

IN THE SUPREME COURT OF MISSOURI

FILED

SEP 30 2009

Thomas F. Simon
CLERK, SUPREME COURT

JOSEPH BANKS,)
)
 Respondent,)
)
 vs.)
)
 SARAH STEELMAN,)
 Treasurer of the State of Missouri,)
 as Custodian of the Second Injury Fund,)
)
 Appellant.)

SC Number: 90131

SUBSTITUTE RESPONDENT'S BRIEF OF JOSEPH BANKS

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SCANNED

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JURISDICTIONAL STATEMENT

Joseph Banks (hereinafter “Employee”) filed the instant workers’ compensation action against Bridgford Foods (hereinafter “Employer”) for an accident that took place on September 13, 2000. On that date, Employee was driving a van for his employer, when the van was struck while Employee was sitting at a red light. On October 2, 2007, Administrative Law Judge (hereinafter “ALJ”) Suzette Carlisle held a Final Hearing. On January 7, 2008, ALJ Carlisle issued her Award. Therein, ALJ found that as a result of the work accident, Employee sustained a 23.9% permanent partial disability of the cervical spine, a 25% permanent partial disability of the right shoulder, and a 15% permanent partial disability of the left shoulder, totaling 188.4 weeks of permanent partial disability. The ALJ concluded that Employer’s liability for permanent partial disability benefits would have commenced on October 2, 2002, and ended on May 19, 2006. Further, the ALJ found that Employee was permanently and totally disabled as of October 7, 2002. She ordered the Second Injury Fund (hereinafter “Fund”) to pay permanent total disability benefits for the remainder of the Employee’s lifetime. Finally, the ALJ held that the Fund was not entitled to a subrogation recovery from the proceeds of the third-party action previously filed by the Employee.

On January 23, 2008, the Fund filed an Application for Review with the Labor and Industrial Relations Commission (hereinafter “the Commission.”) . Thereafter, on July 9, 2008, the Commission issued its Final Award. Therein, the Commission affirmed the Award issued by ALJ Carlisle on January 7, 2008.

On August 7, 2008, the Fund filed its Notice of Appeal with the Commission. On March 17, 2009, the Missouri Court of Appeals, Eastern District, issued its Opinion in which the Court of Appeals reversed the Award of the Commission, and remanded the Claim to the Commission. The Court of Appeals held that the Commission erred in failing to address the Fund's subrogation recovery from the monies the Employee received from settlement of the third-party action.

On April 1, 2009, Employee filed his Motion For Rehearing/Application For Transfer with the Missouri Court of Appeals, Eastern District. The Court of Appeals denied the Motion For Rehearing/Application For Transfer on April 20, 2009. Subsequently, on May 6, 2009, Employee filed his Application For Transfer with the this Court. The Supreme Court granted transfer in this matter on May 26, 2009.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals, pursuant to Article V, Section 3, and Article V, Section 10, of the Missouri Constitution (1945) (as amended 1982). Therefore, the jurisdiction of this Court is invoked pursuant to Article V, Section 3, and Article V, Section 10, of the Missouri Constitution (1945) (as amended 1982).

STATEMENT OF FACTS

Introduction

At issue before the Court is whether the Commission possesses jurisdiction to determine the amount of the Fund's subrogation recovery from the money Employee received in his third-party action. Employee respectfully submits that, since the Fund's subrogation right is equitable in nature and does not arise under the Workers' Compensation Act, the Commission does not possess jurisdiction to determine the amount of the Fund's subrogation recovery from the proceeds of the settlement in the third-party action. Thus, the Commission's Award must be affirmed.

Procedural History/Relevant Facts

On September 13, 2000, Employee was driving a van for his employer, Bridgford Foods. While Employee was stopped at a red light, he was struck by a vehicle driven by a third person. As a result of the accident, Employee injured his neck and bilateral shoulders. Employee received treatment, including surgery on his neck and right shoulder, for injuries sustained in the accident. (Tr.26-27).¹

On December 20, 2002, Employee filed an Amended Claim for Compensation, alleging that he injured his neck, left shoulder, right shoulder, and body as a whole on September 13, 2000 as a result of an accident causally arising out of and in the course and

¹ Matters referred to herein that are contained in the Transcript of Hearing shall be designated as (Tr. __). Matters referred to herein that are contained the Legal File shall be designated as (L.F. __).

scope of his employment. In his Amended Claim for Compensation, Employee sought recovery against the Fund for permanent total disability, listing prior injuries and conditions to and involving the left knee, right big toe, right elbow, right wrist, left wrist, and right knee. (L.F.7-8). In its Answer to the Amended Claim, Employer admitted that Employee sustained accidental injury on or about September 13, 2000 for which all necessary compensation benefits and medical aid had been provided. By way of further answer, Employer denied all allegations contained in the Amended Claim for Compensation not specifically admitted in its Answer. (L.F.9). On January 16, 2003, the Fund filed its Answer to the Amended Claim for Compensation. (L.F.10).

In 2001, Employee filed a negligence action against the third-party tortfeasor who struck him on September 13, 2000 (hereinafter “third-party action”). The third-party action settled for the tortfeasor’s insurance policy limits of \$100,000. (Tr.33). Attorney John Anderson represented the Employee in the third-party action. Employee incurred attorney’s fees in the amount of \$40,000, and costs in the amount of \$5,069.52 in obtaining the settlement in the third-party action. The balance of the monies received in settlement of the Employee’s third-party action, in the amount of \$54,903.68, currently remains in an escrow/trust account. (Tr.33-34).

Employee and Employer entered into a settlement to compromise the Employee’s Claim against the employer for the September 13, 2000 accident and injury. Pursuant to the Stipulations for Compromise Settlement, Employee received a lump sum in the amount of \$99,714.88. The settlement was based upon an approximate disability of 23.9% permanent partial disability of the body as a whole, referable to the cervical spine;

25% permanent partial disability of the right shoulder; 15% permanent partial disability of the left shoulder; and \$18,988.50 to reimburse Employee for charges from Missouri Bone & Joint/Dr. Matthew Gornet. Chief ALJ Edwin Kohner approved the Stipulations for Compromise Settlement on January 29, 2007. (L.F.11-16).

