APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1204122

Rey Perez,

RESPONDENT
CLAIMANT,

vs.

The Lamar Group, LLC, and/or Green Valley Country Club,

EMPLOYER, and

Bridgefield Casualty Insurance Company, and/or SC Uninsured Employers Fund,

CARRIER, and

APPELLANTS
DEFENDANTS.

Appellate Panel Review held in Columbia, South Carolina, on January 23, 2017 per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed May 25, 2017

APPEARANCES:

Respondent Rey Perez represented by Donald Kamb, Esquire of Kathryn Williams, P.A., Greenville, South Carolina.

Defendant South Carolina Workers' Compensation Uninsured Employers Fund represented by David H. Keller, Esquire of Turner Padget Graham & Laney, P.A., Greenville, South Carolina.

Defendant Bridgefield Casualty Insurance Company represented by Tracy Welsh Tiddy, Esquire of Willson Jones

STATEMENT OF THE CASE

This case was originally heard before Commissioner R. Michael Campbell, II on April 20, 2016, in Greenville, South Carolina. At the hearing, the claimant alleged that while working for the Lamar Group he suffered injuries to his face, head, jaw, and ear on March 28, 2012, when a roof truss collapsed and struck him. He also claimed entitlement to additional medical treatment, temporary total disability benefits and eventual permanency. While the accident itself was not disputed, there was a dispute about which party was responsible for payment of benefits. Defendants present at the hearing before the Single Commissioner included: 1) EA Operations dba Green Valley Country Club and their insurance carrier, Bridgefield Casualty Insurance Company; 2) Durham Greene and their insurance carrier, Key Risk Insurance Company; 3) Cornell Dubilier Electronics and their insurance carrier, Travelers Indemnity Company; and 4) the South Carolina Uninsured Employers Fund. While the Lamar Group was properly notified of the hearing and was a named Defendant, no one appeared on behalf of the Lamar Group.

On October 11, 2016, Commissioner Campbell issued Findings of Fact, Conclusions of Law and an Order, finding in pertinent part that the Claimant was an employee of the Lamar Group on the date of accident; that the Lamar Group was subject to the Act and operating without insurance; and that EA Operations was the Claimant's statutory employer and should be responsible for payment of benefits. Commissioner Campbell also found that Durham Greene, Key Risk Insurance Company, Cornell Dubilier Electronics, Travelers Indemnity Company and the South Carolina Uninsured Employers Fund were not proper parties to the case and should be dismissed as party defendants.

The hearing commissioner's Findings of Fact and Conclusions of law are set forth below in their entirety.

SINGLE COMMISSIONER'S FINDINGS OF FACT

1. That the claimant, Rey B. Perez, was a direct employee of The Lamar Group, LLC.

2. That on or about March 28, 2012, the claimant fell from a building striking his face and injuring his face, left eye, mouth and left ear.

3. That at the time the injury occurred The Lamar Group, LLC was subject to the terms of Title 42 of the South Carolina Code of Laws Annotated by virtue of having four or more employees regularly employed in the same business or occupation.

4. That the project that the claimant was working on at the time of his injury was located at Green Valley Country Club in Travelers Rest, South Carolina.

5. That Green Valley Country Club is operated by EA Management which is a family owned business owned by the Kaplan family and was purchased in bankruptcy for purposes of revitalizing the country club and its golf course and returning it to profitability.

6. That in order to accomplish the objective of returning the country club to profitability the Kaplan family named an executive director of EA Management and the country club and undertook the building project.

7. That the Kaplan family named Mike Kaplan as Executive Director of EA Management and specifically determined that in order to return the country club to profitability various improvements were required.

8. That as a result of this determination the Kaplan family and Mike Kaplan specifically determined they would manage the construction projects personally and would not contract out construction projects on the club house and on the golf course.

9. That as a result of this determination, Mike Kaplan hired John Coleman as a construction manager to undertake the various construction projects on behalf of EA Management.

10. That because EA Management/Green Valley Country Club did not have a specific contractor's license, Mike Kaplan used various business connections in order to "borrow" a construction license from Durham Greene, Inc.

11. That this "loaning" of the contractor's license was done voluntarily by Durham Greene, Inc. and they were not remunerated in any way for the use of the construction license.

12. That upon receipt of the construction license, Mike Kaplan, the Kaplan family, and EA Management, which is the company that directly operates Green Valley Country Club and for which Mike Kaplan is employed, specifically undertook a construction project as part of the operations of EA Management and Green Valley Country Club.

13. That EA Management/Green Valley Country Club and its Executive Director, Mike Kaplan, and the Kaplan family enterprises specifically undertook a construction project in the State of South Carolina where the claimant was subsequently injured.

14. That the hiring of a construction manager was done by Mike Kaplan for the purposes of overseeing the aforesaid construction project and Mike Kaplan/EA Management/Green Valley Country Club were directly in charge of the project on which the claimant was injured.

15. That John Coleman, while a construction manager, was under the direct supervision of Mike Kaplan who had the authority to overrule any of Coleman's decisions.

16. That Mike Kaplan/EA Management/Green Valley Country Club maintained the authority to hire and approve contractors contacted by John Coleman and that Mike Kaplan had the final say on all final details of the construction project.

17. That after a design phase it was determined that the building upon which the claimant was injured would be remodeled and that in order to do so, trusses needed to be placed on the roof of the building.

18. That to undertake this job, John Coleman, with the approval of Mike Kaplan, hired The Lamar Group, LLC to do the work at Green Valley Country Club on behalf of EA Management.

19. That the normal operating procedure for the hiring of subcontractors by EA Management was to have a written contract and a certificate of workers' compensation and liability insurance presented to the human resources department of EA Management prior to the work commencing.

20. That in this particular instance, due to the exigencies of acquiring a crane the contract and certificate of workers' compensation and liability insurance were not obtained prior to the work beginning.

21. That the certificate of workers' compensation insurance presented by The Lamar Group, LLC to the human resources department of EA Management showed that the workers' compensation policy for The Lamar Group, LLC expired some two months prior to the commencement of the work herein, and was, therefore, invalid.

