

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

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.

**APPENDIX
VOLUME 2 OF 2**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price,.....Claimant,

v.

Peachtree Electrical Services, Employer, and
Builders Mutual Insurance Company, Carrier,.....Respondent,

and

Bob Wire Electric, Inc., and the South Carolina
Home Builders Self Insurers' Fund.....Appellants.

SUPPLEMENTAL RECORD ON APPEAL

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Builders Mutual Insurance

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BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0220142

Christopher Price,

Employee/
Claimant,

vs.

Peachtree Electrical Services,

Employer, and

Builders Mutual Insurance Company,

Carrier,

Defendants.

APPROVED

AUG 29 2006

S. C. WORKERS COMP. COMM.

CONSENT ORDER APPROVING
SETTLEMENT AGREEMENT

This matter now comes before the South Carolina Workers' Compensation Commission upon the petition of the Claimant, Christopher Price, with the consent of the Defendants. The Claimant is represented by N. David DuRant of The Law Offices of N. David DuRant and Associates, P.A. of Surfside Beach, South Carolina. The Defendants, Peachtree Electrical Services, Employer, and Builders Mutual Insurance Company, Carrier, are represented by Richard C. Detwiler, of Callison Tighe & Robinson, LLC, of Columbia, South Carolina. The South Carolina Workers' Compensation Commission has jurisdiction.

On or about December 9, 2002, while an employee of Peachtree Electrical Services, Claimant sustained an injury by accident arising out of and in the course of employment, suffering injury to the back. Medical care and treatment were necessitated by the injury, as outlined in the Commission's files. The Claimant alleges need and entitlement to additional medical treatment and

SCWCC

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temporary and/or permanent disability benefits as a result of the accident, which allegations are shown in the Commission's file. The Defendants have disputed the claims for additional benefits under the Act.

On June 5, 2006, a hearing was held on the Defendants' application to stop payment of temporary total disability benefits. On July 5, 2006, this Commission issued its Decision and Award, granting the Defendants' application and awarding the Claimant permanent partial disability benefits to the back, with credit to the Defendants for the overpayment of temporary total disability benefits paid after the date of maximum medical improvement.

The Claimant has also prosecuted and ultimately settled a related third-party claim against Divine Dining Group, Inc. d/b/a Divine Fish House for the total lump sum of Five Hundred Forty Thousand and No/100 Dollars (\$540,000.00). The Commission's files reflect that the Defendants have paid approximately One Hundred Thirty-eight Thousand and No/100 (\$138,000.00) in medical benefits on behalf of the Claimant and approximately Fifty-eight Thousand and No/100 (\$58,000.00) in compensation benefits for Claimant's time out of work. Under South Carolina Code §42-1-560 (2006 Ann.), the Defendants have a statutory lien upon the third-party settlement proceeds and assert their entitlement to a full recovery of their lien, less attorneys fees and costs. The Claimant alleges he is entitled to a reduction of the Defendants' lien pursuant to §42-1-560 and the decisions of Kirkland v. Allcraft Steel Co., Inc., S.C. 389, 496 S.E.2d 624 (1998) and Breeden v. TCW, Inc./Tennessee Express, 345 S.C. 201, 546 S.E. 2d 657 (Ct. App. 2001), affirmed in part, reversed in part, 355 S.C. 112, 584 S.E.2d 379 (2003).

The parties hereto now advise that, in view of the aforementioned disputes, an Agreement has been reached between the Claimant and the Defendants to settle this matter in its entirety, subject

SCWCC

AUG 28 2006

JUDICIAL

only to the approval of the South Carolina Workers' Compensation Commission. The Claimant has agreed to make, and the Defendants have agreed to accept, payment in the sum of Fifty Thousand and No/100 Dollars (\$50,000.00) in settlement of any further liability the Defendants may have with respect to the Claimant's claims for benefits under the Act, and in further settlement of the lien held by the Defendants upon the Claimant's third-party recovery proceeds.

As a material and integral part of the agreement of the parties, it is agreed that this Settlement Agreement shall act as a complete and final release of, and in full settlement and satisfaction of, every liability of the Defendants of whatever nature or kind under the laws of the State of South Carolina, including the South Carolina Workers' Compensation Act, growing out of, or in any way connected with, the aforescribed accident. The Defendants shall be responsible for all related medical expenses incurred at the request of the Defendants, or either of them, prior to the date of the Commission's Order of July 5, 2006, and any and all further medical expenses of whatever nature or kind thereafter shall be the express liability of the Claimant, and that the Defendants shall have no further liability therefor. This Settlement Agreement, once approved and payment made hereunder, shall also act as a complete and final discharge of the Defendants' lien under §42-1-560. However, nothing herein shall be construed to release the South Carolina Home Builders Association and Bob Wire Electric from any liability in this case, either to the Defendants' or to the Claimant.

By their signature hereon, the Claimant and Claimant's attorney acknowledge and warrant that the Claimant has been fully advised of all rights under the laws of the State of South Carolina, and the Claimant specifically warrants herein that he is of the opinion that the proposed settlement is reasonable and fair. In this opinion, the Claimant's attorney concurs and, together with Claimant, respectfully requests this Commission approve the Settlement as set forth above. Both the Claimant and Claimant's attorney acknowledge that the Commission relies on these representations and assurances by the Claimant and his Counsel that the Claimant has had the opportunity to be and has

SCWCC
AUG 28 2006
JUDICIAL

been fully advised of his rights under the laws of the State of South Carolina. The Claimant further acknowledges and warrants consent to, and the approval of, this Order as a final determination and adjudication of all benefits and claims for damages to which the Employee might be entitled from the Defendants and a complete release of all liabilities of the Defendants under the laws of the State of South Carolina growing out of, or in any way connected with, the aforesaid accident.

Based upon the foregoing representation of the parties and counsel, this Commission is of the opinion that the Settlement between the parties, the terms of which are set forth herein, is both reasonable and proper and should be approved.

NOW, THEREFORE, IT IS ORDERED that the terms of the settlement as set forth herein are hereby approved and confirmed, and that payment shall be made as provided hereunder, and the Defendants are hereby fully and forever released and discharged of all liabilities of whatever kind and nature under the laws of the State of South Carolina growing out of, or in any way connected with, the aforesaid accident, and that the Defendants' lien pursuant to South Carolina Code §42-1-560 is hereby released and forever discharged, subject only to payment by the Claimant to the Defendants as provided hereunder, so that this matter is not subject to review under any conditions.

It is further ordered that this settlement resolves all issues between the Claimant, on the one hand, and Peachtree Electrical Services and Builders Mutual Insurance Company, on the other, but this Agreement shall in no way be construed as a settlement or release of any claims either party may have against Bob Wire Electric and/or the South Carolina Home Builders Association, its carrier.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By: /s/ Susan S. Barden
David W. Huffstetter, Commissioner

Barden

SCWCC

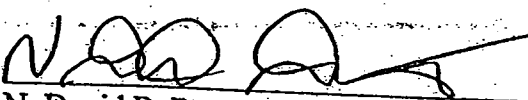
AUG 28 2006

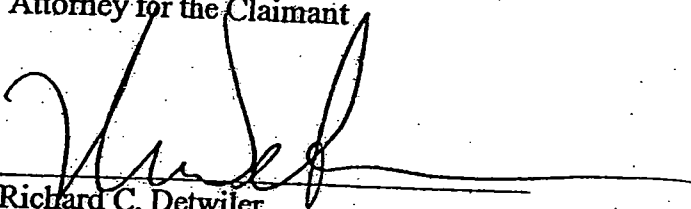
JUDICIAL

I, Christopher Price, have read the foregoing Settlement Agreement and Consent Order. I have conferred with my attorney about the Agreement and Order and I understand and hereby consent to the terms thereof.


Christopher Price, Claimant

WE CONSENT:


N. David DuRant
Law Offices N. David DuRant
and Associates, P.A.
P. O. Box 14722
Surfside Beach, SC
Attorney for the Claimant


Richard C. Detwiler
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Columbia, South Carolina 29202
Attorneys for the Defendants

SCWCC

AUG 28 2006

JUDICIAL

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Christopher Price,

Claimant,

v.

Peachtree Electrical Services, and Builders
Mutual Insurance Company,

Employer/Carrier/Respondents,

v.

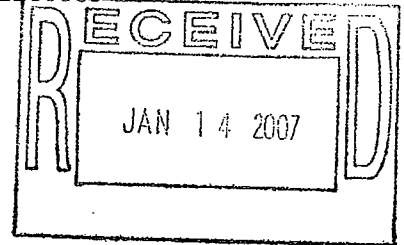
Bob Wire Electric, Inc., self-insured
Employer, through S.C. Home Builders SIF,

Defendants/Appellants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

SCWCC NO. 02200142

CASE NO: 2007CP2200885



ORDER

FILED
GEORGETOWN COUNTY, S.C.
2008 JAN -7 AM 9:13
ALMA Y WHITE
CLERK OF COURT

This is an appeal from the South Carolina Worker's Compensation Commission. It involves a dispute between Peachtree Electrical Services, former employer of the Claimant, Christopher Price, and a subsequent employer, Bob Wire Electric, Inc. Peachtree filed a Motion to Dismiss the appeal on the grounds that it was not made timely, which motion was also before the Court. Because the motion, if granted, would be dispositive of this appeal, it should be considered first.

South Carolina Code Section 42-17-60 provides for appeals from an award of the Worker's Compensation Commission. In pertinent part, it states as follows:

§42-17-60. Conclusiveness of award; appeal; payment of compensation during appeal.

The award of the commission, as provided in Section 42-17-40, if not reviewed in due time, or an award of the commission upon such review, as provided in Section 42-17-50, is conclusive and binding as to all questions of fact. However, either party to the dispute, within thirty days from the date of award or within thirty days after the

receipt of notice to be sent by registered mail of the award, but not thereafter, may appeal from the decision of the commission to the court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.

S.C. Code §42-17-60 (emphasis added)

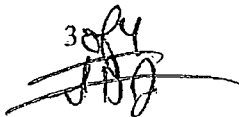
The record in this case indicates that the Full Commission Order was issued on May 4, 2007. According to Bob Wire's Notice of Intent to Appeal, it received that Order on May 7, 2007. Therefore, pursuant to South Carolina Code §42-17-60, Bob Wire had thirty days from May, 7, 2007, or until June 6, 2007, to appeal to the Circuit Court. Bob Wire's Notice of Intent to Appeal was not filed until June 29, 2007, some twenty-three days later. In response to the Motion to Dismiss the appeal, Bob Wire's counsel candidly admits that the appeal was not made timely, but argues excusable neglect. Specifically, Bob Wire's Return to the Motion points out the following:

1. The appeal in question was filed in conjunction with the Decision and Order of the Full Commission issued on May 4, 2007.
2. This matter was originally assigned to Andrew D. Smith, Esquire, at Trask & Howell, L.L.C., to handle the defense for the Appellant. On April 26, 2007, Mr. Smith left the employ of Trask & Howell, L.L.C., causing all of his approximately 150 files, including the present case, to be reassigned.
3. On or about May 7, 2007, the Full Commission Decision and Order in this matter was received in the Appellant's office. However, as a result of a scrivener's error on the part of the docketing clerk, the Notice of Appeal was not properly recorded, and was instead docketed for June 29, 2007.
4. Because this particular claim had not yet been reassigned, the scrivener's error was not discovered, and the Notice of Appeal remained docketed for June 29, 2007.
5. Subsequently, the claim was reassigned to Jamie C. Guerrero at Trask & Howell, L.L.C., who filed a Notice of Appeal with the Georgetown Clerk of Court on June 29, 2007.

2007
J.C. Guerrero

6. On July 3, 2007, Defendant Peachtree Electrical Services and Builders Mutual Insurance Company filed a Motion to Dismiss based upon the Notice of Appeal being filed untimely.
7. The Appellant contends it was excusable neglect to rely on a scrivener's error in the docketing of the Notice of Appeal in light of the fact that the claim was being reassigned to a new attorney after Mr. Smith's departure from Trask & Howell, LLC.
8. Section 15-27-130 provides that the Court may relieve a party from a judgment taken through excusable neglect. "This section is liberally construed to see that, justice is promoted and to strive for disposition of cases on their merits." Mann v. Walker, 328 S.E.2d 659 (Ct. App. 1985).
9. The Appellant maintains that it would be fundamentally unfair to dismiss this claim on the basis of an untimely appeal as a result of a scrivener's error, especially in light of its good faith and meritorious issues on appeal.
10. Since the Appellant's Notice of Appeal was in fact filed on June 29, 2007, it is obvious they relied on the scrivener's error deadline in so filing and did not simply file the appeal untimely on purpose or out of inexcusable neglect.

The question this Court must answer is whether it has any discretion to relieve Bob Wire from an untimely appeal. While the Court is certainly sympathetic to the unintentional and understandable failure to have the appeal calendared properly, the timeliness of an appeal is a matter of jurisdiction and this Court has no discretion or jurisdiction over the matter after the time for the appeal has run. South Carolina Code §42-17-60 is explicit that the award must be appealed within thirty days of the date of the award or after receipt of notice sent by registered mail, "but not thereafter." While there is no authority specifically on point, the South Carolina Court of Appeals has ruled that the circuit court lacked jurisdiction, based on the insufficiency of an appeal, where the petition for review was so vague that it did not adequately specify grounds for the appeal. Solomon v. W. B. Easton, Inc., 307 S.C. 518, 415 S.E. 2d 841 (S.C. App. 1992). Similarly, it is well settled

3074


that the thirty-day period provided for notice of appeal from a circuit court to the appellate courts of this state, provided by the analogous Rule 203 of the S.C. Appellate Court Rules, has been held to be jurisdictional. Thus, this Court has no discretion nor jurisdiction to relieve Bob Wire or the S.C. Home Builders Association from its failure to timely file a notice of appeal from the Commission's award to this Court.

NOW, THEREFORE, IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Motion to Dismiss the Appeal of Bob Wire Electric, Inc. and it's carrier, South Carolina Home Builders Association, is hereby granted and the appeal is dismissed.

AND IT IS SO ORDERED.

Georgetown
Columbia, South Carolina
12/20/2007

Resident
Steven H. John,
Presiding Judge
fifteenth Judicial Circuit

4384
[Signature]

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0327174

Christopher Price,	)	
	)	
Claimant/Employee,	)	
	)	
-vs-	)	
	)	ORDER
Bob Wire Electrical, Inc.,	)	
	)	
Self-Insured Employer,	)	
	)	
-through-	)	
	)	
S.C. Home Builders SIF,	)	
	)	
Defendant.	)	

This matter was originally scheduled for a hearing before the undersigned Commissioner on April 18, 2008, at 9:30 a.m. in Myrtle Beach, SC. However, due to time constraints, the matter was rescheduled for April 23, 2008, at 9:30 a.m. in Florence, SC. On April 18, 2008, the undersigned Commissioner ordered that WCC No. 0220142 and WCC No. 0327174 be bifurcated and addressed in separate hearings. The Claimant filed a Form 50 in WCC No. 0327174 on January 17, 2008. However, because he believed that the issues raised on the Form 50 in WCC No. 0327174 would be addressed in the remand hearing for WCC No. 0220142, that Form 50 was withdrawn on March 26, 2008. In the interest of judicial economy, the undersigned Commissioner reinstated the Claimant's Form 50 in WCC No. 0327174 as well as Defendant Bob Wire Electrical's Form 51.

The Claimant argued that he sustained an injury to his back on or about November 3, 2003, while working for Bob Wire. He maintains that he has not reached maximum medical improvement and is in need of additional medical treatment at this time. The Claimant requested a

ruling from the Commission that Bob Wire is required to provide additional medical treatment as provided for under the Act. The Claimant stated that he has been receiving causally related medical treatment with Dr. Luis Fernandez in Florida and asked that he be allowed to continue treating with Dr. Fernandez, if appropriate.

The Defendant raised the defense of *res judicata* and asserted that these issues have already been litigated. Specifically, the Defendant contended that although the Appellate Panel modified the single Commissioner's Decision and Order providing for an allocation of responsibility between Bob Wire and Peachtree Electrical Services, the Appellate Panel did not modify or reverse the actual award itself. Accordingly, the Defendant argued that if there is any issue to be resolved at all, it is solely between Bob Wire and Peachtree. More importantly, the Defendant maintained that because the Claimant and Peachtree clinched WCC No. 0220142 prior to the Appellate Panel hearing, and with the single Commissioner's Decision and Order still intact, Bob Wire should not have any remaining liability whatsoever.

In addition, the Defendant raised the statute of limitations as a defense barring the claim. According to the Defendant, the alleged injury occurred on November 3, 2003, yet the Claimant did not file a claim against them until January 17, 2008, over four years later. Therefore, the Defendant maintained the claim is barred pursuant to § 42-15-20.

In the alternative, should the undersigned Commissioner find the Claimant is entitled to additional medical treatment, the Defendant contended he should be required to return to the original treating physicians, Dr. William Mills and Dr. Jeffrey Wilkins.

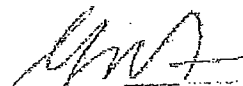
After reviewing the evidence and entertaining arguments from both parties, I hereby order the following:

I find that pursuant to the Appellate Panel Decision and Order dated May 4, 2007, the Claimant sustained a compensable injury on or about November 3, 2003, while working for Defendant Bob Wire. I hereby order Defendant Bob Wire to schedule an updated medical evaluation for the Claimant with Dr. William Mills or Dr. Jeffrey Wilkins and to provide any additional causally related medical treatment as recommended by these physicians, as it does not appear the Claimant has been seen by an authorized physician since approximately May 5, 2005. I find that these physicians were his original authorized treating physicians and were treating the Claimant at the time he underwent both of his surgeries. Accordingly, both of these physicians should be familiar with the Claimant's injury and treatment and are in a better position to address his current condition than a physician who has never seen him.

The Defendant is not responsible for providing any treatment with Dr. Luis Fernandez, whom the Claimant has been seeing for treatment in Florida. However, the Defendant will be responsible for reimbursing the Claimant, who lives in Kentucky, for mileage associated with travel from his home to Myrtle Beach, South Carolina.

All other issues are hereby held in abeyance.

IT IS SO ORDERED.


George N. Funderburk, Commissioner
S. C. Workers' Compensation Commission

0413-180 or 41

6/13

2008

CERTIFICATE OF SERVICE
This is to certify that the foregoing is a true and correct copy of the original as filed with the Clerk of the Court and that the same has been served on the parties to the case in accordance with the rules of the Court.

This 13 day of June, 2008
by Luis Tellez
Administrative Assistant to the Commissioner

JG
NDD

Dec 18 02 01:50p Michael Stead

843-293-8211

P.2

Dec 18 02 11:16a

J Wilson

864 252-1672

P.2

South Carolina Workers' Compensation Commission

P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File #

Carrier File #

Carrier Code # 1062

Employer FEIN 57-0954300

Christopher Price

Claimant's Name

CCAT #

Address

City

State

Zip

Home Phone #

Work Phone #

Peachtree Electric Services

Employer's Name

Address

City

State

Zip

Builders Mutual Insurance Company

Insurance Carrier

Christina Seridkhat

Preparer's Name

843-293-8209

Phone #

A. Total Wages Paid

Date of Injury: 12-9-02

1. Check Applicable Method:

- ☐ Report of earnings of injured employee based on four completed quarters.
☐ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire Date: _____
☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just. (Attach documentation to show how average weekly wage and compensation rate were calculated.)

2. List total wages paid as reported to Employment Security Commission on the Employer Quarterly Contribution and Wage Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st		
2nd		
3rd		
4th		

3. List total value of other allowances

Total Paid 2. 11,326.45

4. Add lines 2 and 3.

TOTAL WAGES PAID:

3. 11,326.45

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 22

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).

AVERAGE WEEKLY WAGE:

6. 514.84

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See line 8 below to determine the actual compensation rate.

7. 343.24

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8:

☒ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. 343.24

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINES 7 OR 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803) 737-5723.

WCC FORM # 20 Rev. Date 1/97

20

Statement of Earnings of Injured Employee

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 0220142

Christopher Price,

Claimant,

v.

Peachtree Electrical Services,

Employer,

and

Builders Mutual Insurance Company,

Defendants.

**MOTION TO ADD A PARTY
AND FOR
CONTINUANCE**

TO: N. DAVID DURANT, ESQUIRE, ATTORNEY FOR CLAIMANT:

YOU WILL PLEASE TAKE NOTICE that the Defendants, Peachtree Electrical Services and Builders Mutual Insurance Company, will move before this Honorable Commission, or as soon as counsel may be heard, for an Order adding Bob Wire Electric, Inc. and South Carolina Home Builders Self Insurance Fund as a party in the above-captioned claim.

Grounds for this motion are that following the Claimant's original injury while working for Peachtree Electrical Services on December 9, 2002, and following the Claimant's first spine surgery performed in April, 2003, the Claimant returned to work for Bob Wire Electric sometime in October, 2003. Shortly thereafter, during the month of November, the Claimant re-injured his back while working for Bob Wire Electric pulling a rope. This second accident was not mentioned in the

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JUN 22 2005

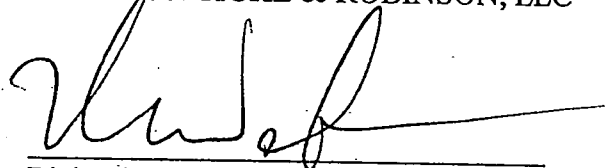
SCHBSIF

Claimant's deposition taken on December 18, 2003. Nor was this accident mentioned in the Claimant's subsequent medical records.

The second accident produced an injury which required a second surgery to the Claimant's back. Peachtree Electrical Services and Builders Mutual Insurance Company assumed responsibility for the second surgery and paid all related expenses for the same. However, this newly discovered evidence reveals that this second accident and injury occurred while the Claimant was working for a new employer, Bob Wire Electric. Therefore, the Defendants are informed and believe that the second accident and subsequent medical treatment including surgery are the responsibility of Bob Wire Electric and South Carolina Home Builders Self Insurance Fund.

THEREFORE, based on the grounds stated above, the undersigned respectfully requests an Order of the Commission adding Bob Wire Electric, Inc. and South Carolina Home Builders Self Insurance Fund as a party to this action. The undersigned further requests a continuance of the hearing scheduled for May 9, 2005, so the parties may conduct further discovery to investigate the liability of the parties sought to be added by this Motion for the second accident and subsequent medical treatment.

CALLISON TIGHE & ROBINSON, LLC



Richard C. Detwiler
1812 Lincoln Street, Suite 200
Columbia, South Carolina 29201
(803) 256-2371

Columbia, South Carolina
April 22, 2005

ATTORNEYS FOR PEACHTREE
ELECTRICAL SERVICES AND BUILDERS
MUTUAL INSURANCE COMPANY

RECEIVED
JUN 22 2005
SCHBSIF
-431-

AMENDED CERTIFICATE OF SERVICE

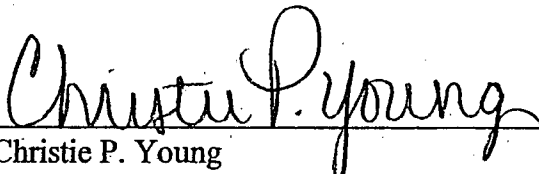
Christopher Price v. Peachtree Electric Services, Inc.
WCC File No.: 0220142

I, the undersigned, Christie P. Young, of the law offices of Callison Tighe & Robinson, LLC, attorneys for Builders Mutual Insurance Company, do hereby certify that I have served the following documents on counsel of record by facsimile and placing a copy of same in the United States Mail, first-class postage prepaid, addressed as follows, on May 2, 2005:

Pleading(s): **Motion to Add Party and for Continuance;
Amended Form 51;**

Counsel Served:

Bob Wire Electric, Inc.
131 Liberty Oak Lane
Surfside Beach, SC 29575


Christie P. Young

Columbia, South Carolina
May 2, 2005

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0220142
Carrier File # 102-47128
Carrier Code # 1062
Employer FEIN 570954300

CHRISTOPHER PRICE

Claimant's Name SSN

MURRELLS INLET, SC 29576

Address City State Zip
843 283-3165 843 293-8209
Home Phone # Work Phone #

PEACHTREE ELECTRIC SERVICES

Employer's Name
196A STONEBRIDGE DR. MYRTLE BEACH SC 29588

Address City State Zip
BUILDERS MUTUAL INS. CO.
Insurance Carrier

Janey Wilson
Preparer's Name

(864) 292-4789
Phone #

1. Date of injury: 12/9/02

2. Total Weeks of Compensation Paid

139 6/7

3. Type of Compensation Paid (TP or TT)/Periods of Payment:

3 6/7

Type: TTD

From: 12/10/02

To: 1/5/03

29

Type: TTD

From: 1/20/03

To: 8/10/03

Type: TTD

From: 11/21/03

To: 12/8/05

4. Date of First Payment: 12/19/02

month day year

5. Total Amount Paid

(a) Compensation:

48,004.54

(b) Medical (Include Nursing, Hospital Drugs, Etc.):

133,742.71

6. Informal Conference is Requested: ☐ yes ☐ no
(check one)

7. Use these lines to send a memo to the Commission:

We are seeking credit for all med/indemnity payments from 11/21/03 to-date because alt suffered new accident w/ another employer. Info was withheld from us.

Janey Wilson (919) 845-1976
Employer's Representative Phone #

12/13/05
Date

File or print all information. File this form 6 months after the alleged injury date and each 6 months until the Commission's File is closed. Form 18 must be filed whether or not compensation is ongoing. Check "yes" after number 6 to request an informal conference. Refer to 67-413, R.67-507, and R.67-804 for further information.

WCC FORM # 18

CC: RICK DETWILER, ATTY.
REV. DATE 3/96

PERIODIC REPORT

CC:

NOTICE OF HEARING

S. C. Workers' Compensation Commission
1612 Marion Street
P. O. Box 1715
Columbia, S. C. 29202-1715

WCC File No.: 0220142
Emp. Code No.: 570954300
Carrier Code No.: 01062
Carrier File No.: 00034246

March 19, 2008

Jamie C. Guerrero
Attorney at Law
P O Box 2167
Mount Pleasant, SC 29465

CHRISTOPHER PRICE v PEACHTREE ELECTRICAL SERVICES

A hearing for the above case is set for:

Date: 04/18/08
Time: 08:30 AM
Before: George N. Funderburk, Commissioner
Place: South Strand Government Complex, 9630 Scipio Lane
Conference Room B-130
Location: MYRTLE BEACH, SC 29588

Subject of hearing: Remand on issues as set forth by Full Commission Order.

S. C. Code R. 67-601 – R. 67-615 governs the conduct of hearings. The employee must attend when not represented by an attorney or when disfigurement is involved. An uninsured employer must attend. A Corporation must be represented by an attorney. All witnesses must be present and available to testify. Attorneys must file Form 58 (Prehearing Brief) with proof of service pursuant to R. 67-611. Contact the commissioner's office listed above to notify that the case has been settled or to request a postponement. Postponements are granted only for grounds stated in R.67-613. The transcript of a hearing is prepared only when requested by a party. Please request a transcript when filing an appeal. An appeal hearing may not be postponed due to failure to timely request the transcript.

If you have questions pertaining to this hearing, please contact the above commissioner's office at 803-737-5701.

"I certify all listed parties, or their counsel, were mailed a copy of this notice on March 19, 2008 at the address listed."

By: Elaine Boyd, SC Workers' Compensation Commission

Notice of Scheduled Hearing

CHRISTOPHER PRICE VS PEACHTREE ELECTRICAL SERVICES

Party

Employee: CHRISTOPHER PRICE

MURRELLS INLET, SC 29576-0000

Employer: PEACHTREE ELECTRICAL
SERVICES

Carrier: Builders Mutual Insurance Company
c/o The Schaffer Companies, Ltd.
171 Church Street, Suite 140
Charleston, SC 29401

Employer: PEACHTREE ELECTRICAL
SERVICES

Carrier: Builders Mutual Insurance Company
c/o The Schaffer Companies, Ltd.
171 Church Street, Suite 140
Charleston, SC 29401

Attorney

N David DuRant
ATTORNEY AT LAW
PO BOX 14722
SURFSIDE BEACH, SC 29587

Richard C. Detwiler
Callison, Tighe & Robinson, LLC
P O Box 1390
Columbia, SC 29202-1390

Jamie C. Guerrero
Attorney at Law
P O Box 2167
Mount Pleasant, SC 29465

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION'S
APPELLATE PANEL**

CHRISTOPHER PRICE,

W.C.C. FILE NO. 0220142

Employee/Claimant,

V.

**Motion by Bob Wire Electrical, Inc.
and the S.C. Home Builders SIF,
(third-party Defendants)
for Reconsideration Panel**

PEACHTREE ELECTRICAL,

Employer, and

BUILDERS MUTUAL INSURANCE,

Carrier, Defendants.

TO THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION AND
RICHARD C. DETWEILER, ATTORNEY FOR PEACHTREE ELECTRICAL
SERVICES AND BUILDERS MUTUAL INSURANCE:

PLEASE TAKE NOTICE that the Third-Party Defendants (Appellants), Bob Wire Electrical and the South Carolina Home Builders Self-Insurers Fund, respectfully request that the South Carolina Workers' Compensation reconsider the Decision and Order issued on December 17, 2008 and issue a new order, based upon the following:

1. The December 17, 2008 Decision and Order purports to address both W.C.C. File 0220142 and W.C.C. File 03277174; however, only File 0220142 was before the Appellate Panel. File No. 03277174 was not before the Panel at the October 28, 2008 hearing and no hearing has ever been held in that case before the Commission's Appellate Panel.
2. The December 17, 2008 Decision and Order suggests that attorney N. David Durant appeared on behalf of Christopher Price at the October 28, 2008 Appellate Panel hearing. Mr. Durant did not appear or make any argument on

behalf of Christopher Price at the October 28, 2008 hearing because Price is not a party to that appeal. In fact, Christopher Price "clinchered" W.C.C. File 0220142 in 2006.