On October 2, 2007, ALJ Carlisle held a Hearing on Employee's remaining Claim against the Fund. (Tr.1-989). At Hearing, the parties stipulated that on September 13, 2000, Employee sustained an accident which arose out of and in the course of his employment; that employer paid Employee \$18,646 in temporary total disability benefits, representing 39 6/7 weeks for the period from February 21, 2001, to November 28, 2001; Employer paid \$17,754 in medical benefits; Employee obtained maximum medical improvement on October 7, 2002; and that the Fund had a subrogation interest in the third-party action and was entitled to a portion of the funds held in escrow, said funds totaling \$54,930.48. (L.F.17-31). The issues to be decided at hearing were the nature and extent of Fund liability, if any, for either permanent partial disability or permanent total disability benefits; and whether the Fund was entitled to any portion of the \$54,930.48 held in escrow from the settlement in the Employee's third-party action. (L.F.17-31).

On January 7, 2008, ALJ Carlisle issued her Award. (L.F.17-31). Therein, the ALJ concluded that Employee sustained disability from the last injury alone - the September 13, 2000 accident - and that that accident resulted in a cervical fusion and a right rotator cuff repair, along with a left rotator cuff tear which had not been surgically repaired. ALJ Carlisle found that claimant sustained a 23.9% permanent partial disability

of the body as a whole, at the level of the cervical spine; a 25% permanent partial disability of the right shoulder; and a 15% permanent partial disability of the left shoulder as a result of the September 13, 2000 accident and injury. (L.F.17-31).

Additionally, the ALJ found that claimant had significant pre-existing disabilities prior to the September 13, 2000 accident. These disabilities included a 1972 neck injury, a 1981 left knee injury, a 1984 right elbow injury, bilateral wrist injuries, a 1999 right meniscus tear, and degenerative arthritis of the right knee, both hands, and feet. (L.F.17-31). The ALJ concluded that these pre-existing disabilities were serious enough to constitute a hindrance or obstacle to employment or re-employment in the open labor market, and that Employee's pre-existing disabilities combined with the September 13, 2000 injuries to create a greater overall disability than the simple sum of the existing disabilities when considered separately. (L.F.17-31). ALJ Carlisle found that Employee was permanently and totally disabled as against the Fund. This permanent total disability was due to the combination of the Employee's pre-existing injuries and conditions in conjunction with the injuries from the September 13, 2000 accident. (L.F.17-31).

As to the commencement date for permanent total disability, ALJ Carlisle found that Employer's liability for permanent partial disability should have commenced on October 7, 2002, and ended on May 19, 2006. The Fund was to pay the Employee permanent total disability beginning on May 20, 2006, and for the remainder of his lifetime. (L.F.17-31).

Finally, the ALJ addressed the Fund's right of subrogation. While the parties stipulated that the net recovery from the third-party action, after attorney's fees and

expenses, totaled \$54,930.48 and that the Fund had a subrogation interest in the net recovery, the Employee asserted that the Division had no jurisdiction to determine the Fund's subrogation rights. Conversely, the Fund contended that it had a right to a portion of the net recovery in the third-party action as an advance toward future permanent total disability benefit payments. As the ALJ observed, in *Cole v. Morris*, 409 S.W.2d 618 (Mo. 1966), the Supreme Court held that Section 287.150 of the Workers' Compensation Act did not provide the Fund with subrogation rights. *Cole* went on to hold, however, that the Fund had a right to subrogation against a third party who was responsible for injury to the Employee. This right arose by operation of law. The goal was to prevent an unjust enrichment by the Employee from retaining both compensation benefits and the damage award in the third-party action. (L.F.17-31).

However, ALJ Carlisle went on to find that the Employee did not receive an unjust enrichment in the instant matter. There was no evidence that Employee was paid rehabilitation benefits under Section 287.140.1 or uninsured employer benefits under Section 287.220.5. As the ALJ observed at Hearing, no evidence was presented regarding the date that the settlement was reached in the third-party action, the amount that the employer paid prior to settlement in the third-party action, or whether there was any evidence presented in the third-party action regarding the Employee's comparative fault. Even assuming that Employee settled his Claim with Employer prior to the settlement in the third-party action, the ALJ concluded that there would be no net recovery to the Employee. Assuming that Employer paid \$136,114.88 in workers' compensation benefits to the Employee, and dividing that amount by the \$100,000 third-

party settlement yielded a 1.36 ratio, or \$74,768.58. Employer would be entitled to recover this amount, pursuant to Section 287.150. Since this amount was greater than the \$54,930.48 net recovery remaining in escrow, Employee would receive no recovery from those funds and, therefore, there would be no unjust enrichment to Employee. (L.F.17-31).

The ALJ noted that while the Fund might have a theoretical subrogation interest in the \$54,930.48 net recovery in the third-party action remaining in escrow, she was not able to determine the actual amount of the Fund's subrogation recovery, if any, since the employer's subrogation recovery had yet to be determined. The ALJ therefore denied the Fund's request for a subrogation recovery from the proceeds of the settlement in the third-party action. (L.F.17-31).

On January 23, 2008, the Fund filed an Application for Review with the Commission. On July 9, 2008, the Commission issued its Final Award Allowing Compensation, affirming the Award of ALJ Carlisle. Having reviewed the evidence and considered the whole record, the Commission found that the ALJ's Award was supported by competent and substantial evidence, and was made in accordance with the Workers' Compensation Act. It affirmed the ALJ's Award in its entirety. (L.F.34-409). On August 7, 2008, the Fund filed its Notice of Appeal with the Commission. (L.F.50-54).

On March 17, 2009, the Missouri Court of Appeals, Eastern District, issued its Opinion. Therein, the Court of Appeals reversed the Commission's Award, and remanded the Claim to the Commission. (Opinion, 1).

Before the Court of Appeals, the Fund argued that the Commission erred in failing to address its subrogation interest. Specifically, the Fund contended that pursuant to *Cole v. Morris*, it was entitled to a subrogation interest because the Employee received a recovery from a third party. The Court of Appeals agreed. (Opinion, 2).

As the Eastern District observed, *Cole* held that the Fund was entitled to a credit on an award of permanent total disability benefits granted to an Employee in the amount of a portion of an Employee's recovery from a third party. *Cole* found that the Fund had a right of subrogation based upon the common law right of subrogation, rather than the statutory language of the Workers' Compensation Act. (Opinion, 3). This right emanated from the general rule that any person who, pursuant to a legal obligation to do so, has paid for an injury resulting from the wrong of another, may be subrogated to the rights of the injured person against the wrongdoer. *Cole* reasoned that the Fund had been required to pay compensation under the terms of the Act to an Employee who was injured by a third-party tortfeasor, and thus, the loss should ultimately fall upon the wrongdoer responsible for it. If the Fund were deprived of the right of subrogation, it would result in the unjust enrichment of the Employee, thereby violating a basic tenet of the common law that there was not to be a double satisfaction for the same wrong. Thus, *Cole* held that a constructive trust was warranted, even though the person who was unjustly enriched did nothing wrong in the legal sense. (Opinion, 3).