22. That the claimant, Rey B. Perez, was a direct employee of The Lamar Group, LLC.

23. That Mike Kaplan/EA Management/Green Valley Country Club was the general contractor of the construction project for which The Lamar Group, LLC was contracted to perform construction services involving the placing of trusses.

24. That The Lamar Group, LLC was a subcontractor of the general contractor, EA Management, and was operating as an unqualified self-insurer on the date of the claimant's injury by accident due to a lapse in insurance.

25. That the claimant, Rey B. Perez, was therefore the statutory employee of Mike Kaplan/EA Management/Green Valley Country Club.

26. That the claimant's average weekly wage was $1,000.00 giving him a compensation rate of $666.70.

27. That as a result of his injuries, the claimant is entitled to temporary total disability compensation commencing March 28, 2012 until his release by Dr. Fowler on December 7, 2012.

28. That the claimant is not yet at maximum medical improvement and requires further medical care and treatment to his face, left eye and mouth.

29. That the insurance carrier for claimant's statutory employer, EA Management is Bridgefield Insurance Company.

30. That because the claimant was the statutory employee of EA Management, Bridgefield Insurance Company is responsible for paying benefits to the claimant, aforesaid.

31. That the employer and carrier shall maintain the right to choose the treating physician or physicians for claimant's ongoing problems for his face, left eye and mouth.

32. That Durham Greene, Inc. and their insurance carrier, Key Risk Services are improper parties to this matter and should be dismissed.

33. That the South Carolina Uninsured Employers Fund is an improper party to this action and should be dismissed.

34. That Cornell Dubilier Electronics and their insurance carrier, Travelers Indemnity Company are improper parties to this action and should be dismissed.

SINGLE COMMISSIONER'S CONCLUSIONS OF LAW

1. That the parties to this action, Rey B. Perez, employee/claimant, The Lamar Group, LLC, EA Management, Green Valley Country Club, Durham Greene Inc., and Cornell Dubilier Electronics, Bridgefield Insurance Company, Travelers Indemnity Company, and Key Risk Insurance of South Carolina and the South Carolina Uninsured Employers Fund are subject to and bound by the terms and provisions of Title 42 of the South Carolina Code of Laws Annotated.

2. That pursuant to Section 42-1-160, the claimant, Rey Perez, suffered an injury by accident arising out of and in the course of employment on or about March 28, 2012.

3. That pursuant to Section 42-1-130 the claimant, Rey Perez, was a direct employee of The Lamar Group, LLC and Lauro Martinez.

4. That pursuant to Section 42-1-360, The Lamar Group, LLC and Lauro Martinez were subject to the terms of the South Carolina Code of Laws Annotated by virtue of having four or more employees regularly employed in the same business or occupation.

5. That pursuant to South Carolina Workers' Compensation Regulation 67-403 The Lamar Group, LLC and Lauro Martinez were subject to the Act under any circumstances by obtaining workers' compensation insurance as noted on the certificate of insurance presented to EA Management.

6. That pursuant to Section 42-1-360, EA Management and Green Valley Country Club were subject to the Workers' Compensation Act by virtue of having four or more employees.

7. That pursuant to Section 42-1-400 et. seq. EA Management and Green Valley Country Club voluntarily undertook to become a general contractor/construction manager for building projects at Green Valley Country Club, and, therefore, made construction management a part of their regular business and/or occupation. Marchbanks v. Duke Power Co., 190 SC 336, 2 SE2d 825 (1939); Collins v. Seko Charlotte, 412 SC 283, 732 SE2d 510 (2015).

8. That pursuant to Section 42-1-400 et. seq. an employee of a subcontractor (claimant) who is working for an owner and or contractor (EA Management/Green Valley Country Club) is deemed to be the statutory employee of the upstream employer, in this case, EA Management. Voss v. Ramco, 325 SC 560, 482 SE2d 582 (Ct. App. 1997)

9. That pursuant to Section 42-5-10, et. seq. the defendant, The Lamar Group, LLC and Lauro Martinez were operating as an unqualified self-insurer without workers' compensation coverage at the time of the injury.

10. That the certificate of insurance presented by The Lamar Group, LLC to EA Management was invalid and, therefore, EA Management and their carrier Bridgefield Insurance Company cannot transfer liability to the Uninsured Employers Fund. Hopper v. Terry Hunt Construction, 383 SC 310, 680 SE2d 1 (2009).

11. That pursuant to Section 42-1-400 et. seq. the statutory employer, EA Management/Green Valley Country Club and their carrier, Bridgefield Insurance Company are responsible for workers' compensation benefits for Rey Perez as a result of this injury of March 28, 2012.

12. That pursuant to Section 42-1-160 and Section 42-15-60, the claimant suffered injuries to his face, jaw, left eye, and left ear.

13. That pursuant to Section 42-15-60, the claimant is not yet at maximum medical improvement.

14. That pursuant to Section 42-15-60, the claimant is entitled to past and ongoing causally related medical care and treatment to be provided by the statutory employer and its carrier for his face, jaw, and left eye.

15. That pursuant to Section 42-15-60, the defendants, Durham Greene, Inc., Cornell Dubilier Electronics, Travelers Indemnity Company, Key Risk Insurance Company of South Carolina, and the South Carolina Uninsured Employers Fund are not proper parties to this action and should be and hereby are dismissed.

ASSIGNMENTS OF ERROR

Within the statutory period, Counsel for EA Operations[1] and Bridgefield Casualty Insurance Company filed an Application for Review in the case setting forth the following assignments of error:

[1] "EA Operations" is the correct name of the Defendant identified as "EA Management" in the Single Commissioner's Order.

1. In referring to the entity operating Green Valley Country Club as EA Management; the error being such entity is EA Operations.

2. In stating that the parties stipulated that the Claimant's injury involved his head, face, jaw, left ear and left eye; the error being that the record reflects no such stipulation – just the Claimant's assertion that some of these body parts were injured.

3. In failing to clearly state that it was the position of the Green Valley Country Club and EA Operations that its business is running a country club and it cannot be the statutory employer of the Claimant where it is not in the trade, business or occupation of putting up trusses; and that assuming that the Claimant was an employee of the Lamar Group and the Lamar Group is subject to the Act and operating without insurance, the Uninsured Employers Fund should be liable for paying benefits in this case.