3. The December 17, 2008 Decision and Order fails to address any of the arguments raised by the Appellants in the Form 30 or the Appellants' Briefs.

The Appellate Panel characterizes the issues as follows:

1. *The hearing commissioner erred in failing to make detailed findings of fact and conclusions of law with respect to the material issues in dispute.*
2. *The hearing commissioner erred as a matter of law in awarding Claimant additional medical benefits based on mere surmise, conjecture, and speculation.*
3. *The claim for benefits related to an alleged accident on "November 2003" is barred by the Statute of Limitations.*

These issues were not raised in the present appeal, but are the issues raised in W.C.C. File 0327174, which has not yet been argued before the Commission.

4. The issues raised by the Appellants, which were in no way addressed by the Appellate Panel in the December 17, 2008 Decision and Order are the following:

1. *The Hearing Commissioner erred as a matter of law in ordering Bob Wire Electrical to reimburse Peachtree Electrical Services for all medical benefits paid after November 3, 2003, as the greater weight of the evidence in the record reflects the Commission no longer had jurisdiction to hear the claim because Peachtree Electrical Services and the Claimant clinchered the claim prior to the November 21, 2006 Appellate Panel review hearing;*
2. *The Hearing Commissioner erred as a matter of law in ordering Bob Wire Electrical to reimburse Peachtree Electrical Services for all temporary disability compensation paid after November 3, 2003, as the greater*

weight of the evidence in the record reflects the Commission no longer had jurisdiction to hear the claim because Peachtree Electrical Services and the Claimant clinched the claim prior to the November 21, 2006 Appellate Panel review hearing;

- 3. The Hearing Commissioner erred as a matter of law in considering the Claimant's request for "equitable subrogation," as the greater weight of the evidence in the record reflects the Commission no longer had jurisdiction to hear the claim because Peachtree Electrical Services and the Claimant clinched the claim prior to the November 21, 2006 Appellate Panel review hearing;*
- 4. The Hearing Commissioner erred as a matter of law in considering the Claimant's request for "equitable subrogation," as the greater weight of the evidence in the record reflects that Peachtree Electrical Services never raised this issue at the original hearing before Commissioner Huffstetler or on their Form 30, Request for Review, and therefore, this issue was not properly before the Commission;*
- 5. The Hearing Commissioner erred as a matter of law in finding that the findings of the Appellate Panel are the law of the case as the greater weight of the evidence in the record reflects that the Appellate Panels' May 4, 2007, Decision and Order was an Order of remand and therefore, interlocutory and unappealable, and not a final Order in the case;*
- 6. The Hearing Commissioner erred as a matter of law in finding that Bob Wire Electrical's argument that Peachtree Electrical Services relinquished its right to seek reimbursement by clinching the case with the Claimant without notice to Bob Wire Electrical is fundamentally without merit because (1) the clincher is specifically between the Claimant and Peachtree Electrical Services, (2) Bob Wire Electrical denied responsibility and was not entitled to notice of any settlement between the parties, and (3) the settlement involved matters arising out of the December 9, 2002 accident with Peachtree Electrical Services, as this finding is unsupported by the greater weight of the evidence in the record and applicable law;*
- 7. The Hearing Commissioner erred as a matter of law in finding that Bob Wire Electrical was not a necessary and proper party to the settlement agreement between Peachtree Electrical Services and the Claimant, as this finding is contrary to the greater weight of the evidence in the record and applicable law;*
- 8. The Hearing Commissioner erred as a matter of law in finding the settlement agreement between Peachtree Electrical Services and the Claimant has no bearing on Peachtree Electrical Services' right to seek reimbursement from Bob Wire Electrical, as the Commission no longer*

had jurisdiction to hear this matter since the claim was clinched prior to the Appellate Panel review hearing;

- 9. The Hearing Commissioner erred as a matter of law in ordering Bob Wire Electrical to reimburse Peachtree Electrical Services for temporary total disability benefits after November 3, 2003, in the total amount of \$47,023.88, as this finding fails to take into consideration that pursuant to the original July 5, 2006, Decision and Order of Commissioner Huffstetler, Peachtree Electrical Services was awarded a credit for temporary total disability benefits paid since May 5, 2005;*
- 10. The Hearing Commissioner erred as a matter of law in considering issues such as apportionment of temporary total disability compensation and medical benefits voluntarily paid by Peachtree, as this is contrary remand instructions of the Appellate Panels' Decision and Order dated May 4, 2007;*
- 11. The Hearing Commissioner erred as a matter of law in ordering Bob Wire Electrical to reimburse Peachtree Electrical Services for benefits paid after November 3, 2003, as the Commission no longer had jurisdiction to conduct a review hearing since the claim was clinched with Commissioner Huffstetler's July 5, 2006, Decision and Order still intact;*
- 12. The Hearing Commissioner erred as a matter of law in failing to find that Peachtree Electrical Services failed to comply with S.C. Code Regulation 67-710, which requires the party to notify the Commission of a settlement pending review.*
- 13. The Hearing Commissioner erred as a matter of law in considering the claim for "equitable subrogation," as the Commission has only such powers as specifically conferred by the General Assembly and has neither equitable powers, nor authority to order "reimbursement," "apportionment," "equitable indemnity," or "equitable subrogation" in this case.*
- 14. The Hearing Commissioner erred in finding and concluding that the Claimant suffered a new accident and injury on or about November 3, 2003, while working for Bob Wire Electrical, Inc., as this finding and conclusion is arbitrary, capricious, contrary to the greater weight of the evidence in the record, and otherwise made upon unlawful procedure.*
- 15. The Hearing Commissioner erred in finding and concluding that the Claimant "gave notice of the new accident and injury," as this finding and conclusion is arbitrary, capricious, contrary to the greater weight of the evidence in the record, and otherwise made upon unlawful procedure.*
- 16. The Hearing Commissioner erred in finding and concluding that the "statute of limitations was satisfied by Bob Wire being added as a party*

by Defendants Peachtree and Builders Mutual," as this finding and conclusion is arbitrary, capricious, contrary to the greater weight of the evidence in the record, and otherwise contrary to the applicable law.

17. The Hearing Commissioner erred in finding and concluding that "all medical expenses and temporary total disability compensation benefits paid after the November 3, 2003 [sic] are causally-related to his accident while working for Bob Wire on that date," as this finding is arbitrary, capricious, contrary to the greater weight of the evidence in the record, and otherwise made upon unlawful procedure.
18. The Hearing Commissioner's conclusion that Bob Wire was not entitled to notice of the settlement agreement between Peachtree and the Claimant, which included the voluntary payment of sums for which Peachtree now seeks reimbursement for Bob Wire, as this conclusion is arbitrary, capricious, and contrary to the applicable law.
19. The Hearing Commissioner's conclusion that "Peachtree is entitled to reimbursement from Bob Wire of the [sic] \$112,789.42 in medical benefits paid by Peachtree," is arbitrary, capricious, contrary to the greater weight of the evidence in the record, made upon unlawful procedure, and is otherwise contrary to the provisions of the South Carolina Workers' Compensation Act, the regulations promulgated thereunder, and the Medical Services Provider Manual.
20. The Hearing Commissioner erred as a matter of law in concluding that "Peachtree is entitled to reimbursement from Bob Wire of the [sic] \$112,789.42 in medical benefits paid by Peachtree" is made without legal authority, as there is no statute or regulation that would authorize the Commission to order reimbursement in this case.
21. The Hearing Commissioner erred as a matter of law in concluding that "Peachtree is entitled to reimbursement from Bob Wire of the [sic] \$112,789.42 in medical benefits paid by Peachtree" as this conclusion totally destroys Bob Wire's statutory right to seek reimbursement from the Second Injury Fund for this claim, as the Fund requires that medical bills be paid by Bob Wire in accordance with the fee schedule, direct to the provider, after receipt of a HCFA Form 1500 and accompanying narrative medical report.
22. The Hearing Commissioner erred in concluding that Peachtree is entitled to reimbursement from Bob Wire in the amount of \$47,023.88 for temporary total disability benefits voluntarily paid by Peachtree, as this conclusion is arbitrary, capricious, contrary to the greater weight of the evidence in the record, made upon unlawful procedure, and made without legal authority.

23. *The Hearing Commissioner erred in failing to find that all issues relative to W.C.C. Case No. 0220142 were rendered moot with the approval of a clincher agreement between the Claimant, Peachtree, and Builders Mutual Insurance Co., as Builders Mutual is the only carrier with coverage for the 2002 accident.*

24. *The Hearing Commissioner erred in failing to find that the Appellate Panel's May 4, 2007 was rendered void for lack of jurisdiction because Peachtree voluntarily clinched the 2002 case with the Claimant prior to any hearing by the Appellate Panel in that case, without notifying either Bob Wire, or the Appellate Panel that they had voluntarily relinquished their right to appeal.*

25. *Even assuming, arguendo, that the Workers' Compensation Commission has the power and authority to address claims for "equitable indemnity," Peachtree and Builders Mutual did not satisfy their burden of proving their entitlement thereto. Specifically, Peachtree and Builders Mutual have no "special relationship" with Bob Wire and the South Carolina Home Builders SIF as required as a matter of law. See Rock Hill Telephone Company, Inc., v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005).*

5. The Appellants brief to the Appellate Panel characterized the issues on appeal as follows:

I. *The South Carolina Workers' Compensation*

Commission does not have jurisdiction over equitable claims of indemnity or subrogation.

II. *Peachtree has unclean hands and will otherwise be unjustly enriched by the "reimbursement" ordered by the Hearing Commissioner.*

III. *Commissioner Funderburk erred in summarily concluding that Peachtree is entitled to "reimbursement" for all medical and compensation benefits it voluntarily paid the Claimant under a theory of equitable indemnity.*

IV. *Commissioner Funderburk erred in summarily concluding that Peachtree is entitled to “reimbursement” for all medical and compensation benefits it voluntarily paid the Claimant under a theory of equitable subrogation.*

V. *Commissioner Funderburk’s finding that Bob Wire must “reimburse” Peachtree for all temporary total disability compensation benefits paid to the Claimant after November 3, 2003 is arbitrary and capricious.*

VI. *Peachtree’s request for “reimbursement” is governed by S.C. Code Ann. § 42-9-210 and § 42-1-560.*

6. The Appellate Panel’s December 17, 2008 Decision and Order fails to address any of the legal arguments raised by the Appellants.
7. In addition, the December 17, 2008 Decision and Order fails to comply with S.C. Code Ann. 42-17-40 and S.C. Code Ann. 1-23-350, which requires the Commission to make detailed findings of fact and conclusions of law on all matters in dispute. Here, the Commission failed to address any of the issues on appeal, failed to set forth any evidentiary basis for its conclusory findings of fact, and further failed to cite any legal authority for its “conclusions of law.”
8. For example, the Appellate Panel’s December 17, 2008 Decision and Order finds that Bob Wire shall reimburse Peachtree in the amount of \$47,023.88 for temporary compensation benefits paid to the Claimant for the period from

November 3, 2003 through July 6, 2006. In its brief and during oral arguments, the Appellants argued that, not only is the Commission without jurisdiction to consider such common law claims, but that this finding is arbitrary and capricious because the Commission (a) failed to address the appropriate compensation rate for the alleged 2003 accident as required by the Commission's prior remand order (which was stipulated to be \$132.56¹); (b) overlooked the fact that the Claimant was only entitled to temporary total disability compensation through May 5, 2005 (68.85 weeks) pursuant to Commissioner Huffstetler's July 5, 2006 Order; (c) failed to consider that Peachtree voluntarily paid these benefits (making it inappropriate for an equitable indemnity or subrogation claim) and later stipulated in the clincher agreement that these benefits related solely to the 2002 claim; and (d) further failed to consider the fact that, had the Claimant claimed temporary total disability compensation directly from the Appellants, he would have only been entitled to \$9,126.76 (68.85 weeks as the rate of \$132.56 per week) – not the \$47,023.88 the Appellants were ordered to pay Peachtree. The December 17, 2008 Decision and Order fails to address any of these arguments and wholly fails to elucidate the basis for the finding that the Appellants must pay Peachtree \$47,023.88.

¹ The transcript of the June 5, 2006 hearing before Commissioner Huffstetler reveals the following stipulation:

Smith:	...the average weekly wage and comp rate when [Price] was working at Bob Wire Electrical was \$198.83 average weekly wage. The comp rate would be \$132.56.
The Court:	Any objection to that?
Mr. Detweiler:	No objection.

9. In addition, the Appellants argued that the Commission was without authority to order payment of \$112,789.42 to Peachtree for "medical benefits" and that this finding was otherwise arbitrary, capricious, and without evidentiary support. As found by Commissioner Huffstetler in his July 5, 2006 Decision and Order:

The Claimant's testimony is that he was not injured by accident arising out of his employment with Bob Wire Electrical and there is no medical evidence to indicate that his disability or need for the second surgery was occasioned by any injury with Bob Wire Electrical. It would be pure speculation for me to find an injury when there is no testimony or medical evidence to support that finding. It appears the Claimant's symptoms recurred after he became active. This resulted in a second surgery (fusion). Dr. Mills opines a 20% impairment of the back in his January 20, 2005 report and goes on to say, "this appears to be all one process."

Thereafter, Peachtree failed to present any evidence that the Claimant's need for medical treatment after November 3, 2003 was in any way related to an alleged accident on that date (a date on which the Claimant was not even working for Bob Wire per APA p. 125). The Commission cited no evidence to support this finding and otherwise failed to elucidate the legal basis upon which the Respondents' liability for medical benefits could be discharged with

a payment to the Claimant's former employer, as opposed to direct payment to the medical provider as required by the Medical Services Provider Manual,

10. More importantly, however, the Appellants raised the issue of whether the South Carolina Workers' Compensation Commission has jurisdiction to consider equitable claims arising under the common law. The December 17, 2008 Decision and Order wholly ignores this issue and fails to establish the legal basis upon which the Commission assumed such equity jurisdiction, an issue which must be raised at every stage in the proceeding and which may even be raised for the first time on appeal.

Therefore, the Appellants respectfully request that the Commission reconsider the Decision and Order rendered in the above-referenced case and issue a new Decision and Order addressing the issues actually presented on appeal, vacating any decision with respect to W.C.C. File No. 0327174, with sufficiently detailed findings of fact and conclusions that specify the law being applied to such findings.

Respectfully submitted,

Kirsten L. Barr

Roy A. Howell, III

Kirsten Leslie Barr

Trask & Howell, LLC

Attorneys for the Appellants

Bob Wire Electrical, Inc. and

The S.C. Home Builders SIF

December 22, 2008

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CHRISTOPHER C. PRICE) Claim No. 0220142
Employee/Claimant,)
-vs-) DEPOSITION OF:
PEACHTREE ELECTRICAL SERVICES) CHRISTOPHER C. PRICE
Employer,)
and)
PEACHTREE ELECTRICAL SERVICES)
Defendant.)

COPY

Given before Charles J. Martin, III, Court Reporter
and Notary Public, at the Law Offices of N. David
DuRant, 1801 Glenns Bay Road, Surfside Beach, South
Carolina, on Thursday, December the 18th, 2003
commencing at 11:10 a.m.

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MAY 2 - 2005

SCHBSIF

A P P E A R A N C E S

For the Plaintiff(s): Callison, Tighe & Robinson, LLP
By: Mikell H. Wyman, Esquire
1812 Lincoln Street, Suite 200
Columbia, S.C. 29201

For the Defendant(s): N. David DuRant & Associates, P.A.
By: N. David DuRant, Esquire
1801 Glenns Bay Road
Surfside Beach, S.C. 29587

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MAY 2 2005

SCHBSIF

-447-

MR. WYMAN

- 1 A. No. He is not.
- 2 Q. Do you know where he works now?
- 3 A. I do not know where he works, but I do know how
- 4 to get in touch with him.
- 5 Q. Okay. Who was your supervisor on that job?
- 6 A. I was my supervisor.
- 7 Q. Okay. And you only had one helper?
- 8 A. Yes.
- 9 Q. Were you the only two on the job site?
- 10 A. Yes.
- 11 Q. Who was your supervisor back (indicates)?
- 12 A. Mike, Mike Stead, the owner.
- 13 Q. Did you contact Mike?
- 14 A. Yes.
- 15 Q. Okay. Where did you first receive treatment?
- 16 A. Doctor Turek.
- 17 Q. Okay. And when was that?
- 18 A. That was after Thanksgiving, it was right after
- 19 the accident.
- 20 Q. Okay. Was it the same day?
- 21 A. No. It was not the same day.
- 22 Q. Can you give me an estimate of how many days it
- 23 was between the accident and your first medical
- 24 treatment? If you're going to refer to it, I'm
- 25 entitled to look at it, is that a problem with

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MAY 2 2005

SCHBSIF

1 you?

2 A. Yeah. No. It's no problem. I'm just trying to
3 see if I've even got it in here, but I don't
4 think I do.

5 Q. Is that just your personal calendar that you're
6 referring to there?

7 A. Yeah. That's my personal calendar.

8 Q. That's fine. I can check it with medicals.

9 Again, I want to get your take on things. How
10 long did you treat with Doctor Turek?

11 A. I only had a couple of visits with Doctor Turek
12 until he referred me to Doctor Mills.

13 Q. What kind of treatment did Doctor Turek give
14 you, just generally?

15 A. Pain medications, steroids, and tried some
16 muscle relaxers.

17 Q. Okay. When you got to Doctor Mills, what kind
18 of treatment was he giving you initially?

19 A. Doctor Mills gave me pain medicine, took me off
20 of steroids. And just gave me pain medicine and
21 that was pretty much it, and started with x-
22 rays, then a CAT scan, then an MRI, and then a
23 mylogram before he decided to do surgery.

24 Q. Did you see any other doctors between the times
25 you were referred to Doctor Mills and your

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MAY 2 - 2005

SCHBSIF -449-

- 1 surgery?
- 2 A. I went for a second opinion to Doctor Benjamin.
- 3 Q. Why did you go to a second opinion?
- 4 A. Because it was my back and that's your life, you
- 5 start messing with your back so I wanted a
- 6 second opinion.
- 7 Q. That was your choice?
- 8 A. Yeah.
- 9 Q. Do you remember the name of that doctor?
- 10 A. Doctor Benjamin.
- 11 Q. Did he provide any treatment to you?
- 12 A. No treatment.
- 13 Q. It was just an evaluation?
- 14 A. That's it.
- 15 Q. And if I'm not mistaken, you had surgery late
- 16 April.
- 17 A. April, had surgery April 22nd.
- 18 Q. How long were you in the hospital then?
- 19 A. I was out on the 23rd.
- 20 Q. Just one night you spent there?
- 21 A. I went there 6:30, 7:30, 22nd that morning, and I
- 22 was out by like 11:30 the next day.
- 23 Q. Okay. Did you continue to treat with Doctor
- 24 Mills following the surgery?
- 25 A. Yes. I did.

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA 1-800-822-8711

RECEIVED

MAY 2 2005

SCHBSIF

- 1 Q. Did you see any other doctors after your surgery
- 2 until Doctor Mills released you?
- 3 A. No. The only thing I had was physical therapy.
- 4 Q. Okay. About how many times did you go to
- 5 physical therapy?
- 6 A. Went to physical therapy three times a week.
- 7 Q. And, when to the best of your recollection did
- 8 Doctor Mills release you to go back to work?
- 9 A. He released me to go back to work on -- I was
- 10 supposed to go back to work August 11th, but
- 11 Peachtree did not want me to come back to work
- 12 for them.
- 13 Q. And did you speak with Mike about that?
- 14 A. Yes. I did.
- 15 Q. What was his response to you?
- 16 A. Told me that work was slow and that he didn't
- 17 need me.
- 18 Q. Okay. Did you go back to work?
- 19 A. Yes. I did.
- 20 Q. You told me you were supposed to back to work on
- 21 the 11th, when did you actually..
- 22 A. I actually went back to work on the 18th of
- 23 August.
- 24 Q. Who did you go to work with?
- 25 A. I went back to work on my own, doing side work.

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA 1-800-822-8711

RECEIVED
MAY 2 - 2005
SCHBSIF 451-

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

CHRISTOPHER PRICE,

EMPLOYEE,

CLAIMANT,

VS.

W.C.C. FILE # 0220142

PEACHTREE ELECTRICAL SERVICES,

EMPLOYER,

BUILDERS MUTUAL INSURANCE,

CARRIER,

DEFENDANTS.

COPY

WORKERS' COMPENSATION HEARING

BEFORE THE HONORABLE GEORGE N. FUNDERBURK, ESQ.

LOCATION: 301 SOUTH DARGAN STREET
FLORENCE, SOUTH CAROLINA

DATE: WEDNESDAY, APRIL 23, 2008

COURT REPORTER: HALEY RUPLE

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3 P.O. BOX 1390
 COLUMBIA, SC 29201
4 BY: RICARD C. DETWILER, ESQ.
5
6 TRASK AND HOWELL, L.L.C.
 763 JOHNNIE DODDS BOULEVARD
7 P.O. BOX 2167
 MOUNT PLEASANT, SC 29465
8 BY: JAMIE C. GUERRERO, ESQ.
9
10
11

12 E X H I B I T S
13 PG/LN EX. DESCRIPTION
14 (ALL EXHIBITS WERE RETAINED BY THE COURT.)
15
16
17
18
19
20

21
22
23
24 ** UH-HUH = AFFIRMATIVE
25 HUH=UH = NEGATIVE

1 THE COMMISSIONER: TODAY IS APRIL 18TH,
2 2008. (SIC) WE ARE ON WORKER'S COMPENSATION
3 COMMISSION FILE 0220142. THE CLAIMANT, CHRISTOPHER
4 PRICE -- IN THAT CASE CHRISTOPHER PRICE WAS -- THE
5 CLAIMANT WAS REPRESENTED BY ATTORNEY N. DAVID DURANT.
6 PEACHTREE ELECTRICAL SERVICES AND BUILDERS MUTUAL
7 INSURANCE BY ATTORNEY RICHARD C. DETWILER AND BOB
8 WIRE ELECTRICAL AND SOUTH CAROLINA HOME BUILDERS
9 SELF INSURED FUND BY ATTORNEY JAMIE C. GUERRERO.

10 THIS ACCIDENT OCCURRED BACK DECEMBER
11 9TH, 2002. THERE WERE NO QUESTIONS AS FAR AS
12 JURISDICTION OR VENUE. THIS CASE HAS A LONG AND
13 COLORFUL HISTORY IN THE WORKER'S COMPENSATION
14 COMMISSION SYSTEM, AND IN THAT CASE -- I BELIEVE
15 IT'S THE LAW OF THE CASE THAT MR. PRICE'S
16 COMPENSATION RATE WAS FOUND TO BE \$343.24.

17 THE PURPOSE OF OUR HEARING TODAY IS TO
18 EXAMINE THE ISSUES SENT TO THE JURISDICTIONAL
19 COMMISSION -- COMMISSIONER ON THE REMAND FOR THE
20 FULL COMMISSION ORDER OF -- WHICH WAS SERVED BACK
21 IN MAY OF 2007. WHAT I -- WE'VE HAD A -- AGAIN
22 SEVERAL EXTENDED PREHEARING DISCUSSIONS.
23 MR. DURANT AND MR. PRICE ARE NOT HERE NOW BECAUSE
24 THEY'RE NOT INVOLVED WITH THE ISSUES BEFORE ME AT
25 THE PRESENT TIME. WHAT I'D LIKE TO DO IS GET EACH

1 OF THE ATTORNEYS -- WE'LL BEGIN WITH
2 MR. DETWILER -- TO STATE FOR THE RECORD THEIR
3 RESPECTIVE POSITIONS. MR. DETWILER.

4 MR. GUERRERO: COMMISSIONER, MAY I
5 INTERRUPT YOU FOR ONE SECOND?

6 THE COMMISSIONER: YES, SIR.

7 MR. GUERRERO: DO YOU WANT TO PUT ON
8 THE RECORD THE FACT THAT YOU BIFURCATED THESE TWO
9 CLAIMS, AND THAT'S WHY WE'RE HERE ON THIS ONE.

10 THE COMMISSIONER: THAT -- THANK YOU
11 VERY MUCH. I BIFURCATED REALLY LAST WEEK, WHEN WE
12 ASSEMBLED DOWN AT SURFSIDE BEACH, THIS CASE FROM
13 W.C.C. FILE NUMBER 0327174, WHICH INVOLVED AN
14 ACCIDENT WHICH OCCURRED ON OR ABOUT NOVEMBER THE
15 3RD, 2003. I DEALT WITH THAT CASE WHERE, OF
16 COURSE, MR. DURANT AND HIS CLIENT WERE HERE JUST A
17 FEW MINUTES AGO, AND -- AND AN ORDER IS TO BE
18 ISSUED WITH RESPECT TO THAT. BUT THAT ISSUE IS
19 SEPARATE FROM THE ISSUES BEFORE ME NOW. AND
20 THAT'S WHY WE'VE BIFURCATED THIS TO -- TO -- AS
21 BETWEEN PEACHTREE ELECTRIC AND BOB WIRE. SO
22 MR. DETWILER, IF YOU WOULD, WHY DON'T YOU GO AHEAD
23 AND LET US KNOW YOUR POSITION ON THIS.

24 MR. DETWILER: THANK YOU, COMMISSIONER.
25 AS YOU POINTED OUT, WE'RE HERE ON REMAND FROM THE

1 FULL COMMISSION TO DETERMINE HOW MUCH OF THE
2 MEDICAL EXPEN--- HOW MUCH -- HOW -- HOW MUCH OF
3 THE BENEFITS AND OTHER EXPENSES THAT PEACHTREE AND
4 BUILDERS MUTUAL HAVE INCURRED IN THIS MATTER
5 SHOULD BE BORNE BY THE SOUTH CAROLINA HOME
6 BUILDERS ASSOCIATION, WHICH HAS NOW BEEN FOUND
7 RESPONSIBLE FOR THE 2003 ACCIDENT. WE HAVE
8 SUBMITTED, YOUR HONOR -- AND I HOPE I'VE GIVEN YOU
9 A COPY OF OUR A.P.A. SUBMISSIONS. LET ME GIVE YOU
10 THOSE AGAIN JUST TO MAKE SURE YOU HAVE IT. AND
11 JAMIE, DO YOU HAVE A COPY?

12 MR. GUERRERO: I GAVE IT BACK TO YOU,
13 BUT THANK YOU.

14 MR. DETWILER: OKAY. WELL, YOU -- YOU
15 MIGHT WANT THAT. AND IN THAT, YOUR HONOR, IN TAB
16 TWO WE HAVE THE ACTUAL PRINTOUT OF WHAT BUILDER'S
17 MUTUAL'S PAY HISTORY IN THIS -- IN THIS CLAIM HAS
18 BEEN. AND -- AND I SHARED THAT WITH MR. GUERRERO
19 A -- A FEW WEEKS AGO, AND IT'S MY UNDERSTANDING
20 THAT HE WILL STIPULATE THAT THIS ACCURATELY
21 REFLECTS THE -- THE PAYMENT SUBJECT TO HIS
22 VERIFICATION OF ADDITIONAL INFORMATION THAT HE MAY
23 WANT. AND THAT THE --

24 THE COMMISSIONER: AND I THINK THAT --
25 LET ME JUST NOTE FOR THE RECORD THAT -- THAT

1 APPARENTLY BREAK -- ALSO BREAKS DOWN BY DATE.

2 MR. DETWILER: IT DOES, SIR.

3 THE COMMISSIONER: IN OTHER WORDS, I
4 THINK THOSE THINGS, FOR EXAMPLE, LEADING UP -- UP
5 TO NOVEMBER, OF '03, AND THOSE THINGS SUBSEQUENT
6 TO IT. OKAY?

7 MR. DETWILER: EXACTLY.

8 THE COMMISSIONER: I THINK --

9 MR. DETWILER: AND -- AND I HAVE TAKEN
10 THE LIBERTY OF -- OF TRYING TO BREAK DOWN THOSE
11 EXPENSES AS BEST I COULD IN THE EXHIBITS, WHICH
12 ARE TAB ONE TO MY A.P.A. SUBMISSIONS. AND, YOUR
13 HONOR, THE MEDICALS ARE WHAT THEY ARE, AND --
14 AND I THINK IT WOULD BE BEST, IF -- IF -- IF YOUR
15 HONOR DOES ORDER THAT THESE BE REIMBURSED, THAT --
16 THAT THEY CAN BE VERIFIED AND SUBJECT TO
17 CONFIRMATION BY MR. GEURRERO'S CLIENT.

18 BUT IT IS OUR VIEW THAT THE MEDICALS
19 THAT HAVE BEEN PAID IN THIS CLAIM, WITH REGARD TO
20 THE '03 CLAIM BY PEACHTREE, ARE \$112,789.42. AND
21 THAT WE ALSO PAID TEMPORARY TOTAL DISABILITY ON
22 THE '03 CLAIM OF 137 WEEKS AT THE COMP RATE OF
23 \$343.24, WHICH BY MY CALCULATION EQUALS 47,000
24 DOLLARS -- \$47,023.88. IT IS OUR POSITION THAT
25 THE PERMANENT PARTIAL DISABILITY AWARD -- AWARDED

1 BY COMMISSIONER HUFFSTETLER -- STETLER ORIGINALLY
2 WAS NEVER APPEALED FROM. WE SETTLED THAT CLAIM AS
3 PART OF THE OVERALL SETTLEMENT OF THE THIRD PARTY
4 CLAIM WITH THE CLAIMANT.

5 THE COMMISSIONER: I'M SORRY -- I'M
6 SORRY, MR. DETWILER. I APOLOGIZE. PLEASE HOLD
7 YOUR THOUGHT RIGHT THERE, AND LET GO OFF THE
8 RECORD ON -- JUST A MOMENT HERE. SOMETHING JUST
9 OCCURRED TO ME. OKAY. BACK ON THE RECORD.
10 MR. DETWILER.

