corporation, ... Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Leave to File Amended Notice of Appeal on Michael Jarrard by depositing a copy of same in the United States Mail, postage prepaid, on May 9, 2012, addressed to his attorney of record, C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29611.

May 9, 2012



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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

**RETURN TO THE MOTION FOR LEAVE
TO FILE AN AMENDED NOTICE OF APPEAL**

This return is filed pursuant to Rule 240(e) of the South Carolina Appellate Court Rules. As the motion under consideration states, this is a workers' compensation case in which the Appellant asks to amend its notice of appeal to specify that it is appealing not one, but two orders of the circuit court.

The argument goes that the Respondent will not be prejudiced by this amendment and that the failure to attach the previously un-attached order is a clerical error, but this argument should not be persuasive. This involves more than attaching a new order — the notice of appeal did not reference this order at all. The circuit court heard not one, but two workers' compensation appeals, and because the notice of appeal pertained to only one of them, the Court only has jurisdiction over one of them. The Court should deny the motion to amend.

BACKGROUND

The previous paragraph's description of this case as "an appeal in a workers' compensation case" is not entirely accurate. On July 25, 2011, the circuit court heard two workers' compensation appeals involving the parties in this case. One involved the workers' compensation commission's decision to give Michael Jarrard some of his benefits in a lump sum. The other involved the commission's decision that Federal Express Corporation (Mr. Jarrard's employer at the time of his injury) was required to pay Mr. Jarrard's wife for the care she has been providing to her husband since his brain surgery. The lump sum order is attached to this return as Exhibit A. The attendant care order is Exhibit B.

These orders were not issued close in time to one another. The attendant care order was issued in July of 2010; the lump sum order was issued in January of 2011. These orders arose out of separate proceedings before the commission. The commission heard the attendant care claim in August of 2009 (hearing commissioner) and April of 2010 (appellate panel). It heard the lump sum claim in March of 2010 (hearing commissioner):¹ FedEx filed separate appeals from both orders. See Exhibit C. The circuit court heard these appeals on the same day, and about four months later it issued two orders affirming the commission.

FedEx timely filed and served a notice of appeal. The notice instructs that FedEx is appealing "the Order of the Honorable Edward W. Miller dated November 3, 2011" and that FedEx received written notice of the entry of the order on November 9, 2011. The only order attached to the notice was the lump sum order, and the only docket number listed on the notice was the docket number for the lump sum order. The notice is attached as Exhibit D.

¹The appellate panel decided the attendant care claim without oral argument.

ARGUMENT

FedEx argues that the failure to attach a copy of the attendant care order to its notice of appeal is a clerical error, and it cites this Court's decision in *Charleston Lumber Co. v. Miller Housing Corp.* to invoke the principle that a non-prejudicial error in a notice of appeal is not fatal to an appeal. This argument should not be persuasive.

Charleston County Lumber Co. involved a series of lawsuits to collect on a monetary obligation. The plaintiff (Charleston County Lumber) was a business that sold construction materials. The defendants were a homebuilding company (Miller Housing) and its vice president (Mr. Miller). Mr. Miller executed a promissory note to Charleston Lumber on behalf of himself and his company. He also executed a mortgage on five pieces of real property. When Mr. Miller defaulted, Charleston Lumber filed six lawsuits. Five of the suits were actions to enforce the collection of the promissory note. The sixth suit sought to foreclose on the mortgage. Charleston Lumber was the winner in the trial court, and Mr. Miller and his company appealed. See 318 S.C. 471, 475-77, 458 S.E.2d 431, 434-35 (Ct. App. 1995).

The notice of appeal was deficient in that its numerical list of the cases appealed did not include one of the five suits to enforce the collection of the note. On appeal, Charleston Lumber took the position that this was a failure to appeal one of the cases, and that this failure was a fatal error. See *Id.* at 477, 458 S.E.2d at 435.

This Court disagreed, observing that “[c]lerical errors in a notice of appeal do not destroy the appeal.” *Id.* at 478, 458 S.E.2d at 435. The Court recited that five of the suits were identical except for the fact that each described a different piece of property, and that

each suit sought to collect the balance due on a single note. The defendants had submitted identical answers, counterclaims, and amended answers to each suit, and although the trial court never consolidated the five cases, the judge signed a single order for all of them. *Id.* at 477, 458 S.E.2d at 435. This Court also observed that although the notice of appeal omitted one of the cases from its list, the pertinent orders had been described and attached to the notice. *Id.* at 478, 458 S.E.2d at 436. The Court used these facts to make the case that Charleston Lumber could not have been misled by the notice of appeal — the appellants' clear intention was to appeal the rulings against them.

The Court should find that our case is meaningfully different, in several respects. For one, this is not a case where there are multiple and identical lawsuits that are tied to a shared issue like collecting on a promissory note. These workers' compensation appeals dealt with entirely different issues. One appeal concerned Mr. Jarrard's request that he receive some of his benefits in a lump sum. The other appeal dealt with whether FedEx was required to pay Mr. Jarrard's wife for the care she has been providing to her disabled husband since his brain surgery. Because of the connection between the lawsuits in *Charleston Lumber Co.*, the only reasonable inference from the notice of appeal was that Mr. Miller and his company were appealing all of the cases; to appeal just five of the six would have been nonsensical. That is not true in our case. FedEx could very well have made a strategic decision not to appeal either of these issues beyond the circuit court level.

Another meaningful difference between *Charleston Lumber Co.* and our case is that although Mr. Miller's notice of appeal did not list the number for one of the cases, the notice described the pertinent orders, and the orders were attached. See 318 S.C. at 478, 458 S.E.2d

at 436. This sent at least some signal (beyond the obvious fact that failing to appeal one of the cases would have made no sense) that the case in question was part of the appeal. This is not true for our case. Here, the notice of appeal was written in the singular — FedEx appealed “the” order dated . . . and received notice of “this” order on . . . — and the only docket number on the notice was the docket number for the lump sum order. See Exhibits A and D.² Nothing gave Mr. Jarrard, the lower court, or this Court any notice that FedEx was appealing the attendant care order. With the exception of having the appeals heard in the circuit court on the same day in July and the court ruling on both appeals on the same day in November, these controversies between Mr. Jarrard and FedEx were handled separately. And it should say something that *if* FedEx had wanted to appeal one order but not the other one, its notice of appeal would have looked an awful lot like the one it actually filed.

Most of what South Carolina’s appellate courts have written about clerical errors has arisen in the context of fixing errors in a court order.³ In that context, courts have defined a clerical error as “a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function.” *Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000) (quoting *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994)). Something that “changes the scope of the judgment” is not a clerical error. See *Brown v. Brown*, 392 S.C. 615, 623, 709 S.E.2d 679, 683 (Ct. App. 2011). Clerical errors at least include things like “misspelling[s], misplaced decimal[s], or []

²The appellate court rules require the notice of appeal to include the docket number of the case in the lower court. See Rule 203(e)(1)(B), SCACR.

³The court can correct clerical mistakes in orders at any time. See Rule 60(a), SCRCP.

miscalculation[s].” *Id.* at 622, 709 S.E.2d at 683. They do not include changes that recharacterize part of the judgment or impose new terms on the parties. *Id.* at 623, 709 S.E.2d at 683.

Allowing FedEx to amend the notice of appeal in this way would recharacterize this appeal — put differently, it would materially change the appeal’s scope. This has not been true for the other cases where there has either been a clerical error in the notice of appeal or a party has argued issue preservation based on the notice of appeal. In *Pittman v. Stevens*, for example, the Supreme Court rejected an error preservation argument because the notice of appeal was adequate to inform the respondent of the issue pressed on appeal. See 364 S.C. 337, 342, 613 S.E.2d 378, 380 (2005). In *State v. Scott*, the defect was that the appellant served the notice of appeal on the clerk of the wrong lower court.⁴ The Supreme Court wrote that the citation of the incorrect county in the notice of appeal was a clerical error. 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002).

Moody v. Dickenson — the case *Charleston Lumber Co.* relies on for the proposition that clerical errors do not invalidate a notice of appeal — involved the argument that the appeal should be dismissed because the appellant had incorrectly captioned the case “Moody, as administrator, v. Dickenson” instead of “Moody and others v. Dickenson.” See *Moody*, 54 S.C. 526, 531, 32 S.E. 563, 565 (1899). In *Weatherford v. Price*, the notice of appeal did not directly refer to the order at issue, but the order was attached to the notice. See 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000).

⁴The appellate court rules require the appellant to file the notice of appeal with the clerk of the lower court and the clerk of the appellate court. See Rule 203(d)(1)(A), SCACR.

Contrast these cases with *Conner v. City of Forest Acres*, where the original notice listed only one person as a respondent, but when the appellant filed her brief, she sought to amend the notice of appeal to add two parties as respondents. See 348 S.C. 454, 460-61, 560 S.E.2d 606, 609 (2002). The Supreme Court distinguished *Moody* and said these respondents had not been served with a notice of appeal within the deadline and had been misled into believing that they were not parties to the appeal. *Conner*, 348 S.C. at 461-62, 560 S.E.2d at 609-610. The Court repeated that the service of a notice of appeal is a jurisdictional requirement and that the Court has no authority to extend or expand the time in which the notice of appeal must be served. *Id.* at 461, 560 S.E.2d at 609. This meant that the appellant had not perfected an appeal against these respondents, and that the court did not have jurisdiction over an appeal involving them.

