THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 4923 (S.C. Ct. App. filed December 21, 2011)

Christopher Price . . . . . Claimant,

vs.

Peachtree Electrical Services, Inc. and
Builders Mutual Insurance Company,
Employer/Carrier . . . . . Petitioners,

vs.

Bob Wire Electric, Inc., self-insured Employer,
through South Carolina Home Builders Association SIF . . . . . Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners hereby certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 27, 2012.

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Columbia, South Carolina
March 28, 2012

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN APPLYING SECTION 14-3-330 INSTEAD OF SECTION 1-23-610 AS THE STATUTE GOVERNING APPEALS FROM THE WORKERS' COMENSATION COMMISSION, AS ESTABLISHED BY PREVIOUS DECISIONS OF THIS COURT, AND IN THEREAFTER FAILING TO PROPERLY APPLY THE RELEVANT CASE LAW WHICH REQUIRES A FINDING THAT THE "FIRST APPELLATE PANEL ORDER", REMANDING THIS CASE FOR A MINESTERIAL CALCULATION ONLY, CONSTITUTES A FINAL ORDER?

II. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE DECISION REACHED IN THE "FIRST APPELLATE PANEL ORDER" AS THE LAW OF THIS CASE WHEN THE "FIRST APPELLATE PANEL ORDER" CONSTITUTED A FINAL ORDER AND WAS NOT APPEALED?

III. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER AN ANCILLARY CLAIM BETWEEN PETITIONERS AND RESPONDENTS WHEN THIS MATTER AROSE UNDER THE WORKERS' COMPENSATION ACT AND ALL DECISIONS REACHED BY THE WORKERS' COMPENSATION COMMISSION IN ITS ORDER DIRECTLY AFFECT, AND IN FACT DETERMINE, THE RIGHTS OF THE EMPLOYEE/CLAIMANT PROTECTED BY THE ACT AND THE RELATIVE OBLIGATIONS OF PETITIONERS AND RESPONDENTS TO THE EMPLOYEE/CLAIMANT?

STATEMENT OF THE CASE / STATEMENT OF THE FACTS

This is an appeal of the Court of Appeals opinion which reversed the decisions of the South Carolina Workers' Compensation Commission and the Circuit Court. The issues addressed by the Court of Appeals in its Opinion (which is the subject of this Petition) arise from facts which are so intertwined with the procedural history of this case that it necessitates discussion of both the procedural history and the underlying facts of the case in concert. The underlying issues in this case concern the relative liabilities of two different employers to an employee who worked for both employers at different times.

Peachtree Electrical Services, Inc. ("Peachtree") employed Christopher Price (the "Claimant") in 2002. He injured his back on December 9, 2002, received treatment and was released to full duty work at maximum medical improvement on August 8, 2003. (R. p. 20.) In connection with this first injury, Peachtree and its carrier voluntarily paid temporary total disability compensation and authorized medical treatment including surgery. Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 721 S.E.2d 461, 462 (Ct. App. 2011). Claimant then went to work for Bob Wire Electric, Inc. ("Bob Wire") and suffered another accident and injury on November 3, 2003 while working there. (Id.; R. pp. 20-21.) While Bob Wire was aware of the new accident (R. pp. 27-29), the injured worker reported it as a continuation of his first injury and was again provided treatment and benefits by Peachtree including an additional surgery. (Price, 721 S.E.2d at 462; R. p. 21.)

After paying substantial additional benefits to the Claimant, Peachtree discovered evidence of the subsequent injury Claimant had suffered while working for Bob Wire.

(R. p. 21.) Peachtree filed a motion to add Bob Wire as a party and that motion was granted. Id. Peachtree sought reimbursement from Bob Wire for workers' compensation benefits it paid to the Claimant unwittingly as a result of an accident that actually occurred while Claimant worked for Bob Wire. (R. p. 18.)

On June 5, 2006, a hearing was held before Commissioner David Huffstetler for the purposes of (1) determining what permanent disability benefits might be due the Claimant for the accident with Peachtree and (2) whether a subsequent accident with Bob Wire had occurred such that Bob Wire should be held responsible for benefits paid as a result of that second accident. (R. pp. 4-12.) Commissioner Huffstetler awarded the Claimant benefits based upon 35% disability to the back and held that there had not been a subsequent accident with Bob Wire. Id.