11 MR. DETWILER: OKAY. THANK YOU, YOUR
12 HONOR. I WAS SPEAKING WITH REGARD TO THE
13 PERMANENT PARTIAL DISABILITY AWARD, AND IT'S OUR
14 POSITION THAT WE PAID -- WE'VE -- WE'VE TAKEN CARE
15 OF THAT IN RELATION TO THE FIRST ACCIDENT IN
16 ACCORDANCE WITH COMMISSIONER HUFFSTETLER'S OFF---
17 ORDER THAT WAS NEVER APPEALED FROM. AND THAT WAS
18 WRAPPED UP IN A OVERALL GLOBAL SETTLEMENT OF THAT
19 AND THE THIRD PARTY CLAIM THAT WE ENTERED INTO
20 WITH THE CLAIMANT.

21 AND, YOUR HONOR, I WOULD ALSO ASK THE
22 COMMISSION TO CONSIDER THE REIMBURSEMENT OF OUR
23 DEFENSE EXPENSES THAT HAVE BEEN INCURRED IN THIS
24 CASE. I HAVE SUBMITTED A -- A -- AN AFFIDAVIT IN
25 THAT REGARD. HOWEVER, I WOULD POINT OUT THAT I

1 MISTAKENLY, I THINK, ASSUMED THAT ALL OF WHAT I
2 HAVE INCURRED DEALT WITH THE -- ALL OF THE '03
3 ACCIDENT WHEN I -- AND -- AND THAT DIDN'T NEED TO
4 BE -- AND -- AND -- AND THAT I -- THAT MY CLIENT'S
5 ENTITLED TO REIMBURSEMENT FOR THAT. I -- I THINK,
6 IN FAIRNESS, I'M GOING TO HAVE TO DO A BETTER JOB
7 OF BREAKING THAT DOWN. IF YOUR HONOR WOULD --
8 WOULD BE INCLINED TO AWARD IT ALL, I'M GOING TO
9 HAVE TO DO A BETTER JOB OF BREAKING THAT DOWN
10 BETWEEN THE '02 AND THE '03 ACCIDENT.

11 AND I WOULD CALL YOUR ATTENTION TO THE
12 FACT THAT MY ATTORNEY'S FEE AF--- AFFIDAVIT, WHILE
13 I SIGNED IT IN GOOD FAITH, DOES CONTAIN SOME
14 INACCURACIES. AND -- AND I -- AND -- AND OUR
15 THEORY FOR ASKING FOR ATTORNEY'S FEES, YOUR HONOR,
16 WOULD BE ON THE THEORY OF EQUITABLE INDEMNITY, AND
17 WE HAVE SOME CASES THAT WE'LL HAND UP TO YOUR
18 HONOR FOR YOUR CONSIDERATION IN THAT REGARD
19 SHORTLY.

20 AND AT ANY RATE, THE TOTAL -- I'VE
21 GIVEN YOU THE TOTAL FOR THE MEDICALS. I'VE GIVEN
22 YOU THE TOTAL FOR THE T.T.D. IF YOUR -- IF YOUR
23 HONOR'S INCLINED TO AWARD DEFENSE COST, I WOULD
24 HAVE TO GIVE YOU A BETTER BREAKDOWN OF THAT, AND
25 WOULD ASK THAT THE RECORD BE LEFT OPEN TO -- TO

1 THAT EXTENT. AND THAT'S WHAT WE'RE HERE FOR. WE
2 THINK IT'S A FAIRLY CLEAN -- ASIDE FORM THE
3 ATTORNEY'S FEE ISSUE -- IT'S FAIRLY CLEAN.
4 EVERYTHING AFTER 11/03/03 IS WHAT WE'RE ENTITLED
5 TO.

6 THE COMMISSIONER: OKAY. ALL RIGHT.
7 MR. GUERRERO.

8 MR. GUERRERO: THANK YOU, COMMISSIONER.
9 AND I'LL TRY AND BE AS BRIEF AS POSSIBLE, BUT AS
10 YOU ALLUDED TO EARLIER, THIS DOES HAVE A LONG
11 PROCEDURAL HISTORY, AND IT'S SORT OF BEEN TIED UP
12 FOR A WHILE. BUT AS I UNDERSTAND THE FACTS, ON
13 DECEMBER 9, 2002, THE CLAIMANT INJURED HIS LOWER
14 BACK WHILE WORKING FOR MR. DETWILER'S CLIENT,
15 PEACHTREE ELECTRICAL. HE ULTIMATELY UNDERWENT A
16 DISCECTOMY ON APRIL 22ND, 2003, AND WAS PLACED AT
17 M.M.I. WITH AN IMPAIRMENT RATING. THE CLAIMANT
18 THEN GOES TO WORK FOR MY CLIENT, BOB WIRE, AND
19 ALLEGEDLY AGGRAVATES OR REINJURES HIS BACK IN
20 NOVEMBER, 2003. AS YOUR HONOR CORRECTLY NOTED,
21 THE FULL COMMISSION ULTIMATELY FOUND THAT THIS
22 ACTUALLY HAPPENED ON NOVEMBER 3, 2003.

23 THE CLAIMANT THEN RETURNS TO DR. MILLS
24 AT SOME POINT THEREAFTER, AND PEACHTREE AGAIN
25 PICKS UP BENEFITS BECAUSE, ONE, THE CLAIMANT NEVER

1 TOLD THE DOCTOR ABOUT A SUBSEQUENT INJURY. AND,
2 TWO, BECAUSE THE ADDITIONAL TREATMENT WAS ALWAYS
3 CONTEMPLATED EVEN BEFORE THE SECOND ACCIDENT.
4 CLAIMANT ULTIMATELY UNDERWENT A FUSION FOLLOWING
5 THE SECOND ACCIDENT THAT OCCURRED, ACCORDING TO
6 THE FULL COMMISSION, WITH BOB WIRE ON JUNE 15,
7 2004, AND WAS AGAIN PLACED AT MAXIMUM MEDICAL
8 IMPROVEMENT WITH 20 PERCENT IMPAIRMENT ON MAY 5,
9 2005.

10 SHORTLY AROUND THIS PERIOD OF TIME,
11 MR. DETWILER'S CLIENT FILED A MOTION TO ADD MY
12 CLIENT AS A PARTY TO THE CLAIM ON APRIL 22ND,
13 2005. AND THAT'S HOW WE BECAME INVOLVED IN THE
14 CLAIM. THE CLAIMANT NEVER FILED A FORM 50 AGAINST
15 BOB WIRE DURING THIS PERIOD OF TIME. A HEARING
16 WAS THEN HELD BEFORE COMMISSIONER HUFFSTETLER
17 ON -- AND I -- AND I APOLOGIZE FOR GIVING YOU SO
18 MANY FACTS, BUT I -- YOU'LL SORT OF UNDERSTAND WHY
19 IN JUST A SECOND. THE -- A HEARING WAS HELD
20 BEFORE COMMISSIONER HUFFSTETLER ON JUNE 5, 2006,
21 AND HE FOUND THAT, ONE, THE CLAIMANT DID NOT
22 SUSTAIN AN INJURY WITH BOB WIRE. AND, TWO, THAT
23 BOB WIRE SHOULD BE DISMISSED FROM THE CLAIM. AND,
24 THREE, THE CLAIMANT SUSTAINED 35 PERCENT LOSS OF
25 USE OF THE BACK. WHICH I WOULD SUBMIT TO THE

1 COURT WAS BASED UPON THE 20 PERCENT IMPAIRMENT
2 RATING FOLLOWING THE SECOND SURGERY.

3 ON JULY 18, 2006, PEACHTREE APPEALED
4 THE DECISION TO THE FULL COMMISSION. PRIOR TO THE
5 APPEAL HEARING AND WITH COMMISSIONER HUFFSTETLER'S
6 ORDER FULLY INTACT, PEACHTREE CLINCHERED THE CLAIM
7 WITH THE CLAIMANT IN AUGUST, 2006. BOB WIRE, MY
8 CLIENT, WAS NOT NOTIFIED OF THIS SETTLEMENT WHEN
9 IT TOOK PLACE, AND WAS NOT ASKED TO PARTICIPATE.
10 NOW, WE CONTEND WE WERE A PARTY AT THAT TIME EVEN
11 THOUGH COMMISSIONER HUFFSTETLER HAD RELEASED US
12 BECAUSE MR. DETWILER HAD ADDED US TO THE CLAIM.

13 AT THAT TIME, THE ONLY PARTY
14 RESPONSIBLE FOR THE CLAIM AT ALL -- THE ONLY
15 W.C.C. NUMBER WE HAD, WHICH WAS AN '02 NUMBER, WAS
16 PEACHTREE. THEREFORE, WE WOULD ASSERT THAT
17 PURSUANT TO REGULATION 67710, PEACHTREE AS THE
18 APPELLANT WAS UNDER A DUTY TO NOTIFY THE
19 COMMISSION OF THE SETTLEMENT IN WRITING. ONCE
20 THAT IS DONE, IT'S REMOVED FROM THE HEARING
21 DOCUMENT.

22 WE CONTEND THAT THE APPEAL HEARING
23 SHOULD HAVE NEVER TAKEN PLACE AS ALL THE ISSUES
24 WERE OVER. DURING THE APPEAL HEARING, YOU KNOW,
25 PEACHTREE NEVER INFORMED THE PANEL NOR BOB WIRE OF

1 THE SETTLEMENT. WE ONLY FOUND OUT ABOUT THAT AT A
2 SUBSEQUENT CIRCUIT COURT HEARING. IT SHOULD ALSO
3 BE NOTED, AS MR. DETWILER POINTED OUT, THAT NO ONE
4 HAS EVER APPEALED THE FULL COMMISSION'S -- I'M
5 SORRY, COMMISSIONER HUFFSTETLER'S ACTUAL
6 PERMANENCY AWARD OF 35 PERCENT. THE FULL
7 COMMISSION ONLY MODIFIED THE -- THE ORDER AS IT
8 PERTAINS TO WHETHER AN ALLOCATION SHOULD BE MADE
9 BETWEEN MY CLIENT AND MR. DETWILER'S CLIENT.

10 BOB WIRE'S POSITION IS THAT THE
11 COMMISSION NO LONGER HAD JURISDICTION OVER THE
12 CLAIM BECAUSE IT WAS CLINCHERED, AND THAT WE
13 SHOULDN'T HAVE ANY LIABILITY IN THIS CLAIM OR ANY
14 OTHER CLAIM BECAUSE THE SETTLEMENT TOOK PLACE WITH
15 A SINGLE COMMISSIONER'S ORDER INTACT.
16 ALTERNATIVELY, SHOULD YOU FIND THAT THE CLINCHER
17 DID NOT END THE CLAIM, ANY APPORTIONATE ORDER
18 SHOULD BE LIMITED TO THE 35 PERCENT AWARD AS
19 ORDERED BY COMMISSIONER HUFFSTETLER AND ANY
20 MEDICAL OR T.T.D. PAID AFTER NOVEMBER 3, 2003.

21 I WOULD ALSO POINT OUT THAT THERE IS A
22 DISCREPANCY BETWEEN THE COMPENSATION RATE PAID BY
23 PEACHTREE VERSUS THE COMPENSATION RATE THAT'S BEEN
24 ESTABLISHED FOR BOB WIRE. IT'S A RATHER
25 SIGNIFICANT DIFFERENCE AND MY POSITION ON THAT

1 WOULD BE SHOULD YOU FIND THAT THE CLINCHER DIDN'T
2 END THE CLAIM, IF WE ARE RESPONSIBLE FOR
3 REIMBURSING PEACHTREE FOR THEIR COMPENSATION RATE,
4 I WOULD ASK THAT A CREDIT -- OR THE ORDER ADDRESS
5 A POTENTIAL CREDIT FOR ME TO BE ABLE TO ASSERT
6 AGAINST THE CLAIMANT ON ANY ADDITIONAL PERMANENCY
7 OR AWARD HE SHOULD RECEIVE IN THE 2003 CLAIM.

8 I DISAGREE THAT PEACHTREE IS ENTITLED
9 TO ANY ATTORNEY'S FEES. SPECIFICALLY,
10 MR. DETWILER APPEARS TO BE REQUESTING THAT YOU
11 ORDER MY CLIENT TO PAY HIS FEES FOR WORK DONE ON
12 THE CLAIM IN WHICH WE CONTEND THAT WE DID NOT KNOW
13 WE WERE A PARTY TO UNTIL SOME TIME THEREAFTER. SO
14 I DON'T THINK THERE'S AN ADEQUATE BASIS FOR AN
15 AWARD OF ATTORNEY'S FEES IN THIS INSTANCE. THANK
16 YOU, COMMISSIONER.

17 THE COMMISSIONER: OKAY. ALL RIGHT.
18 AND LET -- LET ME AMEND THE REMARKS I MADE A FEW
19 MINUTES BACK BEFORE COUNSEL GAVE THEIR POSITIONS.
20 I -- I -- I MEANT -- WHEN I SAID THAT THERE WERE
21 NO QUESTIONS AS TO JURISDICTION OR VENUE AND THAT
22 I WANTED TO MAKE AN EXCEPTION AS TO THE
23 JURISDICTIONAL QUESTION THAT YOU RAISED --

24 MR. GUERRERO: EXACTLY. THANK YOU,
25 COMMISSIONER.

1 THE COMMISSIONER: -- AND I WANTED
2 TO -- I MEANT TO GIVE YOU LEAVE TO -- TO MAKE
3 THAT. ALL RIGHT. ANYTHING ELSE, COUNSEL, WE NEED
4 TO COVER AT THIS POINT?

5 MR. DETWILER: I THINK -- YOUR -- YOUR
6 HONOR, I THINK YOU KNOW OUR POSITION WITH REGARD
7 TO THE DEFENSES RAISED BY MR. GUERRERO. I -- YOU
8 KNOW, IF -- IF I NEED TO RESTATE ANY OF THOSE,
9 I'LL BE GLAD TO DO THAT. BUT I THINK YOU
10 UNDERSTAND THAT, AND -- AND -- AND OUR POSITION IS
11 THAT THE CLINCHER WOULD HAVE NO EFFECT ON -- ON --
12 ON MR. GUERRERO'S RESPONSIBILITY IN THE '03 CLAIM.

13 THE COMMISSIONER: OKAY. LET ME --
14 BEFORE I CLOSE OFF HERE, LET ME GO OFF THE RECORD
15 ONE MORE TIME. BACK -- BACK ON THE RECORD. IF
16 THERE'S NOTHING ELSE, THAT CONCLUDES OUR HEARING.

17 (WHEREUPON, THE FOREGOING
18 HEARING WAS CONCLUDED.)
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF FLORENCE
4

5 I, HALEY RUPLE, COURT REPORTER AND
6 NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DO
7 HEREBY CERTIFY THAT I REPORTED THE FOREGOING
8 PROCEEDINGS AT THE ABOVE-STATED TIME ON THE
9 ABOVE-REFERENCED DATE.

10 I FURTHER CERTIFY THAT I AM NEITHER
11 ATTORNEY NOR COUNSEL FOR, NOR RELATED TO OR
12 EMPLOYED BY ANY OF THE PARTIES CONNECTED TO THE
13 ACTION, NOR AM I FINANCIALLY INTERESTED IN THE
14 ACTION.

15 WITNESS MY HAND AT FLORENCE, SOUTH
16 CAROLINA, THIS THE 4TH DAY OF JUNE, 2008.
17

18
19 _____
HALEY RUPLE
MY COMMISSION EXPIRES:
20 JANUARY 11, 2017
21
22
23
24
25

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2009-CP-22-87

Peachtree Electrical)
Services, et al.,)

Plaintiffs,) Transcript of Record

vs.) July 16, 2009

Christopher Price,)
et al.,)

Defendants.)

B E F O R E :

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

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

Richard C. Detwiler, Esquire
Attorney for Builders Mutual
Insurance Company and
Peachtree Electrical

Kirsten Leslie Barr, Esquire
Attorney for Bob Wire Electric, Inc.,
And South Carolina Homebuilders
Self Insurers Fund

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

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1 (On the record, July 16, 2009.)

2 THE COURT: All right, this is case number 2009-CP-
3 22-87, Christopher Price versus Peachtree Electrical Services
4 and Builders Mutual Insurance Company versus Bob Wire
5 Electric, Inc., self insured through South Carolina
6 Homebuilders Self-Insured Fund. Present at the call of the
7 case Richard Detwiler representing whom? Mr. Detwiler, you
8 represent?

9 MR. DETWILER: I'm sorry, Peachtree and Builders Mutual
10 Insurance Company.

11 THE COURT: All right, and also present Kirsten L.
12 Barr representing?

13 MS. BARR: Bob Wire Electric and the South Carolina
14 Homebuilders Self-Insurers Fund.

15 THE COURT: All right, and what have we got, what
16 does -- what's in front of us?

17 MR. DETWILER: I think there are cross appeals, Your
18 Honor, and I don't remember which one came first but I'm
19 appealing the denial of an award of attorney's fees that I
20 asked for below at the commission level and I can explain the
21 basis for that when you're ready and I think Ms. Barr is
22 appealing the ruling, the general ruling of the commission and
23 I'll be glad to lay out the facts for you if you'd like for me
24 to do that.

25 MS. BARR: And Your Honor, since we're under the new

1 rules as far as the record on appeal what I have done, if I
2 may approach, and I've got a brief as well.

3 THE COURT: Let me ask you this, this is for an
4 incident that occurred prior to the 2007 thing.

5 MR. DETWILER: Yes, sir.

6 THE COURT: Okay.

7 MS. BARR: So, what I've given you and I gave Mr.
8 Detwiler a copy, too, is a semblance of a record on appeal
9 akin to what we're doing, you know, in the Court of Appeals,
10 Supreme Court and I've put the pleadings, the evidence, the
11 transcripts and the orders and I did it in chronological
12 order, the documentary evidence or APA submissions are at tab
13 12 and they're individually page numbered in, in, within tab
14 12.

15 THE COURT: All right.

16 MR. DETWILER: And Your Honor this is the first time
17 I've seen this and I do not have any objection to most of it
18 but I see some things in this proposed record on appeal that
19 were never presented in the record of this case below. So,
20 I'm going to have to review that a little bit. Like for
21 instance the complaint in a third-party claim that has some
22 relationship to this case I don't believe that's ever been
23 submitted in the record below.

24 S. BARR: Actually it was page 127 of the APA
25 submissions that were presented to Commissioner Funderburke.

1 THE COURT: Okay, let me ---

2 MR. DETWILER: I'd have to look at it.

3 THE COURT: Since it's an appeal isn't the Workers'
4 Comp Commission supposed to be providing me with a record on
5 appeal?

6 MS. BARR: They - there was a bench order from the
7 Supreme Court last year saying that they're no longer going to
8 transfer the physical files. I think physical files were
9 getting lost. So, they've asked us now to essentially present
10 the court with the documents that we wish you to consider in
11 the appeal.

12 THE COURT: I see.

13 MS. BARR: So, we're doing it more like you would,
14 again, the Court of Appeals, Supreme Court.

15 MR. DETWILER: I think that's correct, Your Honor.

16 THE COURT: All right, all right, I guess since -
17 well, does it matter what order and I'm assuming Ms. Barr's
18 argument would be dispositive of yours. I don't know that.

19 MR. DETWILER: If - I'm most sure. If you, if you grant
20 her motion then I'm out, yes, sir.

21 THE COURT: Then you're out, okay. Well, let's go
22 ahead and Ms. Barr, let me hear from you first.

23 MS. BARR: Thank you, Your Honor, this is an appeal
24 from the South Carolina Workers' Compensation Commission but
25 it's far more complicated than that and I kind of have a

1 theory that Workers' Comp is not supposed to be complicated
2 and if it has gotten complicated and you've got a record this
3 thick already, by the time you get to the circuit court then
4 something's gone wrong and I think there are a great number of
5 things that have gone wrong in this claim. To give you some
6 background, on December 9, 2002, Christopher Price, the
7 claimant, sustained an admitted back injury while working for
8 Peachtree, Mr. Detwiler's client. Peachtree admitted the
9 claim and paid, voluntarily paid all of the medical and
10 compensation benefits claimed by Mr. Price. A hearing was
11 requested by Peachtree and held in June 2006 to determine
12 whether and to what extent Mr. Price had any permanent
13 disability related to that admitted accident in December of
14 2002. At that time Peachtree also filed a motion to have my
15 clients, Bob Wire Electrical and the South Carolina
16 Homebuilders, added as third-party Defendants in that case.
17 Their theory was that Mr. Price had sustained a subsequent
18 intervening accident sometime in November 2003 while working
19 for Bob Wire and that that may affect their obligations for
20 permanent disability and other benefits in the case. Now,
21 it's important to note that Price himself made no claim
22 against Bob Wire. Price never alleged an accident under their
23 time, and in fact testified both in his depositions and at the
24 hearing that he believed his problems stemmed from the
25 December 2002 accident with Peachtree and his problems never

1 resolved even when he went to work on a part-time basis for
2 Bob Wire after Peachtree fired him, could no longer
3 accommodate his restrictions. He testified that he knew he'd
4 always have problems, needed ongoing medical treatment and
5 even after that he thought he might need additional surgery
6 even after he was initially released by his treating
7 physicians the problems continued. He was having severe pain.

8 So, we have a June 2006 hearing with Commissioner
9 Huffstetler and he issued an order in July of 2006 finding
10 that "there was no testimony or medical evidence to support a
11 finding that Price's disability or need for medical treatment
12 was in any related to his employment with Bob Wire."
13 Huffstetler further found that Peachtree was responsible for
14 an award of 35 percent to the back, 35 percent loss of use of
15 the back. Only a few days after Commissioner Huffstetler's
16 award was issued Peachtree and Price settled that Workers'
17 Compensation claim stemming from the 2002 accident on a
18 clincher.

19 THE COURT: That was settled when?

20 MS. BARR: It was settled in July, July, August of
21 2006 shortly after Commissioner Huffstetler awarded him the 35
22 percent to the back and those documents are contained in the
23 record. At that time, at the time Peachtree and Mr. Price
24 settled the 2002 claim Mr. Price also settled a third-party
25 claim stemming from that December 2002 accident. He recovered

1 \$540,000 from that third-party claim, and of course, having
2 paid substantial medical and compensation benefits Peachtree,
3 Mr. Detwiler's client, had a lien on that third-party
4 proceeds. The exact figure was \$196,086.35 was the amount of
5 Mr. Detwiler's lien or Peachtree's lien on that \$540,000
6 settlement. However, in conjunction with their clincher
7 agreement Peachtree released the liens for only \$50,000,
8 essentially 25 cents on the dollar. Neither Peachtree nor
9 Price informed my clients Bob Wire and the South Carolina
10 Homebuilders of this settlement and then Peachtree went on to
11 ostensibly appeal Commissioner Huffstetler's award of 35
12 percent to the back and sought to really morph it into a new
13 claim for equitable indemnity or equitable subrogation. They
14 were never really clear on what their theory was against my
15 client Bob Wire.

16 THE COURT: Okay, so, the award comes from the
17 Workers' Comp Commission that says that Peachtree is solely
18 liable.

19 MS. BARR: Right.

20 THE COURT: Peachtree settles that award by clincher
21 agreement with the Plaintiff.

22 MS. BARR: Correct.

23 THE COURT: Then Peachtree appeals the decision that
24 held them solely liable?

25 MS. BARR: Correct.

1 THE COURT: Okay.

2 MS. BARR: So, procedurally we would argue that there
3 was, that there was no appeal that could be taken. That claim
4 was gone with the final settlement between the only two
5 parties to that 2002 claim. Nevertheless, an appeal was taken
6 up and heard by the Commission's appellate panel and at that
7 time, the first time Mr. Detwiler argued that he was entitled
8 to either equitable indemnity or equitable subrogation against
9 Bob Wire again on his theory that there was a subsequent
10 intervening accident.

11 Now, it's my position and I think it's very clear that
12 the South Carolina Workers' Compensation Commission is a
13 creature of statute and an administrative agency does not have
14 the authority or subject matter jurisdiction over equitable
15 claims. Nevertheless we have an order, an interlocutory order
16 from the appellate panel that was issued on May 4 of 2007.
17 It's tab 11 of our record, and in that order the commission
18 noted that they believed Mr. Price had had an accident at Bob
19 Wire on November 3, 2003.

20 THE COURT: Okay, I'm sorry. Say that, who says
21 this?

22 MS. BARR: The appellate panel.

23 THE COURT: Okay.

24 MS. BARR: The commission, the Full Commissioner, the
25 appellate, the three-member appellate panel.

1 THE COURT: Okay, all right, let me ask you this, did
2 the employee participate in that appeal?

3 MS. BARR: His name is, his name is still on the
4 caption but no, he did not present any arguments, did not seek
5 any appeal from Commissioner Huffstetler's finding that it was
6 solely ---

7 THE COURT: He had already gotten his money, settled
8 and he was gone.

9 MS. BARR: He'd gotten \$540,000 plus his Workers'
10 Comp benefits. He's gone, and again, still is not
11 making at that point any claim against Bob Wire. He was
12 satisfied with what he had gotten from Peachtree and the third
13 party defendants. So, what we get from the appellate panel is
14 an interlocutory order of remand and I'll quote and again it's
15 page 11 or tab 11 that a jurisdictional commissioner needed to
16 make a determination of, "average weekly wage and benefits,
17 etcetera," and that's quoting, an apportionment of benefits
18 paid and/or to be paid, and again this was on the theory that
19 Price has had a second accident at Bob Wire. So, with a
20 minimum, although this remand instruction I think is rather
21 inarticulate and vague, at a minimum what this means is that
22 a jurisdictional commissioner needed to determine, one,
23 whether the claimant required any medical treatment as a
24 result of an accident on November 3rd, 2003, whether the
25 claimant was temporarily disabled as a result of an accident

1 on November 3, 2003, the period of that disability, you know,
 2 the start and end date, and also the average weekly wage and
 3 compensation rate for the, from the November 3, 2003,
 4 accident. The comp rate had been established for the 2002
 5 claim at \$343.24, but after that claim and he had surgery and
 6 is not doing well. He loses his job. He comes to work for us
 7 part-time. The compensation rate was substantially lower, and
 8 I'd also point out and you can - this is borne out in the
 9 record, tab 12 at page 124, Mr. Price was actually not working
 10 on November 3, 2003, according to his own time sheets and
 11 personal records. So, even after we've got this remand order
 12 now saying that we're going to have a jurisdictional
 13 commissioner determine whether he's entitled to any benefits
 14 as a result of a November 3, 2003, accident Price still
 15 doesn't participate. He's still not making any claim or
 16 making any claims against Bob Wire. It wasn't until January
 17 of 2008 over a year later that Price filed a Workers'
 18 Compensation claim against Bob Wire and at that point he
 19 alleged an injury sometime in November of 2003. That ---

20 THE COURT: Now, who made that allegation?

21 MS. BARR: Price did but it wasn't until January of
 22 2008 that he first makes a claim against my client Bob Wire.
 23 That claim has not been adjudicated by the commission and in
 24 fact the issue of whether and to what extent Mr. Price is
 25 entitled to benefits as a result of a November 2003 accident

1 at Bob Wire is scheduled to be heard by Commissioner Roche on
2 July 30th of this month.

3 THE COURT: Well, is it for the same incident and
4 injury that they claimed on appeal?

5 MS. BARR: Was the intervening accident, yes.

6 THE COURT: Okay, so, we're talking about one
7 incident, one injury. They appealed and said it occurred and
8 then he filed a separate Workers' Comp claim in 2008 for that.

9 MS. BARR: Correct. So, the question will be before
10 Commissioner Roche on the July 30th hearing, you know, again
11 at the Workers' Comp level is what temporary benefits if any
12 my client owes Mr. Price and what medical benefits if any my
13 client owes Mr. Price as a result of the November 2003
14 accident, and I'm sorry this is convoluted but it is a
15 complicated matter and I think we're getting to the heart of
16 it now. A remand hearing was held by Commissioner Funderburke
17 on April 23rd of 2008. Price again was not a party at that
18 hearing. He did not testify. He made no claims. Peachtree
19 presented no evidence that Price required any medical
20 treatment or missed any time from work as a result of an
21 accident at Bob Wire at that hearing. In fact, no testimony
22 at all was given at the April 2008 hearing before Commissioner
23 Funderburke and Price's medical records, I would submit to
24 you, make absolutely no mention of any accident occurring on
25 or about November 3, 2003, or any injuries in the course of

1 his employment with Bob Wire. So, really a bare record as to
2 the issue of causation which, you know, Commissioner
3 Huffstetler had previously said gave no evidence to find, to
4 make a finding that medical or compensation benefits were
5 related to a November 3 accident as opposed to the admitted
6 accident in December of 2002.

7 What you'll see at tab 13 is Commissioner Funderburke's
8 order. It is a very vague order that fails to address any of
9 the issues on remand, fails to make specific findings of fact,
10 fails to cite any legal authority for the ultimate conclusion
11 that he made which was Bob Wire shall "reimburse Peachtree
12 \$112,789.42 for medical benefits and \$47,023.88 in
13 compensation benefits." I don't have my calculator before me
14 but I did it earlier, that's a total of \$159,813.30 that
15 Commissioner Funderburke summarily ordered my clients to pay
16 Peachtree. There was no explanation for this. Perhaps more
17 alarming, you know, is the fact that considering that
18 Peachtree was already reimbursed \$50,000 out of the third-
19 party settlement, Peachtree's net payments to Price including
20 the benefits they paid prior to November of 2003 totaled only
21 \$146,000. What this means is that Commissioner Funderburke's
22 summary and very arbitrary order actually allows Peachtree to
23 realize a profit in excess of \$13,000 for admitted Workers'
24 Compensation claim. I would submit to you that even been on
25 equitable principles that doesn't pass the smell test and that

1 alone makes the commission's order in this regard
2 unjustifiable and should be reversed as a matter of law.