The Eastern District found that it was constitutionally bound to follow *Cole*, since it was the most recent controlling decision of the Missouri Supreme Court on the issue before it. Interpreting *Cole*, the Eastern District held that the Commission erred in failing

to grant the Fund a subrogation interest in the Employee's third-party recovery. (Opinion, 3).

The Eastern District noted that *Cole* put forth instructions for determining the amount of recovery that should be paid and credited to the Fund. (Opinion, 3). Under *Cole*, the amount of recovery remaining in the third-party action, after payment of an Employee's expenses in making the recovery, was to be paid, retained and credited as follows: an Employee was to pay and reimburse the Fund for all compensation paid to him by the Fund, and the balance was to be retained by the Employee and treated as an advance payment by the Fund, on account of any future installments of compensation. The Eastern District reversed the Commission's Award, and remanded the Claim to the Commission, for entry of its order in accordance with the Eastern District's Opinion. (Opinion, 3-4).

Judge Mooney issued a Concurring Opinion. While he concurred with the majority Opinion, Judge Mooney wrote separately to question how the Commission could exercise equitable powers to award a subrogation recovery to the Fund. (Opinion, 5-6).

As Judge Mooney recognized, subrogation was founded on principles of equity and justice, and its operation was governed by principles of equity. While *Cole* held that the Workers' Compensation Act did not grant the Fund subrogation rights, it went on to find that the Fund was subrogated to the rights of the Employee under the common law, and directed the case returned to the Commission for entry of an order in accordance with the Court's opinion. (Opinion, 5).

As Judge Mooney observed, however, the Commission was an administrative agency, and not a court. As an administrative tribunal, the Commission exercised only that authority invested in it by legislative enactment. While the Commission possessed the power to ascertain and determine certain questions of fact, and to apply the provisions of the workers' compensation law, the Act did not vest the Commission with judicial power, and the Commission lacked the power to authoritatively expound any principle of law or equity. In the instant case, as in *Cole*, the right of subrogation that the Fund asserted derived from the common law, and not the Workers' Compensation Act. Thus, if the Fund wished to assert its subrogation right, its proper remedy would seem to be in a suit in equity in the circuit court. (Opinion, 6).

On April 1, 2009, Employee filed his Motion For Rehearing And/Or Application For Transfer with the Court of Appeals. The Court of Appeals denied the Employee's Motion For Rehearing/ Application For Transfer on April 20, 2009.

Subsequently, on May 6, 2009, Employee filed his Application For Transfer with the instant Court. The Court sustained the Application For Transfer on May 26, 2009.

STANDARD OF REVIEW

The Missouri Constitution, Article V, Section 18, provides for judicial review of the Commission's Award, to determine whether it is authorized by law and supported by competent and substantial evidence upon the whole record. *Richard v. Department of Corrections*, 162 S.W.3d 35, 37 (Mo.App.W.D. 2005). On appeal from an Award in a workers' compensation case, the Supreme Court reviews the Award of the Commission, pursuant to Section 287.495. Under that statutory provision, the Court may modify, reverse, remand for hearing, or set aside the Award only upon the following grounds: 1) that the Commission acted without or in excess of its power; 2) that the Award was procured by fraud; 3) that the facts found by the Commission do not support the Award; or 4) that there was not sufficient, competent evidence in the record to warrant the making of the Award. RSMo §287.4095.1; *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222 (Mo banc. 2003).

The Court examines the record as a whole to determine if it contains sufficient, competent and substantial evidence to support the Award. *Hampton*, 121 S.W.3d at 223. Whether the Award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. *Id.*

On appeal, questions of law are given *de novo* review. *DeBose v. City of St. Louis*, 210 S.W.3d 391, 394 (Mo.App.E.D. 2006); *Adamson v. DTC Calhoun Trucking*, 212 S.W.3d 207, 213 (Mo.App.S.D. 2007). This Court is not bound by the Commission's interpretation and application of the law, and no deference is afforded to the Commission's interpretation of the law. *Schoemehl v. Treasurer*, 217 S.W.3d 900,

901 (Mo banc. 2007). The primary issue for the Court's resolution, whether the Commission possessed jurisdiction to determine the Fund's subrogation recovery from the proceeds of the third-party action, requires the interpretation of a statute, and therefore, the Court's review of that question is *de novo*. **Richard**, 162 S.W.3d at 37.

POINTS RELIED ON

I.

THE COMMISSION'S AWARD MUST BE AFFIRMED. THE COMMISSION DID NOT ERR IN DENYING THE SECOND INJURY FUND'S REQUEST FOR A DETERMINATION OF THE AMOUNT OF ITS SUBROGATION RECOVERY FROM THE PROCEEDS OF THE THIRD-PARTY ACTION, FOR THE REASONS THAT THE FUND'S RIGHT OF SUBROGATION IS EQUITABLE, AND NOT STATUTORY, IN NATURE; THE COMMISSION IS AN ADMINISTRATIVE AGENCY, CREATED BY STATUTE, AND POSSESSES ONLY THAT JURISDICTION GRANTED TO IT BY THE WORKERS' COMPENSATION ACT; THE COMMISSION IS NOT A COURT, AND CANNOT EXPOUND ON ANY PRINCIPLE OF LAW OR EQUITY; AND THUS, IF THE FUND WISHES TO SECURE A RULING AS TO THE AMOUNT OF ITS SUBROGATION RECOVERY, IT MUST DO SO IN A CIRCUIT COURT, AND NOT BEFORE THE COMMISSION, WHICH LACKS JURISDICTION TO RENDER SUCH A DECISION.

Cole v. Morris, 409 S.W.2d 618 (Mo. 1966)

Oren v. Swift & Company, 51 S.W.2d 59 (Mo. 1932)

Hunt v. Laclede Gas Company, 869 S.W.2d 770 (Mo.App.E.D. 1993)

Carr v. North Kansas City Beverage, 409 S.W.3d 205 (Mo.App.W.D. 2001)

ARGUMENT

I.