Peachtree promptly appealed Commissioner Huffstetler's Order as to whether there had been a subsequent accident with Bob Wire. (R. p. 32.) The Appellate Panel of the Full Commission reversed, finding that the Claimant had, indeed, suffered a subsequent accident while working for Bob Wire. In this "First Appellate Panel Order," the Commission made detailed findings of fact and then held as follows:

> **The foregoing facts are hereby incorporated by reference as this Commission's Findings of Fact**, and this Commission **further** finds as follows:
>
> 1. Claimant suffered a new accident and injury on or about November 3, 2003, while working for Bob Wire Electrical, Inc., which accident and injury was an aggravation of his pre-existing back condition. Based upon the medical records, testimony and other evidence in the record, it appears that this new accident occurred on or about November 3, 2003.
>
> 2. Claimant gave notice of the new accident and injury which occurred while working for Bob Wire by

immediately telling his supervisor on the job, Brad Arruda, who in turn told the owner of Bob Wire.

3. The statute of limitations was satisfied by Bob Wire being added as a party by Defendants Peachtree and Builders Mutual.

4. This claim is remanded to the Jurisdictional Commissioner for determination of average weekly wage and benefits, etc., and apportionment of benefits paid and/or to be paid in a manner consistent with the findings set forth herein.

(R. p. 32.) (emphasis added).

As a result of the First Appellate Panel Order, the 2002 injury with Peachtree and the 2003 injury with Bob Wire were bifurcated by the Commission and thereafter treated as two separate, distinct claims. (R. p. 42.) Although Bob Wire attempted an appeal of the First Appellate Panel Order, its appeal was dismissed as untimely. (Supp. R. pp. 6-9.)

Following the dismissal of Bob Wire's appeal of the First Appellate Panel Order, a hearing on remand was held before Commissioner George N. Funderburk, who issued the Decision and Order of the South Carolina Workers' Compensation Commission dated June 12, 2008 (the "Single Commissioner's Order.") (R. p. 40.) The Single Commissioner's Order begins by recounting some of the history as well as the findings of fact of the First Appellate Panel Order set forth above. Commissioner Funderburk noted that "the appeal of these findings was dismissed and, therefore, these findings of the Appellate Panel are the law of the case." (R. p. 46.) Commissioner Funderburk noted that the 2002 claim (involving the accident with Peachtree) and the 2003 claim (involving the accident with Bob Wire) were now bifurcated as two separate claims. (R. pp. 42-43.)

At the hearing before Commissioner Funderburk, Peachtree submitted without objection documentary evidence of the compensation and medical benefits it paid to the

Claimant after November 3, 2003, the date of the Claimant's accident and injury with Bob Wire. (R. pp. 47, 69-70, 76.) Commissioner Funderburk concluded that the amount of benefits Peachtree had mistakenly paid as a result of the November 3, 2003 accident, which should have been paid by Bob Wire, was $112,789.42 for medical benefits and $47,023.88 for temporary total disability benefits. (R. p. 48.) This conclusion was based upon the detailed submissions by Peachtree of the benefits it paid to the Claimant. Bob Wire did not offer any contrary evidence as to what benefits Peachtree paid relative to the 2003 claim. The Single Commissioner ordered that:

> Bob Wire shall reimburse Peachtree for all causally-related medical treatment and temporary total disability compensation provided to the Claimant by Peachtree after November 3, 2003. Specifically, Bob Wire shall reimburse Peachtree in the amount of $112,789.42 for medical benefits paid and $47,023.88 for temporary total disability benefits paid to the Claimant after November 3, 2003. Peachtree's claim for litigation costs, including attorneys' fees, is denied.

(R. p. 48.)

Bob Wire appealed the Single Commissioner's Order to the Full Commission. (R. pp. 49-63.) In its Appellate Panel Decision and Order, dated December 17, 2008 (the "Second Appellate Panel Order"), the Appellate Panel unanimously affirmed the Single Commissioner's Order, incorporating that Order as its own.[1] Id.

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[1] The Panel subsequently issued an "Amended Appellate Panel Decision and Order," dated January 6, 2009, making no changes to its findings and conclusions, but stating as follows:

> This Order replaces the Order issued December 17, 2008 which erroneously included the exceptions to a companion file, WCC File #0327174. The previous Order is withdrawn. WCC File #0327174 has not yet been heard on appeal, and it will be scheduled in due course. This appeal is for WCC File #0220142.

(R. p. 58.) All references to the Second Appellate Panel Order shall be deemed to incorporate the modification to that Order as set forth in this Amended Appellate Panel Decision and Order.