3 THE COURT: All right, now, so, you're, you're
4 seeking, you are appealing the remand order.

5 MS. BARR: Correct, Commissioner Funderburke, again,
6 the remand, the instructions on the remand were to determine
7 to make findings of what benefits, what medical benefits and
8 what period of temporary disability was related to a November
9 3, 2003, accident and there were really no and it was to be
10 done under a theory of either equitable indemnity or
11 equitable subrogation and no findings were made, just these
12 conclusionary statements of you owe him X, you owe him
13 \$150,000 and that is what we've appealed.

14 THE COURT: Okay, so, you're not appealing the full
15 commission's decision that held Bob Wire, that Bob Wire must
16 contribute?

17 MS. BARR: Well, it's all part and parcel of the same
18 thing. The facts, whether or not Mr. Price had an accident on
19 November 3, 2003, really isn't the ultimate question. The
20 ultimate question would be what if any benefits does he - was
21 he entitled to as a result of that accident and our position
22 has always been that there's no medical evidence that any of
23 his medical treatments related to an accident on that date as
24 opposed to his acknowledged pre-existing condition.

25 THE COURT: I got you.

1 MS. BARR: And that the disability associated with
2 that is similarly not associated with that, and again, we're
3 on the hook in a whole separate situation with his July 30,
4 2000 or excuse me, the July 30, 2009 hearing set before
5 Commissioner Roche to determine if we independently owe Mr.
6 Price these benefits. The basis of our request for a reversal
7 of the commission, of Commissioner Funderburke's order which
8 was summarily affirmed by the commission's appellate panel and
9 you'll see there's some craziness. Originally they affirmed
10 it in a summary order that addressed both the 2002 claim and
11 this new claim involving Mr. Price that we haven't even
12 adjudicated yet. So, the commission was forced to redact that
13 and issue an amended order but even with that there's no
14 discussion of any of these ultimate issues about equitable
15 subrogation, equitable indemnity or any explanation for the
16 findings of fact or any citation of law. Again we don't
17 believe that the South Carolina Workers' Compensation
18 Commission has jurisdiction over equitable claims. We also
19 feel that Peachtree has failed to prove the elements of
20 equitable subrogation or equitable indemnity, and clearly the
21 Commission's findings are impermissibly vague and otherwise
22 not supported by any competent evidence which in and of itself
23 would require a reversal of that order. For example, I'd show
24 you the commission's finding with regards to temporary,
25 reimbursement for temporary total disability benefits, it is

1 page, excuse me, I lost my page number, tab 13 is the decision
2 and order of Commissioner Funderburke which was affirmed by
3 the commission and at page 8 of that order, paragraph number
4 four, for example, it concludes that Peachtree paid temporary
5 total disability benefits after the November 3, 2003, accident
6 with Bob Wire in the amount of \$47,023.88. Peachtree is
7 entitled to reimbursement of those benefits from Bob Wire.
8 Now, first, there's no mention of what evidence if any they
9 relied upon to make that finding, making it impermissibly
10 vague. I would assume that they're relying on the form 19
11 submitted by Mr. Detwiler. That's tab 12, page 140, and
12 according to this form 19 Peachtree paid Mr. Price temporary
13 total disability benefits from November 21, 2003, through July
14 6 of 2006, and again, that would've been at the rate of
15 \$343.24. Now, what the commission failed to do is explain why
16 that period of time was the responsibility of Bob Wire and why
17 that compensation rate was the responsibility of Bob Wire,
18 \$343.24, and again the jurisdictional commissioner, the remand
19 instruction was to make a finding with regard to average
20 weekly wage and comp rate. The - neither Commissioner
21 Funderburke nor the appellate panel did that; however, I will
22 note that Peachtree has already stipulated as to the
23 applicable average weekly wage and compensation rate for the
24 alleged 2003 accident. That's found tab seven, which is the
25 transcript of the original hearing, tab seven, page three

1 wherein Peachtree stipulated that the average weekly wage for
2 the November 3 accident was 1 98 83 with their corresponding
3 compensation rate of \$132.56. So, there's no explanation why
4 they deviated and applied a much higher compensation rate and
5 in ordering reimbursement. Obviously that's a substantial
6 difference considering we're talking about a period of 137
7 weeks Peachtree pays at \$343.24, yet if Mr. Price had made
8 that claim and been awarded those benefits directly from Bob
9 Wire he would have only been entitled to those weeks at the
10 rate of \$132.56. That's not explained by Commissioner
11 Funderburke.

12 In addition, the period, this reflects a start date of
13 temporary total disability benefits paid by Peachtree of
14 November 21, 2003. The commission doesn't explain why that's
15 the start period for temporary disability benefits, which is
16 very curious considering the record clearly reflects that Mr.
17 Price actually continued working for Bob Wire up through
18 January 10th of 2004. That's borne out tab 12, page 126. So,
19 Mr. Price was not disabled as of November 21, 2003. He was
20 again still working up until January 10. So, no explanation
21 as to why Peachtree would be entitled to reimbursement for
22 benefits paid that weren't actually owed to Mr. Price. Also
23 wrong, just in the long litany of legal errors, Commissioner
24 Funderburke in the appellate panel ordered us to reimburse
25 Peachtree for temporary total benefits paid through July 6,

1 2006. I believe that also requires an explanation because
2 under the law of this case Mr. Price's period of temporary
3 disability ended on May 5 of 2005 according to an un-appealed
4 order of Commissioner Huffstetler. He ended that period of
5 temporary disability. So, Mr. Price was actually only
6 entitled to temporary benefits from January 10, 2004, through
7 May 5, 2005, at a rate of \$132.56 if he'd actually made a
8 claim against my client. Yet, Peachtree grossly overpaid
9 those benefits and without explanation we've been ordered to
10 reimburse that full amount to Peachtree. Now, ordinarily
11 these questions, these legal errors, the vagueness, the fact
12 that that vague finding is not supported by substantial
13 evidence, normally that would require a remand to the
14 commission for clarification. In this case Mr. Detwiler,
15 Peachtree has maintained this is an action in equity and very
16 clearly as I pointed out in my brief the standard of review in
17 an equitable action allows the reviewing court to make its own
18 findings of fact in accordance with its own views of the
19 preponderance of the evidence. So, remand is actually not
20 necessary in this case.

21 THE COURT: But what if I'm unable to make a
22 determination because the facts before the commission were
23 insufficient to make a determination?

24 MS. BARR: Well, I think it would certainly be
25 within your discretion to remand it to commission for more

1 particular findings of fact or conclusions of law but because
2 it is the equitable action the power lies with this court and
3 any reviewing court to make its own facts in accordance with
4 the evidence and what this Court would need to do to fulfill
5 that obligation or remand instructions would need to elucidate
6 would be that we need particular findings of fact regarding
7 whether or not Peachtree has proven the elements of equitable
8 indemnity or equitable subrogation. I've discussed that in my
9 brief. I don't believe they can do that because the right of
10 indemnity only exists when there's relation between the
11 parties such that either in law or equity there's an
12 obligation of one party to indemnify the other as where one
13 person is exposed to liability by the wrongful act of another
14 in which it does not join. That simply does not apply to the
15 facts here because there is no relation between Peachtree and
16 Bob Wire except for the adversarial one created by Peachtree's
17 motion to add us as a party. Furthermore, there was no
18 wrongful act on behalf of Bob Wire that exposed them to this
19 liability. So, again they can't meet the second prong of
20 equitable indemnity. With regard to equitable subrogation you
21 have to prove that the party, in this case Peachtree, was not
22 a volunteer but had a direct interest in discharging the debt
23 or lien of my client Bob Wire. Again, Peachtree had
24 absolutely no interest in discharging the debts of Bob Wire,
25 nor was it as the second, the third prong of that test require

1 it was not secondarily liable for any of Bob Wire's debt if
2 they had such debts. So, again, equitable subrogation does
3 not apply. Assuming under some theory that there's stolen
4 title to reimbursements which we again don't believe they are,
5 it's very clear from our Supreme Court, there was a case a few
6 years ago that I participated in, it's Geathers v. 3V, in
7 which the Supreme Court stated that there is no right of
8 allocation or appropriating benefits between two successive
9 employers. It just does not exist. If there's not a statute
10 dealing with the situation then the commission's powerless to
11 make that determination or to create such a remedy. So,
12 beyond making specific findings of equitable indemnity,
13 equitable subrogation or the legal basis upon which this
14 reimbursement claim is to be awarded, we would also need
15 determination specifically about the average weekly wage,
16 which I believe the record contains a stipulation. So, that
17 should be simple but it hasn't been done, findings as to the
18 exact period for which Mr. Price's temporary total is related
19 to the November 3, 2003, accident; and again, a finding with
20 specific evidence cited as to what medical benefits he is
21 entitled to as a result of a November 3, 2003, accident and
22 again this record in this case contains no such evidence.
23 Awkward and disappointing is the fact again that we're going
24 to litigate this claim with Mr. Price in just a few weeks, and
25 if the Court were to uphold this present order whereby we

1 would be required to make this lump sum payment to Peachtree
2 ostensibly for these medical and compensation benefits
3 producing a windfall for them but subjecting us to double
4 liability because if Mr. Price is able to prove that he
5 sustained an injury by accident at Bob Wire November of 2003
6 at this upcoming hearing then he'll also be entitled to
7 temporary total disability benefits for these same periods
8 perhaps and these same medical benefits. We will be under an
9 order to pay that again perhaps twice and if we're going to
10 talk about simple equities producing a windfall profit for one
11 party who's admitted claim while subjecting the opposing party
12 to double liability is simply not something I think the court
13 in good faith should deal with in equity.

14 THE COURT: I understand your argument, okay.

15 MS. BARR: If I may also briefly.

16 THE COURT: Okay, because now you've requested 30
17 minutes on this appeal and you're well past. We've still got
18 to get into Mr. Detwiler, so.

19 MS. BARR: That's fine. I just wanted to briefly
20 address his argument with regard to attorney's fees and I
21 can hand it up to you, the case of Baxter versus Martin
22 Brothers where the Supreme Court has recently stated that

23 ---

24 MR. DETWILER: Have you got a copy of that I could have,
25 please?

1 MS. BARR: Sure. I thought you were aware of it,
2 where the Court addressed the fact that - excuse me?

3 MR. DETWILER: I'm sorry. Thank you.

4 THE COURT: Here you can use this one. I'll look it
5 up.

6 MS. BARR: Oh, no, I have another copy. It's a short
7 order but you'll see that the Supreme Court stated that
8 attorney's fees are not recoverable unless authorized by
9 contract or statute and neither of which are the case in the
10 present matter. So, we believe that the commission correctly
11 denied Mr. Detwiler's request for attorney's fees in this
12 case. I'd also note that the affidavit upon which Mr.
13 Detwiler submitted in support of his claim for a lump sum
14 attorney's fees I think admittedly contained a number of
15 errors with regard to the amount of fees sought.

16 THE COURT: All right.

17 MS. BARR: Thank you, Your Honor.

18 THE COURT: All right, Mr. Detwiler, let me hear from
19 you.

20 MR. DETWILER: Thank you, Your Honor. May it please the
21 Court.

22 I would agree with Ms. Barr on one point and that is that
23 this matter has made, been made way too complicated. I would
24 submit to you though it's been made way too complicated by the
25 appellant, Bob Wire.

1 Let me fill in, and I'm sorry we're running over
2 beyond the time allotted for this but this is my first
3 opportunity to speak and there's so many things that Ms. Barr
4 failed to tell the Court about that the Court needs to know
5 and I've got to back up and walk you through the story just
6 briefly.

7 This man worked for Peachtree. He was injured in December
8 of 2002 as Ms. Barr noted. We paid him benefits. He - his
9 claim essentially worked its way through the system without
10 lawyers, without anybody being involved. He was treated. He
11 was given medical treatment and he reached maximum medical
12 improvement and the doctor released him, gave him a rating and
13 the case was ostensibly ended at that point. It had not been
14 closed because a final settlement had not been reached, but it
15 had been, in terms of his treatment and his temporary total
16 disability benefits he was done. He didn't go back to work
17 for us. He went back to work for Bob Wire, and that was in
18 the fall, I think in October of 2003. Shortly after he went
19 to work for Bob Wire he had another accident. Now, we didn't
20 know about that accident. He had, he had - this is his
21 testimony, this is exactly what he said in his deposition
22 testimony in a case that we weren't involved in, it was in a
23 third-party case. He said he was pulling some wire and he
24 felt immediate pain in his back, he fell to the ground in pain
25 and cried out, that that is an accident under any scenario in

1 Workers' Comp as you well know.

2 So, we didn't know about that. He went back to the
3 doctor, and said, "My back is hurting still," and the doctor
4 took him back out of work and began treating him.

5 THE COURT: Okay, but all this now has occurred prior
6 to the hearing before the single commissioner.

7 MR. DETWILER: Yes, sir.

8 THE COURT: Okay.

9 MR. DETWILER: At this point no hearing has taken place.

10 THE COURT: All right.

11 MR. DETWILER: We're dealing with at this point the late
12 fall of '03 and the first part of '04.

13 THE COURT: All right.

14 MR. DETWILER: So, he goes back for treatment. Nobody
15 tells us he's got another accident. Nobody tells us he's even
16 gone back to work. As it turns out there's a third party
17 claim brought as a result of this second accident, excuse me,
18 of the, excuse me, the first accident with Peachtree, my
19 client and in that litigation his deposition is taken. We
20 were not a party to that. We didn't go to the deposition,
21 weren't even notified of the deposition but we later found out
22 that the deposition had been taken and we obtained a copy of
23 the transcript and in it he describes for the first time to
24 anybody that I'm aware of this second accident with Bob Wire.
25 Now, the first thing we did when we got that transcript is we

1 filed a motion to add Bob Wire. Now, Ms. Barr stated to you
2 and I forgive her for saying this because she wasn't involved
3 in the case back then, Ms. Barr said to you that we filed a
4 motion to add them as a party at the same time we had the
5 hearing before Commissioner Huffstetler. That's not correct.
6 We filed a motion to add them as a party. That motion was
7 granted but summarily because it always is in Workers' Comp.
8 If there might be another party liable they generally just do
9 a transmittal order. That's what they did in this case.

10 Bob Wire was added. They filed an appeal on that point.
11 So, there was an enormous delay as a result of Bob Wire filing
12 the appeal. So, there was a ---

13 THE COURT: They, they appealed the ---

14 MR. DETWILER: Being added.

15 THE COURT: --- being added, okay.

16 MR. DETWILER: Being added as a party. They just
17 appealed that. That appeal was dismissed and I can't remember
18 exactly why. It's not important to the issues before you and
19 ultimately we wound up having a hearing before Commissioner
20 Huffstetler. They were added back or left in, if you will.
21 We had a hearing before Commissioner Huffstetler. The issue
22 was teed up before Commissioner Huffstetler about whether
23 there was just one accident or whether there was a subsequent
24 accident with Bob Wire. There was testimony taken.
25 Commissioner Huffstetler ruled against me and for Bob Wire and

1 dismissed Bob Wire and something that wasn't exactly made
2 clear a while ago, dismissed Bob Wire and gave an award to the
3 claimant.

4 We appealed that only to the extent that Commissioner
5 Huffstetler didn't dismiss Bob Wire. We didn't appeal the
6 award to the claimant. Ms. Barr said we appealed that. We
7 didn't. That was - that's a - that was a finding of fact,
8 nobody appealed that point.

9 So, that brings us to that hearing. So, we have this
10 hearing, and ---

11 THE COURT: Now, wait a minute, wait a minute. So,
12 the hearing where Bob Wire was dismissed was not the hearing
13 that set the comp rate and determined the disability and ---

14 MR. DETWILER: The same hearing.

15 THE COURT: The same hearing, all right.

16 MR. DETWILER: The same hearing, but this is what
17 Commissioner Huffstetler said and I assume that's in the
18 record. Commissioner Huffstetler said, "I don't believe there
19 was a second accident. I think this was just an extension of
20 the first accident and I'm awarding you benefits and making
21 everything, putting everything on Peachtree, disregarding the
22 deposition testimony that we'd submitted from the claimant."
23 So, we appealed that, just on that issue. We didn't appeal
24 the issue with regard, as I recall anyway, we didn't appeal
25 the issue with regard to the claimant's benefits. So, we go

1 up before the commission and at that point it's a fight
2 between us and Bob Wire about whether not there was the second
3 accident and let me, and let me, and this is a very key point
4 here. This is not the appellate panel ruling that is before
5 you today. This was a previous appellate panel ruling.

6 THE COURT: Right.

7 MR. DETWILER: So, the appellate panel reversed
8 Commissioner Huffstetler and said it's clear in the record
9 that there was a second accident and that ruling was dealt
10 with a host of matters including, if I recall, the equitable
11 indemnity issue and it's found, I believe, at, Your Honor, tab
12 11 of Ms. Barr's submissions. This would be the appellate
13 panel order of May 4th, 2007, and at that point, the claimant
14 doesn't really have a dog in the fight, and you know, at that
15 point in time, and in fact I believe that's ---

16 THE COURT: Well, I mean, if it's held that Bob Wire
17 is liable then the comp rate at Bob Wire and all of that and
18 wages at Bob Wire come into play.

19 MR. DETWILER: That's right.

20 THE COURT: Okay.

21 MR. DETWILER: And I'm going to get to that.

22 THE COURT: All right.

23 MR. DETWILER: I'm going to get to that. So, at that
24 point what it's found is, you know, Bob Wire knew that there
25 was a second accident and said nothing, that's what the

1 appellate panel found, that Bob Wire knew that there was a
2 second accident, they were put on notice and that the statute
3 of limitations didn't apply or was satisfied by our adding
4 them as a party to the case, very specific detailed finding of
5 fact and conclusions of law.

6 Bob Wire appealed that. Unfortunately, they appealed it
7 late, and that appeal was dismissed. So, all - everything
8 that is found is as findings of fact and conclusions of law in
9 what you see in tab 11 is the law of this case and what it
10 said was there was a second accident and Bob Wire is
11 responsible for everything causally related to that second
12 accident.

13 MS. BARR: I will have to object because I'm looking
14 at the findings of fact. It does not say that at all.

15 MR. DETWILER: Your Honor, I didn't interrupt her.

16 THE COURT: Hold on.

17 MS. BARR: I'm sorry.

18 THE COURT: I'm going to give you an opportunity to
19 reply, okay. I mean, give me the grounds for your objection.

20 MS. BARR: Well, I'm looking at the findings of fact
21 and that's not what the order states. He's misrepresented.
22 Clearly the whole thing is ---

23 THE COURT: But what is the grounds for your, your
24 legal grounds for objecting. You're going to be able to make
25 your arguments.

1 MS. BARR: He's gone outside of the record and he's
2 misrepresented prior commission order to the Court. I'm
3 sorry. I just thought that was ---

4 THE COURT: Overruled. All right, go ahead Mr.
5 Detwiler.

6 MR. DETWILER: Your Honor, the findings of fact are
7 shown on page 16 of that order and they speak for themselves.
8 If I've in any way inadvertently misstated anything I
9 apologize to the Court and to Ms. Barr, but they're right
10 there and they find that claimant suffered a new accident and
11 injury on November 3rd, number one. Number two, claimant gave
12 notice of the new accident. Number three, the statute of
13 limitations was satisfied and number four, the claim, the
14 claim is remanded to the jurisdictional commissioner for
15 determination of average weekly wage and benefits and
16 apportionment of benefits paid and/or to be paid in the manner
17 consistent with the findings set forth herein. That's what it
18 says. Now, Ms. Barr quoted just number four a while ago. She
19 didn't bother telling you about the rest of this order. Now,
20 I think it's important for you to understand that there are
21 findings of fact and conclusions of law that are the law of
22 this case because the appeal from that order was dismissed.
23 So, we go back down after the dismissal of that appeal. We go
24 back down and we have this hearing before Commissioner
25 Funderburke at that point and it is solely on the issue as the

1 remand order provides as best as we could determine what it
2 provides. I mean, that's what the remand order says and I
3 would agree with Ms. Barr that it is in-artful but
4 Commissioner Funderburke dealt with that remand order as best
5 he could and it was basically a determination of what the
6 average weekly wage was and the amount of and the
7 apportionment of benefits. Well, what Commissioner
8 Funderburke did at that point rightfully and this was by
9 agreement with her prior counsel in her office. We agreed
10 that now that we're dealing with two accidents we need to have
11 two separate files. We have the '02 file that dealt with
12 Peachtree. Then we have the '03 that file that deals with Bob
13 Wire. It's the only thing that makes sense. It's the law of
14 the case and you can't deal with both, you can't deal with
15 both of them at the same time. Now, in the interim period the
16 claimant files a formal claim with regard to the '03 claim.
17 So, that is going on as Ms. Barr pointed out and I'm not even
18 a party to that, I wasn't aware of it. There's a hearing
19 coming up on the '03 claim with Bob Wire. She mentioned that
20 there was going, that the issue was whether there was an
21 accident on November of '03, November 3rd of '03. That issue
22 has been decided. I mean, that ship left a long time ago.
23 That's an un-appealed from order. So, and Your Honor, to the
24 extent that - and that order also dealt with the issue of
25 equitable indemnity and all, again un-appealed from and if I

1 could hand up a couple of cases, Your Honor. One is the
2 Hoffman, Hoffman case. There's one for you and one for your
3 law clerk and the other one is the Dunlap case.

4 MS. BARR: Might you have a copy for me?

5 MR. DETWILER: I do have one for you, coming your way,
6 and those cases specifically deal with and those cases are
7 cited by the commission in its, in its order. Those cases
8 specifically, I guess the subsequent order, those cases
9 specifically say that, okay, you can raise subject matter
10 jurisdiction at any time. Everybody knows that but you have
11 to appeal to do that and if you haven't perfected an appeal
12 you can't later on argue something that was, even if it's
13 subject matter jurisdiction, you can't later on come back and
14 argue it just because there's hornbook law that says that you
15 can raise subject matter jurisdiction any time. Once you have
16 failed to appeal, failed to raise that on appeal or for
17 whatever reason that issue has been decided below you can't
18 keep raising it afterwards. That's what those two cases say.
19 One is from the thirties. One is from the seventies. It's
20 clear law. There's no, there's no contrary authority that I'm
21 aware of.

22 So, we go to the hearing with Commissioner Funderburke.
23 Commissioner Funderburke makes, the APAs are submitted. I
24 think that they're in Ms. Barr's submissions there. The - my
25 attorney's fee affidavit is submitted and there's a specific

1 list of all the medicals that were paid. Now, keep in mind
2 the commission has already ordered that all - I think the
3 commission previously ordered this, Commissioner Funderburke
4 certainly ordered this that all medicals after November 3 were
5 the responsibly of Bob Wire because they flow from the second
6 accident. That's a simple proposition and it makes perfect
7 sense and that's the determination he made based upon the
8 prior order and his own conclusions and we submitted very
9 specific records of medicals that were incurred by us that
10 were really for Bob Wire's claim. So, what this all boils
11 down to is we got my client, we have one employer who has paid
12 the benefits that another employer should have paid in the
13 first place.

14 Now to the extent on this comp rate issue I think that's
15 a red herring I would respectfully submit. We paid based upon
16 the comp rate that we had to pay based upon the old comp rate
17 for the first claim. We had, we had no argument that we could
18 pay a lesser comp rate. We had to pay the comp rate that we,
19 that we paid. That's the order that was - that we were under
20 and the agreement we were under to pay. So, we paid what we
21 had to pay and it was based on until there was a determination
22 that there was a second accident. We had to pay based on the
23 comp rate that we had. I think Ms. Barr is correct, that
24 resulted in an overpayment with regard to benefits paid after
25 November 3rd. That's something that they could work out with

1 the claimant in the '03 claim. If he's been over - they've
2 got to - they've got to pay us back what we paid. That's what
3 the commission ordered.

4 THE COURT: Well, yeah, but I mean, really in reality
5 the commission is wanting them to pay what they should have
6 paid to start with.

7 MR. DETWILER: No, sir, what the commission specifically
8 found and I think is absolutely correct under the law they
9 specifically found that you have to reimburse Peachtree for
10 what Peachtree paid.

11 THE COURT: Even though you're not - I mean how can
12 you, how can you hold an employer liable for a comp rate of
13 \$1000 a day when the employee was only making \$10 a day while
14 working for them.

15 MR. DETWILER: Well, let's deal with the specific facts
16 of this case and I think I can answer your question. The
17 reason the commission ordered what it did is because Peachtree
18 mistakenly paid, after it specifically found that Bob Wire
19 knew that there was a second accident and was aware of it and
20 sat on their hands and said nothing, Peachtree specifically
21 paid at the higher comp rate. Now, Bob Wire, there's been a
22 finding that Bob Wire has got to deal with this second
23 accident. They can deal with that by adjusting whatever
24 compensation is due to the claimant in the '03 claim. There's
25 an ongoing '03 claim and to the extent there's anything that

1 they owe further that they owe the claimant they can deal with
2 the claimant if he's been overpaid, but it would be more
3 inequitable I would respectfully submit to the Court to stick
4 us with paying, with getting reimbursed at a lower comp rate
5 than we actually paid when we innocently paid it. We are the
6 innocent party in this. We are the people that did the right
7 thing we thought. They are the people that sat on their hands
8 knowing there was another accident, didn't say anything, and
9 that's what the commission found in the earlier order. That's
10 the law of this case. That is the law of this case, and so,
11 to the extent that there is any and most of what Ms. Barr has
12 argued about and talked about is something that was decided a
13 long time ago. Now, she calls this earlier order an
14 interlocutory order. Well, the reality is it was not an
15 interlocutory order. It had specific findings of fact and it
16 remanded for a very narrow point and that is to figure out how
17 to divide everything up and they appealed but they just
18 appealed untimely and that's, that's the real problem that
19 we're dealing with and I, and I couldn't be more sorry for
20 that, but, but ---

21 THE COURT: Well, how is your client not getting
22 double reimbursement by collecting on the third-party claim
23 and now seeking contribution?

24 MR. DETWILER: Keep in mind that the third-party claim
25 had to do with the '03, excuse me, the '02 accident. They

1 don't have any dog in the fight on the '02 accident. The
2 third party claim was a settlement and that is, that is really
3 smoke and mirrors I think and let me, let me try to boil it
4 down and make it simple because I think it's been made more
5 complicated than it needs to be. The clincher that we entered
6 into with the claimant was between us and the claimant. It
7 specifically reserved any rights that the claimant and we had
8 against Bob Wire and it had - and it was specifically for the
9 accident that occurred in December of '02 from which flowed
10 the third-party claim. The '03 accident with Bob Wire has
11 nothing whatsoever to do with the other accident. Now what
12 ---

13 THE COURT: So, the clincher agreements - well, then
14 if it just dealt with the '02 accident the clincher agreement
15 that settled all claims - I'm trying to ---

16 MR. DETWILER: It settled everything to do with the '02
17 accident between ---

18 THE COURT: But now you're coming back and saying
19 that that clincher agreement was based upon an impairment
20 rating that was generated in part by the '03 accident.

21 MR. DETWILER: The, that, the, the impairment - actually
22 the impairment rating is not even recited if I recall in the
23 clincher agreement nor is anything else. The only thing that
24 we did was we settled the '02 claim for what, for what they
25 thought and we thought was fair.

1 THE COURT: What - when did you enter into the
2 clincher agreement?

3 MR. DETWILER: The date, Your Honor.

4 THE COURT: Well, let me ask you this, was it after,
5 you entered the clincher agreement after the commissioner said
6 that Bob Wire was not liable.

7 MR. DETWILER: It was in between when the commissioner
8 said that Bob Wire was not liable and the appellate panel
9 finding that they were liable.

10 THE COURT: Oh, okay.

11 MR. DETWILER: And at that point in time Bob Wire was
12 vehemently denying that they had, that they had, there was any
13 other accident. I mean, that - this, this - they had denied
14 it all the way, all the way through.

15 THE COURT: Right and they had prevailed before the
16 commissioner who said, "You're right. There's no accident."
17 So, when Peachtree settled there's an award by the
18 commissioner.

19 MR. DETWILER: Right.

20 THE COURT: Rather than going by that award you
21 settled it by clincher knowing that that issue was still open.

22 MR. DETWILER: And specifically reserving our rights
23 with regard to that, that issue and, and that was in the
24 commission's file when they heard our appeal.

25 THE COURT: Okay.

1 MR. DETWILER: And so; again, all of this has been made
2 a lot more complicated by sort of brushing over the fact that
3 three fourths of this case has already been decided and
4 there's been no appeal from that. All the stuff about
5 equitable indemnity and all that has already been determined.
6 The only thing that is really before you, Your Honor, today is
7 Commissioner Funderburke's order of whatever date that is,
8 I'll get it for you, it is the June 12th, 2008, order from
9 Commissioner Funderburke, which was and actually the amended
10 appellate panel order that flowed from that and I presume both
11 of those are in the record that Ms. Barr put together for this
12 June.

13 THE COURT: So, you're saying really the only issue
14 is whether or not, the only issue on this appeal is whether or
15 not Bob Wire has to reimburse Peachtree based upon Peachtree's
16 comp rate or based upon Bob Wire's comp rate.

17 MR. DETWILER: What I'm saying is that the only issue
18 before this Court is whether there was substantial evidence to
19 support the appellate panel's finding that is contained in the
20 January 6th order, and let me just say that the appellate panel
21 used ---

22 THE COURT: January 6 order?

23 MR. DETWILER: January 6th, 2009, order is the one that is
24 being appealed from before you today, Your Honor, and let me,
25 let me just ---

1 MS. BARR: Tab 18, Your Honor.

2 THE COURT: Okay.

3 MR. DETWILER: That's the order before you today.

4 THE COURT: Okay.

5 MR. DETWILER: And it says that all of those other
6 matters that were decided before or the law of the case
7 because there hadn't been any appeal, it makes, it makes that
8 point and it also says among other things, it says Bob Wire's
9 argument that Peach Tree relinquished its right to seek
10 reimbursement from Bob Wire by clinchering the case with the
11 claimant without notice to Bob Wire is fundamentally without
12 merit. I want to say that there may be other instances where
13 that characterization is used in this order and I would
14 respectfully submit to you, Your Honor, that this appeal is
15 fundamentally without merit. There's substantial evidence in
16 the record that Ms. Barr has submitted to you to support the
17 appellate panel's ruling which incorporates, if I recall,
18 Commissioner Funderburke's order. It should be sustained in
19 its entirety and there's no error of law contained in either
20 one of those orders. Thank you, Your Honor.