Our case is more like *Conner*. Although FedEx *did* perfect an appeal against Mr. Jarrard as to the lump sum order, it *did not* perfect an appeal against him as to the attendant care order. This is not a question of prejudice — as FedEx describes, this amendment will not impact Mr. Jarrard's time to respond to FedEx's brief. It is a question of properly perfecting an appeal. Again, if FedEx had wanted to appeal one order but not the other one, its notice of appeal would have looked just like the one it actually filed. There was no clue anywhere in the notice that this single document was intended to cover both appeals — both docket numbers and both orders. That difference is a meaningful difference.

CONCLUSION

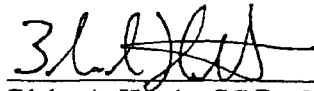
The Supreme Court has observed that “[p]arties who assail others upon [] purely technical grounds should be careful to see that their mode of attack is itself technically

accurate," *Moody*, 54 S.C. at 533, 32 S.E. at 566, and that is a very fair point. On top of that, advancing a technical argument is not a particularly pleasant business — nobody likes to have to press an argument based on procedural rules.

But procedural rules matter, and the fact of the matter is that the amended notice of appeal does more than correct a clerical error. It materially changes the scope of this appeal. The circuit court heard not one, but two workers' compensation appeals, and because the notice of appeal — in all respects — pertained to only one of them, the Court only has jurisdiction over one of them. For that reason, this Court should deny FedEx's motion for leave to file an amended notice of appeal.

Respectfully submitted,

May 21, 2012



Blake A. Hewitt, SC Bar No. 73674

John S. Nichols, SC Bar No. 4210

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C. Daniel Vega

CHAPPELL SMITH & ARDEN

Post Office Box 12330

Columbia, SC 29611

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED
MAY 30 2012
SC Court of Appeals

Case Nos. 2011-CP-23-898, 2010-CP-23-7077

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

**REPLY IN SUPPORT OF
MOTION FOR LEAVE TO FILE
AMENDED NOTICE OF APPEAL**

Respondent concedes that allowing Federal Express to amend its notice of appeal will not cause him any prejudice. In contrast, Federal Express will suffer significant prejudice if amendment is not allowed, because it would be deprived of its right to seek appellate review of the circuit court's order directing Federal Express to pay for full-time attended care by Respondent's wife, for the remainder of his natural life—an amount of approximately \$700,000.

It should be noted that the only mistake in the notice of appeal is the incorrect case number. *Cf. United States v. Taylor*, 628 F.3d 420, 422-23 (7th Cir. 2010) (excusing defective notice of appeal that contained an incorrect case

number).¹ Respondent complains that Federal Express only attached the lump-sum order to its notice of appeal, but this argument overlooks the fact that Federal Express was not required to attach anything at all to the notice of appeal. Rule 203(e)(1), SCACR, sets forth the requirements for the “Form and Content” of the notice of appeal:

In appeals from lower courts, the notice of appeal shall contain the following information:

- (A) The name of the court, judge, and county from which the appeal is taken.
- (B) The docket number of the case in the lower court.
- (C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken
- (D) The name of the party taking the appeal.
- (E) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

There is no requirement in Rule 203(e)(1) to attach a copy of the order or judgment to the notice of appeal, nor is there any requirement to serve a copy of the order on the respondent. Rule 203 requires only that a copy of the judgment or order appealed be filed with the court along with the notice of appeal:

¹ Although this case and *Benn v. First Judicial District, infra*, concern the interpretation of Rule 3(c), Fed. R. Civ. P., the requirements of Rule 3(c) are quite similar to those of Rule 203(e)(1), SCACR. In the absence of any South Carolina authority on point, the Court may consider decisions interpreting the federal rules as persuasive authority. See *State v. Fripp*, 396 S.C. 434, 440-41, 721 S.E.2d 465, 467 (Ct. App. 2012) (recognizing that federal authority is instructive in applying corresponding elements of South Carolina rules).

The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served. The notice filed with the appellate court shall be accompanied by the following:

- (i) Proof of service showing that the notice has been served on all respondents;
- (ii) A copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing; ...

Rule 203(d)(1)(B), SCACR. The Rules thus clearly distinguish the notice of appeal—which must be served on the respondent *and* filed with the court—from a copy of the order or judgment—which must be filed with the Court but need not be served on the respondent.

The cases on which Respondent relies do not counsel against granting the motion to amend. Respondent hinges much of his argument on a definition of “clerical error” drawn from cases discussing correction of court orders under Rule 60(a), S.C.R.C.P. Cases regarding the scope of the circuit court’s authority to revise its own judgments simply are not helpful in this context. A much more pertinent case is *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563, 566 (1899), in which the Court excused the failure to name two parties as respondents as a “clerical error.”

Respondent attempts to equate this case with *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002), but *Conner* is not at all like this case. In *Conner*, the plaintiff sued the City of Forest Acres and two individuals. After the circuit court entered a single order granting summary judgment in favor of all three defendants, Conner filed a notice of appeal naming only the City of Forest Acres

as respondent. In addition to failing to name the individual defendants as respondents, Conner never served them with the notice of appeal. Further, Conner should have realized the error within days of filing the notice of appeal, when the Court of Appeals instructed her to correct the case caption to reflect that the City was the only respondent. It was only after Conner filed her initial brief that the *Court of Appeals* noticed the failure to identify and serve the individual defendants. The Supreme Court held that Conner's failure to serve the individual defendants with *any* notice of appeal was not a "clerical error." *Id.* at 461, 560 S.E.2d at 609; *cf. Moody*, 32 S.E. at 565-66 (excusing failure to name two parties as respondents when the notice of appeal was actually served on the attorney who represented all of the respondents). More importantly, the Court held that Conner should have noticed and corrected the mistake sooner, and that her failure to do so had misled the individual defendants and caused them prejudice. *See Conner*, 348 S.C. at 462, 560 S.E.2d at 610; *cf. Moody*, 32 S.E. at 566 (permitting correction of notice of appeal when respondents "were in no way prejudiced or misled").

Here, in contrast, Federal Express timely served Respondent with the notice of appeal. Federal Express recognized the error in its notice of appeal while it was preparing its initial brief (which has not yet been filed), and it acted promptly to correct the error by filing this motion. Respondent was not misled and has suffered no prejudice. In short, none of the circumstances that concerned the Court in *Conner* are present in this case.

This is a single worker's compensation case;² the underlying orders of the Commission simply concern different components of Respondent's lifetime disability award. The circuit court conducted a single hearing on Federal Express's appeal of those orders. On November 3, 2011, the circuit court issued two orders affirming the Commission's rulings. The first page of each order is virtually identical to the other; the only differences are in the case numbers and the end of the first sentence. Under these circumstances, the error in the notice of appeal is understandable and should be excused by this Court.

In *Benn v. First Judicial District*, 426 F.3d 233 (3d Cir. 2005), the Third Circuit granted relief under nearly identical circumstances. Donald Benn filed suit against three parties—the First Judicial District of Pennsylvania, the City of Philadelphia, and the Board of Pensions—under the Americans with Disabilities Act (ADA). On September 6, 2001, the district court entered two orders: one granting summary judgment in favor of the Judicial District, and the other dismissing without prejudice the claims against the City and the Pension Board. Benn timely filed a notice of appeal from “the Order of the [district court] entered in the above captioned proceeding on the 6th day of September, 2001.” *Id.* at 236. Benn mistakenly attached the order of dismissal, rather than the order granting summary judgment, to his notice of appeal. He later realized the mistake and sought leave to amend the notice of appeal. *See id.*

² Both of the circuit court's orders state, “This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard ... WCC No.: 0217907.”

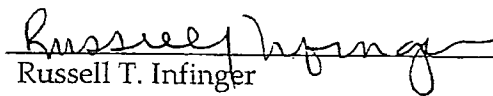
The Third Circuit allowed amendment of the notice of appeal. Recognizing the ambiguity created by the entry of two orders on the same day, the court determined that Benn's situation was similar to "cases where the appellant's notice of appeal implicated two different orders in the same action and failed to specify the correct order appealed." *Id.* at 237. The court applied the reasoning of those cases and concluded that leave to amend was properly granted because (1) the orders "were connected in that they were dispositive of the same case and issued on the same day," and (2) the Judicial District suffered no prejudice because "Benn's mistake was caught and corrected in time to afford the Judicial District a full and fair opportunity to brief the issues." *Id.* at 737-38.

The same result is appropriate in this case. Two orders were entered on November 3, disposing of issues in the same case. Federal Express caught the mistake and is acting to correct it in ample time for Respondent to fully brief the issues. And Respondent must have been aware that Federal Express desired to appeal an award worth \$700,000, particularly when the propriety of that award was the near-exclusive topic of discussion during the circuit court hearing.

CONCLUSION

Accordingly, Federal Express respectfully requests leave to file an Amended Notice of Appeal.

May 29, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ... Respondent,

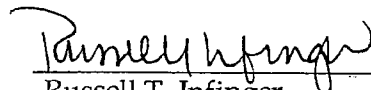
v.

Federal Express Corporation, ... Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Leave to File Amended Notice of Appeal on Michael Jarrard by depositing a copy of same in the United States Mail, postage prepaid, on May 9, 2012, addressed to his attorney of record, C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29611.

May 9, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Greenville County, South Carolina
Honorable Edward W. Miller, Circuit Court Judge

WCC No. 0217907
Case No. 11-CP-23-898
Case No. 10-CP-23-7077

Federal Express Corporation, ... Appellant,

v.

Michael Jarrard, ... Respondent.