Bob Wire appealed the Second Appellate Panel Order to the Circuit Court for Georgetown County wherein Bob Wire claimed (among other contentions) that the South Carolina Workers' Compensation Commission does not have the power or authority to order a subsequent employer to reimburse a prior employer. (R. p. 71.) Judge Culbertson heard this appeal and issued his Order dated September 14, 2009 (the "Circuit Court Order") affirming the Second Appellate Panel Order in all respects. (R. pp. 65-78.)

With respect to Bob Wire's claim that the Workers' Compensation Commission does not have authority to order reimbursement between employers, the Circuit Court Order pointed out the language of the First Appellate Panel Order specifically holding that the "Commission has the authority and power to place the responsibility for a claim upon the employer and carrier who ultimately should be liable." (R. p. 72.) The Circuit Court Order further holds that "[a]s noted by the Single Commissioner and the Appellate Panel in their respective Orders appealed from now, these findings are now the law of the case." (R. p. 73.)

Bob Wire then appealed the Circuit Court Order to our Court of Appeals. Despite the fact that (as recognized by each of the lower courts and tribunals) the findings of fact and conclusions of law established in the First Appellate Panel Order constitute the law of the case in this action (including in an appeal of the Circuit Court Order to the Court of Appeals), the Court of Appeals issued its Opinion No. 4923 (the "Opinion") on December 21, 2011 vacating the Circuit Court Order. Peachtree Electrical Services, Inc. v. Bob Wire Electric, Inc., 396 S.C. 403, 721 S.E.2d 461 (Ct. App. 2011). In its Opinion the Court of Appeals held that the findings in the First Appellate Panel Order are not the law of this case and that the Workers' Compensation Commission lacks jurisdiction to

address claims for reimbursement between two different employers relating to benefits mistakenly paid by one employer under a workers' compensation claim. Id.

It is for this Opinion that Petitioners seek a writ of certiorari.

ARGUMENT

I. THE COURT OF APPEALS WAS BOUND TO APPLY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW REACHED IN THE FIRST APPELLATE PANEL ORDER AS THE LAW OF THE CASE.

A. The First Appellate Panel Order is a "final order" and was immediately appealable.

The Court of Appeals held that the First Appellate Panel Order was not the law of the case. In reaching this conclusion the Court relied on the idea that the First Appellate Panel Order was an interlocutory order and that Section 14-3-330(1) of the South Carolina Code only *allows* (but does not *require*) an appeal to be taken immediately from an interlocutory order. Although Petitioners do not necessarily dispute this general proposition, the Court's reliance on Section 14-3-330(1) is misplaced for two reasons: (1) the First Appellate Panel Order is a "final order" and thus does not fall within the purview of subsection (1) of Section 14-3-330 which governs interlocutory orders and which, according to the Court of Appeals in its Opinion, only allows but does not require immediate appeals therefrom; and (2) appeals from orders of the Workers' Compensation Commission are not governed by the provisions of Section 14-3-330.

At the outset, the First Appellate Panel Order is a "final order" and therefore an appeal therefrom would be governed by subsection (3) of Section 14-3-330 as opposed to subsection (1) upon which the Court of Appeals relied for its analysis. S.C. CODE ANN. §

14-3-330 (1976). Moreover, this Court has held that Section 14-3-330 does not govern appeals from decisions of administrative law courts (such as the Workers' Compensation Commission) and that appeals from these administrative tribunals are instead governed by the "specialized statute" governing such appeals codified as Section 1-23-610 of the South Carolina Code. Charlotte-Mecklenburg Hosp. Auth. v. S. C. Dep't of Health and Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010). Section 1-23-610 provides that only a "final decision" of an administrative tribunal may be appealed. S.C. CODE ANN. §1-23-610 (rev. 2005); see also Charlotte-Mecklenburg at 266, 692 S.E.2d at 894; Long v. Sealed Air Corp., 391 S.C. 483, 486, 706 S.E.2d 34, 36 (Ct. App. 2011). Since only a "final decision" may be appealed, the Court of Appeals' decision based upon Section 14-3-330(1) relating to interlocutory appeals is wholly inapplicable. The Court of Appeals should have instead found that an appeal from the First Appellate Panel Order is governed by Section 1-23-610 and that the First Appellate Panel Order was a "final order" and thus immediately appealable as such.