21 THE COURT: All right, but the only - all right,
22 okay, I understand.

23 MR. DETWILER: And the issue ---

24 THE COURT: All right, let me hear from you on your
25 attorney's fees.

1 MR. DETWILER: Oh, thank you, Your Honor, for reminding
2 me of that. Your Honor, on the attorney's fee issue we
3 submitted an affidavit at the time under the same theory that
4 we're entitled to reimbursement, excuse me, of - that Bob Wire
5 is entitled to - excuse me, Peachtree is entitled to
6 reimbursement for Bob Wire. We incurred not only the benefits
7 we paid to the claimant and the benefit and the benefits or
8 the medical benefits that we paid on behalf of the claimant we
9 have incurred as a result of the intransigent position of Bob
10 Wire throughout this entire process, we have occurred an
11 enormous amount of attorney's fees fighting with them every
12 step of the way. This is the second time this matter has been
13 before this court and we've gone to the appellate court at
14 least, the appellate panel or the commission twice. Every
15 step of the way Bob Wire has won. It is our position that
16 under the theory of equitable indemnity and I don't think the
17 case that Ms. Barr cites is at all applicable. I'm talking
18 about equitable indemnity theory. We are entitled in addition
19 to the reimbursement that's already been noted to a
20 reimbursement of our attorney's fees.

21 Now, the affidavit that Ms. Barr has submitted was
22 submitted into the record in this case. It does contain one
23 error that I'm aware of that was brought to my attention and I
24 would concede that and I would just if Your Honor is inclined
25 to grant our petition for attorney's fees based on the theory

1 of equitable indemnity I would ask that I be allowed to submit
2 an updated affidavit for attorney's fees which includes
3 today's time.

4 THE COURT: All right.

5 MR. DETWILER: Thank you, Your Honor.

6 THE COURT: Ms. Barr, briefly anything in reply that
7 was not addressed in your initial argument?

8 MS. BARR: Yes, Your Honor, briefly, number one,
9 substantial evidence standard of review does not apply to this
10 which is apparently an equitable action against my client,
11 that's a de novo review standard. Number two, simply because
12 Peachtree alleges there was intervening accident and the
13 commission has found that there was an intervening accident
14 that's the basis of a defense in Price's claim against
15 Peachtree. It does not in and of itself make Bob Wire liable
16 to Peachtree for anything. Bob Wire did not sit on its hands.
17 Bob Wire had no claim against it. The mere ---

18 THE COURT: Okay, but now do you, do you agree that
19 the sole order on appeal is the one dated January 6, 2009?
20 That's what is in front of - that's what's appealed from.

21 MS. BARR: No, Your Honor, all the issues are before
22 you. The prior order of the appellate panel was clearly an
23 interlocutory order. It's an order of remand. The case came
24 out just Monday, the 13th, Georgetown County case, ruled on by
25 this court, where a remand order is an interlocutory order and

1 an immediate appeal cannot be taken. Now, I took one in an
2 abundance of caution. It was dismissed as untimely. That's
3 irrelevant. It was an interlocutory order and even if it had
4 been timely the Court wouldn't have heard it under the
5 standards set forth again on Monday in the Georgetown County
6 case. So, that was interlocutory, but more importantly it
7 wasn't a final order because it was only on the issue of
8 remand, the remand hearing held by Commissioner Funderburke
9 where they were supposed to outline, delineate whether it be
10 equitable subrogation, equitable indemnity, how those
11 theories, how that law melds with the facts and the evidence
12 in this case and they failed to do so. So, the issue of
13 whether and to what extent Peachtree is entitled to equitable
14 indemnity or equitable subrogation it's clearly in front of
15 this Court. Unfortunately we're left with an order that fails
16 to address those fundamental issues that were before it, fails
17 to make any detailed findings of fact, fails to even cite any
18 law. Again, as you've noticed we've got a clear problem with
19 the average weekly wage and compensation rate which was not
20 addressed or discussed whatsoever. We have a clear problem
21 with the period of disability where Peachtree is seeking
22 reimbursement for benefits it did not owe but voluntarily paid
23 and to the extent that Peachtree failed to discover the
24 possibility of an intervening accident defense, to the extent
25 they feel they've been misled by Mr. Price their ire should

1 have been directed at Mr. Price not at Bob Wire because
2 Peachtree had the opportunity to not only recover its entire
3 196,000 lien from the \$540,000 third-party settlement but they
4 also were given credits for overpayment of temporary total.
5 They could have continued to litigate and get that money back
6 from Price. They chose not to do so and if there's anybody who's
7 created a convoluted situation it was when that settlement was
8 consummated with Mr. Price without notice to my clients and
9 then this tortuous proceeding under some ill-defined equitable
10 theory was launched.

11 THE COURT: Well, what about his argument that your
12 client is at fault because it failed to acknowledge a
13 compensable injury that occurred in 2003?

14 MS. BARR: Mr. Price neither reported an injury nor
15 made any claim against Bob wire.

16 THE COURT: But you've got a finding that you all are
17 liable for that. You've got a finding by the ---

18 MS. BARR: Well, there's a finding that there's an
19 accident. There's no finding and still to this day no clear
20 outlining of what benefits if any would flow from that
21 accident. Again, the commission has yet to adjudicate that
22 claim on its merits, but again, how - we committed no legal
23 error. There was no malfeasance, there was no nonfeasance.
24 Price did not file a claim against Bob Wire until January of
25 2008. At that point we responded. We were in no - under, I

1 mean, under Mr. Detwiler's theory we were supposed to pick up
2 the phone and say ---

3 THE COURT: Yeah, but I mean ---

4 MR. BARR: --- "Hey, you're paying this claim. We
5 think there might be one against us."

6 THE COURT: No, under his, under his theory is he
7 represents an employer that says, "You weren't hurt on my job.
8 You were hurt on Bob Wire's job. Bob Wire, I'm notifying you
9 he was hurt on your job," and he ultimately prevails in that
10 action. So, when he notified you that the employee was hurt
11 on your job that is when you, I mean, what about his argument
12 where you created the problem because when you were notified
13 by Peachtree that this employee was hurt on your job you
14 denied it, said it didn't happen and you were ultimately wrong
15 on that issue.

16 MS. BARR: Well, we denied that it happened. We
17 don't know if we're ultimately wrong on that issue because the
18 commission hasn't adjudicated the 2003 claim against Bob Wire.
19 This is, this is again their findings with regard to his
20 intervening accident defense, but the Price claim against Bob
21 Wire is yet to be litigated.

22 Price even, even when he raises this intervening
23 accident defense and it's noted by the full commission Price
24 is not making that claim against us, and again, even when he
25 brings us in as third party it's not a claim against us.

1 There's nothing for us to do. We've kind of been along for
2 the ride on this thing all along. You know, again, it wasn't
3 until January of 2008 that Price decided, "Well, hey, I'm
4 going to go try to get some money from them."

5 Briefly want to speak to this, this allegation of smoking
6 mirrors. I see no smoking mirrors. What I see is ---

7 THE COURT: All right, now, don't ---

8 MS. BARR: --- pretty clear numbers. I just want to
9 point out to you.

10 THE COURT: Well, you've already argued that on your
11 primary argument. I know you disagree with his use of the
12 term smoke and mirrors but let's don't go back and rehash an
13 argument you've already made. I've heard it and I recall it.
14 So, go ahead.

15 MS. BARR: I would just submit to you that in
16 addition to - the thing is asked for not only a profit of
17 \$13,000 in an admitted Workers Compensation claim including
18 benefits that they were due their admitted claimant prior to
19 any intervening accident, they also want \$31,000 in attorney's
20 fees for throwing my client in a briar patch. Mr. Detwiler's
21 efforts have in no way benefited my client.

22 THE COURT: Okay, Mr. Detwiler on the sole issue, her
23 argument that if I rule in your favor attorney's fees issue
24 aside, but on the compensation that you all will wind up
25 making a \$13,000 profit.

1 MR. DETWILER: No, sir; no, sir, and I, I, you know, I
2 don't understand that math at all. All we're doing is seeking
3 reimbursement for what we paid to the claimant.

4 Now ---

5 THE COURT: All right, give me the figures, what, what
6 did, what did you all get under the third party claim, how
7 much reimbursement did you all get from that?

8 MR. DETWILER: Well, it was sort of done in the form, if
9 I recall, Your Honor, and it's in record. It was sort of done
10 ---

11 MS. BARR: It's page 140 as tab 12.

12 MR. DETWILER: It was sort of done in the form of a
13 setoff. We wound up saying, "Okay, we're not going to take
14 but \$50,000 out of the \$540,000 you got and we're not going to
15 pay you any of the benefits that were awarded." I mean we
16 just netted out everything and we got a net \$50,000 if I
17 recall correctly. I'm sure Ms. Barr will correct me if I'm
18 wrong, but I think that's what happened; and so, there is no
19 settlement, there's nothing specific in there that says we got
20 this much of a third party claim and we got, we paid this much
21 of the, towards the settlement. It's just, if I recall it's
22 just sort of a net amount, netted out amount.

23 THE COURT: Okay, but the third party claim was just
24 so - what did you all pay out up until the 2003 accident from
25 the 2002 to the 2003 what did you all pay out?

1 MR. DETWILER: Oh, you mean the whole thing?

2 THE COURT: No, no, I'm talking, no, you said that
3 the clincher dealt exclusively with the 2002 claim. So, what
4 did you all pay out from the 2002 accident at Peachtree to the
5 2003 accident at Bob Wire?

6 MR. DETWILER: I don't have those figures in front of
7 me, Your Honor. They may - let me see. It may be provided in
8 the record here on appeal that Ms. Barr has submitted or I may
9 have to just get back to you.

10 MS. BARR: Your Honor, page 140 of tab 12 is the form
11 19 which is the compensation receipt which shows what was paid
12 in the Workers' Compensation claim by Peachtree.

13 MR. DETWILER: And I think there is a calculation, Your
14 Honor, that we submitted. It's in the record of this case
15 that we submitted of what all exactly was paid and then what
16 we allocate to one versus the other and that is also found in
17 her ---

18 MS. BARR: I believe it's page eight of
19 Commissioner's Funderburke's order, that's tab 13 was the way
20 you ---

21 THE COURT: All right.

22 MS. BARR: --- spread it out.

23 MR. DETWILER: Isn't that also in 143 and 146. Didn't we
24 put our figure ---

25 THE COURT: Let me ---

1 MS. BARR: Yes, you did.

2 THE COURT: So, what was the date of the accident at
3 Bob Wire?

4 MR. DETWILER: 11-3-03.

5 THE COURT: All right, so, according - all right, so
6 I've got it right here. Yeah, on your form 19 it showed, I
7 guess I'll have to add 80. You paid out 1 37 784 61. So,
8 those were the medical benefits paid. You paid temporary
9 totals of 58 301. So, you paid out a total of 1 96 0 86 35.

10 MR. DETWILER: And that does not count the whatever might
11 be attributable to the permanent partial disability award that
12 we netted out in the settlement. So, I guess what I'm
13 suggesting to you is that if you're asking a question I think
14 it may be impossible of answering. You know, we ---

15 THE COURT: Well, what was the ultimate permanent
16 partial rating?

17 MR. DETWILER: The ultimate permanent partial rating,
18 the rating, the disability rating was 35 percent. That's
19 right.

20 MS. BARR: But you all didn't pay that; correct?

21 MR. DETWILER: We netted it out in the, in the ultimate
22 settlement and then what we would have been entitled to and
23 then what it would have been reduced to, I mean, you know how
24 that works when you deal with a third party claim in a
25 Workers' Comp case there's a reduction process that could be

1 had by the claimant, reduction of the lien process and we
2 just, we just sort of held our thumbs out and checked which
3 way the wind was blowing and settled it.

4 THE COURT: Well, what's this notation at the bottom,
5 net 146 0 86, that's the total liability less your
6 reimbursement and then you've got reimbursement equals 1 59 8
7 13.

8 MR. DETWILER: Could you tell me what page you're
9 looking at, Your Honor? So ---

10 MS. BARR: It's 140, and Your Honor, I, I ---

11 THE COURT: Page 140 on tab 12.

12 MS. BARR: Your Honor, I believe that's my
13 handwriting. I apologize.

14 THE COURT: Oh, you wrote that, okay, okay.

15 MS. BARR: That net ---

16 THE COURT: I see then.

17 MR. DETWILER: And so, you know, the - as you can see
18 there is no number for the agreement and final release thing
19 because we've netted that out, and so, you know, to, you know,
20 to claim that we got some sort of windfall I think is, you
21 just - you can't make that argument because we, we had, we had
22 an argument that we could give, that we could get up to
23 everything we paid out against, you know, from the third party
24 claim but then the third, then the claimant would then ask for
25 the lien to be reduced under that strange code section that

1 allows them to do that and we just wound up settling that out.
2 Again, this is at a time when Bob Wire was completely denying
3 the claim, that the 11-3-03 accident ever occurred. So, you
4 know, we did the best we could to settle the claim but what we
5 paid the claimant is what we paid the claimant and the
6 commission was absolutely right I think in awarding
7 reimbursement, and Your Honor, there's one thing I want to
8 correct ---

9 THE COURT: Let me ask you this, I mean, isn't your
10 equitable indemnification, isn't there some requirement that
11 if you are seeking indemnification from somebody else for what
12 they should've paid where you have signed, you've clinched it
13 doesn't that clincher have to also release them from
14 liability?

15 MR. DETWILER: No, sir; no, sir.

16 THE COURT: I mean, I know under the joint
17 Tortfeasor's Act that you're not entitled to any contribution
18 from a joint tortfeasor unless you act, unless you release
19 that joint tortfeasor from liability.

20 MR. DETWILER: I don't think that, I don't think we're
21 talking about apples and apples. You know, here we're talking
22 about an ongoing claim that is on appeal, you know, between
23 us.

24 THE COURT: But I mean, let's back up. Let's say
25 there's you now have the employee suing Ms. Barr's client, Bob

1 Wire.

2 MR. DETWILER: Right for the '03 claim.

3 THE COURT: For the '03 claim.

4 MR. DETWILER: Right.

5 THE COURT: He prevails on that and they've already
6 reimbursed you for what, I mean, how is that not going to be a
7 double recovery to the employee?

8 MR. DETWILER: Well, because that's what, exactly what's
9 going to happen and what they're going to be arguing I'm
10 confident in the '03 claim that they're getting ready to
11 adjudicate. Whatever they have to pay us then, then, you
12 know, the employee doesn't get a double recovery. We're not
13 asking for a double recovery. We're just asking to be made
14 whole and we're asking for the right person to be held liable.
15 That's all we're asking. Now ---

16 MS. BARR: We can't make that ---

17 THE COURT: I'm going to give you, Ms. Barr, an
18 opportunity to speak; okay?

19 MS. BARR: Thank you, Your Honor. I appreciate it.

20 THE COURT: Please quit interrupting during these
21 arguments. All right, all right, Mr. Detwiler, go ahead.

22 MR. DETWILER: Thank you, Your Honor. The employee - the
23 commission I would respectfully submit is not going to allow
24 the employee to get a double recovery if and it's already
25 found this I'm, you know, would respectfully submit you should

1 affirm it, you know, the claimant has been paid something by
2 us for that claim. If it turns out to be that those benefits
3 were too much then that's going to be resolved in the '03
4 claim. They pay. Then they have the right to say we've
5 overpaid them. They can't claim it unless they pay us, but
6 they, they have a right to claim as to the employee when he
7 says, "Okay, I want another 35 percent because of this
8 problem, you know, that happened on 11-03-03." Then they've
9 got a right to say, "Well, we've already paid this because we
10 had to pay it to Peachtree. So, you only get, you know, we
11 net that against what you are claiming." So, I mean, that's
12 the only way I think that this can work.

13 THE COURT: All right, Ms. Barr, let me hear from you
14 on that argument.

15 MS. BARR: Thank you, Your Honor.

16 As you can see, Mr. Christopher Price nor his attorney is
17 here today. They're not bound by these proceedings. They're
18 not bound by either of the commission's prior appellate panel
19 orders in this case suggesting there was an intervening
20 accident. Mr. Price is not bound by ---

21 THE COURT: What do you mean they're not bound by
22 this? They're a party to this action.

23 MS. BARR: They are no longer a party to this action
24 because they clinchered their claim. They are not here. He
25 is not bound by any order. Any payment I make to Mr.

1 Detwiler, not only am - do I have no statutory right to refuse
2 payment to Mr. Price on his independent claim against me, I
3 can't even get second injury fund recovery. For second injury
4 fund recovery I've got to make a payment discharged only to
5 the claimant, medical benefits that can only be discharged by
6 payment to the medical providers for me to even get
7 reimbursement from the Second Injury Fund, certainly can't
8 argue to Christopher Price, "Oh, I don't owe you anything. I
9 gave Rick Detwiler a check."

10 THE COURT: If he's the one that filed the claim
11 against Peachtree.

12 MS. BARR: Right.

13 THE COURT: And he collected funds from Peachtree and
14 Peachtree prevails in saying and they have prevailed this far
15 in saying that part of their compensation was for the injury
16 he sustained at Bob Wire then why isn't he? He's a party to
17 this action and he's bound by the orders of the commission and
18 he's bound by the orders of this Court because he's still a
19 party to this action.

20 MS. BARR: I would like to think so but I don't think
21 it's quite as clear as Mr. Detwiler said. That's why we've
22 got a hearing on July 30th to determine those benefits and I
23 don't think that that notice, he has not participated in these
24 proceedings.

25 THE COURT: Well, how can I set a comp rate for

1 somebody that's not even a party to the action?

2 MS. BARR: Well, the comp rate is fairly simple. Mr.
3 Detwiler stipulated to the compensation rate.

4 THE COURT: All right.

5 MS. BARR: Also, you know, that the math, these
6 arguments about setoffs and all the rest it's real simple.
7 196,000.

8 THE COURT: Where does that figure come from?

9 MS. BARR: 119 the total in medical and indemnity
10 benefits paid by Peachtree is \$196,000.

11 THE COURT: All right.

12 MS. BARR: He admits he got a \$50,000 check from the
13 third party settlement. That means his gross, his net payout
14 is \$146,000. He went and got an award from the commission for
15 me to pay him \$159,000, plus he's asking for an additional
16 \$31,000 in attorney's fees on top of that. The math is really
17 simple.

18 THE COURT: Okay, all right.

19 MR. DETWILER: Your Honor, may I, may I point out ---

20 THE COURT: No, I've heard this ad nauseum. I'm going
21 to have to go through everything, take a look at it.

22 MR. DETWILER: I wasn't going to, I wasn't going to argue
23 anything I was just going to point out something that you said
24 a while ago that I think may have been not correct.

25 THE COURT: Well, we're starting to repeat ourself.

1 So, I'm going to go through it. All right.

2 MR. DETWILER: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. DETWILER: Appreciate you allowing us this much time
5 and I apologize to other counsel for eating into their time.

6 (Adjourned.)

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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Peachtree Electrical Services, et al. v. Christopher Price, et al., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on July 16, 2009.

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

Grace L. Hurley

Grace L. Hurley, CVR-CM

Official Reporter

December 24, 2009.

CHRISTOPHER PRICE
64214
08/08/2003

SUBJECTIVE: Returns after finishing two more weeks of work conditioning. His pain has improved some. He reports daily pain which he rates at about a 4 or 5 on a scale of 1 to 10. He denies radicular leg pain.

OBJECTIVE: Well-developed, well-nourished 33-year-old white male in no apparent distress, alert and oriented x 3.

ASSESSMENT: Nonradicular low back pain status post lumbar discectomy.

PLAN: The patient was reviewed with and seen by Dr. Mills. He is at maximum medical improvement with a 10% whole person impairment which equates to a 13% impairment to the spine. He can return to work full duty. He was given a pres. for Celebrex 200 mg. po q d. He was instructed on safe lifting and proper body mechanics. Follow up on as needed basis, and if he is unable to tolerate work, he may next need work hardening.

C. Todd Beebe, PA-C /pmc
for William L. Mills, MD
75035

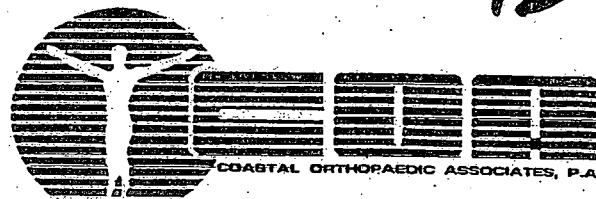
James E. Turek, MD, Referring Dr.

Chart Copy

CRume

[Signature]

12



CHRISTOPHER PRICE

64214

11/13/2003

SUBJECTIVE: Lower back pain and right leg pain for 2 weeks.
No relief with injection.

OBJECTIVE: Well-developed, well-nourished, and in no acute distress. He does have some radiating pain with straight leg raise and McMurray's maneuver on the right.

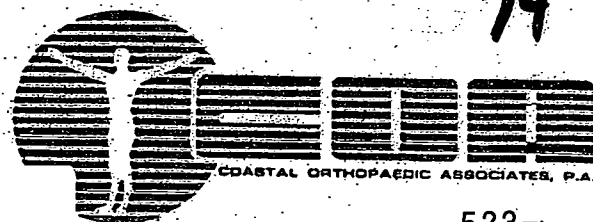
ASSESSMENT: Low back pain with radicular symptoms.

PLAN: Mobic 7.5 mg. qd, Neurontin 300 mg. bid, Vicodin #40.
Will get a CBC and sed rate. Return to office in 2 weeks
and if symptoms have not improved will proceed at that time
with gadolinium lumbar MRI.

William L. Mills, M.D. /dak
85246

James E. Turek, MD, Referring Dr.

Chart Copy



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price,.....Claimant,

v.

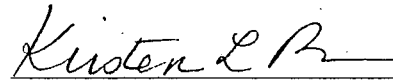
Peachtree Electrical Services, Inc. and
Builders Mutual Insurance Company,
Employer/Carrier,.....Respondent.

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certified that the Supplemental Record on Appeal contains
all material proposed to be included by any of the parties and not any other material.



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(843) 881-4228
Attorneys for the Appellants

August 24, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price,.....Claimant,

v.

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

v.

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

FINAL BRIEF OF THE APPELLANTS

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Statement of the Issues on Appeal

- I. What is the appropriate standard of review in a claim of equity?
- II. Does the South Carolina Workers' Compensation Commission have jurisdiction over common law equitable claims of indemnity or subrogation?
- III. Will the "reimbursement" ordered by the Workers' Compensation Commission unjustly enrich the Respondents?
- IV. Did the Workers' Compensation Commission err in summarily concluding that the Respondents are entitled to reimbursement under a theory of equitable indemnity?
- V. Did the Workers' Compensation Commission err in summarily concluding that the Respondents are entitled to reimbursement under a theory of equitable subrogation?
- VI. Is the Workers' Compensation Commission's finding that the Appellants must "reimburse" the Respondents for all temporary total disability compensation benefits paid to the Claimant after November 3, 2003, at the rate of \$343.24 per week, arbitrary and capricious?
- VII. Did the Commission err in creating a new right and remedy for the Respondents when adequate statutory rights and remedies already exist?

Statement of the Case

Third-party Defendants, Bob Wire Electrical Services and the South Carolina Home Builders Self-Insurers' Fund (hereinafter "the Appellants") seek review and reversal of the September 14, 2009 Order of the Honorable Benjamin H. Culbertson, which affirmed the January 6, 2009 "Amended" Decision and Order of the South

Carolina Workers' Compensation Commission. (R. p. 65). The Appellants respectfully contend that the Commission erred as a matter of law by summarily finding and concluding that "Peachtree is entitled to reimbursement from Bob Wire of \$112,789.42 in medical benefits" and temporary total disability benefits "in the total amount of \$47,023.99." (R. p. 63).

The Appellants respectfully contend that the South Carolina Workers' Compensation Commission does not have the power or authority to apportion liability for benefits between successive employers, or to order a subsequent employer to "reimburse" a prior employer under any common law theory. Even if the Commission had such authority, the elements of equitable indemnity and/or subrogation are otherwise not established in, or applicable to, this case. In addition, the Workers' Compensation Commission failed to address any of the jurisdictional or complex legal issues raised by the Appellants and failed to make sufficiently detailed findings of fact and conclusions of law on these disputed matters, in contravention of S.C. Code Ann. § 42-17-40 and S.C. Code Ann. § 1-23-350.¹

The record reveals that Christopher Price (hereinafter "the Claimant") injured his back in an accident arising out of and in the course of his employment with Peachtree Electrical Services on December 9, 2002, while working at a restaurant owned by the Divine Dining Group, Inc..² The Respondents, Peachtree Electrical and its insurance carrier, Builders Mutual, admitted liability for the Claimant's back injury and voluntarily paid temporary total disability compensation and authorized medical treatment, including

¹The Workers' Compensation Commission's January 6, 2009 Order fails to reference any legal authority whatsoever. No statute, regulation, or even case law is discussed, applied, or even mentioned by the Commission.

² The Claimant did not begin to work for the Appellant, Bob Wire Electric, until October 19, 2003. (R. p. 345).

two surgeries with Dr. William L. Mills at Coastal Orthopaedic Associates. The Claimant last saw Dr. Mills on December 17, 2004 and a 20% impairment rating was issued on January 6, 2005. (R. pp. 240-41).

On February 3, 2005, the Claimant filed a Form 50, "Notice of Claim and Request for a Hearing," against the Respondents, seeking additional medical and compensation benefits as a result of the December 9, 2002 accident. (R. p. 83). On March 7, 2005, the Respondents filed a Form 51, admitting that the Claimant sustained an injury on or about December 9, 2002. The Claimant did not file any claim against (nor did he seek workers' compensation benefits from) the Appellants.

On April 22, 2005, the Respondents filed a Motion to Add Bob Wire Electric and the South Carolina Home Builders SIF (the Appellants) as third-party defendants in the workers' compensation claim. In their Motion, the Respondents alleged that the Claimant sustained an injury in "November of 2003," while working for Bob Wire Electrical. The Claimant did not join in this motion and did not amend his Form 50 to allege any injury arising out of his employment with the Appellants.

A Transmittal Order was issued by Commissioner Susan S. Barden on June 21, 2005, by which the Appellants, Bob Wire Electric and the South Carolina Home Builders SIF, were added as parties to the Claimant's admitted workers' compensation claim against the Respondents.³ (R. p. 1). On July 12, 2005 the Appellants appealed Commissioner Barden's Order to the Commission's Appellate Panel and this appeal was summarily dismissed as interlocutory. (R. p. 2). The Appellants also filed a Motion to be

³ Note: there is no statutory or regulatory provision authorizing or otherwise governing third-party practice in a workers' compensation claim.

removed as parties on July 13, 2005. This motion was also summarily dismissed by the Workers' Compensation Commission.

On September 29, 2005 – over seven months after the Claimant was placed at maximum medical improvement – the Respondents filed a Form 21, requesting a hearing to determine the Claimant's entitlement to additional medical and compensation benefits as a result of the admitted accident on December 9, 2002. (R. p. 84). Again, the Claimant made no claim against the Appellants. Instead, in addition to his workers' compensation claim against the Respondents, the Claimant filed a civil law suit against the Divine Dining Group, Inc., alleging negligence in connection with the December 9, 2002 accident. (R. p. 79).

On December 11, 2005, the Divine Dining Group paid the Claimant \$540,000.00 for the injuries he sustained as a result of the December 9, 2002 accident. (R. pp. 353-55). By virtue of S.C. Code Ann. § 42-1-56(b), the Respondents had a statutory lien on this \$540,000.00 settlement "to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid" in the workers' compensation claim.

A hearing was held before Commissioner David W. Huffstetler on June 5, 2006 regarding the December 9, 2002 workers' compensation claim against the Respondents. Appearances were made by the Claimant, the Respondents, and the Appellants as third-party defendants. By Decision and Order dated July 5, 2006, Commissioner Huffstetler dismissed the Appellants as parties to the Claimant's admitted claim against the Respondents, on the basis that (1) the Claimant did not make any claim against the Appellants, (2) the Claimant did not even give the Appellants notice of any injury, and (3) even if the Claimant did decide to file a claim against the Appellants, it would be

barred by the statute of limitations. (R. pp. 13-16). In addition, Commissioner Huffstetler specifically found that “the Claimant testified he believes that all of his problems stem from the injury with Peachtree Electrical Services” and that “there is no medical evidence to indicate that his disability or the need for the second surgery was occasioned by an injury with Bob Wire Electrical. It would be pure speculation for me to find an injury when there is no testimony or medical evidence to support that finding.” (R. pp. 13-14).

Commissioner Huffstetler further found that the Claimant was entitled to, and the Respondents were liable for, benefits for a 35% loss of use of the back as of the December 9, 2002 accident (\$36,040.20). (R. p. 12). The Respondents were awarded a \$20,986.68 credit for overpayment of temporary total disability compensation for the period after May 5, 2005, resulting in a net award to the Claimant of \$15,053.52. (R. p. 12). Neither the Respondent, nor the Claimant, appealed the award of 35% to the back or the credit for overpayment of temporary benefits.