THE COMMISSION'S AWARD MUST BE AFFIRMED. THE COMMISSION DID NOT ERR IN DENYING THE SECOND INJURY FUND'S REQUEST FOR A DETERMINATION OF THE AMOUNT OF ITS SUBROGATION RECOVERY FROM THE PROCEEDS OF THE THIRD-PARTY ACTION, FOR THE REASONS THAT THE FUND'S RIGHT OF SUBROGATION IS EQUITABLE, AND NOT STATUTORY, IN NATURE; THE COMMISSION IS AN ADMINISTRATIVE AGENCY, CREATED BY STATUTE, AND POSSESSES ONLY THAT JURISDICTION GRANTED TO IT BY THE WORKERS' COMPENSATION ACT; THE COMMISSION IS NOT A COURT, AND CANNOT EXPOUND ON ANY PRINCIPLE OF LAW OR EQUITY; AND THUS, IF THE FUND WISHES TO SECURE A RULING AS TO THE AMOUNT OF ITS SUBROGATION RECOVERY, IT MUST DO SO IN A CIRCUIT COURT, AND NOT BEFORE THE COMMISSION, WHICH LACKS JURISDICTION TO RENDER SUCH A DECISION.

JURISDICTION OF THE COMMISSION IN WORKERS' COMPENSATION

PROCEEDINGS

A proper resolution of the jurisdictional question before the Court requires an understanding of the nature of workers' compensation proceedings, and the scope of the Commission's authority and jurisdiction in such proceedings.

Jurisdiction concerns the right, power, and authority of a court or administrative agency to act. *Schneider v. Feeder's Grain & Supply*, 24 S.W.3d 739, 741 (Mo.App.E.D. 2000); *Heinle v. K&R Express Systems*, 923 S.W.2d 461, 464 (Mo.App.E.D. 1996). The concept of jurisdiction includes the authority or power to act in certain ways, i.e., to make certain orders or awards. *Ringeisen v. Insulation Services*, 539 S.W.2d 621, 625 (Mo.App.E.D. 1976).

Workers' Compensation is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy, which is wholly substitutional in character, and supplants all other rights and remedies where the employer and employee have elected to accept the Act, or are subject thereto by operation of law. *Sheets v. Hill Brothers Distributors*, 379 S.W.2d 514, 516 (Mo. 1964); *Oren v. Swift & Co.*, 51 S.W.2d 59, 60 (Mo. 1932). All remedies, claims or rights accruing to an employee against an employer for compensation for an injury arising out of and in the course of the employment are those provided for in the Act, to the exclusion of any common law or contractual rights. *Sheets*, 379 S.W.2d at 516. As a creature of statute, workers' compensation law is governed by Chapter 287, **RSMo.** *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo banc. 1998).

The Workers' Compensation Act is a complete code, governing all questions of substantive rights under its terms. *State ex rel Melbourne Hotel v. Hostetter*, 126 S.W.2d 189, 192 (Mo banc. 1939); *Groce v. Pyle*, 315 S.W.2d 482, 492 (Mo.App.W.D. 1958). The rights of the parties under the Workers' Compensation Act, and the manner of procedure thereunder, must be determined by the provisions of the Act. *Melbourne*

Hotel, 126 S.W.2d at 192; *Kristanik v. Chevrolet Motors*, 41 S.W.2d 911, 912 (Mo.App.E.D. 1931).

An administrative tribunal, like the Commission, is a creature of statute and only exercises that authority invested by legislative enactment. *King v. Chrysler Corporation*, 91 S.W.3d 696, 697 (Mo.App.E.D. 2002); *Carr v. North Kansas City Beverage Company*, 409 S.W.3d 205, 207 (Mo.App.W.D. 2001) (an administrative agency has only such jurisdiction and authority as may be granted to it by the legislature). The Commission, as an administrative agency created by statute, is limited in its jurisdiction by the terms of the Act. *Carr*, 409 S.W.3d at 207; *Hunt v. Laclede Gas Co.*, 869 S.W.2d 770, 773 (Mo.App.E.D. 1993). The Commission can only do those things, and make those orders or awards that the Workers' Compensation Act, or rules or regulations promulgated thereunder, authorize. *Ringiesen*, 539 S.W.2d at 625. The Commission must find its authority to make orders or awards in the Act. *Soars v. Soars-Lovelace*, 142 S.W.2d 866, 871 (Mo. 1940).

If the Commission lacks statutory power, it is without subject matter jurisdiction. *Carr*, 409 S.W.3d at 207; *St. Charles County Ambulance District v. Department of Health & Senior Services*, 248 S.W.3d 52, 54 (Mo.App.W.D. 2008). Subject matter jurisdiction of the Commission cannot be enlarged or conferred by consent or agreement of the parties. *Carr*, 409 S.W.3d at 207; *Kelly v. Howard*, 123 S.W.2d 584, 589 (Mo.App.W.D. 1938).

The Commission is an administrative and administrative body with incidental quasi-judicial powers. *Leichty v. Kansas City Bridge Co.*, 155 S.W.2d 297, 301

(Mo.App.E.D. 1941). The quasi-judicial power conferred upon the Commission is limited to the ascertainment of facts, and the application of existing law to the facts, in order to resolve issues within the given area of the agency's expertise. *Hunt*, 869 S.W.2d at 773; *Mikel v. Pott Industries/St. Louis Ship*, 896 S.W.2d 624, 626 (Mo banc. 1995). The Missouri Constitution does not permit the legislature to vest an administrative agency, such as the Commission, with purely judicial functions. *Hunt*, 869 S.W.2d at 773; *Liechty*, 160 S.W.2d at 279 (Commission cannot usurp judicial functions, contrary to constitutional inhibition). The Commission is an agency, and not a court. *Bliss v. Lungstras Dyeing & Cleaning Co.*, 130 S.W.2d 198, 201 (Mo.App.E.D. 1939). Judicial power of the state of Missouri is vested in the courts. **Missouri Constitution** Article V, Section 1; *Mikel*, 896 S.W.2d at 626. The Workers' Compensation Act does not vest the Commission with judicial power. *Oren*, 51 S.W.2d at 60. Thus, the Commission is not a court of general jurisdiction. *Hunt*, 869 S.W.2d at 773.

A "judgment" is the judicial act of a court. *Lederer v. Department of Social Services*, 825 S.W.2d 858, 862 (Mo.App.W.D. 1992). The Commission has no power to render a judgment. *Carr*, 409 S.W.3d at 207; *Lederer*, 825 S.W.2d at 862; *Winberry v. Treasurer*, 258 S.W.3d 455, 457 (Mo.App.E.D. 2008). Nor may the Commission expound on any principle of law or equity. *Bliss*, 130 S.W.2d at 201; *Oren*, 51 S.W.2d at 876; *Kelly*, 123 S.W.2d at 587.