In the First Appellate Panel order, the Appellate Panel found and held that Claimant did in fact suffer a new injury on November 3, 2003 while Claimant worked for Bob Wire. (R. p. 32.) By its ruling, the Commission created a separate claim file for the subsequent injury and, in effect, awarded the Claimant the right to continuing benefits against Bob Wire. Ancillary to that ruling, it required Bob Wire to reimburse Peachtree for benefits it paid on Bob Wire's claim. (R. p. 32.) In sum, the First Appellate Panel Order established that a second accident had, in fact, occurred, and that the Claimant's rights were thereby affected. As a result of those rulings, the First Appellate Panel Order was a final determination of the respective liability of both Peachtree and Bob Wire to

Claimant. The only matter left for determination on remand involved the calculation of the Claimant's average weekly wage in what became, in effect, his second ongoing workers' compensation claim and the amount of the reimbursement required from Bob Wire to Peachtree to compensate Peachtree for amounts it paid in connection with the subsequent November 3, 2003 injury.

Each of these calculations left for determination on remand are clearly ministerial in nature and certainly do not involve the exercise of any judicial discretion. In fact, the average weekly wage calculation is no longer an issue in the claim to with Peachtree is a party. (R. p. 69.) Moreover, Bob Wire did not present any evidence or objection relating to Peachtree's documentary evidence submitted outlining the compensation and benefits paid to Claimant after November 3, 2003, for which Peachtree should be reimubursed. (R. pp. 69-70, 76.) No judicial discretion was required in receiving the figures properly documented by Peachtree and issuing an award based thereon – particularly when there was no objection to the submission of any of these figures, and no dispute as to their amount. This task is clearly ministerial in nature.

"'Final judgment' is a term of art referring to the disposition of all of the issues in the case." Doe v. Howe, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004). In this respect our Court of Appeals has also held that "[g]enerally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits." McCrea v. City of Georgetown, 384 S.C. 328, 681 S.E.2d 918 (Ct. App. 2009). Likewise, "any judgment or decree, leaving some further act to be done by the court *before the rights of the parties are determined,* is interlocutory." Olson v. Faculty House of Carolina, Inc., 344 S.C. 194; 213, 544 S.E.2d 38, 48 (Ct. App. 2001) (emphasis added). All rights of

Peachtree and Bob Wire to Claimant were determined by the Appellate Panel in the First Appellate Panel Order, and the First Appellate Panel Order constituted an ultimate decision on the merits of all issues presented in the case between Peachtree, Bob Wire and Claimant. Therefore, this First Appellate Panel Order was a "final judgment" as required in Section 1-23-610 to be immediately appealable and also for purposes of determining the law of the case moving forward.

Petitioners recognize the line of cases which state that an order remanding a case for additional proceedings before an administrative agency is not immediately appealable. Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52; 446 S.E.2d 618 (1994). However, the Montjoy rule is often distinguished and easily so in the case sub judice. See Long v. Sealed Air Corp., 391 S.C. 483, 485, 706 S.E.2d 34, 35 (Ct. App. 2011) (recognizing that Montjoy is distinguished in situations involving remands which don't require further "judgment on the merits"). Of great significance is the case of Hicks v. Piedmont Cold Storage, Inc., 324 S.C. 628, 479 S.E.2d 831 (Ct. App. 1996), in which an order remanded the case for a mathematical calculation of death benefits. Id. at 632, 479 S.E.2d at 834. The Court in Hicks noted that the determination to be made on remand did not require any "judgment on the merits" and that "[a]ny further proceedings on remand are purely ministerial and do not require the exercise of independent judgment or discretion on the part of the commission." Id. The Court held that this scenario – akin to the facts of the case before us – was distinguishable from Montjoy, and that the order at issue was to be considered a final order and immediately appealable. Id.

Likewise, the Court of Appeals in McCrea v. City of Georgetown, 384 S.C. 328, 681 S.E.2d 918 (Ct. App. 2009), held that despite the Montjoy rule "[i]n some situations

remand orders from the circuit court to the commission may be immediately appealable. Namely, if the circuit court's order is a 'final judgment,' then it is immediately appealable." Id. at 331, 681 S.E.2d at 920 (further instructing that an order is a final judgment if it "constitutes an ultimate decision on the merits").

