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September 25, 2013

Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RE: Antonio Lazaro v. Burriss Electrical Inc.
Case Tracking No. 2011-192272

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the original and sixteen (16) copies of the Respondent's **BRIEF ON THE ISSUES AS REQUESTED BY THE COURT** along with our original Proof of Service showing that we have served same on the Counsel of Record. I would appreciate your returning the clocked-in copy to me in the enclosed self-addressed, stamped envelope.

Thank you for your time and attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Landon L. Hughey, Esquire
Weston Adams, III, Esquire
Helen F. Hiser, Attorney
Jack E. Duncan, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0710622

Antonio Lazaro, by and through his GAL,
Decidora Lazaro, Employee, Respondent,

v.

Burriss Electrical, Inc., Employer, and
Comptrust AGC of the Carolinas, Carrier, Appellants.

BRIEF ON THE ISSUES AS
REQUESTED BY THE COURT

Preston F. McDaniel
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and

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Attorneys for Respondent

QUESTIONS PRESENTED

During oral argument, the Court requested a Brief on the following two issues:

1. During the pendency of an appeal what is the proper forum for determining whether a settlement exists?
2. If there is determined to be a settlement during the pendency of an appeal, what is the proper forum to enforce it?

QUESTION NO. 1:

DURING THE PENDENCY OF AN APPEAL WHAT IS THE PROPER FORUM FOR DETERMINING WHETHER A SETTLEMENT EXISTS?

Under Rule 205 and Rule 241(a) SCARC, upon the service of a Notice of Appeal, the Appellate Court has exclusive jurisdiction over an appeal, except for matters not affected by the appeal. Rule 205 specifically states,

"Nothing in these Rules shall prohibit the lower court, Commission or tribunal from proceeding with matters not affected by the appeal."

Therefore, the first question that needs to be answered is whether or not a settlement would affect the issues on appeal. Counsel would submit that while it is probably stating the obvious, the answer to this question is a settlement of the underlying case would obviously affect the issues on appeal.

Rule 261(b) SCACR deals with, "settlement agreements"

and specifically provides:

"If a settlement agreement relates to a matter that is pending before the Appellate Court, the settlement agreement need not be submitted to the Appellate Court unless approval by the Appellate Court, a lower court or tribunal is required before the agreement can be effective, or the parties' desire to have the agreement approved by the Appellate Court."
(Emphasis added).

Thus, there is another preliminary question that needs to be answered in reference to, "approval". If there is a dispute over whether or not a settlement exists, approval or a determination as to whether or not that settlement exists needs to be made by the appropriate jurisdictional authority. Since this is a workers' compensation appeal, the question then becomes who has jurisdiction over approval of the settlement agreement if it is determined to exist. (Please note this in some regards crosses over to the second question that was asked by the Court which will be addressed hereinafter separately.)

In that regard, this is a post-2007 workers' compensation case. Prior to 2007, the Act required under SC Code §42-9-390 that even where the parties were represented by Counsel that a settlement agreement entered into by the parties was not effective until it was approved by one member of the Commission. The Amendments to the Act in 2007 deleted that requirement from SC Code §42-9-390 which

now only provides that a copy of the agreement reached once reduced to writing is to be filed with the Commission. There is no requirement for approval by the Commission after 2007 where the parties are represented by Counsel, as they are in this case. Therefore, there is no requirement of approval of the agreement by the Workers' Compensation Commission which would require remand for that purpose.

Thus, since this matter is pending before the Court and the Rules give this Court exclusive jurisdiction over all matters that are pending before it except those which do not affect the issues on appeal and since any settlement would affect the issues on appeal, the Respondent would submit that this Court has jurisdiction to determine whether or not a settlement exists.

[Note: The Respondent would point out one part of Rule 241(a) that is worrisome as to jurisdiction over a settlement and that is in reference to the last sentence of that part of the Rule which provides:

"The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."
(Emphasis added).

Since the actual issue of settlement is not stayed, it could be argued that this matter could be remanded to the

Commission for enforcement of the settlement¹ (this again goes to the second question presented by the Court).]