Where the Commission exercises a judicial function, it exceeds its jurisdiction. See, for example, *Hunt v. Laclede Gas*, 869 S.W.2d at 773-774. Thomas Hunt was injured while working for Laclede. *Hunt*, 869 S.W.2d at 771. Hunt hired the law firm of

McAvoy & Bumb to represent him in his workers' compensation claim. At that time, McAvoy and Bumb were the only firm shareholders. They each owned 500 shares of stock in the firm and were the only professional corporate employees. *Id.* Because he had previously decided not to handle any more workers' compensation cases, McAvoy turned the Hunt file over to Bumb, and asked him to handle the Hunt claim. Bumb entered his appearance on Hunt's behalf with the Division. *Id.*

Thereafter, McAvoy and Bumb's professional relationship began to deteriorate. McAvoy alleged that an accounting was made, and he paid Bumb approximately \$61,000 and executed a release of Bumb as guarantor on the firm's behalf of a \$19,000 line of credit with the bank. *Id.* McAvoy contended that the payment and release were given in exchange for Bumb's withdrawal from the corporation, transfer of the stock shares to McAvoy, and to compensate Bumb for his share of outstanding attorney's fees. *Id.*

Conversely, Bumb claimed that in November 1989, McAvoy unilaterally segregated his cases and fees from Bumb, and in January 1990, they physically separated and established independent practices. Bumb argued that the payment and release were in satisfaction for specific fee interests unrelated to his work on Hunt's claim. *Id.* In February 1990, Bumb notified Hunt of his intention to continue to represent him. Hunt denied Bumb's request, and returned his file to McAvoy. Thereafter, the state approved McAvoy's amendment to the articles of incorporation of McAvoy & Bumb. *Id.*

McAvoy gave Hunt's file to John Allen, an Employee of the new law firm, to proceed with prosecution of Hunt's claim. *Id.* In March 1990, Bumb filed a memorandum, withdrawing as Hunt's attorney. He alleged that he spent 6-7 hours

working on Hunt's claim, and that he negotiated a \$5,000 settlement proposal for Hunt from Laclede. *Hunt*, 869 S.W.2d at 772. In his memorandum, Bumb asserted notice of a lien of \$1,460 in fees, or 25% of the outstanding settlement offer, plus a \$210 deposition fee, against the proceeds of any future recovery in Hunt's favor. *Id.* In February 1991, Hunt settled his claim with Laclede for \$5,000, subject to attorney's fees of 25% of the settlement. Bumb appeared before the Division, and asserted his lien against the proceeds of Hunt's recovery. *Id.*

After an informal non-evidentiary hearing, an ALJ divided the attorney's fees, and awarded Bumb \$835 and McAvoy \$625. He ordered Bumb to pay the \$210 deposition expense. McAvoy sought review of the ALJ's order. *Id.* The Commission remanded for an evidentiary hearing. Thereafter, the Commission affirmed the ALJ's order, dividing the attorney fee. McAvoy appealed to the Missouri Court of Appeals. It reversed and remanded. *Id.*

Before the Court of Appeals, McAvoy challenged the jurisdiction of the Commission to order division of the attorney's fee between competing attorneys. *Id.* The Court of Appeals reversed that portion of the Commission's award dividing attorney's fees between Bumb and McAvoy. *Hunt*, 869 S.W.2d at 773.

As the court noted, the division of the attorney's fee was not requested by either lawyer. A number of factual issues were in dispute. *Id.* The amount of the attorney's fee, and the responsibility for payment of expenses, were subject to conflicting contentions. Nothing in the ALJ's award, or that of the Commission, resolved those factual disputes. *Id.* Moreover, as the court of appeals noted, the Commission was an

administrative agency created by statute, and limited in its jurisdiction by the terms of the Act. The Commission was not accorded general jurisdiction. *Id.*

Section 287.260 authorized the Commission to determine if the attorney's fees charged in a worker's compensation case were fair and reasonable, and to hear and determine all disputes concerning the same. This legislative authorization could not be construed as vesting the Commission with judicial power to decide complex legal issues pertaining to professional corporations and the dissolution thereof. *Id.* Section 287.260 merely authorized the Commission to resolve disputes concerning the fairness and reasonableness of the fees charged, nothing more. To hold otherwise, the Court reasoned, would raise questions regarding separation of powers and the unconstitutional delegation of judicial authority. The Constitution did not permit the legislature to confer purely judicial functions on an administrative agency. *Id.* Thus, the Commission exceeded its jurisdiction by attempting to resolve the dispute between the shareholders of the professional legal corporation. Such issues were to be addressed in a court of general jurisdiction. *Hunt*, 869 S.W.2d at 773-774.

See also *Carr v. North Kansas City Beverage Co.*, 409 S.W.3d at 207. Ronald Carr was employed by North Kansas City Beverage. Carr was killed in a work-related motor vehicle accident. Thereafter, his widow and minor child filed a workers' compensation claim against the employer, seeking death and burial benefits. *Carr*, 409 S.W.3d at 206. After hearing, the ALJ issued an award ruling that Carr's death did not arise out of and in the course of employment. *Id.* Carr's dependents filed an Application for Review with the Commission. The Commission reversed the ALJ's award, and

ordered the employer to pay the widow and minor child weekly death benefits, as well as funeral expenses. *Id.* In its award, the Commission ordered that any past due compensation was to bear interest as provided for by law. The Court of Appeals affirmed the Commission's award. *Id.*

After the Court of Appeals issued its opinion, the employer tendered to Carr's widow and minor child past due benefits in the amount of \$151,000. This represented past weekly death benefits from the date of Carr's death to the date benefits were tendered, along with funeral expenses awarded by the Commission. *Id.* Employer, however, did not tender any sum representing interest owed on past due weekly death benefits and funeral expenses. Thereafter, Carr's widow made repeated demands for payment of interest on past due death benefits and funeral expenses. *Id.* The employer refused to pay any interest. Consequently, Carr's widow filed a motion with the Commission to compel compliance with the award regarding interest on death benefits and funeral expenses. The Commission denied the motion, stating that it had no power to enforce the award and, therefore, lacked subject matter jurisdiction. Carr's widow appealed. *Id.*