Instead of paying the \$15,053.52 net award pursuant to Commissioner Huffstetler’s Decision and Order, the Respondents settled the Claimant’s workers’ compensation claim (WCC Claim No. 0220142), as well as their outstanding lien⁴ against the Claimant’s \$540,000 civil settlement on July 10, 2006.⁵ (R. p. 398). According to the terms of the settlement,

The Claimant has agreed to make, and the [Respondents] have agreed to

⁴ At the time of the settlement, the Respondents’ lien totaled \$196,085.84 for medical and temporary compensation benefits paid in the workers’ compensation claim. (R. p. 136).

⁵ Counsel for the Respondents submitted his billing records into evidence. According to an entry dated July 10, 2006, “Telephone conferences with David Durant [Claimant’s counsel], telephone conferences with Tina Hill (case settled -- \$50,000 payment to BMIC from third-party proceeds.” (R. p. 398).

accept, payment in the sum of Fifty Thousand and No/100 Dollars (\$50,000.000) in settlement of any further liability the [Respondents] may have with respect to the Claimant's claims for benefits under the Act, and in further settlement of the lien held by the [Respondents] upon the Claimant's third-party recovery proceeds. (R. p. 358).

Neither the Respondents, nor the Claimant, notified the Appellants or the Workers' Compensation Commission that the Claimant's workers' compensation claim had been settled.

Instead, on July 18, 2006, the Respondents filed a Form 30, requesting review of Commissioner Huffstetler's Decision and Order by the Commission's Appellate Panel, raising 18 alleged errors. (R. p. 86). The Respondents' Form 30 makes no mention that the claim had been settled.⁶ The Claimant and the Respondents did not file their settlement agreement with the Commission until August 28, 2006. (R. p. 356). Even after the settlement agreement was filed with and approved by the Workers' Compensation Commission, the Respondents failed to notify the Appellants that W.C.C. Claim No. 0220142 – the only claim pending before the Commission -- had been settled. (R. p. 356).

A hearing was held before the Commission's Appellate Panel on November 21, 2006, with counsel for the Appellants and the Respondents appearing. The Claimant did not make an appearance before the Appellate Panel, having already settled his workers' compensation claim.

⁶ S.C. Code Reg. 67-710 governs settlement of claims pending review. This regulation requires "the appellant shall immediately notify the Commission's Judicial Department in writing... The Judicial Department will remove the case from the review hearing docket or notify the Commission an order is not required. Apparently, this procedure was not followed in the claim *sub judice*."

At the Appellate Panel hearing, the Respondents argued

We've been paying [the Claimant] under false pretenses, and this ought to be Bob Wire Electrical's problem...Mr. Price didn't file a claim against Bob Wire, we did... But this court, *this Commission sits in equity*, and I see no reason why you can't, in good conscious [sic] and equity, find the employer who should be responsible for the claim responsible. (R. pp.

172-73) (emphasis added).

The Respondents further argued, "[a]gain, we're bringing this claim on [the Claimant's] behalf⁷... we've had to pay an enormous amount of benefits to this man because we didn't know he had been injured in the subsequent injury." (R. p. 177). However, despite their indignation, the Respondents failed to acknowledge that they had paid these benefits to the Claimant voluntarily and on advice of counsel, failed to acknowledge that they had voluntarily relinquished their right to seek a credit for reimbursement for overpayment from the Claimant, and failed to acknowledge that they had discharged their lien against the \$540,000.000 third-party settlement for only \$50,000.00.

At the hearing before the Appellate Panel, the Appellants argued that neither the Claimant's testimony, nor the medical records, supports a finding that the Claimant sustained any injury as a result of an alleged accident at Bob Wire. (R. pp. 179-88). Importantly, the Claimant brought no claim against the Appellants and did not participate in the Respondents' appeal. The Appellants further argued that, having failed to bring any claim for an alleged accident in November 2003, any such claim by the Claimant would be barred by S.C. Code Ann. § 42-15-40, which requires that the "right to

⁷ There is no evidence in the record to suggest that they were authorized to bring any claim on behalf of the Claimant. Of course, S.C. Code Ann. § 42-9-360 expressly provides that "No claim for compensation under this title shall be assignable."

compensation under [the Workers' Compensation Act] is barred unless a claim is filed with the commission within two years after an accident." (R. p. 187).

After hearing oral arguments, the Commission's Appellate Panel issued an interlocutory Order on May 4, 2007, remanding the case to a "Jurisdictional Commissioner." (R. p. 32). According to the Appellate Panel, there is no requirement that the Claimant file a claim against the Appellants, as opposed to some third party. (R. p. 30). The Appellate Panel stated that the Respondents, the Claimant's prior employer and its insurance carrier, had "an inherent right" to bring a claim against the Appellants. According to the Appellate Panel,

While the regulations of this Commission make no specific provisions for an Employer to bring third-party or indemnity claim [sic] against another party in this situation, it should not be precluded from doing so...the common law doctrines of indemnity and equitable subrogation are certainly applicable in an instance, such as this, where one employer had been required by circumstance⁸ to pay a claim for another employer. (R. p. 30).

The Appellate Panel stated that the Respondents' claim against the Appellants was not barred by the statute of limitations and further stated that it was the Commission's "duty" to "apportion the costs of caring for an injured worker appropriately."⁹ (R. p. 31).

⁸ Apparently the "circumstance" to which the Appellate Panel refers is the Respondents' failure to defend the Claimant's workers' compensation claim against them on its merits and the Respondents' failure to recover its statutory lien from the at-fault third-parties who paid the Claimant \$540,000.000.

⁹ The Appellate Panel's May 4, 2007 Order did not cite or distinguish the case of Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29, which was issued by the South Carolina Supreme Court on January 29, 2007. In Geathers, the Supreme Court held that

On this basis, the Appellate Panel reversed Commissioner Huffstetler's Decision and Order and found, instead, that the "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." (R. p. 32). The Appellate Panel did not make any findings as to whether, or to what extent, the Claimant's workers' compensation benefits should be "apportioned," nor did the Appellate Panel find the Appellants liable for any benefits to either the Respondents or the Claimant. The Appellate Panel did not make any findings relative to the impact of the Respondents' settlement with the Claimant. Furthermore, the Appellate Panel made no conclusions of law in its May 4, 2007 Order. Instead, the Appellate Panel remanded the case to a "Jurisdictional Commissioner" for a "*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).¹⁰

A hearing pursuant to the Appellate Panel's remand Order was held on April 23, 2008 before Commissioner George N. Funderburk. No testimony was presented at the April 23, 2008 hearing. However, the Appellants and the Respondents did present documentary evidence pursuant to the Administrative Procedures Act. The Claimant was not a party to the April 23, 2008 hearing; having settled his claims against the Respondents and having failed to bring any claim against the Appellants.

Commissioner Funderburk issued a Decision and Order on June 12, 2008, but

the Workers' Compensation Commission does not have authority to apportion liability for successive injuries between two parties.

¹⁰ While it is unclear what this vague and inarticulate phrase actually means, it is clear that, at a minimum, the Jurisdictional Commissioner was required to make detailed findings as to whether and to what extent the Claimant was entitled to benefits as a result of the alleged accident on November 3, 2003 at Bob Wire and the applicable average weekly wage for that alleged accident.

made no finding as to the Claimant's average weekly wage at the time of the alleged accident on November 3, 2003, as required by the Appellate Panel's remand Order. (R. pp. 40-48). In addition, Commissioner Funderburk made no finding regarding the elements of the Respondents' equitable indemnity/subrogation claim (*i.e.*, which benefits the Respondents were "secondarily liable" and paid "involuntarily" on behalf of the Appellants). Commissioner Funderburk made no finding as to whether the Claimant's need for medical treatment or compensation benefits was in any way related to any accident on November 3, 2003. Instead, Commissioner Funderburk summarily concluded that the Appellants must pay the Respondents \$112,789.42 for medical benefits and an additional \$47,023.88 for temporary disability compensation (for a total of \$159,813.33) -- without citing any evidence or any law. (R. p. 48).

In addition, Commissioner Funderburk did not discuss the fact that the Claimant was not actually entitled to, and the Respondents were not actually liable for \$47,023.88 in temporary total disability compensation, the amount the Appellants are required to "reimburse" the Respondents. The Claimant was only entitled to, and the Respondents were only liable for \$26,037.20 in temporary disability compensation after Commissioner Huffstetler's previous Order granted the Respondents a credit of \$20,986.68 for overpayment of benefits. (R. p. 15). There was no explanation as to why the Appellants' liability to the Respondents should exceed the Respondents' liability to the Claimant or why the Respondents were entitled to such an obvious windfall.

Commissioner Funderburk also failed to consider that the Respondents had already received a \$50,000.00 reimbursement from the third-party claim"¹¹ According to

¹¹ In addition, Peachtree avoided payment of the award of 35% loss of use of the back. This fact directly contravenes Peachtree's statement that it expended \$36,040.20 in

the Respondents' filings with the Commission, it paid out a total of \$196,086.35 before the \$50,000.00 reimbursement, resulting in a net payment of \$146,086.35 to (or on behalf of) the Claimant. (R. p. 365). Commissioner Funderburk failed to reconcile the fact that an additional payment of \$159,813.33 by the Appellants would actually mean that the Respondents will make a net profit of \$13,726.98 in an admitted workers' compensation claim.

In addition, Commissioner Funderburk failed to explain why the Appellants were responsible for temporary total disability compensation at a rate more than double that at which the Appellants would have been liable to the Claimant, had the Claimant actually filed a workers' compensation claim against them. According to the transcript of June 5, 2006 Hearing before Commissioner Huffstetler, the parties stipulated that the Claimant's average weekly wage at Bob Wire was \$198.83, resulting in a compensation rate of \$132.56 per week. (R. pp. 141-42). The Claimant's compensation rate for the December 9, 2002 accident at Peachtree is \$343.24. (R. p. 141). Commissioner Funderburk failed to explain why the Appellants were liable to the Respondents for \$47,023.88 in temporary total disability compensation, when the Appellants would have been liable to the Claimant for only \$9,535.73 in temporary total disability benefits had the correct rate and period been applied.¹²

In addition to claiming that they are entitled to *profit* from this workers' compensation claim, the Respondents argued before Commissioner Funderburk that the

permanent partial disability benefits as a result of the December 9, 2002 accident. (R. p. 364).

¹² The Claimant continued working for Bob Wire through January 10, 2004. The period from January 10, 2004 through May 5, 2005 (the date upon which the Claimant's period of temporary disability ended according to Commissioner Huffstetler's Decision and Order), is 68.85 weeks ($68.85 * \$138.50 = \$9,535.73$).

Appellants should reimburse them for \$36,234.27 in attorneys' fees and expenses incurred in the Respondents' defense. (R. p. 365). Commissioner Funderburk denied this request.

Following Commissioner Funderburk's Order, the Appellants requested that the Commission's Appellate Panel review and reverse that Order, raising 25 grounds for appeal. A review hearing was held on October 28, 2008 before a three-member Appellate Panel. On December 17, 2008, the Appellate Panel issued an inexplicable Order, which addressed issues wholly irrelevant to the appeal. (R. pp. 49-56). The Appellate Panel failed to address a single issue raised in the Appellants' brief or oral arguments in the case *sub judice*. An "Amended Appellate Panel Decision and Order" was thereafter issued on January 6, 2009; however, the Commission again failed to address even one of the twenty-five issues raised by the Appellants on appeal. (R. pp. 57-63).

The Appellants timely filed a Petition for Judicial Review in the Court of Common Pleas for Georgetown County on February 3, 2009. (R. pp. 133-38). The Respondents filed a cross-appeal, regarding the Commission's denial of their claim for \$36,234.27 in attorneys' fees and costs.

The appeals came before the Honorable Benjamin H. Culbertson, who issued an Order dated September 14, 2009, affirming the Appellate Panel's Amended Order. (R. p. 78). According to Judge Culbertson, "substantial evidence" supports the Workers' Compensation Commission's findings; however, no actual evidence is referenced in the Order. Judge Culbertson further concluded that it would require some sort of "speculation" to conclude that the Respondents' request for reimbursement actually

exceeds its net liability in this case. (R. p. 71). In addition, Judge Culbertson determined that the Commission's failure to determine the Claimant's compensation rate for the November 2003 (the rate at which the Appellants would have been liable to pay benefits to the Claimant had he actually filed a claim against them) was somehow irrelevant because the Respondents paid the Claimant at a higher rate and were deserving of reimbursement at this higher rate. (R. pp. 74-75). The present appeal ensued.

Evidence Summary

The record reveals that Christopher Price (hereinafter "the Claimant") injured his back in an accident arising out of and in the course of his employment with Peachtree Electrical Services on December 9, 2002 while working at a restaurant owned by the Divine Dining Group, Inc..¹³ The Respondents, Peachtree Electrical and its insurance carrier, Builders Mutual, admitted liability for the Claimant's back injury, voluntarily provided compensation benefits, and authorized medical treatment with Dr. William L. Mills, to include a lumbar laminectomy and discectomy surgery on April 22, 2003 and a lumbar fusion surgery on June 15, 2004. (R. p. 229, p. 234).

Dr. Mills initially opined that the Claimant reached maximum medical improvement by August 8, 2003, though the Claimant reported that he continued to have "daily pain which he rates at about a 4 or 5 on a scale of 1 to 10."¹⁴ (R. p. 307). On

¹³ The Claimant did not begin to work for Bob Wire Electric until October 19, 2003. (R. p. 345).

¹⁴ The Claimant testified that he continued to have back pain at the time he was released to return to work in August 2003. According to the Claimant, Peachtree informed him that they "didn't want [him] back," so he found part-timework at Bob Wire. The Claimant testified he could not work full-time because his ongoing back pain. (R. 155-57). The Claimant testified that his doctors led him to believe that if he pushed himself to work he would eventually need another back surgery. (R. p. 155).

October 15, 2003, the Claimant returned to Dr. Mills, who noted: "Mr. Price reports a two week history of right lower back pain. He denies accident or injury." (R. p. 308). Dr. Mills gave the Claimant an injection and prescribed Vicodin for pain. The following week, the Claimant began working part-time for the Appellant, Bob Wire Electrical. (R. p. 345).

Dr. Mills subsequently recommended an MRI scan because the Claimant's ongoing symptoms did not improve with the injection and pain medications. (R. pp. 224-25). In his preoperative report dated March 31, 2004, Dr. Mills stated

Mr. Price is a 34 year old white male with a history of low back and right leg pain dating back to a work-related accident on 12/9/02...He went on to have a right L5-S1 diskectomy on 4/22/03 and did fairly well for a brief period of time after his diskectomy. He began having significant low back and right leg pain after having had three weeks of Work Hardening. (R. p. 229).

There is no mention of any injury or accident while working for Bob Wire contained in any of the Claimant's medical records.

According to the Commission, the Claimant re-injured his back in an accident at Bob Wire on November 3, 2003. The Claimant's time cards from his job at Bob Wire reveal that he did not actually work for Bob Wire on that date. (R. p. 346).

The Claimant last saw Dr. Mills on December 17, 2004 and a 20% impairment rating was issued on January 6, 2005. (R. pp. 240-41). The Respondents did not seek to terminate temporary total disability compensation at that time, as was their right under S.C. Code Reg. 67-506. Instead, the Respondents continued to pay temporary total

disability compensation through July 6, 2006 – an additional 78 weeks beyond the date of maximum medical improvement -- at the rate of \$343.24 per week, totaling an additional \$26,821.76 in temporary total disability compensation.

Arguments

I. The Court of Appeals should review an equitable claim under a preponderance of evidence standard.

The Respondents allege that they are entitled “reimbursement” from the Appellants, not under some provision of the Workers’ Compensation Act, but under a common law theory of equitable indemnity and/or equitable subrogation. Therefore, the South Carolina Workers’ Compensation Commission, which purportedly acted under the assumption that it sits as a “court of equity” in awarding the requested “reimbursement,” is not entitled to the deferential substantial evidence standard of review employed in the typical workers’ compensation appeals. Instead, because this is an “appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence.” Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). *See also*, Horry County v. Ray, 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009) (noting that “[t]he appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence.” (citing Williams v. Wilson, 349 S.C. 335, 339-40, 563 S.E.2d 320, 322 (2002))).

The Circuit Court stated that there is no case law to support application of a preponderance of evidence standard of review in a workers’ compensation appeal. The Appellants respectfully contend the Workers’ Compensation Commission has not

heretofore addressed a common law claim of equity and, therefore, the issue has not been squarely addressed. However, the Supreme Court most recently employed a preponderance of evidence standard of review in a workers compensation case in Shuler v. Tri-County Electric Co-op, Inc., 385 S.C. 470, 684 S.E.2d 765 (2009) and Brayboy v. Workforce, 383 S.C. 463, 681 S.E.2d 567 (2009). In both cases, the question before the Supreme Court was whether the claimant was an “employee” of the defendant for purposes of the Workers’ Compensation Act. Because the existence of an employer-employee relationship is a jurisdictional question, the Supreme Court made “findings based on its view of the preponderance of the evidence.” Brayboy, 383 S.C. at 464, 681 S.E.2d at 567. The Supreme Court explained that “[w]hen the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence.” Shuler, 385 S.C. at 473, 684 S.E.2d 767.

The Appellants respectfully contend that when the issue involves a matter of equity, the appellate court may also take its own view of the preponderance of the evidence, even in appeals from the Workers’ Compensation Commission. In the present case, the preponderance of the evidence reveals that the Claimant’s need for medical treatment and his period of disability – even after November 3, 2003, are causally-related to the December 2, 2002 accident for which the Respondents have sole liability. On October 15, 2003, medical records reveal that “Mr. Price reports a two week history of right lower back pain. He denies accident or injury.” (R. p. 308). Dr. Mills gave the Claimant an injection and prescribed Vicodin for pain. Dr. Mills subsequently recommended an MRI scan because the Claimant’s ongoing symptoms did not improve with the injection and pain medications. (R. pp. 224-25). In his preoperative report dated

March 31, 2004, Dr. Mills stated

Mr. Price is a 34 year old white male with a history of low back and right leg pain dating back to a work-related accident on 12/9/02...He went on to have a right L5-S1 diskectomy on 4/22/03 and did fairly well for a brief period of time after his diskectomy. He began having significant low back and right leg pain after having had three weeks of Work Hardening. (R. p. 229).

There is no mention of any injury or accident while working for Bob Wire contained in any of the Claimant's medical records.

According to the Commission, the Claimant re-injured his back in an accident at Bob Wire on November 3, 2003. The Claimant's time cards from his job at Bob Wire reveal that he did not actually work for Bob Wire on that date. (R. p. 346). The Claimant testified that he believed all of his problems stemmed from the December 2, 2002 accident at Peachtree. (R. p. 157). Therefore, the Appellants respectfully contend that the preponderance of the evidence reveals that, despite the Commission's finding that there was an accident on November 3, 2003, this was merely a "recurrence of the first injury" on December 2, 2002 and that the Claimant's need for medical treatment and his period of disability following this date are the sole responsibility of the Respondents. *See Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007) (stating that "if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second").

The Appellants further contend that the Circuit Court erred in affirming the Commission without considering the legal errors raised on appeal. Even if the Court of

Appeals determines that the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5)(e) applies to findings of fact in equitable actions tried by the Workers' Compensation Commission, the Appellants respectfully contend that the Commission's findings, inferences, conclusions, and decisions were made in excess of the Commission's statutory authority, were made upon unlawful procedure, are affected by error of law, and are otherwise arbitrary, capricious, and characterized by an abuse of discretion. An appellate court "freely and absolutely reviews a trial court's decision concerning an issue of law." Houston v. Deloach & Deloach, 378 S.C. 543, 552-3, 663 S.E.2d 85, 90 (Ct. App. 2008). Indeed, the appellate court's authority to review errors of law has been described as "plenary." Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005). For these reasons, the Court of Appeals clearly has the power to reverse or modify the Commission's Order pursuant to S.C. Code Ann. § 1-23-380, for the reasons stated below.

II. The South Carolina Workers' Compensation Commission does not have jurisdiction over common law equitable claims of indemnity or subrogation.

The South Carolina Workers' Compensation Commission is an administrative agency, created by statute, and can only exercise those powers that have been specifically conferred by the South Carolina General Assembly. S.C. Tax Comm'n v. S.C. Tax Board of Review, 278 S.C. 556, 299 S.E.2d 489 (1983). *See also*, James v. Annes, Inc., ___ S.C. ___, 688 S.E.2d 562 (2010) (holding that without an express grant from the legislature, the Workers' Compensation Commission is without power to address an issue). In Owens v. Herndon, 252 S.C. 166, 165 S.E.2d 696 (1969), the South Carolina Supreme Court held, "[t]he rights and liabilities of employee and employer under the

Workmen's Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy considerations as to what benefits should be conferred or obligations imposed are strictly for the legislature. . . .” The legislature has enacted no statute by which an employer, which voluntarily pays benefits, can seek “reimbursement” from a subsequent employer, or request an “apportionment” of benefits between them. In fact, our Supreme Court has specifically held that South Carolina has neither statute, nor case law, authorizing the apportionment of workers' compensation benefits between successive employers. Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007).

In the present case, the Appellants were ordered to pay the Respondents \$112,789.42 for medical benefits and \$47,023.99 temporary total disability benefits, which the Respondents had voluntarily paid to the Claimant as a result of his admitted December 9, 2002 workers' compensation claim. The payment of temporary total disability compensation is governed by S.C. Code Ann. § 42-9-10, which states, that “the employer shall pay...*to the injured employee* during the total disability a weekly compensation equal to sixty-six and two-thirds of his average weekly wages.” (emphasis added). Nothing in S.C. Code Ann. § 42-9-10, or the regulations promulgated thereunder, suggests that temporary total disability compensation is payable to anyone other than the employee, or at any rate other than sixty-six and two thirds of his average weekly wages.”¹⁵ Similarly, S.C. Code Ann. § 42-15-60 and S.C. Code Regs. 67-1302 through 67-1305 govern payment of medical benefits and provide that payment be made only to a “medical provider” or “medical practitioner.” There is no statute or regulation providing for payment of medical expenses to any other entity.

¹⁵Here, the Appellants were ordered to reimburse the Respondents for temporary total disability compensation at a rate that was admittedly higher than the Claimant’s average weekly wage with the Appellant, Bob Wire.

The Commission acknowledged that it was without statutory authority to address the Respondents' claim for reimbursement of medical and compensation benefits, as the Commission's May 4, 2007 Order states:

While the regulations of this Commission make no specific provisions for an Employer to bring third-party or indemnity claim [sic] against another party in this situation, it should not be precluded from doing so...the common law doctrines of indemnity and equitable subrogation are certainly applicable in an instance, such as this, where one employer had been required by circumstance to pay a claim for another employer. (R. p. 30)

Clearly, the equitable doctrines of indemnity and subrogation – upon which the Respondents' "reimbursement" claims purportedly rely -- arise out of the common law,¹⁶ not out of the statutory provisions of Title 42.

The Appellants respectfully submit that the Commission does not have the power, authority, or jurisdiction to order the Appellant to pay the Respondents \$159,813.33 for reimbursement of medical and compensation benefits the Respondents voluntarily paid the Claimant in an admitted workers' compensation claim. Of course, "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Issues related to subject matter jurisdiction may be raised at any time. Edwards v. State, 372 S.C. 493, 642 S.E.2d 738 (2007), (quoting State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). Because the Commission does not have subject matter jurisdiction or statutory authority over the Respondents' equitable claims, the Court of Appeals should reverse the

¹⁶ Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000).

Commission's "Amended" Order dated January 6, 2009.

III. The Appellants have unclean hands and will otherwise be unjustly enriched by the "reimbursement" ordered by the Commission.

The Workers' Compensation Commission summarily found that the Appellants must reimburse the Respondents for "[a]ll medical expenses and temporary total disability compensation paid after the November 3, 2003 [accident] [sic]," ostensibly under the doctrines of equitable indemnity or equitable subrogation. However, one who comes to the court seeking equity must come with clean hands. See Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814, 65 S.Ct 993, 89 L.Ed. 1381 (1945) ("He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."); Wilson v. Landstrom, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (internal quotations and citations omitted)). The Appellants respectfully contend that the Respondents are not entitled to "reimbursement" because they have acted unfairly and prejudicially to the Appellants. Furthermore, the Respondents concealed their "unclean" hands at the time of the hearing before the Appellate Panel on November 21, 2006.

The record reveals that the Respondents were given a \$20,986.68 credit for overpayment of temporary total disability compensation for the period from May 5, 2005 through July 6, 2006, pursuant to Commissioner Huffstetler's Order. However, without

notice to, or consent from, the Appellants, the Respondents voluntarily relinquished its right to the \$20,986.68 credit when it entered into a settlement agreement with the Claimant on August 28, 2006. The Respondents concealed this settlement from the Appellants for over a year. The Respondents later claimed (and the Commission inexplicably awarded) that they are entitled to reimbursement for \$47,023.88 in temporary total disability compensation (R. p. 365), though the Respondents were only liable for \$26,037.20 in temporary total disability compensation.¹⁷ The Appellants respectfully contends that the Respondents' voluntary decision to waive a credit for overpayment of temporary disability compensation alone should bar their request for "reimbursement" under some ill-defined equitable theory.

In addition, the Claimant reached a \$540,000.00 settlement in his civil claim against the at-fault third-parties for the December 9, 2002 accident. (R. pp. 353-55). Despite this very substantial third-party recovery, the Respondents voluntarily relinquished their statutory lien of \$196,085.84 for only \$50,000.00. The Appellants respectfully contend that the Respondents could have easily recovered more (it not all) of its statutory lien of \$196,085.84 from the Claimant's settlement. The fact that the Respondents voluntarily waived a \$196,085.84 lien for only 25 cents on the dollar suggests that the Respondents were not acting in good faith (or made some strategic decision with the Claimant to discharge their lien in exchange for an assignment of his claim against the Respondent). The Respondents' waiver of their statutory lien obviously prejudiced the Appellants, as a more reasonable lien recovery would have obviated the

¹⁷ Note that the Respondents also filed an "exhibit" (R. p. 364) suggesting that it paid the Claimant \$36,040.20 in benefits for permanent loss of use of the back, as ordered by Commissioner Huffstetler on July 5, 2006, but the Respondents never actually paid this award. This is further evidence of the Respondents' "unclean hands."

need for the present tortuous proceedings.

Lastly, it is evident that the Respondents appear to have unclean hands because they seek to profit from their request for "reimbursement." According to the Respondents, in addition to their \$50,000 lien recovery, the Appellants should "reimburse" the Respondents in the amount of \$159,813.30 for medical and indemnity benefits they paid to the Claimant. However, the Respondents' Form 19 reflects that the Respondents' net payment to (or on behalf of) the Claimant was only \$146,085.84¹⁸. (R. p. 361). On its face, the Respondents seek (and the Commission awarded) the Respondents a windfall profit in the amount of \$13,727.46 in a claim for which it voluntarily admitted liability. This is further evidence of the Respondents' unclean hands and the inequitable, faulty logic employed by Commission, which should be reversed on appeal.

IV. The Commission erred in summarily concluding that the Respondents are entitled to "reimbursement" for all medical and compensation benefits it voluntarily paid the Claimant under a theory of equitable indemnity.

Assuming the Commission has the power and authority to address the Respondents' common law equitable claims, then the proper question before the Jurisdictional Commissioner on remand was the extent to which the Respondents are

¹⁸The Respondents' gross payment of \$196,085.84 includes benefits paid prior to November 3, 2002. The sum of \$146,085.84 is the net payment to, or on behalf of, the Claimant after the Respondents recovered \$50,000.00 in compromise settlement of their lien on the Claimant's \$540,000.00 civil settlement.

entitled to such relief under a theory of equitable indemnity.¹⁹ Unfortunately, neither the Jurisdictional Commissioner, nor the Appellate Panel, addressed this issue. Instead, the Commission summarily concluded that the Respondents are entitled to reimbursement from the Appellant for all benefits the Respondents voluntarily paid to the Claimant after November 3, 2003. The Appellants respectfully contend that the Commission did not make sufficient findings to support this conclusion and that the conclusion is otherwise contrary to the applicable law.

Indemnity is a “form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.” First Gen. Servs. of Charleston, Inc. v. Miller 314 S.C. 439, 442, 445 S.E.2d 446, 449 (1994) (quoting Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990), *aff’d*, 307 S.C. 128, 414 S.E.2d 118 (1992)). Furthermore, “a right of indemnity exists whenever the *relation between the parties* is such that either in law or in equity there is an obligation on one party to *indemnify* the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.” Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) (emphasis added). In the present case, there is no evidence that the Respondents were exposed to liability to the Claimant by virtue of any “special relationship” with, or “wrongful act” by the Appellants.

Not only is there is no “special relationship” between the Appellants and the Respondents, the only relationship between the Appellants and the Respondents is the adversarial relationship created by the Respondents when it moved to add the Appellants

¹⁹ The Appellate Panel’s Order states that the case was remanded for a “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. 296).

as a party to the Claimant's workers' compensation claim. However, according to the South Carolina Supreme Court in Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., *supra*, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." Therefore, the Respondents' claim for any amount of equitable indemnity must fail on this basis alone.

In addition, the Respondents were not "exposed to liability by the wrongful act" of the Appellants. Clearly, the Respondents were exposed to liability for workers' compensation benefits because the Claimant made a claim against the Respondents. The Respondents' liability to the Claimant arose out of an accident on December 9, 2002, which the Respondents voluntarily admitted. The Appellants did not cause the December 9, 2002 accident, nor were they in any way involved with the Respondents' voluntary decision to pay medical and compensation benefits. Similarly, the Appellants were not in any way involved with the Respondents' subsequent decision to settle with the Claimant and waive their statutory lien on the Claimant's \$540,000.00 civil settlement. The Appellants committed no "wrongful act" and otherwise did not expose the Respondents to any liability. Again, there is simply no factual basis upon which the Commission or the Court could properly ascribe any degree of liability to the Appellants under a theory of equitable indemnity.

- V. The Commission erred in summarily concluding that the Respondents are entitled to "reimbursement" for all medical and compensation benefits it voluntarily paid the Claimant under a theory of equitable subrogation.