As to the procedure to be followed, the Respondent would submit that the procedure to be followed to determine whether or not a settlement exists would be the same that is followed in reference to any other motion or petition. Rule 240 SCACR applies to all motions and petitions filed with the Court. The Respondent would submit that the proper instrument or pleading is the same as would be required in

¹ As an Officer of the Court, Counsel for the Respondent would be remiss if he did not point out several inconsistencies that exist in the Workers' Compensation Act in reference to both questions as to what is the proper forum for determining whether or not a settlement exists and the proper forum to enforce that settlement, specifically in reference to a workers' compensation case. While there is absolutely no question that the intent of the amendments made in 2007 to §42-9-390 was to remove the requirement of approval of a settlement reached between the parties by the Commission, in the zeal to make those amendments there were several sections of the Act that were not amended which conflict with §42-9-390 which could be read to require remand to the Commission on both questions. Those sections are SC Code §42-3-20(C) and §42-3-180. (These conflicting sections would need to be considered by the Court in light of the statutory principle that a specific statutory requirement controls over a general statutory requirement.) Under the general authority of the Commission under §42-3-20(C) the Commission has the authority to determine all contested cases and also to, "approve settlements" . . . and to . . . "handle such other matters as may come before the department for judicial disposition." This authority was not removed or deleted from the statutory amendments in 2007. In addition, §42-3-180 concerning the jurisdiction of the Commission to determine all issues in reference to the Workers' Compensation Act retains among the authority of the Commission to determine all questions arising under the Title, the authority to approve settlements and specifically provides, "if not settled by agreement of the parties interested therein with the approval of the Commission". (Emphasis added). Based on these two sections which are in reference to the general authority of the Commission, it can be argued that this matter should be remanded to the Commission to determine whether or not a settlement has been reached applying general contract principles as have been applied by our Courts to settlements in other matters and to enforce that settlement as an Order of the Commission with the accompanying penalties for non-payment as found under SC Code §42-1-640, §42-3-175, §42-9-90, §42-9-240 and §42-17-70.

the Circuit Court or any other forum which would be by way of a motion to enforce settlement. For an excellent discussion of this issue, see the case of Sadighi v. Daghighfekr, 66 F.Supp.2d 752 (1999) and specifically p. 759 and that section of the decision entitled, "B. Exchange of Letters Constituted an Enforceable Settlement Agreement."

Further, Rule 240 SCACR(j), "Authority of an Individual Judge or Justice" provides that a motion may be heard either by multiple members of the Court or may be referred and decided by a Judge or Justice of the Court of Appeals or Supreme Court. Therefore, the Respondent would submit that the appropriate forum and pleading would be by way of a motion filed with this Court for determination as to whether or not a settlement exists.

QUESTION NO. 2:

IF THERE IS A SETTLEMENT, WHAT IS THE PROPER FORUM TO ENFORCE IT?

As set forth above, since this Court has exclusive jurisdiction once the Notice of Intent to Appeal has been filed over all matters affecting the appeal and since settlement of the underlying matter would affect the issues on appeal, the Respondent would submit that this Court has jurisdiction to determine whether or not a settlement

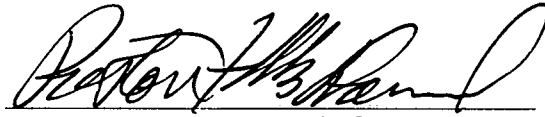
exists and that it is the proper forum to enforce the settlement.

As set forth in Question No. 1, the alternative would be a remand to the Commission depending on the Court's determination of its exclusive jurisdiction during the pendency of the appeal and whether or not the general statutory provisions concerning the authority of the Commission control over the specific statutory authority given to the Commission or in this case, taken away from the Commission by §42-9-390 wherein the authority over settlements and approval of those settlements was specifically taken away from the Commission where the parties are represented by Counsel as they are in this case.

CONCLUSION

Based on the above, the Respondent would submit that the proper forum for determining whether or not a settlement exists and the enforcement of that settlement if it is determined to exist lies either within the exclusive jurisdiction of the Court by motion or by remand to the Commission.

Respectfully submitted,

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

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Attorneys for Respondent

September 25, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel
Richland County
Trial Court Case No. 2004-WC-40-10622

WCC File No. 0710622


Antonio Lazaro, by and through his GAL,
Decidora Lazaro, Employee, Respondent,

v.

Burriss Electrical, Inc., Employer, and
Comptrust AGC of the Carolinas, Carrier, Appellants.

PROOF OF SERVICE

I certify that I have served the on this day by depositing a copy of Respondent's **BRIEF ON THE ISSUES AS REQUESTED BY THE COURT** in the United States Mail, postage prepaid, on September 25, 2013, addressed to Counsel of Record: Landon Hughey, Esquire, Weston Adams, III, Esquire, and Helen F. Hiser, Attorney, all of McANGUS, GOUDELOCK & COURIE, LLC, Post Office Box 12519, Capitol Station, Columbia, SC 29211.


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