The Western District affirmed. It rejected the widow's argument that the Commission possessed jurisdiction to rule on the motion to compel compliance with award regarding interest. *Carr*, 409 S.W.3d at 206-207. Employer contended that the Commission was without enforcement power or jurisdiction to address the motion to compel compliance with the award regarding interest and, thus, the Commission properly denied the motion. *Carr*, 409 S.W.3d at 207. As the Court of Appeals noted, the

Commission had no power to render a judgment, or enforce an award. Therefore, the Commission did not err in denying the widow's motion. It lacked authority to compel compliance with the Commission's award. *Id.*

SUBROGATION UNDER THE WORKERS' COMPENSATION ACT

The Workers' Compensation Act provides an employer with a subrogation interest in an Employee's recovery against a third person who is liable to that Employee for physical injury or death. *Kinney v. Schneider National Carriers*, 200 S.W.3d 607, 610 (Mo.App.W.D. 2006); *ATS, Inc. v. Listenberger*, 101 S.W.3d 495, 498 (Mo.App.E.D. 2003). Where an Employee has received benefits under the Workers' Compensation Act, and a third person is liable to the Employee, the employer is subrogated to the right of the Employee against the third party. *Consolidated Freightways v. Batton*, 673 S.W.2d 96, 98 (Mo.App.E.D. 1984).

Section 287.150 of the Workers' Compensation Act mandates employer subrogation. **RSMo** §287.150(1); *Bi-State Development Agency v. Watson*, 40 S.W.3d 43, 45 (Mo.App.E.D. 2001). Section 287.150 states, in relevant part, as follows:

“Where a third person is liable to the Employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the Employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such Employee or dependents, but such employer may recover any amount which such Employee or his dependents would have been entitled to recover. Any recovery by the employer against such third

person shall be apportioned between the employer and Employee or his dependents using the provisions of subsections 2 and 3 of this section.”

RSMo §287.150.1.

The purpose of Section 287.150 is to protect and benefit an employer liable for compensation, and the subrogation statute is created to afford indemnity for compensation payable by the employer. *Bi-State Development Agency*, 40 S.W.3d at 405. Section 287.150 is designed to ensure that there is not a double recovery by the Employee or his dependents, i.e., recovery from both an employer and from a third-party tortfeasor. *Id.*; *Missouri Highway & Transportation Commission v. Merritt*, 204 S.W.3d 278, 282 (Mo.App.E.D. 2006). It is axiomatic that an injured Employee is not allowed to keep the entire amount of both the compensation award and the common-law damage recovery. *McCormack v. Stewart Enterprises*, 916 S.W.2d 219, 224 (Mo.App.W.D. 1995).

Either the Employee or the employer may pursue the claim against the third-party tortfeasor. *Consolidated Freightways*, 673 S.W.2d at 98. When the Employee pursues the third-party action and effects a recovery, the employer is required to pay a proportionate share of the expenses of recovery, and the balance of the recovery is to be divided proportionately between the employer and employee. *Consolidated Freightways*, 673 S.W.2d at 96. Under Section 287.150, an employee who seeks and obtains a third-party recovery for his injuries holds the amount due to the employer in trust, to ensure that the employer’s right of subrogation is protected. *McCormack*, 916 S.W.2d at 224; *Kinney*, 200 S.W.3d at 613-614.

Significantly, Section 287.150.1 does not grant subrogation rights to the Second Injury Fund. **RSMo** §287.150.1. The right of the Fund to subrogation is addressed by Section 287.150.4. That provision states:

“In any case in which an injured employee has been paid benefits from the second injury fund as provided in subsection 3 of Section 287.141, and recovery is had against the third party liable to the employee for the injury, the second injury fund shall be subrogated to the rights of the Employee against said third party to the extent of the payments made to him from such fund, subject to provisions of subsections 2 and 3 of this section.”

RSMo §287.150.4.

Construing together Subsections 1 and 4 of Section 287.150, the Second Injury Fund only possesses a statutory right of subrogation when the Fund makes payments pursuant to Section 287.141.3 of the Act. **RSMo** §§287.150.1; 287.150.4; *Wilcut v. Innovative Warehousing*, 247 S.W.3d 1, 5 (Mo.App.E.D. 2008) (the provisions of the Workers’ Compensation Act are to be construed together and harmonized to give effect to the entire statute). Section 287.141.3 requires the Second Injury Fund to pay for a seriously-injured employee’s physical rehabilitation during such period while the Employee is actually being rehabilitated. **RSMo** §287.141.3.

COLE V. MORRIS

In finding that the Second Injury Fund did not have a statutory right to subrogation, the Commission relied upon the Supreme Court’s prior opinion in *Cole v.*

Morris, 409 S.W.2d at 670-671. (L.F.34-49). At issue in *Cole* was whether the Second Injury Fund had a subrogation interest in the amount an injured Employee secured in a third-party action. Sylvester Cole was employed by General Tire as a truck driver. While making a service call on his employer's behalf, Cole was involved in a collision when his truck was struck by a truck of Armour Packing Company. As a result of the collision, Cole injured his back. He filed a claim against General Truck and the Second Injury Fund. *Cole*, 409 S.W.2d at 669. Subsequently, Cole settled the claim against his employer, leaving his Fund claim pending. While the claim against the Fund was pending, Cole settled his third-party action against Armour Packing for \$18,600. Cole's total expense in recovering that sum from Armour was \$6,341.50, leaving a net recovery of \$12,258.50. *Id.*

In its award, the Commission found that as a direct result of the work accident, Cole sustained a 40% permanent partial disability of the body as a whole. Moreover, the Commission concluded that prior to the work accident, Cole had a pre-existing permanent partial disability equal to 30% of the body as a whole. Cole's pre-existing disability and the disability from the work accident, when combined, resulted in permanent total disability. Thus, the Fund was obligated to pay permanent total disability benefits to Cole for life. *Id.*

Before the Commission, the Fund argued that it was entitled to be subrogated to Cole's rights against the third-party tortfeasor. It sought a credit on the award against the Fund for the amount Cole recovered from Armour. However, the Commission denied the Fund's request for a credit against the award. The Circuit Court affirmed. *Id.*

As the Supreme Court noted, the precise question – whether the Fund was entitled to a subrogation interest in funds secured by an Employee in a third-party action – had not been ruled on by the Missouri appellate courts. Decisions in other jurisdictions were not in agreement on the question. However, the weight of authority led toward a conclusion that the Fund was entitled to subrogation. *Cole*, 409 S.W.2d at 669.