The doctrine of equitable subrogation is inapplicable to the case at bar and is not a proper basis for ordering the Appellants to reimburse the Respondents for medical and compensation benefits it voluntarily paid to, or on behalf of, the Claimant. Subrogation can arise by statute, by contract, or through equity. Dailey v. Secura Ins. Co., 164 Wis.2d 624, 476 N.W.2d 299 (Ct.App.1991). Conventional subrogation arises by contract and is specifically bargained for by the parties. In contrast, equitable (or legal) subrogation arises under the common law. While conventional subrogation obviously does not apply to the facts of this case, the Appellants respectfully contend that the Respondents are similarly not entitled to recover any amount under a theory of equitable subrogation.

On remand, the Commission failed to apply the elements of equitable subrogation to the facts of this case in summarily concluding that the Appellants must reimburse the Respondents for \$159,813.30 for medical and indemnity benefits they paid to the Claimant.

The elements of the doctrine of equitable subrogation are:

1. the party claiming subrogation has paid the debt;
2. the party was not a volunteer, but had a direct interest in the discharge of the debt or lien;
3. the party was secondarily liable for the debt or for the discharge of the lien; and
4. no injustice will be done to the other party by the allowance of the equity.

United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994). Following the remand Order, the issue before the Commission was whether and to what extent the

Respondents involuntarily paid a debt for which it was only secondarily liable. The Respondents cannot meet elements 2, 3, or 4 and, therefore, are not entitled to any amount of “reimbursement” under a theory of equitable subrogation.

With regard to the second element of equitable subrogation, the Respondents clearly had no legal interest in, or obligation for, any liability the Appellants may have had to the Claimant stemming from an alleged accident on or about November 3, 2003. The Claimant did not even file a workers’ compensation claim against the Appellants until January 17, 2008 (long after the Respondents and the Claimant reached a full and final settlement by which the Respondents agreed to pay all medical and compensation benefits) and the Respondents are not a party to the Claimant’s claim against Bob Wire, because it has no relationship with the Appellants (W.C.C. 0327174). Instead, the Respondents voluntarily paid medical and compensation benefits after November 3, 2003 – it was under no legal compulsion to pay these benefits. The Respondents did not even seek to defend themselves at a hearing when the Claimant requested additional medical and compensation benefits after reaching maximum medical improvement in August 2003. On this basis alone the Respondents’ “equitable subrogation” claim must fail.

Furthermore, the Respondents are not “secondarily liable” for any claim against the Appellants. There is simply no relationship between the Appellants and the Respondents that would subject the Respondents to any liability should the Appellants fail to meet their legal obligations to the Claimant.

Perhaps more importantly, the Appellants do face an “injustice” should the Court permit the Respondents to accept liability on its behalf and then have a right of reimbursement (with potential for profit and claim for attorney fees). Not only do the

Appellants now face a double liability for the same accident, but the matter of whether and to what extent the Appellants should be liable for the Claimant's alleged injuries should rest solely between the Appellants and the Claimant. As stated by the South Carolina Supreme Court in Blue Cross/Blue Shield v. S.C. Industrial Commission, 274 S.C. 204, 262 S.E.2d 35 (1980), "[t]he employee may file a claim or refuse to file a claim. The employer and employee are entitled to litigate, or refuse to litigate, without interference. If Blue Cross is aggrieved, it may refuse to pay and litigate with its insured."

The Appellants respectfully contend that the Respondents in this case are no different than the health insurance company in Blue Cross and the same legal principle is equally applicable in the case *sub judice*. Having no legal relationship with the Appellants, the Respondents should not be entitled to recover any amount as "subrogation" or any other equitable theory, simply because the Respondents claim to be aggrieved. See Owens v. Herndon, 252 S.C. 166, 165 S.E.2d 696 (1969) (holding that the "rights and liabilities of employee and employer under the Workmen's Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy considerations as to what benefits should be conferred or obligations imposed are strictly for the legislature. . . .").

VI. The Commission's finding that the Appellants must "reimburse" the Respondents for all temporary total disability compensation benefits paid to the Claimant after November 3, 2003 at the rate of \$343.24 per week is arbitrary and capricious.

Following the December 10, 2002 accident, the Claimant could only work part time because he still had “severe lower back pain.” (R. pp. 155-56). Payroll records indicate that, after he was terminated by Peachtree, the Claimant only worked for Bob Wire a total of 35.5 hours over a two-week period prior to November 3, 2003, the date the second “accident.” (R. p. 345). Based upon this evidence and the parties’ stipulation that that the Claimant’s average weekly wage at Bob Wire was \$198.83 (R. p. 141), the Commission should have found (as required by the Appellate Panel’s Order of Remand) that the Claimant’s applicable compensation rate for the period after November 3, 2003 was only \$132.56.

Instead, the Commission failed to address the proper compensation rate for the November 3, 2003 accident following the Order of remand and otherwise did not explain this failure. However, S.C. Code Reg. 67-606(A) states, “[t]he average weekly wage and compensation rate is an issue for determination at the hearing unless stipulated by the parties.” The Commission’s failure to address the applicable average weekly wage and compensation rate was especially critical, as the Commission ordered the Appellants to reimburse the Respondents for 137 weeks of temporary total disability compensation. The Appellants respectfully contend that, if the Appellants should have any liability for temporary total disability compensation for the period after November 3, 2003, it should be at the rate of \$138.50 per week, not \$343.24 per week as implicitly found by the Commission.

Furthermore, according to the un-appealed portion of Commissioner Huffstetler’s July 5, 2006 Decision and Order, the Respondents were only liable for temporary total disability compensation through May 5, 2005. The Respondents were given a credit for

overpayment of temporary total disability compensation benefits paid after that date, to be applied against the award of 35% loss of use of the back, which was likewise not appealed. Yet inexplicably, the Commission has ordered the Appellants to reimburse the Respondents for temporary total disability compensation through July 6, 2007 -- an additional 61.1429 weeks (\$20,986.68) beyond the Respondents' own liability, without explanation.

The Appellants respectfully contend that, had the Claimant actually filed a workers' compensation claim for a November 3, 2003 accident and actually proven his entitlement to benefits, he could not have been entitled to more than \$132.56 per week for the period from January 10, 2004²⁰ through May 5, 2005 (68.85 weeks). Therefore, at best, the total amount of temporary total disability compensation payable for a November 3, 2003 accident is \$9,126.75. Yet, the Commission ordered the Appellants to pay the Respondents \$47,023.88 in temporary total disability compensation. The Commission's conclusions regarding the amount of temporary total disability compensation are arbitrary, capricious, and contrary to the undisputed evidence and the applicable law.

Furthermore, if the Appellants are liable for temporary total disability compensation, such benefits should be made payable to the Claimant alone, pursuant to S.C. Code Ann. § 42-9-10, § 42-9-220, § 42-9-260. There is no statutory provision providing that the Appellant's liability for temporary total disability compensation can be discharged by payment to a third-party, such as the Respondents.²¹ Therefore, the

²⁰ See R. p. 347, which shows that the Claimant continued working for Bob Wire through January 10, 2004.

²¹ S.C. Code Ann. § 42-9-360 states that "[n]o claim for compensation under this title shall be assignable." Therefore, Commissioner Funderburk erred as a matter of law by impliedly assigning the claim for temporary total disability compensation to the Respondents.

Appellants are at a serious risk of a double exposure for temporary disability benefits (the Claimant has now filed a claim against the Appellants for a November 2003 accident and this claim is still pending before the Workers' Compensation Commission). In addition, the Appellants' right to seek reimbursement from the Second Injury Fund may be seriously prejudiced (by the fact that its obligations have not been discharged in accordance with the S.C. Code reg. 67-1302, *et seq.*). For these reasons, the Appellants seek reversal.

VII. The Respondents' request for "reimbursement" is governed by S.C. Code Ann. § 42-9-210 and § 42-1-560 and the Commission erred in creating new right and remedy.

Essentially, the Respondents argue that some of the Claimant's medical and compensation benefits are causally-related to an accident at Bob Wire on November 3, 2003 and that, therefore, these benefits were paid by the Respondents in error. In fact, the Respondents claim that they were induced by the Claimant's "false pretenses" to pay these medical and compensation benefits for the period after November 3, 2003. However, the Respondents seemingly rewarded the Claimant's "false pretenses" with a settlement agreement and waiver of their lien on the Claimant's \$540,000.00 civil settlement. Instead of challenging their liability to the Claimant on appeal, or seeking reimbursement from the Claimant or from his \$540,000.00 civil settlement, the Respondents argued that the Workers' Compensation Commission should create a new right of reimbursement against the Appellants, out of "fairness."

However, by statute, the South Carolina General Assembly has already provided a

specific procedural mechanism by which the Respondents could have recouped these payments from the Claimant, to the extent that they were not due and payable when made. Credit for overpayment of temporary total benefits is governed by S.C. Code Ann. § 42-9-210, which states,

Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation...

See Sanders v. MeadWestvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (2006). Therefore, the Workers' Compensation Act already provided the Respondents an adequate remedy for their claimed overpayment of compensation. The Respondents could have argued that, pursuant to S.C. Code Ann. § 42-9-210, they were entitled to a credit for all temporary total disability compensation benefits paid for the period after November 3, 2003 against the award of permanency, for which the Respondents concede liability in the amount of \$36,040.20. (R. p. 364). To the extent that the Respondents' claim that their overpayment of compensation benefits totaled \$47,023.88,²² the Respondents had the additional right to enforce their statutory subrogation rights under S.C. Code Ann. § 42-1-560.

Pursuant to S.C. Code Ann. § 42-1-560(b), the Respondents had a right to assert a lien on the proceeds of any recovery from a third-party "to the extent of the total amount

²² Note that the Respondents' overpayment is due in part to the fact that they did not timely request a hearing to terminate benefits and in part due to the fact that the Respondents paid the Claimant \$2,471.32 during a period when the Claimant was actually working (11/21/03 – 1/10/04). (R. pp. 345-47).

Respondents' common law claim for equitable subrogation or equitable indemnity as a matter of law. Furthermore, to the extent that the Workers' Compensation Commission has subject matter jurisdiction over these claims, the preponderance of the evidence shows that the Respondents are not entitled to equitable subrogation or equitable indemnity in any amount. Therefore, the Appellants respectfully request that the Commission's "Amended" Decision and Order be reversed in its entirety.

Respectfully submitted,



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August 25, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price,.....Claimant,

v.

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of the Appellants
complies with Rule 211(B), SCACR and Supreme Court Order 2007-08-16-02, dated
August 13, 2007, requiring redaction of personal data identifiers..



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August 24th, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price, ... Claimant,

vs.

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

vs.

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

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September 14, 2010

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court sitting in judicial review of an order of the Workers' Compensation Commission correctly determine that a prior order of the Commission was immediately appealable and, because no appeal was taken, the Findings of Fact and Conclusions of Law contained therein were the law of the case?

2. Was there substantial evidence to support the findings of fact and conclusions of law contained in the subsequent order of the Commission?

STATEMENT OF THE CASE

This is the second round of appeals in this case. This appeal deals with the amount the subsequent employer and carrier ("Appellants") are required to reimburse the previous employer ("Respondents") for benefits the Respondents erroneously paid the Claimant as a result of a subsequent injury. The first round of appeals dealt with whether the subsequent employer should be required to reimburse the previous employer. In the first round of appeals, the Single Commissioner found that no subsequent accident occurred and no reimbursement was ordered. Peachtree appealed and the Full Commission issued its Appellate Panel Decision and Order, dated May 4, 2007 ("First Appellate Panel Order"), which reversed the single commissioner and required the Appellants to reimburse the Respondents. The Appellants appealed from that First Appellate Panel Order. That appeal was dismissed by the Circuit Court as untimely and the matter was remanded in accordance with the First Appellate Panel Order to determine the amount of reimbursement.

On remand, the single commissioner issued a Decision and Order, dated June 11, 2008 ("Second Single Commissioner's Order") determining the amount of reimbursement owed by Appellants to Respondents and Appellants appealed to the Full Commission. The Appellate Panel affirmed the single commissioner by its Amended Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, dated January 6, 2009 ("Second Appellate Panel Order"). The Honorable Benjamin H. Culbertson issued an Order dated September 14, 2009 affirming the Second Appellate Panel Order. It is the appeal from this Order that this matter now appears before this Court.

STATEMENT OF FACTS

The parties to this appeal each employed the Claimant, Christopher Price, at different times. Peachtree Electrical Services ("Peachtree") employed 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.) He then went to work for Bob Wire Electric, Inc. ("Bob Wire"), and suffered another accident and injury on November 3, 2003 while working there. (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. (R. p. 21.) 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. It was established by the Workers' Compensation Commission that Bob Wire was liable to reimburse Peachtree and the case was remanded to a single

commissioner to determine the amount. (R. p. 32.) Bob Wire appealed that determination, but its appeal was dismissed as untimely.¹ (Supp. R. pp. 6-9.) This current appeal is from the Order issued on remand. (R. p. 40.) While Judge Culbertson very clearly laid out the long factual and procedural history of this case, that history must be repeated for the Respondent to address the issues raised in this appeal. It is helpful to review this history in two parts, one involving the prior appeal and the other involving this current appeal.

1. Prior Appeal:

The underlying facts established in the first appeal (R. pp. 17-33) are as follows:

The Claimant was injured on the job with Peachtree Electrical Services ("Peachtree") on December 9, 2002. Peachtree provided all benefits under the South Carolina Workers' Compensation Act ("Act") for that injury. The Claimant was released by his authorized treating physician on August 8, 2003 with no work restrictions and given an impairment rating. He subsequently went to work for Bob Wire Electrical ("Bob Wire"). On November 3, 2003, after he had been working for Bob Wire, he returned to the authorized treating physician complaining of additional back problems. Nothing was said about a new accident. He was taken out of work by the doctor and Peachtree's Carrier restarted workers' compensation benefits, including medical treatments.

¹The Appellants fail to mention this appeal of the First Appellate Panel Order in their brief or include the Order dismissing their appeal in their Designation of Matter to be Included in the Record on Appeal. See Supplemental Record pp. 6-9.

After paying substantial additional benefits to the Claimant, Peachtree discovered evidence which it believed showed Claimant had suffered a subsequent injury while working for Bob Wire, which had led him to return to the doctor. Peachtree filed a Motion to add Bob Wire as a party. That motion was granted.²

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. 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.

Peachtree appealed Commissioner Huffstetler's Order as to whether there had been a subsequent accident with Bob Wire. 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

²Bob Wire appealed the Order adding it to the case but that appeal was dismissed as interlocutory.

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.

ORDER

IT IS, THEREFORE, ORDERED that the Order of the Hearing Commissioner filed on July 5, 2006, is hereby AFFIRMED, AS MODIFIED, and the matter is remanded to the jurisdictional Commissioner as provided herein.

Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, dated May 4, 2007 ("First Appellate Panel Order"), p. 16 (emphasis added). (R. p. 32.)

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.

Bob Wire attempted to appeal from this First Appellate Panel Order, but the appeal was dismissed as untimely.³

³In its Brief, Bob Wire does not mention this appeal and instead simply refers to this First Appellate Panel Order as an "interlocutory" order.

2. Current Appeal:

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 involved in this current appeal ("Second Single Commissioner's Order.") (R. p. 40.) The Second 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." Second Single Commissioner's Order, Findings of Fact No. 1, p. 7. (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. Bob Wire argued that Peachtree had waived its right to seek reimbursement from Bob Wire by entering into a settlement agreement with the Claimant with regard to the 2002 claim. (Supp. R. p. 47.) In his Conclusions of Law, the Single Commissioner held that this argument was "fundamentally without merit." Second Single Commissioner's Order, Conclusion of Law No. 1, p. 7. (R. p. 46.)

The record reflects that the Average Weekly Wage for Peachtree's 2002 accident was \$343.24, and all benefits were paid by Peachtree at that rate. 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. 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.

Second Single Commissioner's Order, pg. 9. (R. p. 48.)

Bob Wire appealed the Single Commissioner's Order to the Full Commission. In its Appellate Panel Decision and Order, dated December 17, 2008, the Appellate Panel unanimously affirmed the Second Single Commissioner's Order, incorporating that Order as its own. The Panel subsequently issued an "Amended Appellate Panel Decision and Order," dated January 6, 2009 ("Second Appellate Panel Order") (R. p. 57), 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.) Bob Wire appealed. Judge Culbertson issued his Order dated September 14, 2009 affirming the Appellate Panel's Order. (R. p. 65-78.)

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of an administrative agency." Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). "Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). Under this standard, a reviewing court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence or is affected by an error of law. Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005).⁴

⁴Bob Wire asserts that, because the Commission relied upon equitable principals in its decision in the First Appellate Panel Order, this is an action in equity requiring a de novo review by this Court. Bob Wire cites no authority for the proposition that a review of a decision of the South Carolina Workers Compensation Commission should be made under any standard of review other than the substantial evidence rule provided for under the Administrative Procedures Act. See, Lockridge, supra. However, as Judge Culbertson noted, even if Bob Wire's argument did have merit, this is an argument which should have been raised on appeal from the First Appellate Panel Order as it relates to the issues of whether (not how much) Peachtree should be reimbursed. Therefore, the determination as to all issues which were, or could have been, raised at that time are now the law of the case. King v. James, Ct. App. Op. No. 4686 (April 20, 2010).

ARGUMENT

1. All but one exception raised by Appellants in this appeal were ruled upon previously in the South Carolina Workers' Compensation Commission's First Appellate Panel Order and those findings are now the law of the case.

The issues relating to the Commission's authority to order reimbursement by Bob Wire to Peachtree and its decision to do so were matters specifically addressed by the Full Commission in its First Appellate Panel Order of May 4, 2007. Bob Wire's appeal from that Order was dismissed as untimely. Thus, the Findings of Fact and Conclusions of Law contained in that Order are the law of the case.

In the case of Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), this Court provided guidance with respect to when an order of the South Carolina Workers' Compensation Commission either affects the merits of a claim or deprives the Appellant of a substantial right, such that it is immediately appealable. "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Id. at 621, 682 S.E.2d at 505 (citing Green v. City of Columbia, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993)). In Canteen, the Court relied upon the case of Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), *cert. denied*, Jan. 31, 2007, a case with remarkable procedural similarities to this matter now before the Court. In Brown, the Commission awarded benefits to the Claimant for an occupational lung disease. The Circuit Court affirmed the Commission on compensability, but found that the Commission should have allocated a portion of Brown's disease to his long history of smoking. The Circuit Court remanded for such allocation. The remanding Order included "specific

direction to make the necessary findings as to the apportionment” Id. at 386, 622 S.E.2d at 550. The Claimant did not appeal and the Court found the findings and conclusions of the Order became the law of the case. This Court addressed the appealability of that order:

Generally, an order is a final judgment on one of more issues if it constitutes an ultimate decision on the merits. . . . Accordingly, in determining whether the court’s order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits.

“An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.” Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (citing Henderson v. Wyatt, 8 S.C. 112 (1877)). In the case *sub judice*, the order of the Circuit Court finally determined an issue on the merits - that Brown’s smoking, a non-compensable cause, contributed to his disability. The court noted “the employer does have the burden of proving . . . the interplay of a non-compensable cause” and found “the employer clearly met that burden[.]” Consequently, the Circuit Court ruled that “the employer was entitled to a determination of the proportion allocable to the non-compensable cause[.]” The case was remanded, not for evaluation whether apportionment was appropriate, but “with specific direction *to make the necessary findings as to the apportionment* between compensable versus non-compensable causes, and a corresponding reduction in the Claimant’s disability award.” —

The court’s order mandates apportionment. This ruling is a decision on the merits because it decides with finality whether Greenwood is required to reduce his compensation Although the Judge left the percentage of apportionment to the [C]ommission on remand, the Panel would have no choice but to allocate some part of Brown’s disability to the non-compensable cause.

Brown at 387-388, 622 S.E.2d at 551 (emphasis in original).

In Canteen, supra, this Court considered whether the decision of the Appellate Panel of the Workers' Compensation Commission, which reversed the Single Commissioner's findings concerning the compensability of claimant's brain injury and remanded the case to the Single Commissioner for a determination of permanency as to other body parts, was interlocutory or immediately appealable. Applying the reasoning in its earlier decisions in Brown and Green, this Court found that the ruling of the Appellate Panel which concluded that the claimant's alleged brain injury was not compensable was a decision on the merits of that issue and was at that point immediately appealable. Because no appeal was taken, the Appellate Panel's decision was the law of the case.

In this case, as in Canteen and Brown, the Appellate Panel ruled on the substantive merits of the issue as to whether the Claimant's injuries were all part of one event which occurred while he was employed with Peachtree, or whether a new, separate event occurred while the Claimant worked for Bob Wire. The Workers' Compensation Commission ruled that it had the authority to make such a decision, and that indeed a second accident had occurred. It further ruled that Bob Wire and its carrier should be required to reimburse Peachtree and its carrier for all benefits the latter had paid as a result of the accident occurring while the Claimant worked for Bob Wire. The Appellants failed to perfect an appeal from the First Appellate Panel Order and the decisions on the merits of Peachtree's claim became the law of the case. The only issue on remand was how much Bob Wire should be required to repay Peachtree. That is the only issue which is now appealable.

All but one of the exceptions raised by the Appellant in this appeal go to the merits of the issues determined by the First Appellate Panel Order from which the Appellants took no appeal. The only issue before this Court is the amount of reimbursement ordered by the Commission on remand. The Appellate Panel rightly affirmed the Second Single Commissioner's Order that Bob Wire was required to reimburse Peachtree for all benefits it paid after the date of the second accident, November 3, 2008. The Circuit Court, per Judge Culbertson, affirmed, finding that the decision of the Commission was supported by substantial evidence and was not affected by any error of law.

2. The Appellate Panel and the Circuit Court made clear, detailed Findings of Fact and Conclusions of Law and the amount it determined Peachtree should be reimbursed by Bob Wire is supported by substantial evidence.

The Appellants argue that the Appellate Panel failed to make adequate findings of fact and conclusions of law, as required by S.C. Code § 42-17-40 and S.C. Code § 1-23-350. This position is based predominately on Bob Wire's arguments with regard to the issues raised, but not timely appealed from, in the first round of appeals in this case. Again, as to those issues, Bob Wire did not appeal.

With respect to the amounts determined by the Single Commissioner to be reimbursed by Bob Wire to Peachtree, which amounts were affirmed by the Appellate Panel, there is substantial evidence in the record to support the Circuit court's decision to affirm the Commission's Order.

a. Determination of Average Weekly Wage.

The record reflects that the average weekly wage paid by Peachtree to the

Claimant for its 2002 accident was \$343.24. At the time of the hearing on remand from the First Appellate Panel Order, Bob Wire's 2003 accident claim had been bifurcated from the 2002 claim. Therefore, there was no calculation of the average weekly wage and compensation rate for the 2003 claim at the hearing on remand.

Bob Wire contends nonetheless that the average weekly wage for the November 3, 2003 accident is lower and it should not be required to reimburse Peachtree at a higher comp rate. Judge Culbertson correctly noted the difficulties with Bob Wire's argument. First, the Commission determined that Peachtree innocently and unwittingly paid the Claimant benefits at the rate established in the 2002 claim and it should be reimbursed for exactly what it paid. According to the First Appellate Panel Order, Bob Wire had notice of but nevertheless denied that the Claimant had been injured on its job. Because Peachtree had no knowledge of the subsequent accident, it paid at the higher rate of compensation; Peachtree had no right to pay the Claimant using a lower rate. As noted by Judge Culbertson, if Bob Wire's argument were to be accepted, this Court would calculate the weeks of benefits paid after November 3, 2003 at the lower comp rate, which would result in only a partial reimbursement of what Peachtree actually paid as a result of the 2003 claim against Bob Wire. Therefore, the Commission correctly based reimbursement to Peachtree on the amount of benefits actually paid by it to the Claimant and not, as Bob Wire argues, on the Claimant's lower average weekly wage while employed by Bob Wire.

b. Allocation of Benefits Paid Between the 2002 and 2003 Claims.

As noted, the Second Appellate Panel Order specifically incorporates by

reference the Second Single Commissioner's Order. Read together, the Findings of Fact and Conclusions of Law are clear and specific. Peachtree submitted detailed evidence of the medical bills and compensation it paid to or on behalf of the Claimant. The record reflects a breakdown of those benefits paid before the second accident on November 3, 2003, for which the Commission held Peachtree responsible, and after that second accident with Bob Wire, for which it held Bob Wire responsible. Bob Wire submitted no contrary evidence. The First Appellate Panel Order had already concluded that the 2003 accident with Bob Wire was an aggravation of the prior injury sustained while working for Peachtree. See, First Appellate Panel Order, dated May 4, 2007, Findings of Fact No. 1. (R. p. 32.) Prior to that second accident, the Claimant was released by his physician at maximum medical improvement, with no restrictions, and had been returned to full duty work. Thus, it is perfectly logical for the Commission to conclude that all benefits paid after the date of the second accident flowed from this second accident. Because there is substantial evidence to support the Commission's findings, the Respondents would respectfully submit that this Court must sustain those findings.

Bob Wire also argues that, should the Commission's Order be affirmed, Peachtree would somehow reap some "windfall" benefit. This position is based predominately upon the fact that Peachtree "clinchered" its case with the Claimant in conjunction with the settlement of its lien on proceeds from a third-party suit brought by Claimant as a result of the 2002 accident. The Single Commissioner, the Appellate Panel (by reference), and the Circuit Court all found this argument to be fundamentally without merit.

As the Second Appellate Panel Order held, the clincher agreement was between the Claimant and Peachtree, not Bob Wire. It settled all matters with respect to Peachtree's 2002 claim only, including Peachtree's lien on third party proceeds relating only to that 2002 claim. Both Peachtree and the Claimant specifically reserved all rights either party may have against Bob Wire. At the time of that settlement, Bob Wire denied any responsibility whatsoever in this matter, or even that a subsequent accident ever occurred at all. Second Appellate Panel Order, Conclusions of Law No. 1, p. 5. (R. p. 61.) There is no basis upon which Bob Wire would have the right to claim a benefit from (or complain about) Peachtree's settlement under those circumstances. The third-party case arising from the 2002 claim (and its subsequent settlement) and the workers' compensation claim against Peachtree all arose out of the December 9, 2002 accident, not the November 3, 2003 accident with Bob Wire. As the Commission held, "the settlement agreement between Peachtree and the Claimant, which settled the 2002 claim, has no bearing on Peachtree's right to reimbursement for expenses it incurred as a result of the 2003 claim." Id., p. 6. (R. p. 62.)

Judge Culbertson also correctly found Bob Wire's position to be based substantially upon conjecture. The clincher settlement between Peachtree and the Claimant of the 2002 claim was a compromise of several significant issues. The first issue compromised was Peachtree's lien on the third-party settlement, which was subject to reduction pursuant to S.C. Code § 42-1-560. A second issue compromised was its obligations to pay the Claimant permanent partial disability benefits pursuant to Commissioner Huffstetler's Order. Third, Peachtree

compromised its potential liability for a change of condition pursuant to S.C. Code § 42-17-90 and exposure to future medicals pursuant to S.C. Code § 42-15-60. As Judge Culbertson noted, the calculus of this settlement between Peachtree and the Claimant, at the time it was entered into, would require pure speculation; speculation, for instance, as to what value was placed upon the potential liability to the Claimant for future medical benefits pursuant to S.C. Code § 42-15-60 and/or a change of condition for the worse, pursuant to S.C. Code § 42-17-90 and speculation as to the Claimant's total cognizable damages at law and the reduction of the Employer's lien under S.C. Code §42-1-560. "This Court does not have the ability to look behind the four corners of that settlement agreement to divine the dynamics of the issues settled, even if that settlement of the 2002 claim were germane to Peachtree's right to reimbursement for benefits paid as a result of Bob Wire's 2003 accident." (R. p. 77.) Order, Honorable B. Culbertson, dated September 14, 2009. (R. p. 65.) Judge Culbertson rightly declined to engage in such speculation.

CONCLUSION

The majority of Bob Wire's exceptions raised here on appeal were matters which were before the Commission in the earlier appeal. Bob Wire failed to appeal those findings and conclusions of the Commission and, therefore, they are now the law of the case. As to the decision of the Appellate Panel dated January 6, 2009, relating to the amount Bob Wire should be required to reimburse Peachtree, which was the only matter properly before the trial Court, the record contains substantial evidence to support the Commission's findings of fact and conclusions of law on all issues.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price, ... Claimant,

vs.

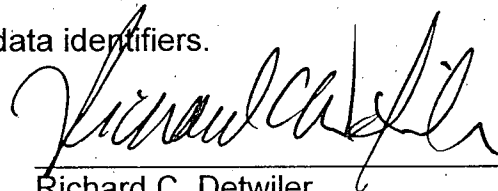
Peachtree Electrical Services, Inc. and
Builders Mutual Insurance Company,
Employer/Carrier, ... Respondent.

vs.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with
Rule 211(b), SCACR and Supreme Court Order 2007-08-16-02, dated August 13,
2007, requiring redaction of personal data identifiers.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price, ... Claimant,

vs.

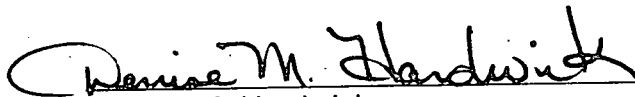
Peachtree Electrical Services, Inc. and
Builders Mutual Insurance Company,
Employer/Carrier, ... Respondent.

vs.

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

PROOF OF SERVICE

I certify that I have served three copies of the Final Brief of Respondent on the Appellants by depositing a copy of same in the United States Mail, first-class postage prepaid, on September 15, 2010, 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
September 14, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

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Christopher Price,.....Claimant,

v.

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

v.