4. In stating in the Statement of the Case that final approval for contractors came from Mike Kaplan, executive director of EA Operations; the error being John Coleman had full authority to select and contract with contractors.

5. In stating in the Statement of the Case that based on the uncontradicted testimony of John Coleman, Mike Kaplan was the general contractor of the project; the error being Mr. Coleman did not so testify.

6. In stating in the Testimony of the Case that Mike Kaplan testified that "most" employees of EA Operations had nothing to do with construction; the error being he, in fact, testified that none of the employees of EA Operations have ever performed construction work.

7. In stating in the Testimony of the Case that Mr. Kaplan testified that he, as the executive director of EA Management, determined to undertake a specific construction project for the renovation and refurbishment of Green Valley Country Club; the error being Mr. Kaplan testified that the project in question involved converting some restrooms into a fitness center.

8. In stating in the Testimony of the Case that Mr. Kaplan testified that the golf course was also being renovated by other construction crews; the error being there is no testimony to this effect.

9. In stating in the Testimony of the Case that Mr. Kaplan testified that in order to go forward with the construction project it was necessary for him to obtain a contractor's license which he borrowed from Durham Greene, Inc.; the error being Mr. Kaplan testified that he contracted with Durham Greene to use its license for the project.

10. In stating in the Testimony of the Case that Mr. Kaplan testified that he hired a construction manager, John Coleman, whose job was to carry out the construction project; the error being Mr. Kaplan testified he retained John Coleman as a consultant to oversee the project.

11. In stating in the Testimony of the Case that Mr. Kaplan conceded EA Management had bought Green Valley Country Club when it was bankrupt at a bargain price

with the intention of refurbishing it and moving it back to profitability; the error being there is no testimony to that effect.

12. In stating in the Testimony of the Case that Mr. Kaplan testified most of the time he trusted Coleman's judgments, but he did have the right to make the final decision if he disagreed with Coleman and in stating that Kaplan agreed that Coleman reviewed bids and made final recommendations as to which contractors he ought to hire; the error being Mr. Kaplan, in fact, testified that Mr. Coleman hired the contractors and he approved whatever he decided.

13. In stating in the Testimony of the Case that the bookkeeping/HR department of EA Management maintained all the contract documents; the error being Mr. Kaplan actually testified only that certificates of insurance were maintained by the bookkeeper, as far as he knows.

14. In stating in the Testimony of the Case that Mr. Kaplan testified that because of potential liability he required certificates of insurance to be delivered prior to contractors coming on the job and that these were kept in the bookkeeping department of EA Management; the error being the hearing transcript contains no testimony to this effect.

15. In stating in the Testimony of the Case that Mr. Kaplan testified that Cornell Dubilier actually paid some contractors but this was a cash flow pass through and EA Management directly reimbursed Cornell Dubilier for any of these pass through payments; the error being there was no testimony to this effect.

16. In stating in the Testimony of the Case that Mr. Kaplan testified that Cornell Dubilier is a part of a number of family owned businesses owned by the Kaplans and the payments were eventually charged to EA Management on Cornell's books and EA reimbursed dollar for dollar; the error being there was no testimony to this effect.

17. In stating in the Testimony of the Case that Mr. Kaplan testified that he had a human resources manager who was the expert in workers' compensation matters; the error being there was no such testimony in the record.

18. In stating in the Testimony of the Case that Mr. Kaplan testified that first reports of injury were maintained by his human resources manager; the error being there is no testimony to this effect in the record.

19. In stating in the Testimony of the Case that Mr. Kaplan testified that a first report of injury had been completed by the human resources department and signed by Mr. Coleman on the date of the accident; the error being that there is no testimony to this effect in the hearing transcript.

20. In stating in the Testimony of the Case that Mr. Kaplan testified that the first report of injury was filled out by his human resources department; the error being Mr. Kaplan testified EA Operations does not have a human resources department.

21. In stating in the Testimony of the Case that Coleman's testimony involved his hiring by Mr. Kaplan as a construction manager; the error being Mr. Coleman testified that he was a consultant.

22. In stating in the Testimony of the Case that Mr. Coleman testified he had worked with Mr. Kaplan on numerous occasions; the error being that Mr. Coleman testified only that Mr. Kaplan worked for him as a young man and then reached out to him about this project.

23. In stating in the Testimony of the Case that Mr. Coleman testified he did not know anything about the relationship between Kaplan and Durham Greene, Inc.; the error being the transcript of Mr. Coleman's de bene esse deposition contains no such testimony.

24. In stating in the Testimony of the Case that Mr. Coleman knew that Kaplan had a construction/contractor's license which was "borrowed" from Durham Green, Inc., but he did not know any of the particulars regarding the same; the error being the transcript of Mr. Coleman's de bene esse deposition contains no such testimony.

25. In stating in the Testimony of the Case that the an accident report was filed by John Coleman, the construction manager for the project at Green Valley Country Club; the error being the testimony only reflects that Mr. Coleman printed his name on the first report of injury, not that he filed it. Further, Mr. Coleman testified that he was a consultant on the project, not the construction manager.

26. In Finding as a Fact (#2) that that the Claimant fell from a building striking his face and injuring his face, left eye, mouth and left ear; the error being the preponderance of the evidence reflects that the Claimant injured his face, jaw and left eye; there is no evidence of an injury to the left ear.

27. In Finding as a Fact (#5) that the Country Club was purchased in bankruptcy for purposes of revitalizing the country club and its golf course and returning it to profitability; the error being the preponderance of the evidence and the testimony in the record do not support this conclusion.

28. In Finding as a Fact (#6) that in order to accomplish the objective of returning the country club to profitability the Kaplan family named an executive director of EA Management and the country club and undertook the building project; the error being the preponderance of the evidence and the testimony in the record do not support this finding.

29. In Finding as a Fact (#7) that the Kaplan family named Mike Kaplan as Executive Director of EA Management and specifically determined that in order to return the country club to profitability various improvements were required; the error being the preponderance of the evidence and the testimony in the record do not support this finding.