Before the Supreme Court, employee Cole argued that the Fund was not entitled to a credit on the award of permanent total disability benefits against it, because Sections 287.150 and 287.220 of the Workers’ Compensation Act did not give the Fund a right of subrogation. *Id.* Relatedly, Employee contended that Section 287.220, providing for payments from the Fund, and other sections in the Act relating to the Fund, did not authorize a credit to the Fund for any amount recovered by an Employee from a third-party tortfeasor. *Id.* There was no specific mention of a right of subrogation to the Fund in those statutory provisions. Moreover, Cole asserted that Section 287.150, providing for subrogation of the employer to the rights of the Employee against a third-party tortfeasor, did not authorize subrogation of the Fund to the rights of the Employee against third parties, with the exception of rehabilitation benefits paid to an Employee pursuant to subsection 3 of Section 287.141. *Id.*

The Court observed that if it were confined to Section 287.150 as authority for crediting the Fund with the amount recovered by the Employee from the third party, then the Fund was not entitled to the credit claimed. However, the Supreme Court found that it was not confined to the statute. *Cole*, 409 S.W.2d at 669-670.

As the Supreme Court observed, subrogation was founded on principles of justice and equity. Its operation was governed by principles of equity. Subrogation was closely akin to, if not a part of, the equitable principles of restitution and unjust enrichment. *Id.* Thus, it had been said that the right of subrogation was a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by the one who, in fairness and good conscience, ought to pay it. Though the doctrine was equitable in its origin, the right acquired was generally referred to as legal subrogation. *Id.* Legal subrogation arose by operation of law when a person having a liability in the premises pays a debt due by another under such circumstances, that he is in equity entitled to the security or obligation held by the creditors whom he has paid. *Id.*

As a general rule, any person who, pursuant to a legal obligation to do so, has paid for an injury resulting from the wrong of another, may be subrogated to the rights of the injured person against the wrongdoer. Before the effective date of the Workers' Compensation Act, the Supreme Court had recognized and applied this rule in an action by an employer to recover from a third party for the amount the employer paid its injured employee as damages on account of the negligence of the third party. *Id.*

Other than providing two methods for apportionment of the recovery from the third-party tortfeasor between the employer and employee, in enacting Section 287.150, the legislature did nothing more than declare the law, that is, the right of subrogation as it existed before the enactment of the Workers' Compensation Act. No new right was created under Section 287.150. *Id.* The employer's right of subrogation to tort claims in favor of its injured employee against third persons, as it existed before the enactment of

the workers' compensation law, and as it existed today, was based upon the employer's legal obligation to pay compensation for the injury. *Id.*

On the same basis, the Supreme Court found that there was no logical reason why another, under the same obligation to pay compensation for injury caused by the negligence of a third party, should not be accorded the same right. *Cole*, 409 S.W.2d at 670-671. The right of subrogation existed in such persons under the common law before enactment of the Workers' Compensation Act, and continued to exist, without enactment of statutory authority. The Supreme Court found that the essential elements of the common law right of subrogation were present, and should be applied to the facts before it. *Cole*, 409 S.W.2d at 671.

The Supreme Court found that the Fund had been required to pay workers' compensation benefits under the Act to an employee injured by a third-party tortfeasor. That loss should ultimately fall upon the wrongdoer responsible for it. If the Fund was deprived of the right of subrogation, Cole would be unjustly enriched, since he could retain both his permanent total disability benefits and tort damages. This would violate the basic tenet of common law that there be no double satisfaction for the same wrong. *Id.*

Thus, the Supreme Court held that the Fund was subrogated to Cole's rights and entitled to a credit against the award of permanent total disability benefits for a portion of the employee's recovery from the third party. The only question remaining, then, was what portion of the recovery was to be paid and credited to the Fund. *Id.* The amount of the recovery remaining, after payment of the employee's expenses in making the

recovery, was to be paid and credited in the following manner: the employee was to pay and reimburse the Fund for all compensation paid to him by the Fund. The balance was to be retained by the employee, and treated as an advance payment by the Fund on account of any future installments of compensation. *Id.*²

It is important to note what the Supreme Court did **not** hold in *Cole*. Therein, the Supreme Court did not rule that the Commission, an administrative agency, possessed jurisdiction to determine the Second Injury Fund's subrogation recovery from the proceeds secured by the Employee in his third-party action. *Cole*, 409 S.W.2d at 669-671. While the Supreme Court recognized that the Fund possessed a right of equitable subrogation when it paid benefits to an injured Employee, as a result of an injury the Employee sustained from the negligence of a third party, the Supreme Court did not address whether the Commission, as an administrative tribunal, could exercise equitable powers to determine the amount of the Fund's subrogation recovery. *Id.* Neither employee Cole nor the Second Injury Fund raised this issue for resolution by the

² The formula for the apportionment of the proceeds of the third-party action between the Fund and the employee, as set forth by the Supreme Court in *Cole*, is entirely in keeping with the method of apportioning the proceeds of a third-party recovery between an employer and an employee, set forth by the Supreme Court in its decision in *Ruediger v. Kallmeyer Brothers Service*, 501 S.W.2d 56,59 (Mo banc. 1973), and subsequently followed by the Missouri courts. See, for example, *Kereperien v. Lumbermen's Mutual Casualty*, 100 S.W.3d 778, 781-782 (Mo banc. 2003).

Supreme Court. Thus, *Cole* merely stands for the proposition that the Second Injury Fund possesses an equitable subrogation right against a third party who is responsible for injury to an Employee. The Fund is subrogated to the Employee's rights against that negligent third party. *Cole*, 409 S.W.2d at 671.

EQUITABLE SUBROGATION

Equitable subrogation exists to prevent unjust enrichment. *Keisker v. Farmer*, 90 S.W.3d 71, 75 (Mo banc. 2002). Subrogation is a creature of equity. *Street v. Lincoln National Life Insurance Company*, 347 S.W.2d 455, 459 (Mo.App.W.D. 1961); 83 C.J.S. Subrogation §7. The object of subrogation is the advancement of justice and the prevention of injustice. *Street*, 347 S.W.2d at 459; *Messner v. American Union Insurance Company*, 119 S.W.3d 642, 649 (Mo.App.W.D. 2003); *Metmor Financial v. Landoll Corporation*, 976 S.W.2d 454, 461 (Mo.App.W.D. 1998).