In sum, the First Appellate Panel Order constitutes a "final order" for purposes of determination of whether the Order was immediately appealable and for purposes of establishing the law of this case. The fact that the case was remanded for further determination relating to the calculation of the reimbursement owed to Peachtree does not alter this analysis. An order remanding a case for determinations which do not require the exercise of independent judgment or the making of any additional findings or rulings on the merits of the case is to be considered a "final order" and immediately appealable – particularly when the determinations to be made on remand are primarily mathematical, and ministerial, in nature. See 4 AM. JUR. 2D *Appellate Review* § 89 (2012) ("A judgment which terminates the litigation between the parties on the merits of the case and only remands the case to a lower court for the performance of ministerial acts is a final judgment for the purposes of review.").

The Court of Appeals erred in not properly considering the First Appellate Panel Order a "final order" in the action and in applying Section 14-3-330(1) in its analysis, which section is inapplicable to appeals from administrative tribunals. The Court of Appeals should have applied the principles set forth above and found that the First Appellate Panel Order was a "final order" and immediately appealable, and that since no appeal was perfected therefrom the findings and conclusions set forth in the First

Appellate Panel Order became the law of this case. Petitioners therefore seek a writ of certiorari to review the Court of Appeals' Opinion on this issue.

B. The findings of fact and conclusions of law reached in the First Appellate Panel Order are the law of this case.

Since the First Appellate Panel Order was a final order, and since no appeal was properly perfected therefrom, all findings of fact and conclusions of law made in the unappealed First Appellate Panel Order constitute the law of this case and the Court of Appeals was properly bound thereby.

It is well settled law that an un-appealed final ruling on the merits becomes the law of the case. King v. James, 388 S.C. 16, 25, 694 S.E.2d 35, 40 (noting that "neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements" and holding that "[t]herefore, this ruling is the law of the case.") (citing ML-Lee Acquisition Fund, L.P. v. Deloiotte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) for the proposition that "an unappealed ruling, *right or wrong*, becomes the law of the case.") (emphasis added).

This is true on remand to the trial level as well as upon further appellate review. In Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) ("Charleston Lumber II"), this Supreme Court considered whether the failure to appeal a final order rendered certain findings to be the law of the case. In the prior proceedings ("Charleston Lumber I"), the Court of Appeals reversed the trial court's order granting summary judgment to the plaintiff and instead held that the defendant was entitled to recover lost employee time as damages on his fraud counterclaim. Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). The Court of Appeals remanded the matter to the trial court for a determination of the

extent of the damages. Id. The plaintiff did not seek further appellate review of Charleston Lumber I. Charleston Lumber II at 174, 525 S.E.2d at 871.

On remand, the plaintiff moved again for summary judgment on the fraud counterclaim, and the trial court again granted the plaintiff summary judgment. Id. The defendant appealed (Charleston Lumber II), arguing that the ruling permitting it damages for fraud in Charleston Lumber I was binding on the trial court. Id. This Supreme Court held that the ruling in Charleston Lumber I was "adverse to Charleston Lumber" and "[a]ccordingly, it was incumbent upon Charleston Lumber to seek rehearing and/or petition [the Supreme Court] for a writ of certiorari or be bound by Charleston Lumber I as the law of the case." Id at 174-75, 525 S.E.2d at 871 (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unappealed ruling is the law of the case).

In fact, the established law of the case rule applies even if the holding reached in the un-appealed order, which has consequently become the law of the case, was wrong. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "*right or wrong*, is the law of this case and requires affirmance") (emphasis added). The foregoing rule has been consistently applied and this Supreme Court has specifically stated that: "We are not convinced that our former opinion was erroneous, but *even if it were*, we are precluded, under the settled rule, from reviewing it on this subsequent appeal. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) (emphasis added) (holding that a decision of the court on a former appeal is the law of the case); see also Johnson v. Fidelity & Guaranty Ins. Co., 245 S.C. 205, 212, 140 S.E.2d 153, 156 (1965) ("This holding was favorable to the

appellant and unfavorable to the respondent, and neither of them has filed any exception thereto. Assuming that the aforesaid holding is *incorrect*, such has become the law of the case because there is no appeal therefrom.") (emphasis added); Irick v. Ulmer, 246 S.C. 178, 185, 143 S.E.2d 126, 129 (1965) ("The aforesaid charge of the Trial Judge, whether right or wrong not being challenged by a proper exception, became the law of the case."). This is certainly a persuasive aspect of the law of the case rule – particularly considering that the law of this case as established in the First Appellate Panel Order is a correct and proper application of the law in all respects (which is discussed in greater detail below).