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STATEMENT OF ISSUES

1. Did the Commission err in awarding attendant care compensation retroactive to the date of total disability, when Mr. Jarrard waited for seven years to request such compensation?
2. Did the Commission err in awarding attendant care compensation for hours in which Mrs. Jarrard was not actually caring for her husband (including time spent performing ordinary household tasks), at an hourly rate that is not supported by the evidence?

STATEMENT OF THE CASE

This is a workers' compensation case. Respondent Michael Jarrard was exposed to hazardous chemicals during the course of his employment with Appellant Federal Express. These exposures resulted in lung damage and physical brain injury. In July 2006, Commissioner Childs found Mr. Jarrard permanently disabled and awarded lifetime benefits. (Order, July 14, 2006.) This award was affirmed by an appellate panel (Order, Jan. 8, 2007) and by the Circuit Court. (Order, Oct. 31, 2008.)

In March 2009, Mr. Jarrard sought an additional award of compensation to be paid to his wife for attendant care. (Form 50, Mar. 20, 2009.) Mr. Jarrard further claimed that this award should be made retroactive to November 14, 2002. Federal Express denied this request. (Form 51, Apr. 17, 2009.) Commissioner Wilkerson conducted a hearing on September 11, 2009, following which he awarded compensation for attendant care 20 hours per day, 7 days per week, at the rate of \$12.00 per hour. (Order, Jan. 4, 2010.) An appellate panel reviewed Commissioner Wilkerson's award but could not reach consensus. (Order, July 21, 2010.) Accordingly, the award was confirmed.

In a separate Form 24 filed September 23, 2009, Mr. Jarrard sought a partial lump-sum award to make repairs to his home and to pay his

attorney's fees. Commissioner Bardon granted this request. (Order, Apr. 22, 2010.) An appellate panel affirmed this award. (Order, Jan. 7, 2011.)

Federal Express appealed the attendant care order and the lump-sum order to the Circuit Court, which conducted a single hearing concerning both appeals. (Hearing Tr. July 25, 2011.) The Circuit Court, Judge Edward R. Miller, affirmed both awards. (Order, Nov. 3, 2011; Order, Nov. 3, 2011.) Federal Express appealed. (Amended Notice of Appeal.)

STATEMENT OF FACTS

Mr. Jarrard was employed by Federal Express as a truck driver and Dangerous Goods Specialist. In June 2001, he was exposed to chemicals from a leaking package causing uncontrollable coughing. Mr. Jarrard was exposed to chemicals a second time in October 2002, again causing uncontrollable coughing. These chemical exposures have resulted in permanent lung damage. (Order, July 14, 2006, at 9.) The chemical exposures also aggravated an existing lesion in Mr. Jarrard's brain. (*Id.*) Mr. Jarrard underwent surgery in November 2002, during which he suffered a hemorrhage that resulted in physical brain damage. (*Id.* at 7.) Following his surgery and continuing to the present, Mr. Jarrard's wife has taken care of him, assisting him with medications, preparing his meals, taking him to doctor's appointments, and helping him care for himself.

In 2005, Mr. Jarrard obtained a life care plan from Hollenback and Associates (APA pp. 189-243), which included a proposal for attendant care for 16-20 hours a day (APA p. 156). Mr. Jarrard sought an award of permanent disability, in January 2005, submitting the life care plan as part of the evidence in support of his claim. (APA pp. 189-243.) Although the life care plan included a provision for attendant care, and although Mrs. Jarrard was providing attendant care at that time, Mr. Jarrard did not

request compensation for past or future attendant care. (Form 50 filed Jan. 13, 2005.) Mrs. Jarrard testified at the hearing, but Mr. Jarrard's counsel did not ask her to describe the care she provided for him. (Hearing Tr. July 13, 2006, at 15-20.) In her order awarding lifetime benefits, Commissioner Childs ordered payment for "[c]harges for the medical care of the Claimant's injury ... as outlined in the Life Care Plan." (Order, July 14, 2006 at 10.) The order made no specific provision for attendant care services, and Mr. Jarrard did not appeal the absence of such an award. Commissioner Childs's order was affirmed by an appellate panel and the Circuit Court and to date remains the law of the case.

In March 2009 (three years after Commissioner Childs's order), Mr. Jarrard obtained a second life care plan. This plan, prepared by Sarah Lustig, R.N., called in part for Mr. Jarrard to receive attendant care provided by Mrs. Jarrard 24 hours a day, 7 days per week, at a rate of \$12.00 per hour. (APA p. 26.) Based on this new plan, Jarrard petitioned for payment of both past and future attendant care. (Form 50, Mar. 20, 2009.) On September 11, 2009, Commissioner Wilkerson heard testimony on this matter. Commissioner Wilkerson thereafter ordered that Mrs. Jarrard should receive payment for providing attendant care 20 hours per day, 7

days per week, at \$12.00 per hour, commencing on November 14, 2002 and continuing during Jarrard's lifetime. (Order, Jan. 4, 2010 at 13.)

Federal Express appealed Commissioner Wilkerson's order (Form 30, Jan. 22, 2010), but the appellate panel could not reach consensus.

Commissioner Huffstetler would have affirmed the award, but Commissioners Williams and Beck both found error in the retroactive portion of the award. Commissioner Williams would have limited retroactivity to 2005, while Commissioner Williams would not have made any part of the award retroactive. (Order, July 21, 2010, at 7.) Accordingly, the Order of Commissioner Wilkerson was deemed affirmed. (Order, July 21, 2010.)

Federal Express thereafter appealed this issue to the Circuit Court.

(Petition for Judicial Review, Aug. 25, 2010.) On July 25, 2011, Judge

Edward W. Miller conducted a hearing on this matter as well as on Federal Express's appeal of a partial lump-sum award. (Hearing Tr., July 25, 2011.)

On November 3, 2011, Judge Miller entered orders affirming both awards.

SUMMARY OF ARGUMENT

Commissioner Wilkerson's award of attendant-care benefits is improper in two ways. First, Commissioner Wilkerson erred in making the award retroactive to November 14, 2002. Mr. Jarrard did not request attendant care benefits until March 2009. As a matter of simple fairness, Federal Express should not be required to pay for attendant care prior to the date it first received notice that such care was being sought.

Second, the record evidence does not support the full extent of the compensation awarded by Commissioner Wilkerson. The award of compensation for care provided 20 hours per day is improper because it provides compensation for hours when Mrs. Jarrard is not actually caring for her husband, including time spent doing ordinary housework. The hourly rate of \$12.00 is also improper. This rate may be appropriate for skilled nursing services, but the record is clear that much of what Mrs. Jarrard does is not skilled nursing care and should be compensated, if at all, at a lower hourly rate.

The Circuit Court order should be reversed and the case remanded for modifications to the attendant care award.

ARGUMENT

Commissioner Wilkerson ruled that an award of compensation for attendant care provided by a claimant's spouse is permitted by S.C. Code Ann. § 42-15-60(C) (Supp. 2011), which provides in relevant part:

In cases in which total and permanent disability reasonable and necessary nursing services ... and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit.

Federal Express does not dispute that compensation for attendant care provided by a spouse or other family member may be awarded by the Commission as "other treatment or care." While the South Carolina appellate courts have never addressed this issue, the majority of states approve of such awards. See William J. Appel, Annotation, *Worker's Compensation: Recovery for Home Service Provided by Spouse*, 67 A.L.R.4th 765 (1989). In particular, North Carolina courts have explicitly approved the payment of workers' compensation benefits for attendant-care services provided by a family member. See, e.g., *Boylan v. Verizon Wireless*, 685 S.E.2d 155, 159-60 (N.C. Ct. App. 2009). Because South Carolina's workers' compensation law was modeled on North Carolina's, the decisions of the North Carolina court are "entitled to great weight" in construing the South Carolina act. See *Holley v. Owens Corning Fiberglass Corp.*, 301 S.C. 519, 523,

392 S.E.2d 802, 806 (Ct. App. 1990). In sum, as a general matter the Commission may award compensation for attendant care provided by a claimant's spouse as "reasonable and necessary ... other treatment."

This appeal presents two specific questions regarding Commissioner Wilkerson's award of compensation for attendant care provided by Mrs. Jarrard. First, did the Commissioner err in awarding compensation retroactive to November 14, 2002 — *seven years* before Mr. Jarrard's first request for such benefits? Second, does the evidence in the record support Commissioner Wilkerson's decision to award compensation for 20 hours per day, at a rate of \$12.00 per hour? The answer to both of these questions is "No."

- I. Because Federal Express was not notified of the need for attendant care services until March 2009, the retroactive portion of the award should be reversed.

The Administrative Procedures Act establishes the standard for judicial review of worker's compensation decisions. *Lark v. Bi-lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The Full Commission is the ultimate finder of fact in workers' compensation proceedings, but its conclusions of law are entitled to no particular deference. *See Hutson v. State Ports Auth.*, 390 S.C. 108, 113, 700 S.E.2d 462, 465 (2010).

In affirming the retroactive portion of the attendant care award, the Circuit Court relied on *Boylan v. Verizon Wireless*, 685 S.E.2d 155 (N.C. Ct. App. 2009). *Boylan* is different from this case, however, and does not aid in resolving the issue raised by Federal Express. In *Boylan*, the North Carolina Commission awarded compensation for past attendant care services provided by various members of the claimant's family. On appeal, the employer argued that the retroactive portion of the award was improper because the claimant failed to seek prior approval for attendant care under N.C. Gen. Stat. § 97-90(a). *Id.* at 158. Section 97-90(a) requires Commission pre-approval of "charges of health care providers for medical compensation." The North Carolina Court of Appeals rejected this argument, reasoning that attendant care provided by a family member is not "medical compensation." *Id.* at 159.