30. In Finding as a Fact (#8) that as a result of this determination the Kaplan family and Mike Kaplan specifically determined they would manage the construction projects personally and would not contract out the construction projects on the club house and on the golf

course; the error being the preponderance of the evidence and the testimony in the record do not support this conclusion.

31. In Finding as a Fact (#9) that as a result of this determination, Mike Kaplan hired John Coleman as a construction manager to undertake the various construction projects on behalf of EA Management; the error being the preponderance of the evidence does not support this conclusion.

32. In Finding as a Fact (#10) that because EA Management/Green Valley Country Club did not have a specific contractor's license, Mike Kaplan used various business connections in order to "borrow" a construction license from Durham Greene, Inc.; the error being the preponderance of the evidence does not support this conclusion.

33. In Finding as a Fact (#11) that this "loaning" of the contractor's license was done voluntarily by Durham Greene, Inc., and they were not remunerated or compensated in any way for the use of the construction license; the error being the preponderance of the evidence does not support this conclusion.

34. In Finding as a Fact (#12) that upon receipt of the construction license, Mike Kaplan, the Kaplan family, and EA Management, which is the company that directly operates Green Valley Country Club and for which Mike Kaplan is employed, specifically undertook a construction project as part of the operations of EA Management and Green Valley Country Club; the error being the preponderance of the evidence does not support this conclusion.

35. In Finding as a Fact (#13) that EA Management/Green Valley Country Club and its Executive Director, Mike Kaplan, and the Kaplan family enterprises specifically undertook a construction project in the State of South Carolina where the Claimant was subsequently injured; the error being the preponderance of the evidence does not support this conclusion.

36. In Finding as a Fact (#14) that the hiring of a construction manager was done by Mike Kaplan for purposes of overseeing the aforesaid construction project and Mike Kaplan/EA Management/Green Valley Country Club were directly in charge of the project on which the Claimant was injured; the error being the preponderance of the evidence does not support this conclusion.

37. In Finding as a Fact (#15) that John Coleman, while a construction manager, was under the direct supervision of Mike Kaplan who had the authority to overrule any of Coleman's decisions; the error being the preponderance of the evidence doesn't support this conclusion.

38. In Finding as a Fact (#16) that Mike Kaplan/EA Management/Green Valley Country Club maintained the authority to hire and approve contractors contacted by John Coleman and that Mike Kaplan had the final say on all final details of the construction project; the error being the preponderance of the evidence does not support this conclusion.

39. In Finding as a Fact (#18) that to undertake this job, John Coleman, with the approval of Mike Kaplan, hired The Lamar Group, LLC to do work at Green Valley Country

Club on behalf of EA Management; the error being such finding is not supported by a preponderance of the evidence.

40. In Finding as a Fact (#19) that the normal operating procedure for the hiring of subcontractors by EA Management was to have a written contract and a certificate of workers' compensation and liability insurance presented to the human resources department of EA Management prior to the work commencing; the error being that such finding is not supported by a preponderance of the evidence.

41. In Finding as a Fact (#20) that in this particular instance, due to the exigencies of acquiring a crane the contract and certificates of workers compensation and liability insurance were not obtained prior to the work beginning; the error being the preponderance of the evidence does not support this finding.

42. In Finding as a Fact (#21) that the certificate of workers' compensation insurance presented by The Lamar Group, LLC to the human resources department of EA Management showed that the workers compensation policy for the Lamar Group, LLC expired some two month prior to the commencement of the work herein, and was, therefore, invalid; the error being the preponderance of the evidence does not support this conclusion.

43. In Finding as a Fact (#23) that Mike Kaplan/EA Management/Green Valley country Club was the general contractor of the construction project for which The Lamar Group, LLC was contracted to perform construction services involving the placement of trusses; the error being the preponderance of the evidence does not support this conclusion.

44. In Finding as a Fact (#24) that The Lamar Group, LLC was a subcontractor of the general contractor, EA Management; the error being such finding is not supported by a preponderance of the evidence.

45. In Finding as a Fact (#25) that the Claimant, Rey B. Perez, was therefore the statutory employee of Mike Kaplan/EA Management/Green Valley Country Club; the error being the preponderance of the evidence does not support this conclusion.

46. In Finding as a Fact (#26) that the Claimant's average weekly wage was $1000.00 giving him compensation rate of $666.70; the error being the preponderance of the evidence does not support such conclusion and such conclusion is speculative.

47. In Finding as a Fact (#27) that as a result of his injuries, the Claimant is entitled to temporary total disability compensation commencing March 28, 2012 until his release by Dr. Fowler on December 7, 2012; the error being the preponderance of the evidence does not support this conclusion.

48. In Finding as a Fact (#28) that the Claimant is not yet at maximum medical improvement and requires further medical care and treatment to his face, left eye, and mouth; the error being the preponderance of the evidence does not support this conclusion.

49. In Finding as a Fact (#29) that the insurance carrier for Claimant's statutory employer, EA Management, is Bridgefield Insurance Company; the error being the preponderance of the evidence does not support the conclusion that EA Management/Operations is the Claimant's statutory employer.

50. In Finding as a Fact (#30) that because the Claimant was the statutory employee of EA Management, Bridgefield Insurance Company is responsible for paying benefits to the Claimant, aforesaid; the error being the preponderance of the evidence does not support the conclusion that the Claimant is a statutory employee of EA Management.

51. In Finding as a Fact (#33) that the South Carolina Uninsured Employers Fund is an improper party to this action and should be dismissed; the error being the preponderance of the evidence does not support the conclusion that EA Operations is the Claimant's statutory employer; rather, the preponderance of the evidence supports the conclusion that EA Operations is not in the trade business or occupation of setting trusses, the Claimant was directly employed by the Lamar Group which was subject to the Act and operating without insurance, and the responsible party should be the Uninsured Employers Fund.

52. In concluding as a Matter of Law (#7) that pursuant to Section 42-1-400 et. seq. EA Management and Green Valley Country Club voluntarily undertook to become a general contractor/construction manager for building projects at Green Valley Country Club, and, therefore, made construction management a part of their regular business and/or occupation; the error being the preponderance of the evidence does not support this conclusion, nor is this conclusion supported by case law.