In this case, the rulings contained in the First Appellate Panel Order were not appealed. The First Appellate Panel Order held that the South Carolina Workers' Compensation Commission had subject matter jurisdiction to determine from which employer the Claimant is to receive benefits.[2] This ruling, therefore, became the law of this case on remand to the single commissioner and upon appellate review by the second appellate panel and the circuit court – and each of these courts so found and properly applied the ruling of the First Appellate Panel Order as the law of the case. The Court of Appeals clearly erred in not doing so, and in instead holding (in direct contravention of the established law of the case) that the Workers' Compensation Commission does not have the proper subject matter jurisdiction to render a decision on the issues presented in this case.

[2] The Appellate Panel specifically stated in the First Appellate Panel Order that "[i]n this case, the Commission has the authority and power to place the responsibility for a claim upon the employer and carrier who ultimately should be liable." (R. p. 31.)

Notably, the law of the case doctrine has been repeatedly applied to prevent subsequent challenges to subject matter jurisdiction once the law of the case has been established. This Court has recently specifically held that an un-appealed ruling that a magistrate had subject matter jurisdiction became the law of the case which could not be challenged in subsequent proceedings. Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) ("The circuit court's unchallenged disposition on the magistrate's subject matter jurisdiction therefore became the law of the case, and this court declines to reopen that issue in this subsequent action."); see also Watkins v. Hodge, 232 S.C. 245, 101 S.E.2d 657 (1958) (refusing to consider jurisdictional matter of underlying case where the issue had been ruled upon and not challenged on appeal).

The Court of Appeals erred in not applying as the law of the case the ruling in the First Appellate Panel Order that the Workers' Compensation Commission had proper subject matter jurisdiction to determine the issues before it. The Court of Appeals was bound by the law of the case doctrine to apply this holding - whether it was right or wrong. Nonetheless, it will be shown below that this finding of the First Appellate Panel was entirely correct and in accordance with all applicable law on the issue. Regardless, the law of the case doctrine should have been applied and the subject matter jurisdiction of the Commission should not have been challenged or addressed on appeal. In ruling against the law of the case on this issue the Court of Appeals clearly erred and Petitioners therefore request that this Court grant a writ of certiorari to review the Court of Appeals' Opinion.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION HAD EXCLUSIVE SUBJECT MATTER JURISDICTION TO ADJUDICATE ALL RIGHTS BETWEEN CLAIMANT AND PEACHTREE AND/OR BOB WIRE INCLUDING THE ANCILLARY REIMBURSEMENT ISSUES BETWEEN BOB WIRE AND PEACHTREE.

The Court of Appeals not only erred in failing to apply the law of the case established in the First Appellate Panel Order (which held that the South Carolina Workers' Compensation Commission had subject matter jurisdiction to address and adjudicate the respective rights and obligations of Peachtree and Bob Wire to one another as well as to the Claimant), but the Court of Appeals further erred in its subsequent determination that the Workers' Compensation Commission did not in fact have subject matter jurisdiction over these claims. Petitioners respectfully submit that the Court of Appeals' decision in this regard clearly misapprehends and misapplies the previous decisions of our courts relating to these issues.

The South Carolina Workers' Compensation Commission inarguably has subject matter jurisdiction over cases where the relationship of employer/employee exists at the time of the alleged injury for which the claim is made. McCreery v. Covenant Presbyterian Church, 299 S.C. 218, 221, 383 S.E.2d 264, 265 (Ct. App. 1989) (rev'd on other grounds by 303 S.C. 271, 400 S.E.2d 130 (1990)). In this regard, Section 42-3-180 of the South Carolina Code requires that "[a]ll questions *arising under this title*, if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise provided in this title." S.C. CODE ANN. § 42-3-180 (1976) (emphasis added).

The Court of Appeals references the Supreme Court case of Labouseur v. Harleysville Mutual Insurance Company, 302 S.C. 540, 397 S.E.2d 526 (1990), in which this Court held that a dispute between an employer and its insurance carrier/agent over the alleged wrongful cancellation of a workers' compensation policy did not "arise under this title," and therefore the Commission had no subject matter jurisdiction to decide that issue. Id. Petitioners do not dispute this Court's holding in Labouseur, as that case involved only a bad faith/wrongful cancellation claim – a tort action - to which no employee was even a party.[3] Id. However, the Court of Appeals' reliance on that decision here, and its determination that the Claimant's rights are not involved in this dispute (rendering the Commission without subject matter jurisdiction to determine that a subsequent accident occurred and the respective liability of successive employers) is clearly misplaced. Not only does the case sub judice involve a relationship between employer and employee and a claim that arose during this relationship, the employee is an actual party to this action, and determination of the claims between Peachtree and Bob Wire has a direct effect on the rights of the employee; herein, the Claimant.