Boylan is not on point because the issue here is not Mr. Jarrard's failure to seek pre-approval for attendant care services; it is his failure to seek payment for those services in 2005, when he first sought an award of benefits from the Commission.¹ Nothing precluded Mr. Jarrard from

¹ Additionally, *Boylan* is substantially undermined by the North Carolina Court of Appeals' subsequent decision in *Mehaffey v. Burger King*, 718 S.E.2d 720 (N.C. Ct. App. 2011). In *Mehaffey*, the court rejected an award of retroactive attendant care benefits because the claimant had

seeking an award of attendant care at that time; his wife had been providing attendant care for over two years by that point, and the life care plan prepared by Hollenbeck & Associates noted that attendant care would be appropriate. It is Mr. Jarrard's failure to provide timely notice, not any failure to seek pre-approval, that precludes a retroactive award.

A more helpful case is *St. Clair v. County of Grant*, 797 P.2d 993 (N.M. Ct. App. 1990). Quaid St. Clair obtained a judgment of total disability due to brain injury in 1984, in an award that included payment of future medical expenses. Although his wife had been providing attendant care since the date of the accident in 1983, St. Clair did not seek compensation for attendant care until 1986, two years after the initial award of total disability. *See id.* at 996. The commission granted attendant care benefits retroactive to the date of injury, but the New Mexico Court of Appeals reversed. The court reasoned that the commission's award of *future* benefits in 1984 permitted modification of the award to include attendant care services, *but only prospectively*. *See id.* at 999.

The Court should reach the same result in this case. The doctrine of laches applies in workers' compensation cases. *Richey v. Dickinson*, 359 S.C.

failed to obtain pre-approval as required by the workers' compensation fee schedules. *See id.* at 724.

609, 612-13, 598 S.E.2d 307, 309-10 (Ct. App. 2004). A workers' compensation claimant cannot sleep on his rights but rather "must prosecute his claim in a timely fashion." *Id.* Mr. Jarrard failed to do so, and as a result Federal Express has been prejudiced.

The notice requirements of the Worker's Compensation Act are necessary to allow employers to investigate claims and to provide appropriate, cost-effective care. Those purposes are disserved by retroactive awards like the one in this case, which holds Federal Express liable for *seven years* of attendant care. Had Mr. Jarrard made a timely request for attendant care benefits in January 2005, when he filed his first Form 50, Federal Express could have addressed the issue then. Mr. Jarrard's delay in making this claim deprived Federal Express of any ability it might have had to investigate the need for attendant care or to mitigate the cost.

Accordingly, Commissioner Wilkerson's award of attendant care benefits should be modified to exclude retroactive payments.

- II. The attendant care award should be modified because the record evidence supports neither the number of hours per day nor the hourly rate.

The Court must affirm the Commission's factual findings if they are supported by substantial evidence in the record as a whole. *See Frame v.*

Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494-95 (Ct. App. 2004).
"Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Id.* at 527-28, 593 S.E.2d at 495. "[A]n appellate court can 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." *Fishbourne v. ATI Sys. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 599-600 (Ct. App. 2009).

Federal Express does not dispute that Mr. Jarrard needs attendant care. But it is Mr. Jarrard's burden to establish that the requested compensation is both "reasonable *and* necessary." S.C. Code Ann. § 42-15-60; *see Pilgrim v. Eaton*, 391 S.C. 38, 48-49, 703 S.E.2d 241, 246 (Ct. App. 2010). The proof offered by Mr. Jarrard does not support Commissioner Wilkerson's award. First, the award of 20 hours per day rests entirely on Mrs. Jarrard's testimony that she has slept no more than four hours per night since November 14, 2002. Second, the evidence does not support an hourly rate

of \$12.00. While the care Mrs. Jarrard provides is important, it is not skilled nursing care and should not be compensated as such.

Some courts have adopted a four-factor test for the determination of whether attendant care provided by a spouse is compensable. *See, e.g., Warren Trucking Co. v. Chandler*, 277 S.E.2d 488, 493 (Va. 1981). North Carolina, however, has rejected this standard in favor of a “flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence.” *Shackleton v. S. Flooring & Acoustical Co.*, 712 S.E.2d 289, 300-01 (N.C. Ct. App. 2011).

A. Commissioner Wilkerson erred in awarding compensation for 20 hours per day of attendant care.

A critical aspect of this case is that Mr. Jarrard seeks payment only for attendant care services provided by his wife, and the award must be viewed through the lens of that request. The request for attendant-care compensation rests on the assumption that *only* Mrs. Jarrard will provide care for Mr. Jarrard for 20 hours per day, 365 days per year. Federal Express does not question Mrs. Jarrard’s devotion to her husband or the quality of the care she provides. But as a practical matter it is unlikely that Mrs. Jarrard has been caring for Mr. Jarrard 20 hours of every day since

November 2002. It is far more likely that Mrs. Jarrard has provided care for a smaller number of hours every day.

On September 11, 2009, a hearing on the issue of attendant care was held before Commissioner Avery Wilkerson. During the course of the hearing, Ms. Lustig testified she based her assessment on a single visit to the Jarrard home that lasted for four or five hours. (Hearing Tr. Sept. 11, 2009 at 40.) She admitted that she did not witness Mrs. Jarrard actually caring for her husband, but instead based her recommendation on Mrs. Jarrard's demonstration of how she cared for her husband. (*Id.* at 41-42.) Ms. Lustig testified that while she recommended Jarrard's wife be paid for 24 hours a day, 7 days a week for attendant care, she acknowledged that Mrs. Jarrard is not actually providing care during all of those hours, and indeed may not be present at all. (*Id.* at 43-44.) In essence, Ms. Lustig testified that because *someone* is with Mr. Jarrard for 24 hours of every day, *Mrs. Jarrard* should be compensated for 24 hours of attendant care every day.

An award of 20 hours per day of attendant care might be appropriate if Mr. Jarrard requested care to be provided by more than one provider, or care only by Mrs. Jarrard for fewer than 20 hours. An award based on such a request would have more support in the evidentiary

record. Having requested compensation only for Mrs. Jarrard, however, Mr. Jarrard must prove that Mrs. Jarrard is actually occupied with caring for Mr. Jarrard for 20 hours per day.²

The award of 20 hours per day is also improper because much of what Mrs. Jarrard does is not "treatment." S.C. Code Ann. § 42-15-60 (authorizing benefits for "other *treatment* or care" (emphasis added)). To be compensable under § 42-15-60, the services provided by Mrs. Jarrard "must be incident to medically necessary attendant care services and *central* to the employee's physical health or personal care. *Nonmedical homemaking services are not compensable as 'nursing' services.*" 2 Modern Workers Compensation § 202:29 (emphasis added). Mrs. Jarrard's testimony establishes that she does provide "treatment" to Mr. Jarrard by monitoring his medications, seeing to his physical comfort, and assisting him with personal care. (Hearing Tr. Sept. 11, 2009, at 9, 18). But she also spends part of her day on household tasks such as cooking, cleaning, and doing laundry — all things she did before Mr. Jarrard's disability. (*Id.* at 24-26.). Such ordinary household services are not compensable under § 42-15-60. See *Jerome v. Farmers Produce Exch.*, 826 S.W.2d 3, 6-7 (Mo. Ct. App.

² Actually, Mr. Jarrard requested that Mrs. Jarrard receive payment for 24 hours per day of attendant care.

1991) (affirming commission order that granted compensation for 11½ hours per week of nursing care but denied compensation for 13½ hours of meal preparation and planning), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Because the evidence does not support an award of 20 hours per day for “other treatment” provided by Mrs. Jarrard, the award should be modified so that the number of hours per day reflects only those hours that Mrs. Jarrard actually spends providing necessary care to Mr. Jarrard.

B. Commissioner Wilkerson erred in awarding compensation at the hourly rate of \$12.00.

The evidence does not support the hourly rate of \$12.00 awarded by Commissioner Wilkerson. Ms. Lustig testified that her recommendation that Mrs. Jarrard be paid \$12.00 per hour came from calling three private agencies that provide attendant care and skilled nursing. (Hearing Tr. Sept. 11, 2009 at 45.) She did not, however, perform any research into the qualifications of these facilities, nor did she do any additional research regarding the appropriate rate of pay for spousal care. (*Id.*) Furthermore, Ms. Lustig based her estimate on the amount these agencies *charged clients* for their services – an amount that would include the agencies’ overhead and profit margin – rather than the amount those agencies *paid their employees*. The North Carolina Court of Appeals, however, has held that

the amount nursing assistants are paid is the proper measure of compensation for spousal attendant care, not the amount an agency charges for nursing services. *See Levens v. Guilford Cty. Sch.*, 567 S.E.2d 767, 771-72 (N.C. Ct. App. 2002).

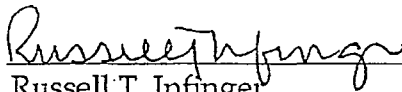
Additionally, Mrs. Jarrard has no training in nursing. While Ms. Lustig testified that Mrs. Jarrard provides excellent care to Mr. Jarrard, the fact remains that this care is unskilled. Compensation should not be premised on hourly rates applicable to skilled nursing services.

Because the evidence does not support an award of \$12.00 per hour for Mrs. Jarrard's services, the award should be modified to reflect a more appropriate hourly rate.