53. In concluding as a Matter of Law (#8) that pursuant to Section 42-1-400 et seq., an employee of a subcontractor (Claimant) who is working for an owner and or contractor (EA Management/Green Valley Country Club) is deemed to be the statutory employee of the upstream employer, in this case, EA Management; the error being the preponderance of the evidence and the case law does not support this conclusion.

54. In concluding as a Matter of Law (#10) that the certificate of insurance presented by The Lamar Group, LLC to EA Management was invalid and, therefore, EA Management and their carrier Bridgefield Insurance Company cannot transfer liability to the Uninsured Employer's Fund; the error being the preponderance of the evidence does not support the conclusion that EA Operations is the statutory employer of the Claimant.

55. In concluding as a Matter of Law (#11) that pursuant to Section 42-1-400 et. seq., the statutory employer, EA Management/Green Valley Country Club and their carrier, Bridgefield Insurance Company are responsible for workers' compensation benefits for Rey Perez as a result of this injury of March 28, 2012; the error being the preponderance of the evidence does not support this conclusion.

56. In concluding as a Matter of Law (#12) that pursuant to Section 42-1-160 and 42-15-60, the Claimant suffered injuries to his face, jaw, left eye, and left ear; the error being the preponderance of the evidence does not support an injury to the Claimant's left ear.

57. In concluding as a Matter of Law (#14) that pursuant to Section 42-15-60, the Claimant is entitled to past and ongoing causally related medical care and treatment to be provided by the statutory employer and its carrier for his face, jaw, and left eye; the error being the preponderance of the evidence does not support the conclusion that EA Operations/Green Valley Country Club is the Claimant's statutory employer and is engaged in the trade business or occupation of construction or setting trusses.

58. In concluding as a Matter of Law (#15) that pursuant to Section 42-15-60, the defendants Durham Greene, Inc., Cornell Dubilier Electronics, Travelers Indemnity Company, Key Risk Insurance Company of South Carolina, and the South Carolina Uninsured Employers Fund are not proper parties to this action and should be and hereby are dismissed; the error being the preponderance of the evidence supports the conclusion that EA Operations/Green Valley Country Club is not the Claimant's statutory employer, and that the Claimant's direct employer, the Lamar Group, was subject to the Act and operating without insurance and, therefore, the Uninsured Employers Fund is a proper party to this action and should be responsible for paying benefits to the Claimant.

59. In ordering that defendants, EA Management/Green Valley Country Club and their carrier, Bridgefield Casualty Insurance Company, shall pay the claimant, Rey B. Perez, temporary total disability compensation at the rate of $666.70 for the period of March 28, 2012 through December 7, 2012; the error being the preponderance of the evidence does not support the conclusion that EA Operations is the statutory employer of the Claimant, that the Claimant's compensation rate is $666.70, or that Claimant was totally disabled from March 28, 2012 through December 7, 2012.

60. In ordering defendants EA Management/Green Valley Country Club and their carrier, Bridgefield Casualty Insurance Company, to pay for and/or reimburse the Claimant for previous causally related medical care and provide ongoing medical care and treatment to for injuries suffered to his face, jaw, left eye, and left ear; the error being the preponderance of evidence does not support the conclusion that EA Operations is the Claimant's statutory employer, or that the Claimant sustained an injury to his left ear.

61. In ordering that defendant South Carolina Uninsured Employer's Fund shall be dismissed from this action with prejudice; the error being the preponderance of the evidence supports the conclusion that EA Operations/Green Valley Country Club is not the Claimant's statutory employer, and that the Claimant's direct employer, the Lamar Group, was subject to the Act and operating without insurance and, therefore, the Uninsured Employers Fund is a proper party to this action and should be responsible for paying benefits to the Claimant.

APPELLATE PANEL DECISION

Copies of the above assignments of error were furnished to all interested parties prior to oral argument scheduled before the Appellate Panel on January 23, 2017. Following the filing of

the assignments of error, the parties entered into a consent order, specifically agreeing that Durham Greene, Key Risk, Cornell Dubilier Electronics and Travelers Indemnity were not proper parties to this case and should be dismissed with prejudice.

STANDARD OF REVIEW

Pursuant to S.C. Code Ann. § 42-17-50, the Commission shall review the award and, if good grounds be shown therefore, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award. Pursuant to S.C. Code Ann. § 42-17-50, the Appellate Panel reviewed the Award and weighed the evidence in the records presented at the initial hearing. The Panel also considered all issues raised in the brief s of the Appellants and Respondents.

As detailed in the allegations of error, EA Operations asserts errors in the summary of the evidence in the Single Commissioner's order. Therefore, the Appellate Panel now sets forth the summary of evidence below.

Further, after careful review in the instant case, the Appellate Panel **AFFIRMS**, with amendments, the Single Commissioner's Order in part, and **REVERSES** the Single Commissioner's Order in part. The following Findings of Fact and Conclusions of Law are wholly substituted for the Findings of Fact and Conclusions of Law of the Single Commissioner and are now the Law of the Case.

SUMMARY OF THE EVIDENCE

Testimony of Claimant

On the date of accident, Claimant was working for Lara Martinez, nailing down trusses on the roof of the Green Valley Country Club (Hrg. Tr. p. 27). He was not an employee of the Green Valley Country Club and did not perform work with golf, tennis or food and beverages. (Id. at 36-37) Mr. Martinez was directing the Claimant's work and that of the crane operator who was setting the trusses. (Id. at 31). As the Claimant was working, the trusses came down and pinned him. He

fell, injuring his jaw and his cheek. Id. Mr. Martinez took him to hospital where he was treated for his jaw and cheek. (Id. at 32) He had surgery and plates were placed in his jaw. Id. He has not seen Mr. Martinez since that day. Id. He was never paid for the day of his injury. (Id. at p. 35)

Claimant believes he was out of work about nine months due to his injury. (Id. at 33). Since claimant returned to regular work, he has worked full-time for Alfredo Juarez. (Id. at 34).