In fact, this Court in Labouseur specifically held that "when it is ancillary to the determination of the employee's right," the Commission has the authority to pass upon a question relating to an issue between the employer and a third party – such as his insurance carrier – or in this case a subsequent employer. Id. at 543, 397 S.E.2d at 528; see also James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010) ("the Commission regularly exercises its flexibility in making compensation awards to ensure the best

[3] This Court in Labouseur observed that the Commission is not equipped to address tort claims (as presented in Labouseur) "in a meaningful way." Labouseur at 543, 397 S.E.2d at 528. In this respect the Court noted that the Commission cannot award the necessary damages sought in connection with a tort action such as punitive damages. Id.

interests of the workers are protected to the extent the award is not otherwise prohibited by the Act."); Spivey v. D.G. Construction Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996) ("South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act."). The Labouseur Court stated as follows in this respect:

> [W]hen there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is in the Workers' Compensation Commission. On the other hand, *when there exists no employee claim for compensation*, the Commission lacks the jurisdiction to decide such questions.

Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529 (1990) (emphasis added).

Clearly this case involves, and in fact arose from, an employee's claim for compensation. In addition, the determination of the rights of Peachtree and Bob Wire to one another and to the Claimant clearly affect the rights of the Claimant and thus necessarily fall within the purview of the Commission's jurisdiction. The determination of which employer is responsible for which of the benefits to which the Claimant has a right is inarguably a matter "arising under this Title" and, therefore, is within the jurisdiction of the Workers' Compensation Commission. S.C. CODE ANN. § 42-3-180 (1976).

This matter began with one workers' compensation claim brought by the Claimant against Peachtree. The Commission determined that there had been a second, subsequent accident involving the Claimant's employment with Bob Wire. As a result, the Commission determined that the Claimant actually had not one claim extant, but two, and

actually bifurcated the case into two separate claims, assigning two separate workers' compensation claim file numbers. (R. pp. 42-43 and Supp. R. pp. 10-12.) It is difficult to imagine how the Claimant's rights were not involved in this case. The Commission's rulings actually created a separate claim for the subsequent accident and created a right to receive benefits from Bob Wire. (R. pp. 42-43.) In that same adjudication, it determined that Bob Wire had to pay all of the benefits as a result of that subsequent claim, including those mistakenly paid by Peachtree. Therefore, the Labouseur decision, on which this Court relies, is factually distinguishable. Labouseur involved a claim which had at its root a bad faith tort claim for which the Commission was not equipped. Similarly, this Court's holding in Roper Hospital v. Clemons, 326 S.C. 534, 484 S.E.2d 598 (Ct. App. 1997) is inapposite. In Roper Hospital, it was held that a medical provider's common law claims for payment of an employee's medical bills were not within the purview of the South Carolina Workers' Compensation Act and were properly litigated only in the Circuit Court. Id. As in Labouseur, there were no employee rights involved. Id.

In reliance upon Labouseur and Roper Hospital, the Court of Appeals held as follows:

> The matter directly in contention does not affect Price's right to compensation. He has been completely compensated for the 2002 accident pursuant to the Clincher Agreement between himself and Peachtree, and any future benefits for which Bob Wire may be liable are a separate and distinct matter from any benefits Peachtree may have paid previously.

Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 721 S.E.2d 461, 464 (Ct. App. 2011).

The difficulty with the Court's logic, of course, is that it was this very action and dispute between Peachtree and Bob Wire which led to the determination that there was a subsequent accident and there might be future benefits owing to the Claimant for which Bob Wire would be liable. The determination of those benefits was by definition established in the First Appellate Panel Order; without that litigation, there would have been no such determination of the Claimant's rights *vis-a-vis* the two employers. The prior benefits paid by Peachtree were paid as a matter of the Claimant's rights under the South Carolina Workers' Compensation Act. Similarly, the finding of the second accident and Bob Wire's liability therefor were determinations made under the Act. *Only* the South Carolina Workers' Compensation Commission could determine that a subsequent accident occurred and the respective rights of the parties, *vis-a-vis* the Claimant's rights to compensation resulting from the two accidents.