CONCLUSION

For the reasons set forth above, Federal Express asks the Court to reverse or modify Commissioner Wilkerson's order by (a) vacating the retroactive portion of the award; (b) reducing the number of hours of attendant care per day; and (c) reducing the hourly rate.

Respectfully submitted,



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Federal Express Corporation

June 11, 2012

Greenville, South Carolina

The South Carolina Court of Appeals

Michael Jarrard, Claimant, Respondent,

v.

Federal Express, Employer and Self-Insured, Appellant.

Appellate Case No. 2011-204646

ORDER

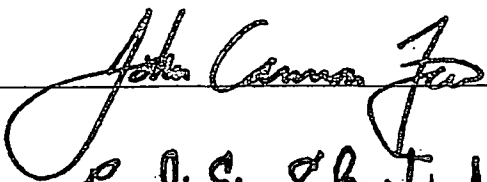
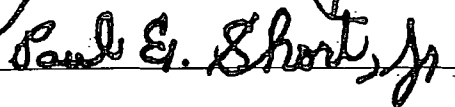
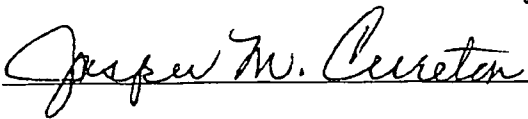
On November 3, 2011, the circuit court issued two orders involving the parties. It appears that the orders arose from the same case before the Workers' Compensation Commission, WCC No. 0217907, but from separate cases in the circuit court. The first case, Case No. 11-CP-23-898, involved the partial award of lump sum benefits, and the second case, Case No. 10-CP-23-7077, involved the award of attendant care benefits. Appellant timely filed a notice of appeal, appealing "the Order . . . dated November 2, 2011." The notice of appeal references only Case No. 11-CP-23-898, and Appellant attached the lump sum benefits order to the notice of appeal.

Appellant has now filed a motion for leave to file an amended notice of appeal, arguing it inadvertently failed to attach the attendant care order. Respondent filed a return in opposition to the motion, arguing this Court is without jurisdiction to hear an appeal stemming from the attendant care order because Appellant failed to timely serve a notice of appeal from that order. Respondent adds that granting Appellant's motion would materially change the scope of this appeal. Appellant filed a reply, arguing its reference to the wrong case number was a clerical error, and the filing of an amended notice of appeal would not prejudice Respondent.

"This Court has previously held that a mere clerical error in a notice of appeal does not warrant dismissal of the appeal." *See Weatherford v. Price*, 340 S.C. 572, 577, 532 S.E.2d 310, 313 (Ct. App. 2000) (*citing Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995)). Our review of

Appellant's notice of appeal, however, does not indicate Appellant's notice of appeal contained a clerical error. As set forth above, Appellant's notice of appeal provides that Appellant is appealing "the *Order* . . . dated November 2, 2011," and references the Case No. 11-CP-23-898. The only order attached to the notice of appeal was the lump sum order. Accordingly, Appellant failed to perfect an appeal from Case No. 10-CP-23-7077 and the attendant care order, and thus, this Court lacks jurisdiction to entertain an appeal from that order. *See* Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment."); Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rule[] 203 . . . may be extended or shortened by the appellate court . . .").

Appellant's motion to amend is therefore denied. Within thirty days, Appellant shall serve and file an amended initial brief arguing only those issues relating to Case No. 11-CP-23-898.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:
C. Daniel Vega
Russell Thomas Infinger
Blake Alexander Hewitt
John S. Nichols

FILED
6-29-12 *LLH*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case Nos. 2011-CP-23-898, 2010-CP-23-7077

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC***

Federal Express Corporation respectfully files this petition for rehearing, asking this Court to reconsider its June 29, 2012 order denying Federal Express's motion to amend its notice of appeal. Because this order had the effect of dismissing the primary issue raised in Federal Express's appeal, this petition for rehearing is proper pursuant to Rules 221(a) and 240(i), SCACR. Furthermore, a determination about which errors constitute un-amendable and fatal errors to a notice of appeal is a question of exceptional importance to the appellate process, and therefore, *en banc* consideration of this issue is warranted. Rule 219(a), SCACR. As explained more fully below, Federal Express urges this Court to find that where, as here, the error in a notice of appeal is clerical in nature, does not prejudice the respondent, and is promptly brought to the attention of the respondent and the Court in good faith, the motion to amend should be granted.

BACKGROUND

This is a workers' compensation case that was heard by the Appellate Panel on different dates, but retained a single case number. The claimant, Michael Jarrard, was exposed to hazardous chemicals while working for Federal Express, causing physical damage to his brain and lungs. In July 2006, the single commissioner found he was permanently disabled and awarded him lifetime benefits. This award was affirmed by the Appellate Panel. Federal Express pursued no further appeal and has abided by this award.

Then, in March 2009, Jarrard sought compensation to be paid to his wife for the attendant care services she provides for him. The single commissioner found Jarrard was entitled to these benefits both prospectively and retroactively. In a split decision from the Appellate Panel, the award was affirmed on July 21, 2010. In a separate Form 24, which Jarrard filed in September 2009, he also requested a partial lump-sum award to pay attorney's fees and to make repairs to his home. The Commissioner granted this request, and the Appellate Panel affirmed on January 7, 2011.

Both the attendant care and lump-sum orders were appealed to the circuit court and were heard in a single hearing before Judge Edward W. Miller. During the hearing, the parties' arguments focused almost entirely on the propriety of the attendant care award. On November 3, 2011, Judge Miller issued two orders, affirming both the awards. Even though the cases stemmed from the same injury and had the same case number in the Workers' Compensation Commission, the case numbers at the circuit court were different: the award affirming the attendant care benefits had a case number of 2010-CP-23-7077; the award affirming the partial lump-sum award had a case number of 2011-CP-23-898.

On December 2, 2011, Federal Express served a timely notice of appeal from “the Order of The Honorable Edward W. Miller dated November 3, 2011.” Federal Express inadvertently listed only case number 2011-CP-23-898. Additionally, when Federal Express filed its notice of appeal, it failed to attach the 2011-CP-23-7077 order.

Prior to filing its Initial Appellant’s Brief, Federal Express discovered that the notice of appeal it had served on Jarrard excluded case number 2010-CP-23-7077 from its caption and that the copy of the notice of appeal it filed with the Court of Appeals had only the one order attached. Immediately upon recognizing this error, Federal Express brought it to Jarrard’s and the Court’s attention, so as to admit the error, correct it, and prevent any potential prejudice a delay in correcting the error might cause. Jarrard opposed the amendment, and a panel of this Court denied Federal Express’s motion to amend the notice of appeal. It is from this denial that Federal Express seeks rehearing.

LAW/ANALYSIS

“While [the South Carolina Supreme] Court has consistently held service of the notice of appeal is a jurisdictional requirement, non-prejudicial clerical errors in the notice are not detrimental to the appeal.” *State v. Scott*, 351 S.C. 584, 587, 571 S.E.2d 700, 701-702 (2002). *See also* Rule 263(b), SCACR (affording the appellate court discretion to expand the time for serving, filing, and correcting anything other than the time for serving the notice of appeal). Historically, our appellate courts have generously allowed parties to correct errors in an effort to promote justice and ensure that appeals are decided on their merits and not on mere technicalities. *Cf. Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (“[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . .

. .”). Indeed, the clerk’s office routinely sends letters to parties allowing them an opportunity to correct errors such as: the failure to list a lower court case number, the failure to reveal the lower court judge and date of the order, the failure to attach the lower court order, the failure to include a certificate of service, the failure to correctly caption the appeal, the failure to timely file a notice of appeal, etc. In fact, the Court does not limit its leniency to notices with only one or two of these errors, but allows the appellant to correct notices even when the defects are numerous. Here, the error Federal Express made was so minor as to be undiscoverable by the clerk’s office. Furthermore, because it was inadvertent, the error was not discovered by Federal Express until it began preparing its initial brief.

The cases favor liberally allowing amendments to the notice of appeal where the errors are minor enough so as to not prejudice the respondent. *See, e.g., Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435-36 (Ct. App. 1995) (forgiving appellant’s error in neglecting to appeal one of a series of cases tried together and holding that a non-prejudicial clerical error is not fatal to an appeal); *see also Moody v. Dickerson*, 54 S.C. 526, 531, 32 S.E. 563, 565 (1899) (allowing the amendment of a notice of appeal to add additional respondents where the amendment was filed soon after the error was discovered and there was no evidence the additional parties were misled or prejudiced); *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (finding the failure to reference the order on appeal was not fatal where the order was attached to the notice).

Indeed, the very case upon which Jarrard relies, *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002), illustrates why Federal Express’s error should be

forgiven. In *Conner*, the plaintiff sued the City of Forest Acres and two individuals. After the circuit court entered a single order granting summary judgment in favor of all three defendants, Conner filed a notice of appeal naming only the City of Forest Acres as respondent. Conner did not name the individual defendants as respondents and *never served them with the notice of appeal*. Moreover, Conner did not correct her error even after receiving a letter from the Court of Appeals, advising her to revise the case caption to reflect that the City was the only respondent. It was only after Conner filed her initial brief that *the Court of Appeals* noticed that Conner never served the individual defendants. Upon making this discovery, the Court of Appeals informed the parties of this defect, and it was then that Conner finally amended her Notice of Appeal. The Supreme Court held that Conner's failure to serve the individual defendants with *any* notice of appeal was not a "clerical error." *Id.* at 461, 560 S.E.2d at 609. The Court contrasted Conner's error to that of *Moody v. Dickerson*, *supra*, where the Court allowed an appellant to correct his notice of appeal to add parties because the appellant's motion to amend was prompt and the opposing parties were not misled. The Court in *Conner* held that the appellant should have noticed and corrected the mistake sooner, and that her failure to do so had misled the individual defendants and caused them prejudice. *See Conner*, 348 S.C. at 462, 560 S.E.2d at 610.