Claimant had worked for Mr. Martinez in the past, performing framing work. (Id. at 27). He has been a framer since he came to the U.S. from Mexico approximately eight years ago. (Id. 26-27). Mr. Martinez previously paid him between $200 and $250 per day, but they had not discussed how much he would be paid for the job on which he was injured. (Id. at 28) The Claimant has no proof of his earnings. (Id. at 37-38).

On the date of accident, Mr. Martinez told the claimant when to show up, where to show up, and what to do. (Id. at 30). There were six people doing the framing job at the country club on the day of the accident. (Id. at 39).

In addition to problems with his jaw and left cheek, Claimant's left eye is sensitive to the light and painful. Sometimes he experiences blurry vision. (Id. at 32-33). He is able to play soccer every weekend. (Id. at 38-39).

Testimony of Pablo Alvarez

Mr. Alvarez knows the claimant from working with him in construction. (Hrg. Tr. 13). Mr. Alvarez previously worked for Lara Martinez in Asheville. (Hrg. Tr. 13–14). Mr. Alvarez was on the job site when the claimant was injured. (Id. at 14). Mr. Martinez called him about the job at the country club. (Id. at 14). On the day of the accident, Mr. Martinez was telling the people working on the trusses what to do. (Id. at 15). Other than Mr. Martinez, Mr. Alvarez did not speak to anyone regarding the job at the country club. (Id. at 15–16). Mr. Alvarez considered Mr. Martinez

his employer for that day. (Id. at 16). After the claimant's accident, Mr. Martinez admitted to Mr. Alvarez that he did not have any insurance. (Id. at 18).

Mr. Alvarez expected to be paid between $200 and $250 per day for his work on this job. (Id. at 16). Mr. Martinez had previously paid him $150 per day. He made between $800 and $900 per week, but estimated his annual earnings at between $20,000 and $25,000. (Id. at 23, 24).

Mike Kaplan Testimony

Mike Kaplan is Executive Director of EA Operations, d/b/a Green Valley Country Club. EA Operations manages the golf course and is not in the business of construction. (Id. at 46–47). EA Operations also maintains the golf course, provides food and beverage service, runs the fitness center, provides tennis facilities, manages the golf center, and does everything involved with running a country club. (Id. at 46). As Executive Director, Mr. Kaplan oversees the club. (Id.).

The construction project in question was renovation of a locker room/restroom to be turned into a fitness center. (Id. at 47). The building had a flat roof, so the plan was to build a new roof in order to put in air-conditioning. (Id. at 47). A contractor's license was necessary in order to complete the renovation project. (Id. at 56). Mr. Kaplan arranged to use Duane Green's construction license for the project. (Id. at 53). Mr. Kaplan also contracted with a friend, John Coleman, whose business is training building inspectors, as a consultant to oversee the project. (Id. at 48). Mr. Coleman provided Mr. Kaplan with periodic progress reports, but for the most part Mr. Kaplan let Mr. Coleman make decisions and work with contractors. Id.

To the best of Mr. Kaplan's knowledge, the certificates of insurance for the project were kept in his bookkeeping department. (Id. at 58). The contracting work was paid for out of EA Operations' operating budget. (Id. at 61).

No employees of EA Operations performed any work on this construction project. (Id. at 49). In fact, no EA Operations employees have ever performed construction work for EA Operations. (Id.). No EA Operations employee is trained to install or put up trusses. (Id.). EA

Operations has operated the country club without the fitness room. (Id. at 50). Claimant was not an employee of EA Operations. (Id. at 50).

De Bene Esse Deposition of John Coleman

Mr. Coleman was a consultant for the Green Valley Country Club on this particular project and oversaw the construction process, which included meeting with contractors, meeting with architects, and working with the bid process so that Mike Kaplan would have the information necessary to decide on bids. (Dep. Tr. pp. 7–12). Mr. Kaplan made the final determination on which contractors to use. (Dep. Tr. p. 18). No employee of EA Operations did any construction work on the job. (Dep. Tr. 16–17). The purpose of bringing in The Lamar Group, LLC, or Lara Martinez, was to set trusses for a roof system. (Dep. Tr. 25). Mr. Coleman asked Mr. Martinez for a contract and proof of workers compensation insurance. (Id. p. 13). He received a certificate of insurance at some point, but it had expired. (Id. at 14).

As far as the proposal process, Mr. Coleman testified that the subcontractors would provide written proposals that would have been kept by the EA Operations bookkeeper. (Dep. Tr. 37). Mike Kaplan did reject some of Mr. Coleman's recommendations for subcontractors. (Dep. Tr. 38).

Claimant's APA Submissions

On March 28, 2012, claimant presented to the Greenville Hospital System. (APA #4, p. 19). He was admitted on that date and discharged on April 10, 2012. (Id.) He suffered multiple facial fractures including a left orbital fracture and mandibular fractures. (APA #4, p. 23). The Claimant underwent surgery for a tracheostomy and a facial fixation. (APA #4, p. 24). A laceration to the left ear was noted. (Id.)

In addition to medical records, claimant submitted various other documents attached to the APA submissions. Claimant submitted a certificate of liability insurance for workers'

compensation and employer's liability insurance purporting that The Lamar Group, LLC had workers compensation insurance with Companion from January 27, 2011 to January 27, 2012. (APA #6, p. 48). Claimant also submitted a First Report of Injury for the claimant dated May 15, 2012 for the applicable date of injury. (APA #9, p. 57).

Other APA Submissions

In addition to an operative note showing removal of some hardware (APA #10, pp. 62–63), EA Operations submitted documents related to the construction project at the Green Valley Country Club describing the project as "Fitness Center Renovations for Green Valley Country Club." (Exhibit A, p. A1). The description of the project in a commercial building application made to the County of Greenville was an "Interior upfit of existing space into a private fitness center for club mem[bers]." (Id. at A2).