It cannot be disputed that the South Carolina Workers' Compensation Commission has not only the exclusive subject matter jurisdiction but also the responsibility to determine whether an injury by accident occurred during the Claimant's employment. In this case, the Commission determined that an injury by accident occurred while the Claimant worked for Bob Wire, from which he suffered a new injury for which Bob Wire was held responsible. The order of reimbursement by Bob Wire to Peachtree for benefits Bob Wire should have paid was merely ancillary to the findings that only the South Carolina Workers' Compensation Commission could make. As this Court aptly held in Labouseur, "when it is ancillary to the determination of the employee's right," the Commission has the authority to pass upon a question relating to an issue between the employer and a third party. Labouseur at 543, 397 S.E.2d at 528.

The decision of the South Carolina Workers' Compensation Commission and the Circuit Court is completely consistent with – not contrary to – this Court's decision in Labouseur.

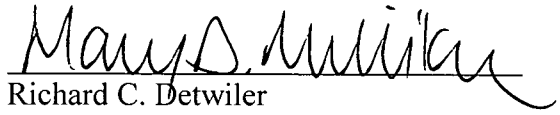
Despite the clear subject matter jurisdiction of the Commission over the reimbursement issue between Peachtree and Bob Wire, and even despite the undisputed subject matter jurisdiction of the Commission over the determination of the rights of each of Peachtree and Bob Wire to the Claimant, the Court of Appeals' Opinion vacates all orders from the proceedings below, including the determinations which are indisputably within the exclusive jurisdiction of the Commission. This Court issued its decision in Labouseur "for the sake of clarity and to provide guidance to the bench and bar" as to the subject matter jurisdiction of the Workers' Compensation Commission over questions "arising under" the Workers' Compensation Act. Labouseur at 542, 397 S.E.2d at 528. The Court of Appeals failed to properly apply and follow this Court's guidance as set forth in Labouseur and in this respect the Court of Appeals clearly erred. Petitioners respectfully request that this Court grant a writ of certiorari to review the Court of Appeals' Opinion in this regard.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition for a writ of certiorari to review the Court of Appeals' decision in this matter.

[SEE FOLLOWING PAGE FOR SIGNATURE]

Respectfully submitted,



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ATTORNEYS FOR PETITIONERS

Columbia, South Carolina
March 28, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED
MAR 28 2012
S.C. Supreme Court

Opinion No. 4923 (S.C. Ct. App. filed December 21, 2011)

Christopher Price . . . . . Claimant,

vs.

Peachtree Electrical Services, Inc. and
Builders Mutual Insurance Company,
Employer/Carrier . . . . . Petitioners,

vs.

Bob Wire Electric, Inc., self-insured Employer,
through South Carolina Home Builders Association SIF . . . . . Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the **Petition for Writ of Certiorari and Appendix** on the Respondents by depositing a copy of same in the United States Mail, first-class postage prepaid, on March 28, 2012, addressed to their attorney of record, Kirsten L. Barr, Trask & Howell, L.L.C., P.O. Box 2167, Mt. Pleasant, South Carolina, 29465.

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Columbia, South Carolina
March 28, 2012

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CALLISON TIGHE

March 28, 2012

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29211

Re: Christopher Price v. Peachtree Electrical Services, et al.
SCWCC No.: 0220142
Civil Action No.: 2009-CP-22-0087
Case Tracking Number: 2009146866
Our File No. 3399.056

Dear Mr. Shearouse:

I have enclosed herewith for filing with respect to the above-referenced matter, the original and seven (7) copies of the Petition for Writ of Certiorari; three (3) copies of the Appendix; Proof of Service on counsel of record; and a check in the amount of $100.00 to cover filing fees pursuant to Rule 242, SCACR. Please return the filed-stamped copies of the Petition and Appendix to me via my courier.

By copy of this letter to opposing counsel we are hereby serving a copy of same on Respondents.

Additionally, by copy of this letter to the Court of Appeals we are delivering a copy of the Petition for Writ of Certiorari and Proof of Service to them for filing.

Thank you for your kind assistance with this matter.

Check #96550
$100.00

Sincerely yours,

Mary D. Milliken

MDH/dmh
Enclosures
cc: The Honorable Tanya A. Gee, Clerk, Court of Appeals (w/copy of Petition)
Kirsten L. Barr, Attorney at Law (w/enclosures)
Janey Wilson (w/enclosures)