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

FINAL REPLY BRIEF OF THE APPELLANTS

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Arguments

I. All of the arguments raised by the Appellants are preserved for review and are properly before the Court of Appeals.

The Respondents argue, inexplicably, that “the Findings of Fact and Conclusions of law contained in [the Appellate Panel Order of May 4, 2007] are the law of the case” and that; therefore, the question of whether the Workers’ Compensation Commission has the jurisdiction or authority to order the Appellants to pay the Respondents “\$112,789.42 in medical benefits” and temporary total disability benefits “in the total amount of \$47,023.99” under a theory of either equitable indemnity or equitable subrogation is not properly before the Court of Appeals at this time. The Appellants respectfully submit that the Respondents’ argument is without merit and that all of the issues raised by the Appellants are preserved for review and are properly before the Court of Appeals at this time.

First, the Appellate Panel Order of May 4, 2007 does not contain any conclusions of law with respect to any issue and, therefore, it is not a “final order.” (R. p.32). According to the Administrative Procedures Act, “[a] final decision shall include findings of fact and conclusions of law, separately stated.”¹ Because the Appellate Panel Order of May 4, 2007 does not contain any conclusions of law it is not a “final order” as contemplated by the Administrative Procedures Act. Perhaps more importantly, *how can the Appellants be bound by “Conclusions of Law” that simply do not exist?*

¹ S.C. Code Ann. § 1-23-350. *See also*, S.C. Code Ann. § 42-17-40(A) (which requires that final orders contain “a statement or the findings of fact, rulings of law, and other matters pertinent to the questions at issue”).

Second, the Appellate Panel Order of May 4, 2007 contains only cursory findings of fact, none of which have any bearing on the question of whether the Workers' Compensation Commission has the jurisdiction or authority to order the Appellants to pay the Respondents "\$112,789.42 in medical benefits" and temporary total disability benefits "in the total amount of \$47,023.99" under a theory of either equitable indemnity or equitable subrogation. (R. p.32). The Appellate Panel Order of May 4, 2007 does not find that the Respondents are entitled to "reimbursement" in any amount under any legal or equitable theory. Instead, the Appellate panel Order of May 4, 2007 contains the following "finding," which further confirms that it is not a final judgment:

*"This claim is remanded to the Jurisdictional Commissioner for determination of the 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."*² (R. p.32).

In most cases, an appeal lies only from a final judgment. Hagood v. Sommerville, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 14-3-330(1); Rule 72, SCRPC, Rule 201(a), SCACR. An appeal from an interlocutory order is permitted only in certain circumstances, including when the order is one "involving the merits ... [or] affecting a substantial right." S.C. Code Ann. § 14-3-330. Our Courts have previously concluded that appeals from the Workers' Compensation Commission follow

² In addition to the quoted "finding," the May 4, 2007 Order contains three other findings: (1) that there was a second accident on November 3, 2003; (2) that the Claimant gave notice of the November 3, 2003 accident; and (3) that the statute of limitations was satisfied. (R. p.32). The Appellants raise no argument as to these three findings in the present appeal.

the same rules, such that “Orders from the Commission remanding a case to the single commissioner for further proceedings generally do not affect the merits and are not considered final.” Brunson v. American Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005). (citing Chastain v. Spartan Mills, 228 S.C. 61, 65-67, 88 S.E.2d 837-38 (1955) (holding that an order that “neither allows nor denies compensation...does not affect the merits” and is not immediately appealable.)). The Appellate Panel Order of May 4, 2007 is clearly an order of remand and was not a final decision with respect to the Appellants’ liability to the Claimant for any medical or compensation benefits, or their liability to the Respondents in any amount under any legal or equitable theory.

In fact, the Appellate Panel Order of May 4, 2007 committed the issue of whether and to what extent the Appellants are liable to the Claimant or the Respondents to the absolute discretion of the jurisdictional Commissioner on remand. Clearly, the award of “112,789.42 in medical benefits” and the award of temporary total disability benefits “in the total amount of \$47,023.99” was not made until June 12, 2008 (the Order of Commissioner Funderburk) (R. pp.40-48) and the question of whether this award is supported by substantial evidence or the applicable law could not have been raised prior to the present appeal. The Appellants have no liability to either the Claimant or to the Respondents under the terms of the May 4, 2007 Appellate Panel Order.³ (R. p.32).

³ The Respondents’ Brief states that the May 4, 2007 Appellate Panel Order “ruled that [the Appellants] should be required to reimburse [the Respondents] for all benefits the latter had paid.” (emphasis added). However, the May 4, 2007 Appellate Panel Order contains no rulings of law whatsoever. Furthermore, the May 4, 2007 Appellate Panel Order does not contain any finding of fact (much less rulings of law) with respect to “reimbursement,” nor does it find or conclude that the Appellants are responsible for any

Therefore, the May 4, 2007 Appellate Panel Order does not involve the merits or affect any substantial right involved the present appeal. As such, the Appellants respectfully request that the Court of Appeals address all of the issues presented in this appeal, as they are properly preserved and timely presented.

II. The proper compensation rate for temporary total disability compensation, for the period from November 3, 2003 through May 5, 2005, is \$138.50 per week, as stipulated by the Respondents.

The May 4, 2007 Appellate Panel Order clearly required the jurisdictional Commissioner to determine the Claimant's average weekly wage for the November 3, 2003 accident.⁴ (R. p.32). Such a finding was critical, as the law mandates that the Appellants' liability for weekly workers' compensation benefits is capped at "sixty-six and two-thirds percent of his average weekly wages." S.C. Code Ann. § 42-9-10. However, the jurisdictional Commissioner made no finding of fact or conclusion of law

benefits, much less "all benefits" paid by the Respondents. If the May 4, 2007 Order had been so definitive, the Appellate Panel would not have remanded the case "for determination of average weekly wage and benefits, etc...".

⁴ Based on the un-appealed portion of Commissioner Huffstetler's July 5, 2006 Decision and Order, the Respondents were only liable for temporary total disability compensation through May 5, 2005. Despite this, the Respondents claim entitlement to reimbursement for temporary total disability compensation for a period through July 6, 2007 -- an additional 61.1429 weeks (\$20,986.68) beyond the Respondents' own liability. Without explanation, the Commission ordered the Appellants to "reimburse" the Respondents for this additional period of disability, despite the fact that it was not even owed by the Respondents.

with respect to the average weekly wage or compensation rate for the November 3, 2003 accident in his June 12, 2008 Order, nor did he explain his failure to do so. (R. pp.40-48). Instead, the jurisdictional Commissioner summarily ordered the Appellants to reimburse the Respondents for temporary total disability benefits “in the total amount of \$47,023.99” for a 137 week period, thus implicitly finding a compensation rate of \$343.24 per week. (R. p.48). There is no explanation for this implicit finding in the June 13, 2008 Order of the jurisdictional Commissioner or the Appellate Panel Order of December 17, 2008.

However, the record is clear: the Respondents stipulated that the average weekly wage for the November 3, 2003 accident was \$198.83, resulting in a compensation rate of \$132.56 per week.⁵ According to S.C. Code Ann. § 42-9-10, \$132.56 is the maximum weekly rate at which the Appellants are responsible for any total disability compensation. There is no provision in the law that would require the Appellants to pay compensation at any other rate, much less one that is more than doubled.⁶ The Commission utterly failed to explain this gross deviation from well-settled law.

⁵ The Record also contains all of the Claimant’s payroll records from his employment with the Appellant Bob Wire, where he was employed part-time (payroll records indicate that the Claimant worked only 35.5 hours over a two-week period prior to November 3, 2003). (R. pp.345-347). The Commission did not mention these payroll records in their Orders, though they support the parties’ stipulation regarding the correct average weekly wage and compensation rate. (R. p.141, l. 21 through p.142, l.2).

⁶ See Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589, 591 (1955) (holding that “on no sound theory of the law or fact could the court or commissioner in the absence of consent of the parties increase the amount of the weekly installments.” (internal citations omitted)).

While the Circuit Court attempted to justify the Commission's implicit findings in this regard, it was not within the Circuit Court's discretion to do so. Furthermore, the purported justification – that the Respondents were “innocent and unwitting” and that therefore the Appellants should be penalized – has no place in the Workers' Compensation law. Not only do such punitive claims have no place in Workers' Compensation law, they have no place in equitable claims either. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 454, 392 S.E.2d 477 (Ct. App. 1990) (stating that “punitive damages are not available in equity.”).

If the Appellants should have any liability for temporary total disability compensation for the period after November 3, 2003, it should be at the rate of \$132.56 per week, not \$343.24 per week as implicitly found by the Commission. Because this fact is not in dispute, it is within the Court of Appeals's sound discretion to reverse the Commission make its own finding of fact and conclusion of law in this regard. Furthermore, the Respondents themselves were only liable for temporary total disability compensation through May 5, 2005, yet inexplicably, the Commission has ordered the Appellants to reimburse the Respondents for temporary total disability compensation through July 6, 2007 -- an additional 61.1429 weeks (\$20,986.68) beyond the Respondents' own liability. (R. p.12). In their Brief, the Respondents do not dispute this fact, yet claim the windfall nonetheless. Because the period of temporary disability is likewise undisputed, the Court of Appeals is free to apply, not only the proper compensation rate, but the appropriate period of disability, and conclude that the Appellants' liability for temporary total disability compensation cannot exceed \$132.56

per week for the period from January 10, 2004⁷ through May 5, 2005 (\$9,126.7) as a matter of law.

III. To conclude that the Commission's award results in a windfall to the Respondents requires no speculation, only simple arithmetic.

The record clearly and unequivocally reveals that the Respondents paid a total of \$196,086.35 in benefits to (or on behalf of) the Claimant.⁸ (R. p.361). The record further clearly and unequivocally reveals that the Respondents received \$50,000.00 in satisfaction of their \$196,086.35 lien against the Claimant's third-party recovery. (R. p. 358). Therefore, by subtracting \$50,000.00 from the gross payment of \$196,086.35, one can clearly and unequivocally determine that the Respondents' net payment of benefits to (or on behalf of) the Claimant totaled \$146,086.35. However, the Commission also awarded the Respondents "reimbursement" from the Appellants in the amount of \$159,813.30. (R. p.63). Because \$159,813.30 is clearly and unequivocally a greater sum than \$146,086.35, then it would seem clear and unequivocal that the Respondents' potential gains exceed their losses, which will result in a profit or *windfall* in the amount of \$13,726.95 (*i.e.*, the difference between \$159,813.30 and \$146,086.35).

No speculation is required to determine that the Respondents stand to gain a windfall profit from the Commission's arbitrary and capricious award of

⁷ See R. p. 347, which shows that the Claimant continued working for Bob Wire through January 10, 2004.

⁸ This amount includes the benefits voluntarily paid by the Respondents for the admitted accident of December 9, 2002, as well as benefits voluntarily paid for the period after November 3, 2003.

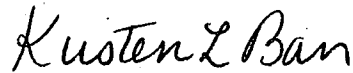
“reimbursement.” No speculation is required to determine that this award is inequitable.

Therefore, the Appellants respectfully request that the award be reversed.

Conclusion

The Appellants respectfully contend that the Respondents voluntarily relinquished all rights to reimbursement under the South Carolina Workers’ Compensation Act. The Appellants further contend that the Workers’ Compensation Commission does not have the authority, power, or jurisdiction to address the Respondents’ common law claim for equitable subrogation or equitable indemnity as a matter of law. Furthermore, to the extent that the Workers’ Compensation Commission has subject matter jurisdiction over these claims, the evidence is undisputed that the amounts awarded as “reimbursement” are arbitrary and capricious, as they result in a windfall profit to the Respondents and are tantamount to a penalty against the Appellants. Therefore, the Appellants respectfully request that the Commission’s “Amended” Decision and Order be reversed in its entirety.

Respectfully submitted,



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August 24, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-0087

Christopher Price,.....Claimant,

v.

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Builders Mutual Insurance Company,
Employer/Carrier,.....Respondent

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of the Appellants
complies with Rule 211(B), SCACR and Supreme Court Order 2007-08-16-02, dated
August 13, 2007, requiring redaction of personal data identifiers..

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August 24, 2010

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Christopher Price,

Claimant,

v.

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

Respondents,

v.

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

Appellants.

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 4923
Heard October 5, 2011 – Filed December 21, 2011

VACATED

Kirsten Leslie Barr, of Mount Pleasant, for Appellants.

Richard C. Detwiler, of Columbia, for Respondents.

KONDUROS, J.: Christopher Price was injured while working for Peachtree Electrical Services (Peachtree) in December 2002. In 2003, while in the employment of Bob Wire Electrical (Bob Wire), Price was injured again. Bob Wire and the South Carolina Home Builders Self Insurers' Fund (collectively Appellants) appeal the circuit court's order affirming the decision of the Appellate Panel of the Workers' Compensation Commission (the Commission) requiring Bob Wire to reimburse Peachtree for benefits Peachtree paid to Price after the 2003 injury. We vacate the single commissioner's, the Appellate Panel's, and the circuit court's orders.

FACTS

Price injured his back in an accident arising out of and in the course and scope of his employment with Peachtree on December 9, 2002, while working at a restaurant owned by the Divine Dining Group, Inc. Peachtree and its carrier admitted liability for the injury, voluntarily paid temporary total disability compensation, and authorized medical treatment including a surgery performed by Dr. William L. Mills of Coastal Orthopaedic Associates. Price was released to full-duty work at maximum medical improvement on August 8, 2003, with a ten percent impairment rating to the whole body and thirteen percent to the spine. Price did not return to work for Peachtree but went to work part-time for Bob Wire and suffered another injury in November 2003.¹ Price did not return to work at Bob Wire and never filed a claim against Bob Wire. Instead, he returned to Dr. Mills and complained of worsening and continuing back pain stemming from the 2002 accident. Peachtree again provided benefits to Price, paying him the same

¹ According to Price's testimony, his supervisor at the time was working on the other side of the wall where they were pulling and installing electrical cables. Price fell to the ground and moaned in pain, and his supervisor checked on him.

temporary total benefits as in 2002, and authorized medical treatment, which included an additional surgery.

In May 2004, Price filed a negligence claim against Divine Dining for his injuries arising out of the 2002 accident. The complaint sought past and future medical bills, past and future physical pain and suffering, past and future lost wages, past and future mental pain and suffering, and permanent disability. In February 2005, Price filed a Form 50 seeking total disability stemming from his back injury, which the form indicated was caused by the 2002 accident. Price was given a twenty percent impairment rating after the second accident. In April 2005, Peachtree added Bob Wire as a party to the workers' compensation action. Peachtree's attorney indicated Bob Wire was added as soon as Peachtree discovered, by reading Price's deposition testimony in the negligence action, a second injury had occurred.

Price settled his negligence claim against Divine Dining for \$540,000 in April 2006. In June 2006, Peachtree entered into a clincher agreement with Price for \$50,000, whereby Peachtree released its liens against the proceeds of the negligence action and Price released Peachtree from all further liability. Each covenanted not to waive any claims either of them may have against Bob Wire. Bob Wire was not informed of the clincher agreement.

The single commissioner determined no evidence demonstrated Bob Wire ever knew of a second accident and no evidence showed the injury in 2003 was not just a continuation of the injury Price had already suffered. On appeal, the Appellate Panel reversed the single commissioner, finding Price had suffered a second accident in 2003 and holding Bob Wire responsible for reimbursing Peachtree for benefits Peachtree paid to Price as a result of the second accident. The matter was remanded to the single commissioner to determine "the 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." Bob Wire attempted to appeal from this order, but the appeal was dismissed as untimely.

On remand to the single commissioner, Peachtree submitted evidence regarding the compensation and medical treatment it had provided to Price.

Bob Wire argued Peachtree had waived its right to seek reimbursement for these costs from Bob Wire by entering into the clincher agreement with Price regarding the 2002 injury. The single commissioner was unpersuaded and ordered that Bob Wire reimburse Peachtree for all causally-related medical treatment and temporary total disability compensation provided to Price by Peachtree after November 3, 2003, in the amount of \$112,789.42 and \$47,023.88 respectively. The Appellate Panel and circuit court affirmed the single commissioner's order. This appeal followed.

LAW/ANALYSIS

Bob Wire contends the Commission lacks subject matter jurisdiction² to deal with Peachtree's equitable claim for reimbursement because the Commission's authority is derived strictly from statute in derogation of the common law. We agree.

As a threshold matter, Peachtree contends the findings in the Appellate Panel's first order of May 2007 (First Order) constitute the law of the case because the appeal from that order was dismissed as untimely. We disagree.

Peachtree is correct in asserting that, in effect, no immediate appeal was taken from the First Order because Bob Wire's appeal was late.³ However, we disagree that Bob Wire was required to immediately appeal the First Order to prevent its findings from becoming the law of the case. An intermediate order may be appealed if it involves the merits of the case as described in section 14-3-330(1).⁴ Section 14-3-330 merely allows the

² Subject matter jurisdiction refers to "the authority of a court to entertain a particular action." Cribb v. Spatholt, 382 S.C. 475, 481, 676 S.E.2d 706, 709-10 (Ct. App. 2009).

³ Bob Wire filed its appeal of the First Order outside the thirty-day time limit set forth in section 42-17-60 of the South Carolina Code (Supp. 2006).

⁴ Appeals from the Commission are governed by section 42-17-60 of the South Carolina Code (Supp. 2010). See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (holding if a more specialized statute concerning appealability

aggrieved party to appeal an intermediate order involving the merits; it does not require an appeal at that time. The aggrieved party may wait until a final judgment is rendered and then appeal. See Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991)-("[I]f there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under section 14-3-330(1) this [c]ourt can review any intermediate order or decree necessarily affecting the judgment not before appealed from.").

Accordingly, Bob Wire was not required to appeal the First Order immediately following its issuance to avoid the findings therein becoming the law of the case.⁵ Instead, Bob Wire, as it was permitted to do, appealed the final judgment of the single commissioner on remand. Bob Wire continued to raise the jurisdictional question on subsequent appeals to the Appellate Panel, the circuit court, and this court. Therefore, the findings of the First Order regarding subject matter jurisdiction did not constitute the law of the case, and the issue is properly preserved for our consideration in this appeal.

Turning our attention to that issue, our jurisprudence has long recognized the power of the Commission is derived strictly from statute.

The right to workmen's compensation is wholly statutory, not existing except under the circumstances provided in the Workmen's Compensation Acts. It is not a common law right for the reason that the Acts

exists, it is controlling); see also Allison v. W.L. Gore & Assocs., 394 S.C. 185, ___, 714 S.E.2d 547, 549 (2011) (discussing appealability of workers' compensation claim as governed by section 42-17-60). At the time of this case, section 42-17-60 of the South Carolina Code provided that workers' compensation appeals were to be taken in the same manner as other appeals. See S.C. Code Ann. § 42-17-60 (Supp. 2006) (stating a party could appeal "under the same terms and conditions as govern appeals in ordinary civil actions"). Thus, the general appealability statute at section 14-3-330 of the South Carolina Code (1977 & Supp. 2010) is controlling.

⁵ We decline to address whether the First Order constituted an appealable interlocutory order as such a determination is not necessary to the disposition of this issue.

are in derogation of, or departures from, the common law, and are not amendatory, cumulative or supplemental thereto, nor declaratory thereof, but wholly substitutional in character

Marchbanks v. Duke Power Co., 190 S.C. 336, 363, 2 S.E.2d 825, 836 (1939) (internal quotation marks and citations omitted). Therefore, the Commission's jurisdiction and authority is circumscribed by the Workers' Compensation Act (the Act).

Peachtree argues unless an express provision prohibits an action, the Commission can deal with any issue arising under the Act. See S.C. Code Ann. § 42-3-180 (1985) ("All 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."); see also James v. Anne's, Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010) (finding the Commission had authority to prorate a lump sum award because nothing in the Act prohibited, either expressly or impliedly, the proration language at issue). However, only disputes ancillary to an employee's right to compensation arise under the Act. See Labouseur v. Harleysville Mut. Ins., Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529 (1990) (discussing the Commission's purview to determine policy cancellation and stating "[w]hen the employee's rights are not involved, an employer/insured must present all such issues to the circuit court"); see also Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600 (Ct. App. 1997) (holding a medical provider's common law claims for payment of employee's medical bills did not fall within the purview of the Act and claims would properly be litigated in circuit court). Claims not affecting the employee's right to compensation are within the purview of the circuit court, not of the Commission.

In this case, the claim presented is a common law, equitable claim for reimbursement made by Peachtree, an employer, against Bob Wire, another employer. 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. Therefore, the Commission lacked subject matter jurisdiction to determine Peachtree's right to reimbursement from Bob Wire, and that claim should have been dismissed.

Because our determination as to the jurisdiction of the Commission is dispositive of the case, we need not address Bob Wire's remaining issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when one issue is dispositive). Because the Commission lacked subject matter jurisdiction to hear Peachtree's claim for reimbursement, the single commissioner's order, the Appellate Panel's order, and the circuit court's order are hereby

VACATED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Christopher Price, ... Claimant,

vs.

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

vs.

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

PETITION FOR REHEARING

The Respondents, Peachtree Electrical Services, Inc. and Builders Mutual Insurance Company, respectfully petition this Court for a rehearing, pursuant to Rule 221(a) and Rule 224 of the South Carolina Rules of Appellate Practice. The grounds for this Petition are that Opinion No. 4923 in this matter, filed by this Court on December 21, 2011, overlooked or misapprehended certain points of fact and law applicable to this matter. For the reasons set forth below, the Respondents

SC Court of Appeals

JAN 05 2012

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respectfully request this Court reconsider its opinion and grant this Petition for Rehearing.

ARGUMENT

I. THIS COURT MISAPPREHENDED OR OVERLOOKED THE RESPONDENTS' ARGUMENT THAT THE RULINGS IN THE FIRST APPELLATE PANEL ORDER ARE THE LAW OF THE CASE AND ARE NOT PRESERVED FOR APPEAL.

In the First Appellate Panel Order, the Appellate Panel determined that the Claimant suffered injuries resulting from a subsequent accident occurring on November 3, 2003 while the Claimant worked for the Appellant Employer, Bob Wire Electric, Inc.¹ 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. Respondents failed to perfect an appeal of the First Appellate Panel Order.

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 the parties to this appeal, Respondent Peachtree and Appellant, to the Claimant. The only issues left for determination by the remand of the Appellate Panel involved the calculation of the Claimant's average weekly wage in what became, in effect, his second ongoing workers' compensation claim and the

¹ Capitalized terms have the same meanings as in the Final Brief of Respondent.

apportionment of the benefits to be paid on behalf of the Claimant between the two cases. Respondents respectfully assert that all findings of fact and conclusions of law in the First Appellate Panel Order are now the law of the case and are not preserved for appellate review. The Respondent would respectfully show that this Court's opinion in the matter sub judice is contrary to the holdings in other decisions of this Court and of the South Carolina Supreme Court.

In *King v. James*, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010), this Court considered, among other things, the validity of a tax sale. The Master-in-Equity determined that a tax sale was invalid because Beaufort County failed to comply with the statutory requirements for such sale. *Id.* In *King*, this Court went on to state:

Moreover, neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements. Therefore, this ruling is the law of the case. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case). Accordingly, we affirm the Master's finding as to the invalidity of the tax sale and tax deed.

Id. at 25, 694 S.E.2d at 40 (Ct. App. 2010).

As set forth in *King*, an unappealed final ruling on the merits becomes the law of the case. 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*), the 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 a trial court order of summary judgment and held that the defendant was entitled to recover lost employee time as damages for a counterclaim of fraud.

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*. *Id.*

On remand, the plaintiff moved again for summary judgment on the fraud counterclaim, and the trial court again granted the plaintiff summary judgment. 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. The 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.* (citing *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is the law of the case); *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."))

In this case, the rulings contained in the First Appellate Panel Order were adverse to the Appellants. The Appellants failed to perfect an appeal. Such rulings, therefore, were the law of the case on remand to the single commissioner and upon

appellate review by the second appellate panel and the circuit court, as each so found. In particular, that the South Carolina Workers' Compensation Commission had subject matter jurisdiction to determine from which Employer the Claimant is to receive which benefits is the law of the case and is not preserved for appellate review. See *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009) (holding that the unappealed ruling of the circuit court that the magistrate court had subject matter jurisdiction of defendant's counterclaim was the law of the case in subsequent proceeding before master-in-equity.)

This Court has held that an order of the Workers' Compensation Commission is immediately appealable "if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993). Here, the First Appellate Panel Order finally determined on the merits that (a) a subsequent injury by accident occurred to the Claimant while he worked for the subsequent employer, Appellant Bob Wire, (b) there were actually two workers' compensation claims, not just one, and, therefore, (c) the Commission had jurisdiction and power to determine which Employer was liable to the Claimant for benefits in each case and, naturally, determine which benefits Peachtree paid to the Claimant which should have been paid by Bob Wire. On remand by the First Appellate Panel, the only issues left unresolved were the amounts of reimbursements from one responsible employer to another and what benefits were due to the Claimant in the "new" claim. Thus, the First Appellate Panel Order was immediately appealable, and the Appellants' failure

to so appeal rendered the findings of fact and conclusions of law in the First Appellate Panel Order the law of the case.

Accordingly, the Respondents request that this Court grant the Respondents' Petition for Rehearing on the issue that the rulings in the First Appellate Panel Order are the law of the case.

II. THIS COURT MISAPPREHENDED OR OVERLOOKED THE RESPONDENTS' ARGUMENT THAT THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION HAS SUBJECT MATTER JURISDICTION TO DETERMINE THE ISSUES RELATING TO WHETHER A SECOND ACCIDENT OCCURRED, WHICH EMPLOYER SHOULD BE LIABLE FOR THE CLAIMANT'S BENEFITS AS TO THE ORIGINAL ACCIDENT VS. THE SUBSEQUENT ACCIDENT, AND THE ANCILLARY ISSUES REGARDING REIMBURSEMENT FROM ONE EMPLOYER TO THE OTHER.

The Respondent would respectfully show that in its opinion this Court misapprehends the extent of the subject matter jurisdiction of the South Carolina Workers' Compensation Commission, as it relates to the facts of this case. The Respondent therefore requests that this Court grant its Petition for Rehearing on the grounds that the Workers' Compensation Commission has exclusive subject matter jurisdiction to make the determination that a second, subsequent accident occurred; which Employer is responsible for the benefits resulting from each accident; and the ancillary issue of whether (and to what extent) one employer should reimburse the other for benefits mistakenly paid.

The South Carolina Workers' Compensation Commission has subject matter jurisdiction 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), reversed on other

grounds by 303 S.C. 271, 400 S.E.2d 130 (1990). S.C. Code Ann. § 42-3-180 (1976) 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."

This Court cites to the Supreme Court case of *Laboureur v. Harleysville Mutual Insurance Company*, 302 S.C. 540, 397 S.E.2d 526 (1990), in which the Supreme Court held that a dispute 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. Relying on that decision here, this Court determined that the Claimant's rights are not involved in this dispute and, therefore, this Commission had no subject matter jurisdiction to determine that a subsequent accident occurred and the respective liability of successive employers. The Respondent would respectfully show that this is clear error.

The determination of which employer is responsible for which of the benefits to which the Claimant has a right is a matter "arising under this Title" and, therefore, is within the jurisdiction of the Workers' Compensation Commission. S.C. Code Ann. § 42-3-180. As the Supreme Court in *Laboureur* has held:

when 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.

Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529 (1990). Because the Claimant's rights are involved, the Workers' Compensation Commission retains jurisdiction over all matters appealed herein.

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. 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, as the Supreme Court noted, 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. As in *Labouseur*, the employees rights were not involved.

In reliance upon *Labouseur* and *Roper Hospital*, this Court held in this case:

The matter directly in contention does not effect 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.

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 were 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 subject matter but 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

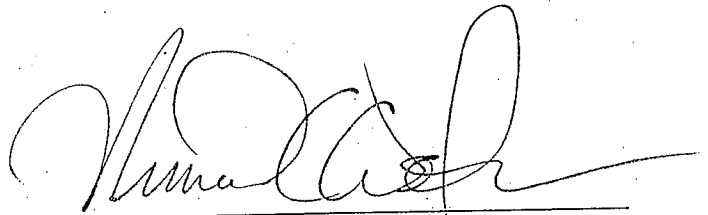
Claimant worked for Bob Wire, from which he suffered a new injury for which Bob Wire was held responsible. The order of reimbursement by Bob Wire to Peachtree for benefits Bob Wire should have paid was merely ancillary to the findings that only the South Carolina Workers' Compensation Commission could make. Yet this Court's decision vacates all orders from the proceedings below, including the determinations which are undisputably within the exclusive jurisdiction of the South Carolina Workers' Compensation Commission.

Accordingly, the Respondents request that this Court grant its Petition for Rehearing on the issue of the scope of the Workers' Compensation Commission's subject matter jurisdiction over these issues.

CONCLUSION

Given the foregoing, Appellants would respectfully suggest that the Court misapprehended or overlooked the matters set forth above and, therefore, Appellants would respectfully submit this Petition for Rehearing should be granted.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina

January 5, 2012

The South Carolina Court of Appeals

Christopher Price,

Claimant,

v.

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

Respondents,

v.

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

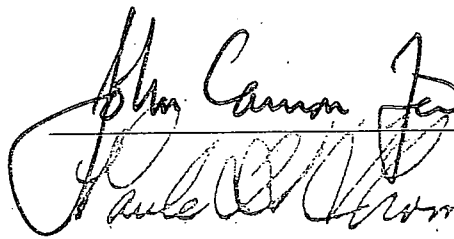
Appellants.

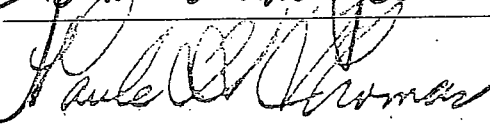
The Honorable Benjamin H. Culbertson
Georgetown County
Trial Court Case No. 2009-CP-22-00087

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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.

It is, therefore, ordered that the Petition for Rehearing be denied.


C.J.


J.

U. Ke J.

Columbia, South Carolina

cc: Kirsten Leslie Barr, Esquire
Richard C. Detwiler, Esquire

FILED

January 27, 2012