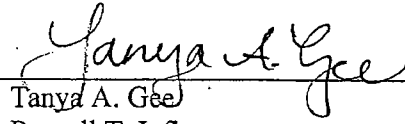
Here, in contrast, Federal Express timely served Respondent with the notice of appeal. Federal Express recognized the error in its notice of appeal while it was preparing its initial brief, and promptly filed a motion to amend before the initial brief had been filed. Jarrard has not suffered any prejudice and did not argue otherwise in his return to the motion to amend. Moreover, Jarrard must have been aware that Federal Express

desired to appeal the attendant care award worth \$700,000, particularly when the propriety of the award was the near-exclusive topic of discussion during the circuit court hearing. In fact, Jarrard may have never have even noticed the technical error had Federal Express not attempted to correct it in good faith.

CONCLUSION

In appealing Judge Miller's award of attendant care services, Federal Express timely served Jarrard with a notice that correctly listed the names of the parties, the name of the lower tribunal, the name of the trial court judge, and the date of the order. What Federal Express did not do was list the case number associated with the attendant care award. Likewise, when it filed its notice of appeal with the Court of Appeals, it attached the lump-sum award order, and not the attendant care order. Because this error was inadvertent, was promptly corrected in good faith, and did not cause any prejudice to Jarrard, nothing in the Appellate Court Rules or prior case law prevents this Court from allowing the appeal to be determined on its merits. Federal Express respectfully requests the panel reconsider its order denying the motion to amend, and in the event the panel wishes to stand by its order, suggests the Court of Appeals consider the matter *en banc*.

Respectfully submitted,

A handwritten signature in cursive script, reading "Tanya A. Gee", is positioned above a horizontal line.

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July 16, 2012

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Petition for Rehearing and Suggestion for Rehearing *En Banc* on Michael Jarrard by electronic mail and by depositing a copy in the United States Mail, postage prepaid, on July 16, 2012, addressed to his attorneys of record, Blake A. Hewitt, Bluestein Nichols Thompson Delgado, LLC, P.O. Box 7965, Columbia, South Carolina, 29202, bhewitt@bntdlaw.com; and C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29211.

July 16, 2012


Sharon A. Werdenie
Legal Assistant to Tanya A. Gee

RECEIVED
JUL 16 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

RETURN TO PETITION FOR REHEARING

This return is filed pursuant to Rule 240(e) of the South Carolina Appellate Court Rules. In addition to requesting rehearing, FedEx suggested that the Court hear this issue *en banc*. Rule 219(b) of the appellate court rules prohibits any response to this suggestion.

Like FedEx's original motion to amend, the argument goes that the Respondent will not be prejudiced by allowing FedEx to amend its notice of appeal and that the failure to attach the previously un-attached order or reference the order are clerical errors, but an error does not become a "clerical error" just because it was inadvertent, and none of the South Carolina cases describing clerical errors are fairly comparable. The guiding principle of the relevant cases is that where the notice of appeal and accompanying documents are technically deficient but are such that they logically imply an appeal of a certain scope, amendments that

conform the notice to that scope are permissible. Amendments that take the scope of the appeal beyond that which is logically implied in the notice and accompanying documents are not permissible, and a party may not use an amended notice to cure an un-perfected appeal outside the appeal deadline. That is what FedEx is attempting to do here.

I.

Mr. Jarrard agrees that this petition for rehearing is appropriate under the rules, but applying that to the circumstances of this case should say something about the notice of appeal, the errors in it, and some of the arguments in the rehearing petition.

Mr. Jarrard agrees that denying FedEx's motion to amend has the effect of deciding the appeal of the attendant care order (docket number 2010-CP-23-7077), and as the parties have observed, FedEx's motion results from the fact that these two workers' compensation appeals have different case numbers. FedEx's petition for rehearing downplays the significance of the case numbers. It points out that "the cases stemmed from the same injury and had the same case number in the Workers' Compensation Commission[.]" (Petition, p.2). FedEx also offers that Mr. Jarrard "must have been aware that [FedEx] desired to appeal the attendant care award worth \$700,000, particularly when the propriety of the award was the near-exclusive topic of discussion during the circuit court hearing." (Petition, pp.5-6). The argument seems to be that despite the fact that the notice of appeal contains only one docket number, has only one order attached, and is written in the singular — it says "*the* order" — Mr. Jarrard must have known an appeal of the attendant care order was included.

One fair push-back to this argument is the fact that FedEx's actions with respect to the lump-sum order (lower court docket number 2011-CP-23-898) tell the opposite story.

Although the lump-sum order was attached to the notice of appeal, and the docket number for that order was listed on the notice, the initial brief FedEx filed in this Court never argues that the lump-sum order is wrong. See Attachment A (FedEx's Initial Brief). The lump-sum order does not involve a trivial amount of money; it orders FedEx to pay Mr. Jarrard's attorney roughly \$170,000 in attorney's fees and grants Mr. Jarrard roughly \$16,000 for repairs to his house. Here is the point: it is a bit of double-speak to say that Mr. Jarrard should have anticipated an appeal of the order that is *not* referenced in the notice of appeal when the appeal of the only order that *is* referenced in the notice is being abandoned.

This point is not a game-changer. This says nothing about whether these errors are truly "clerical" or whether the Court was correct when it held that FedEx had failed to perfect an appeal of the lump-sum order. But it is not fair to say that "the error was not discovered by the clerk's office," (Petition, p.4), and that Mr. Jarrard should have known this other order was included in the appeal. The notice of appeal appears correct on its face; there was no error for the clerk's office to discover. And to someone who knew about both issues in the case, the notice gave the signal that FedEx was not appealing the attendant care order. Sometimes litigants abandon issues. FedEx now appears to be doing that very thing with the lump-sum order; the order they unquestionably appealed.

II.

One of the guiding principles of the clerical error cases is that context — not inadvertence — matters. For example, it was fair to call the omission of one docket number "clerical" when the case was one of six related cases, five of the cases were identical, the cases were all resolved in a single order, and appealing only five of the six cases would have

been fatal to the appeal. That was the situation in *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). On the other side, it was not fair to attempt to add a party from trial as a respondent after the deadline for serving a notice of appeal had passed. Although the appellant could legitimately claim that the eleventh-hour respondent was not *truly* prejudiced — the respondent would still have the full time to file a respondent’s brief — and although the omission may have been inadvertent, the fact of the matter was that the appellant had failed to perfect an appeal as to those parties. This was the situation in *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002).

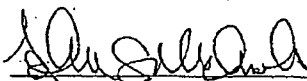
This principle runs throughout the clerical error cases. Where a notice of appeal gives fair notice of what is in play, a technical deficiency in that notice does not defeat an appeal. See *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005) (notice adequate to inform the respondent of the issue presented); *State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002) (notice accurate on its face but served on the clerk of the wrong lower court); *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) (notice did not directly refer to the order, but the order was attached); *Moody v. Dickinson*, 54 S.C. 526, 32 S.E.563 (1899) (caption incorrectly read “Moody *as administrator* v. Dickinson” instead of “Moody *and others* v. Dickinson”). On the other side, where an alteration would change the scope of the document — in most cases, a judgment — the alteration is not “clerical,” regardless of whether its omission from the original document was inadvertent. See *Brown v. Brown*, 392 S.C. 615, 709 S.E.2d 679 (Ct. App. 2011). This is not a hidden danger for the unwary. Saying that perfecting an appeal requires a party to either attach the order or reference the order in some way is not setting much of a trap.

III.

As Mr. Jarrard's original return described, nobody likes pressing a procedural point, but the parties cannot confer jurisdiction over an appeal by consent. *Conner*, 348 S.C. at 461, 560 S.E.2d at 609 (court cannot extend the deadline for serving the notice of appeal); *Plante v. State*, 315 S.C. 562, 463, 446 S.E.2d 437, 438 (1994) (parties cannot confer jurisdiction by consent). Yes, these cases had the same case number before the workers' compensation commission, but that was not always the case. See Attachment B, p.5, ¶14 (from the hearing commissioner's order in the lump-sum case). Moreover, it made sense that the cases had separate numbers in circuit court; they were handled separately at the commission, and by the time the commission issued its order on the lump sum, the appeal of attendant care issue had been pending for almost five (5) months. See Attachment C (the lump sum order and the petition for judicial review of the attendant care case). The conclusion that the notice did not confer jurisdiction over the attendant care order is sound.