STIPULATION

At the Appellate Panel hearing, the remaining parties entered into an agreement to narrow the scope of the disputed issues. Specifically, the parties agreed as follows:

1. The average weekly wage shall be five hundred seventy-five and 00/100 dollars ($575.00), with a corresponding compensation rate of three hundred eighty-three and 35/100 dollars ($383.35).
2. The parties agree that claimant is entitled to a closed period of temporary total disability from March 28, 2012, the date of the accident, through September 25, 2012, for a total of 26 weeks at the agreed upon compensation for a total of nine-thousand nine hundred sixty-seven and 10/100 ($9,967.10).
3. Such amount shall be the responsibility of whichever party is found responsible for payment of benefits in this case.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The claimant, Ray B. Perez, was an employee of The Lamar Group, LLC, on the date of the accident. Such finding is based on the testimony of the Claimant, Pablo Alvarez, and John Coleman.

2. The Lamar Group, LLC, had four or more employees on the date of the accident. Such finding is based on the testimony of the Claimant.

3. The Lamar Group, LLC, was previously insured, but this insurance had lapsed prior to the date of accident. Such finding is based upon the certificate of insurance submitted by the Claimant and the Commission's file.

4. The Lamar Group, LLC, was subject to the SC Carolina Workers Compensation Act and was operating without insurance on the date of accident in this case. Such finding is based on the claimant's testimony, the Commission's file, the testimony of John Coleman, and the certificate of insurance submitted by the Claimant.

5. As the Lamar Group was the Claimant's employer and was subject to the Act and operating without insurance, the South Carolina Uninsured Employers' Fund is a proper party to this claim and to the extent it has been dismissed, we find that the Uninsured Employers Fund shall be reinstated as a party to this action.

6. EA Operations/The Green Valley Country Club was also subject to the Act on the date of the accident and had coverage for its employees through Bridgefield Casualty.

7. On or about March 28, 2012, the claimant fell from a building ("Fall") striking his face, injuring his face (facial bones), jaw, left eye, and left ear, while working on a construction project located at the Green Valley Country Club. Such finding is based on the testimony of the Claimant, John Coleman, Pablo Alvarez, and medical records of Greenville Hospital System

8. EA Operations manages the Green Valley Country Club. This involves golf course maintenance, providing food and beverage service, and managing the fitness center and tennis facility. Such finding is based on the testimony of Mike Kaplan and John Coleman.

9. At the time of the Fall, EA Operations had commissioned a renovation project for one of the buildings on the country club property, which specifically involved renovating a locker room/restroom into a fitness center ("Project"). Such finding is based on the testimony of Mike Kaplan, the testimony of John Coleman and construction documents submitted in the APA submissions.

10. In order to complete the Project, Mike Kaplan, the Executive Director of EA Operations, consulted with John Coleman, a building inspector by trade, to manage and oversee the project. Such finding is based on the testimony of Mike Kaplan and John Coleman.

11. Mr. Coleman hired numerous subcontractors to complete the Project for the country club. Such finding is based on the testimony of Mike Kaplan and John Coleman.

12. One of the subcontractors used by Mr. Coleman was The Lamar Group, LLC, owned by Lara Martinez. Such finding is based on the testimony of John Coleman, the Claimant and Pablo Alvarez.

13. The Lamar Group, LLC's responsibility was to set trusses for a roof system for the Project. Such finding is based on the testimony of John Coleman, the Claimant and Pablo Alvarez.

14. Mr. Coleman did not obtain a valid certificate of workers compensation insurance or a signed contract from the Lamar Group due to the exigencies of the getting the trusses installed in a timely fashion. Such finding is based upon Mr. Coleman's testimony and the certificate of insurance in the Commission's file.

15. Setting trusses is a specialized process which requires use of a crane. Such finding is based on the testimony of John Coleman.

16. No EA Operations employee was trained to install or put up trusses. Such finding is based on the testimony of Mike Kaplan.

17. EA Operations was not equipped to handle the process of installing trusses with its own workforce. Such finding is based upon the testimony of John Coleman and Mike Kaplan.

18. Construction, specifically setting trusses, is not an important part of EA Operations' trade or business. Such finding is based on the testimony of Mike Kaplan and John Coleman.

19. Green Valley Country Club/EA Operations could have and did function without the new fitness center which was the subject of this Project. Such finding is based on the testimony of Mike Kaplan.

20. Construction, including specifically setting trusses for the new fitness center, was not a necessary, essential and integral part of EA Operations' business.

21. No EA Operations employee worked on the Project. Such finding is based on the testimony of Mike Kaplan and John Coleman.

22. No employees of EA Operations have ever set trusses or performed construction work for EA Operations. Such finding is based on the testimony of Mike Kaplan.

23. The activity being performed by the Claimant at the time of his injury has never been performed by EA Operations' employees. Such finding is based on the testimony of Mike Kaplan.

24. EA Operations' trade, business, and occupation is managing the golf course and country club. Such finding is based upon the testimony of John Coleman and Mike Kaplan.

25. There is no evidence that EA Operations ever was involved in managing any renovation or construction projects outside of Green Valley Country Club. Such finding is based on the Commission's file, including the testimony of all witnesses.

26. There is no evidence that EA Operations contemplated ongoing or continual building construction projects as a part of the ongoing revenue obtained from the golf course and country club. Such finding is based on the Commission's file, including the testimony of all witnesses.

27. There is no evidence that EA Operations anticipated earning revenue directly in exchange for providing contracting services. Such finding is based on the Commission's file, including the testimony of all witnesses.

28. Even assuming EA Operations acted as a general contractor for the Project, renovation of a physical building on the site of the Green Valley Country Club, without more, is insufficient to make contracting or construction part of EA Operations' regular business.

29. We find, by the preponderance of the evidence, that EA Operations was not in the trade, business, or occupation of installing trusses, or, more generally, building construction.

30. Therefore, in conjunction with the above finding of facts, we specifically find claimant was not the statutory employee of EA Operations.

31. Because there is no employee-employer relationship between EA Operations and claimant, EA Operations and their carrier are not responsible for paying benefits to claimant under the Workers' Compensation Act.

32. As the Claimant's Employer, the Lamar Group is responsible for paying benefits to the Claimant; however because the Claimant's employer was subject to the Act and operating without insurance on the date of accident, and there is no statutory employer, the SC Uninsured Employers' Fund is responsible for providing applicable benefits to the claimant should the Lamar Group be unable to, refuse to, or fail to pay the same.