Respectfully submitted,

July 26, 2012



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ATTACHMENT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case Nos. 2011-CP-23-898, 2010-CP-23-7077

RECEIVED
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SC Court of Appeals

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

APPELLANT'S REPLY IN SUPPORT OF
ITS PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

Federal Express submits this Reply not to unnecessarily belabor the issue regarding its request to amend the Notice of Appeal, but to make three simple and brief points:

1. Federal Express's error does not deprive this Court of jurisdiction.

The issue before the Court is not a jurisdictional one. Unlike *Conner v. Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002), upon which Jarrard heavily relies, ours is not a situation where we inadvertently failed to serve a party. Here, the proper party was timely served with the notice of appeal, albeit a notice that had a defect. Our failure was to list the incorrect case number on the notice that was served on Jarrard, even though the correct hearing date and judge were listed. While this mistake understandably made Jarrard think Federal Express would argue only about the lump sum payment in its Appellant's brief and not the attendant care benefits, the fact that Jarrard was unaware of

the issues being raised by Federal Express is no different from the blindness with which Respondents are always afflicted while awaiting an Appellant's Initial Brief: the listing of exceptions is not required in a Notice of Appeal.¹

Because the proper party was timely served with the appeal, the question before this Court is not whether it has jurisdiction over the matter, but whether the opposing party would be prejudiced by allowing Federal Express to amend its notice to include the case number of the attendant care award. Where, as here, the Appellant realized its error and promptly notified the Court and the Respondent of the prior to filing its Appellant's Initial Brief, no prejudice exists and the amendment should be allowed.

2. The guiding principle is prejudice, not context or inadvertence.

Jarrard argues that context and not inadvertence is the guiding principle to determine whether an error in a notice of appeal can be amended. While Federal Express agrees that inadvertence is not paramount, it would submit that it is *prejudice*, not context, upon which the appellate courts have hinged their previous decisions regarding amendments. At no time – not in his return to the motion to amend or in his return to the petition for rehearing – has Jarrard argued he would be prejudiced if Federal Express were allowed to make this amendment. When the opposing party has not been prejudiced, appellate courts allow notices of appeal to be amended. *See, e.g., State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002) (“While this Court has consistently held service of the notice

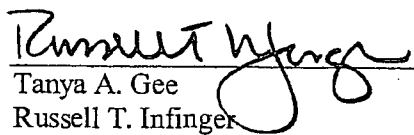
¹ This is a workers' compensation appeal that came to the Court of Appeals via the circuit court. However, even if this were a *direct* appeal from the Workers' Compensation Commission, for which section 42-17-60 of the South Carolina Code states that the notice of appeal must state the grounds of the appeal, our Supreme Court has found that an appellant's failure to state grounds for the appeal in the notice does not require dismissal of the appeal. *See Allen v. Florence Pole & Piling, Inc.*, Sup. Ct. Order dated Nov. 6, 2008 (attached as Exhibit A).

of appeal is a jurisdictional requirement, non-prejudicial clerical errors in the notice are not detrimental to the appeal.”). *Accord Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435-36 (Ct. App. 1995); *Moody v. Dickerson*, 54 S.C. 526, 531, 32 S.E. 563, 565 (1899); *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000).

3. South Carolina Policy Favors Deciding Appeals on Their Merits.

Finally, Federal Express reiterates that this Court routinely forgives far more egregious errors in notices of appeal. Often an appealing party neglects to list any case number, attach any order, or even list the name of the judge and the date of the order. So long as the opposing party has been timely served, this Court gives the Appellant an opportunity to correct its errors in an effort to allow appeals to be decided on their merits. Federal Express asks this Court to be similarly forgiven and to allow the merits of this appeal to be decided by a panel.

Respectfully submitted,


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Greenville, South Carolina
August 2, 2012

Attorney for Appellant

The South Carolina Court of Appeals

Michael Jarrard, Claimant, Respondent,

v.

Federal Express, Employer and Self-Insured, Appellant.

Appellate Case No. 2011-204646

ORDER

This is an appeal from a decision of the circuit court on appeal from the workers' compensation commission. Appellant Federal Express filed a motion to amend its notice of appeal, which we denied. Federal Express has now filed a petition for rehearing. It contends the court's prior "order had the effect of dismissing the primary issue raised in [the] appeal," and thus "this petition for rehearing is proper pursuant to Rules 221(a) and 240(j), SCACR." Respondent "agrees that this petition for rehearing is appropriate under the rules." We have carefully considered the filings of the parties and the oral arguments of counsel. For the reasons explained below, we adhere to our original position, deny the motion to amend the notice, and dismiss the appeal.

I. Facts and Procedural History

Michael Jarrard was exposed to hazardous chemicals in the course and scope of his employment with Federal Express resulting in severe brain and lung damage. In 2006, the commission found him permanently disabled and awarded lifetime benefits. Federal Express did not appeal the commission's ruling.

In March 2009, Jarrard asked the commission to award attendant care benefits for the care his wife provides for him. In September 2009, Jarrard asked the commission for a partial lump-sum award to pay attorney's fees and to make repairs on his home. On July 21, 2010, the commission granted attendant care benefits, and on January 7, 2011, the commission granted Jarrard a partial lump-sum award.

Federal Express appealed both orders to the circuit court. Both appeals arose out of the same case at the commission, and both of the commission's orders had the same case number. However, because the appeals were filed in the circuit court at different times, the circuit court clerk's office assigned the appeals two different case numbers—2010-CP-23-7077 for the attendant care appeal and 2011-CP-23-898 for the lump-sum appeal. The circuit court heard both appeals in the same hearing, and on November 3, 2011, issued two orders—one affirming each award.

Federal Express served and filed a notice of appeal on December 2, 2011, appealing "the Order . . . dated November 3, 2011." The notice of appeal references case number 2011-CP-23-898 and had attached to it the circuit court's order affirming the commission's lump-sum award. On May 11, 2012, Federal Express filed a Motion for Leave to File Amended Notice of Appeal, arguing it inadvertently failed to attach the circuit court's order in case number 2010-23-7077. This court denied the motion to amend, and this case is now before us on Federal Express's petition for rehearing.

II. Jurisdiction

We begin by observing that this case is different from other decisions of our appellate courts in which the appellant has sought to amend its notice of appeal to include within this court's jurisdiction an order or a party it had not properly included with the service of its initial notice of appeal. In each of those cases, the appellant served and filed a facially defective notice of appeal or failed to properly name the opposing party and serve it with the order it intended to appeal. *See, e.g., State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002) (noting the State failed to file the notice in the correct county and listed the incorrect county in its notice); *Conner v. City of Forest Acres*, 348 S.C. 454, 460-62, 560 S.E.2d 606, 609-10 (2002) (providing the appellant failed to name and serve two defendants it sought to bring before the appellate court); *Moody v. Dickinson*, 54 S.C. 526, 531, 32 S.E. 563, 565-66 (1899) (observing the defendant failed to name the correct plaintiff in its notice of appeal); *Weatherford v. Price*, 340 S.C. 572, 577, 532 S.E.2d 310, 313 (Ct. App. 2000) (stating the appellant did not "technically" appeal the final order when the notice of appeal referred to the order denying the motion for reconsideration); *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 477, 458 S.E.2d 431, 435 (Ct. App. 1995) (noting the appellant failed to list one of the six cases included in the order on appeal in its notice of appeal).

In this case, however, Appellant properly served and filed a notice of appeal that brought Respondent and the lump-sum order before this court. As to the lump-sum order, the notice of appeal was properly drafted and had the correct order attached. The notice was properly served on Respondent and filed with this court. Federal Express, however, has made it clear both in its initial brief and in oral argument that it intends to appeal only the attendant care order, and it mistakenly appealed the lump-sum order. Because the notice it filed as to the lump-sum order was valid and complete on its face, and conferred upon this court jurisdiction to hear the appeal from that order, we must address the extent of jurisdiction this court derived from the notice Federal Express did properly file and serve. Specifically, we address whether the notice Federal Express filed and served for the lump-sum order conferred upon this court jurisdiction to hear issues arising out of the attendant care order.

The source of this court's jurisdiction to hear appeals begins with article 5, section 9 of the South Carolina Constitution, which provides: "The Court of Appeals shall have such jurisdiction as the General Assembly shall prescribe by general law." The General Assembly enacted section 14-8-200 of the South Carolina Code (Supp. 2012), which provides "the court [of appeals] has jurisdiction over any case in which an appeal is taken from an order . . . of the circuit court." Under this section, therefore, once a proper notice of appeal is served and filed, this court gains jurisdiction over the "case" in which the order was filed.

We find these provisions do not confer jurisdiction over issues arising out of the attendant care order. Though the controversy between Jarrard and Federal Express started before the commission as one "case," it became two cases when separate orders of the commission were filed and appealed at different times. Though the term "case" is not defined in the Chapter containing section 14-8-200, we do not believe the section was intended by the General Assembly to confer jurisdiction over a separate order arising from the same original case when the orders came through the circuit court with separate case numbers, even though the orders arose out of what was once a single controversy.

For these reasons, we find the notice served and filed as to the lump-sum order did not provide this court jurisdiction over the attendant care order.

III. Clerical Error

Federal Express claims this court has jurisdiction over the attendant care order because it made a "clerical error" in the notice of appeal. Federal Express asserts

that its mistake in listing the case number for the lump-sum order in the notice and attaching that order to the notice was a clerical error because it actually intended to appeal the attendant care order. Citing cases that allow amendment of a notice for "non-prejudicial clerical errors in the notice," such as *Scott*, 351 S.C. at 587, 571 S.E.2d at 701, Federal Express argues "our appellate courts have generously allowed parties to correct errors in an effort to promote justice and ensure that appeals are decided on their merits and not on mere technicalities." However, we find that any error in appealing the wrong order was not clerical. Rather, Federal Express filed a notice of appeal that was valid on its face and properly appealed the lump-sum order. There was no reason on the face of the notice that Jarrard or anyone else should have realized Federal Express intended to appeal the attendant care order. As the supreme court stated in *Conner*, "the rule [regarding clerical errors] compels us under these facts to find [Jarrard was] misled into believing [the attendant care order was] not part of this appeal" 348 S.C. at 462, 560 S.E.2d at 610.