33. As the Lamar Group has failed to appear and pay benefits to date, the SC Uninsured Employer's Fund shall pay all causally related medical treatment to date for the Claimant's injuries to his face (facial bones), jaw, left eye and left ear, consistent with the

Workers' Compensation Act; however the Uninsured Employer's Fund retains full lien rights and is entitled to collect payment from the Lamar Group and its owner for any fees, costs or benefits paid.

34. The SC Uninsured Employer's Fund shall appoint an authorized physician and provide additional medical treatment for the claimant's face (facial bones), jaw, left eye and left ear, consistent with the SC Workers Compensation Act.

35. The SC Uninsured Employer's Fund shall pay the Claimant a closed period of temporary total disability benefits in the amount of $9,967.10 which represents 26 weeks of compensation at the compensation rate of $383.85, consistent with the parties' stipulation.

36. Claimant is not yet at maximum medical improvement and the Claimant's testimony and a determination as to permanent disability, if any, is premature. Such finding is based upon the medical records

37. The SC Uninsured Employer's Fund shall provide any other benefits as may be due consistent with the terms of the South Carolina Workers Compensation Act.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to Section 42-1-160, the claimant, Rey Perez, suffered an injury by accident arising out of and in the course of employment on or about March 28, 2012.

2. Pursuant to Section 42-1-130, the claimant, Rey Perez, was an employee of The Lamar Group, LLC.

3. Pursuant to South Carolina Workers' Compensation Regulation 67-403 and SC Code Ann. § 42-1-360, The Lamar Group, LLC was subject to the Act by previously obtaining workers' compensation insurance and by having four or more employees.

4. Pursuant to §42-5-10 et. seq., the Lamar Group was operating as an unqualified self-insurer on the date of the injury.

5. Pursuant to S.C. Code Ann §42-1-400, while EA Operations as the owner contracted with the Lamar Group to set trusses on the Project, EA Operations is not the Claimant's statutory employer as the work of setting trusses was not part of its "trade, business or occupation."

6. Under Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997), in determining whether an activity is part of the owner's trade, business or occupation, the court must consider whether: (a) the activity of subcontractor is **an important part** of the owner's trade or business; (b) the activity performed by the subcontractor is a **necessary, essential and integral part of the owner's business**; or (c) **the identical activity performed by the subcontractor has been performed by employees of the owner**. Glass at 50.

7. The Glass court held that an activity is not an important part of the owner's trade or business "...where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force." Therefore, based on the above findings of fact, under Glass v. Dow Chemical Co., 482 S.E.2d at 51 (1997), installing trusses is not an important part of EA Operations' business.

8. Pursuant to Raines v. Gould, Inc., 288 S.C. 541, 343 S.E.2d 655 (Ct. App. 1986) and Hairston v. Re: Leasing, Inc., 286 S.C.493, 497, 334 S.E.2d 825, 827 (Ct. App. 1985), an activity is a "necessary, essential, or integral" part of the owner's business "[if] the nature of the work being done is such an integral part of the operations of the company for which it is done that the company cannot function without it." Therefore, because the evidence and the above findings of fact indicate the country club could have (and did) function without the construction new fitness center and trusses, the installing of trusses is not a necessary, essential or integral part of EA Operations' business.

9. Finally, pursuant to Glass, there is no evidence employees of EA Operations had ever set trusses or performed construction work.

10. In sum, pursuant to Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997), Glass v. Dow Chemical Co., 482 S.E.2d at 51 (1997), work performed by claimant and The Lamar Group, LLC was not part of the general trade, business, or occupation of EA Operations and EA Operations is therefore not the Claimant's statutory employer.

11. Pursuant to Reg. 67-403 and S.C. Code Ann. §§ 42-1-360, 42-1-400, & 42-7-200 and the above-referenced case law, the Lamar Group is ultimately responsible for payment of benefits in this case; however, as the Lamar Group has failed to appear and pay the compensation due, the Uninsured Employers Fund is responsible for payment of benefits in this case.

12. Pursuant to S.C. Code Ann. §42-7-200, the Uninsured Employers Fund retains full lien rights against and the right to collect payments from the Lamar Group and its owner for any fees and costs incurred and any benefits paid on this claim.

13. Pursuant to § 42-15-60, Claimant is entitled to causally-related medical treatment to date and additional medical treatment which will tend to lessen his period of disability.

14. Pursuant to § 42-9-10 and the stipulation of the parties, Claimant is entitled to temporary total disability benefits for 26 weeks.

ORDER

Based upon the Appellate Panel's Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the average weekly wage is five hundred seventy-five and 00/100 dollars ($575.00), with a resulting compensation rate of three hundred eighty-three and 35/100 dollars ($383.35).

IT IS FURTHER ORDERED that claimant is not a statutory employee of EA Operations, and, therefore, EA Operations is not responsible for payment of workers' compensation benefits to the claimant.

IT IS FURTHER ORDERED that the South Carolina Uninsured Employers Fund shall pay the claimant, Rey B. Perez, temporary total disability compensation at the rate of $383.35 for the period of March 28, 2012, the date of the accident, through September 25, 2012 for a total of 26 weeks for a total of nine-thousand nine hundred sixty-seven and 10/100 ($9,967.10).

IT IS FURTHER ORDERED that the defendant, the South Carolina Uninsured Employers Fund, shall provide ongoing medical care and treatment to the claimant for injuries suffered to his face (facial bones), jaw, left eye and left ear.

IT IS FURTHER ORDERED that the defendant, the South Carolina Uninsured Employers Fund, has full lien rights against and the right to collect payments from the Lamar Group for costs, fees or benefits paid in this matter.

IT IS FURTHER ORDERED that the defendants, EA Operations dba Green Valley Country Club and Bridgefield Casualty Insurance Company are hereby dismissed from this action with prejudice.

AND IT IS SO ORDERED.

AFFIRMED WITH AMENDMENT

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Aisha G. Taylor, Commissioner

Avery B. Wilkerson, Commissioner

Melody L. James, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on May 25, 2017