Because we find the mistake Federal Express contends it made was not clerical, we do not reach the arguments Federal Express makes that its mistake caused no prejudice to Jarrard.

IV. Conclusion

For the reasons stated above, we deny Appellant's motion to amend its notice of appeal. Because we have no jurisdiction to address issues arising out of the attendant care order and Federal Express has no intention of pursuing an appeal of issues arising out of the lump-sum order, this appeal is dismissed.

John C. Cannon, Jr. C.J.
Paul E. Short, Jr. J.
Joseph M. Curran A.J.

Columbia, South Carolina

FILED
Feb 25-13

cc: C. Daniel Vega
Russell Thomas Infinger
Blake Alexander Hewitt
John S. Nichols
Tanya Amber Gee

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case Nos. 2011-CP-23-898, 2010-CP-23-7077

RECEIVED
MAR 12 2013
SC COURT OF Appeals

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

Federal Express Corporation respectfully files this petition for rehearing, asking this Court to reconsider its February 25, 2013 order denying Federal Express's petition for rehearing and suggestion for rehearing *en banc*. Because this order had the effect of dismissing the primary issue raised in Federal Express's appeal, this petition for rehearing is proper pursuant to Rules 221(a) and 240(i), SCACR. Furthermore, a determination about which errors constitute un-amendable and fatal errors to a notice of appeal is a question of exceptional importance to the appellate process, and therefore, *en banc* consideration of this issue is warranted. Rule 219(a), SCACR. As explained more fully below, Federal Express urges this Court to hold that the error in the notice of appeal was not a fatal, jurisdictional error. Rather, the error in the notice of appeal is clerical in nature, was promptly and in good faith brought to the court's attention, and did not prejudice the respondent. Under the circumstances, Federal Express should be allowed to

amend its notice of appeal so this appeal may be considered on its merits.

BACKGROUND

Federal Express timely filed, and served upon Respondent, a notice of appeal that complied with all requirements of Rule 203(e), SCACR, but which listed an incorrect docket number. Appellate counsel noticed the error when drafting the initial brief and immediately sought to correct it by moving to amend the notice of appeal. In opposing the motion to amend, Respondent candidly admitted that his opposition was “purely technical.” Return to Motion, at 7 (internal quotation marks omitted). Respondent never alleged that he was actually misled by the notice of appeal, and he has forthrightly acknowledged that he has suffered no prejudice.

After this Court denied its motion, Federal Express filed a petition for rehearing and suggestion for rehearing *en banc*. The Court denied the petition by order dated February 25, 2013. Federal Express seeks rehearing of that order.

ARGUMENT

In South Carolina, service of the notice of appeal is the *sine qua non* of appellate jurisdiction. “The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). Provided the respondent is actually served with a timely notice of appeal, the appellate courts of this State will generously allow all manner of corrections to the notice. *See, e.g., State v. Scott*, 351 S.C. 584, 587, 571 S.E.2d 700, 701-02 (2002) (notice of appeal filed with the clerk of the wrong county); *Charleston*

Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 477-78, 458 S.E.2d 431, 435-36 (Ct. App. 1995) (failure to include docket number in notice of appeal); *Weatherford v. Price*, 340 S.C. 572, 577-78, 532 S.E.2d 310, 313 (Ct. App. 2000) (failure to identify judgment in notice of appeal).

The appellate courts have denied leave to amend a notice of appeal in only one circumstance: when the appellant sought to amend the notice of appeal and serve respondents who had not previously been served. See *Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). In *Connor*, the plaintiff sued the City of Forest Acres and two individuals. After the circuit court entered a single order granting summary judgment in favor of all three defendants, Conner filed a notice of appeal naming only the City of Forest Acres as respondent. Conner's notice of appeal did not name the individual defendants as respondents, and Connor failed to serve them with the notice of appeal even after the Court of Appeals alerted Connor to the error. The Supreme Court found that the individual defendants "were misled into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they were prejudiced by the amendment." *Id.* at 462, 560 S.E.2d at 610. Unlike the Respondents in *Conner*, Federal Express was not misled or prejudiced.

In denying Federal Express's petition for rehearing in this case, the Court observed that the original notice of appeal bore no facial defect and was fully effective to appeal the lump-sum Order. Moreover and, most importantly, the Court conceded that the lump-sum Order and the attendant care Order arose out of one single controversy. Despite being "one controversy", the Court concluded that what was one case before the Commission later became two cases when the Commission issued separate Orders. This

nuanced finding along with the resulting interpretation of South Carolina Code Section 14-8-200 in this instance is misplaced. The Court's finding of one controversy is sufficient to satisfy Section 14-8-200 and confer jurisdiction over both the lump-sum Order and the attendant care Order. Once jurisdiction is conferred over the one controversy, this Court's decision in *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) controls the analysis. The notice of appeal in *Weatherford*, on its face, was directed only to the denial of the appellant's motion for reconsideration, and thus the appellant "did not 'technically' appeal from the trial court's original order." *Id.* at 577, 532 S.E.2d at 313. Like the notice of appeal in this case, the notice in *Weatherford* was "valid and complete on its face" but was directed to the "wrong order." Order, at 3, 4. Nevertheless, this Court excused the appellant's incorrect identification of the judgment appealed because the respondent suffered no prejudice from the error. See also, *Charleston Lumber Co. vs. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) (forgiving the omission of one docket number in a notice of appeal containing a series of related cases even though the cases were never consolidated below).

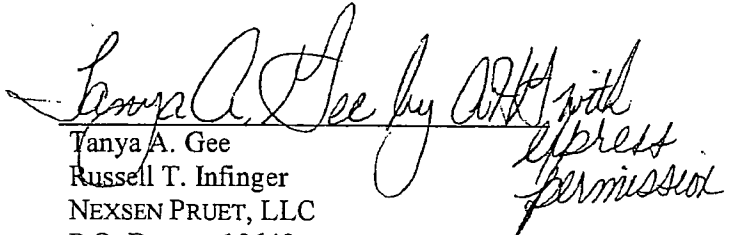
Under the decisions of this Court and the South Carolina Supreme Court, the error in Federal Express's notice of appeal should be considered clerical. Both of the circuit court's orders arose from a single worker's compensation proceeding; the underlying orders of the Commission simply concern different components of Respondent's lifetime disability award. Both orders were entered on the same day. And, the first page of each order entered by the circuit court is virtually identical to the other. The only differences are in the case numbers at the end of the first sentence. Under these circumstances, the

error in the notice of appeal is an understandable one. Indeed, it is possible that Respondent would never have noticed the technical defect in the notice of appeal if Federal Express had not, in good faith, attempted to correct it.

CONCLUSION

In appealing Judge Miller's award of attendant care services, Federal Express timely served Respondent with a notice that correctly listed the names of the parties, the name of the lower tribunal, the name of the trial court judge, and the date of the order. What Federal Express did not do was list the case number associated with the attendant care award. Likewise, when it filed its notice of appeal with the Court of Appeals, it attached the lump-sum award order, and not the attendant care order. Because this error was inadvertent, was promptly corrected in good faith, and did not cause any prejudice to Respondent, nothing in the Appellate Court Rules or prior case law prevents this Court from allowing the appeal to be determined on its merits. Federal Express respectfully asks the panel reconsider its order denying the petition for rehearing, and in the event the panel wishes to stand by its order, suggests the Court of Appeals consider the matter *en banc*.

Respectfully submitted,


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March 12, 2013

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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MAR 12 2013

SC Court of Appeals

Case No. 2011-CP-23-898

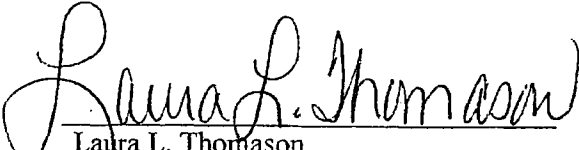
Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Petition for Rehearing and Suggestion for Rehearing *En Banc* on Michael Jarrard by electronic mail and by depositing a copy in the United States Mail, postage prepaid, on March 12, 2013, addressed to his attorneys of record, Blake A. Hewitt, Bluestein Nichols Thompson Delgado, LLC, P.O. Box 7965, Columbia, South Carolina, 29202, bhewitt@bntdlaw.com; and C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29611 (dvega@csa-law.com).


Laura L. Thomason

Legal Assistant to Tanya A. Gee

March 12, 2013

The South Carolina Court of Appeals

Michael Jarrard, Claimant, Respondent,

v.

Federal Express, Employer and Self-Insured, Appellant.

Appellate Case No. 2011-204646

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff

J.

Paul E. Short, Jr.

J.

Jasqueline Curator

A.J.

Columbia, South Carolina

FILED

SLG 4-16-13

cc:

C. Daniel Vega

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Blake Alexander Hewitt

John S. Nichols

Tanya Amber Gee

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable Edward W. Miller, Circuit Court Judge

RECEIVED

AUG 15 2013

Appellate Case No. 2011-204646
Case No. 11-CP-23-898

S.C. Supreme Court

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Petitioner.

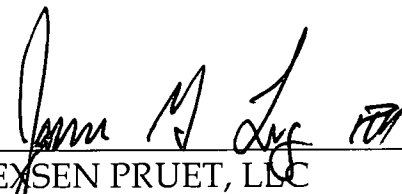
PROOF OF SERVICE

I certify that I have served a copy of the **Appendix To Petition For Writ Of Certiorari** on Michael Jarrard by hand-delivering a copy of it on August 15, 2013, addressed to his attorneys of record.

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Federal Express Corporation*