Subrogation compels the ultimate payment of a debt by one who, in justice, equity and good conscience, should pay it. *Metmor Financial*, 976 S.W.2d at 461. See also *Messner*, 119 S.W.3d at 648-649, finding that any person who, pursuant to a legal obligation to do so, has paid for a loss or injury resulting from the wrong or default of another, will be subrogated to the rights of the creditor or injured person against the wrongdoer, or others who are primarily responsible for the wrong or default. A party seeking subrogation must prove, by clear and convincing evidence, that equity requires another party to bear the loss. *Street*, 347 S.W.2d at 459; *Kansas City Downtown Minority Development Corporation v. Corrigan Associates Limited Partnership*, 868

S.W.2d 210, 224 (Mo.App.W.D. 1994); *Frago v. Sage*, 737 S.W.2d 482,483 (Mo.App.E.D. 1987).

Pursuant to *Cole*, the Second Injury Fund possesses a right of subrogation against the negligent third party who was responsible for the September 13, 2000 accident and Joseph Bank's injuries. *Cole*, 409 S.W.2d at 671. This subrogation right is equitable in nature, and arises by operation of law. *Id.* The Fund possesses a subrogation right because of its obligation, pursuant to the Commission's Award and Section 287.220, to pay the Employee permanent total disability benefits beginning on May 20, 2006, and thereafter for the remainder of the Employee's lifetime. *Id.* Clearly, the Commission did not err in following *Cole*, and in ruling that the Fund possessed an equitable right of subrogation. (L.F.34-49).

**THE COMMISSION DOES NOT POSSESS JURISDICTION TO DETERMINE
THE AMOUNT OF THE FUND'S SUBROGATION RECOVERY**

Nor did the Commission err in denying the Fund's request that it determine the amount of the Fund's subrogation recovery from the proceeds of the Employee's settlement in the third-party action. (L.F.34-49). It is undisputed that the Fund has not paid any benefits to the Employee under Section 287.141.3, which requires benefits to be paid during physical rehabilitation. **RSMo** §287.141.3. At no time has the Fund paid any benefits to the Employee because his employer, Bridgford Foods, was uninsured. **RSMo** §287.220.5. Accordingly, the Fund does not possess a *statutory* right of subrogation. **RSMo** §§287.150.4; 287.141.3; 287.220.5; *Cole*, 409 S.W.2d at 669-670. Rather, the Fund's right of subrogation is equitable in nature. It arises not from the

Workers' Compensation Act, but by operation of common law. *Cole*, 409 S.W.2d at 670-671.

Given the equitable nature of the Fund's right of subrogation, any determination of the amount of the Fund's subrogation recovery must necessarily be made by a circuit court sitting in equity, and not by the Commission. It is axiomatic that the Commission is not a court of general jurisdiction, and does not possess judicial power. *Oren*, 51 S.W.2d at 60; *Hunt*, 869 S.W.2d at 773. The Commission is limited in its jurisdiction by the terms of the Workers' Compensation Act. *Hunt*, 869 S.W.2d at 773. Pursuant to the Workers' Compensation Act, the Commission's power only extends to the determination of factual questions, and the application of the provisions of the workers' compensation law. *Oren*, 51 S.W.2d at 61; *Mikel*, 869 S.W.2d at 626. Section 287.150 does not confer jurisdiction on the Commission to resolve issues involving equitable subrogation. **RSMo** Section 287.150. That statutory provision merely authorizes the Commission to make determinations as to the *statutory* subrogation right of an employer, and of the Fund, where the Fund pays benefits under Section 287.141.3. The Commission, as an administrative agency, cannot expound on any principle of law or equity or issue a judgment. *Oren*, 51 S.W.2d at 876; *Carr*, 49 S.W.3d at 207; *Bliss*, 130 S.W.2d at 201.

Should the Commission undertake to determine and calculate the Fund's subrogation recovery from the proceeds secured by the Employee in the third-party action, the Commission will be doing just that. In making such a determination, the Commission would be exercising judicial and equitable powers, and acting in excess of its statutorily-defined jurisdiction. *Hunt*, 869 S.W.2d at 773; *Leichty*, 160 S.W.2d at

279; *Oren*, 51 S.W.2d at 60-61. The Commission, being an administrative agency, lacks jurisdiction to render the judgment sought by the Fund. *Oren*, 51 S.W.2d at 60; *Hunt*, 869 S.W.2d at 773. The Commission cannot exercise equitable powers to award the Fund a subrogation recovery from the proceeds of the third-party action. *Id.* It necessarily follows that the Commission's Award must be affirmed. The only appropriate forum where the Fund can exercise its equitable right of subrogation and secure a calculation of its subrogation recovery, if any, from the proceeds of the Employee's third-party action, is in an equity suit filed in a Missouri circuit court. See, e.g., *Lincoln County v. E.I.DuPont*, 32 S.W.2d 292, 295 (Mo.App. 1930).

THE SECOND INJURY FUND'S ARGUMENTS ARE WITHOUT MERIT

In its Substitute Appellant's Brief, the Fund asserts that the Commission erred in failing to determine its subrogation recovery from the proceeds in the third-party action. Specifically, the Fund contends that the Commission possessed jurisdiction to make this determination, pursuant to the decision in *Cole*. (Fund's Substitute Appellant's Brief, 11-19).

However, the Fund fails to recognize that *Cole* merely held that the Second Injury Fund possessed an equitable right to subrogation where it had paid, or was obligated to pay, benefits to an Employee who was injured as a result of the negligence of a third party. *Cole* did nothing more than recognize an equitable right to subrogation. *Cole*, 409 S.W.2d at 670-671. That decision did not address the jurisdiction of the Commission to determine the amount of the Second Injury Fund's subrogation recovery. Nor did *Cole* rule that the Commission possessed such jurisdiction. *Id.* Since the Fund's arguments

fail to acknowledge the limited nature of the Supreme Court's ruling in *Cole*, those arguments are without merit, and must be rejected.

In its Brief, the Fund misconstrues the Employee's position. Employee does not argue that the Fund does not possess an equitable right of subrogation arising by operation of law.³ That is not the issue. Rather, the issue is the appropriate forum in which the Fund can exercise that right and secure a ruling as to the amount of its subrogation recovery from the proceeds in the third-party action. It is Employee's position that, if the Fund wishes to assert its equitable right of subrogation and secure a ruling as to the amount of the subrogation recovery from the proceeds in the third-party action, its remedy lies in the circuit court, and not before the Commission. The Commission cannot make such a ruling, since only a court of general jurisdiction, sitting in equity, can render such a decision or judgment. *Oren*, 51 S.W.2d at 60-61; *Hunt*, 869 S.W.2d at 773. Because the Fund misconstrues the Employee's arguments regarding the subrogation issue, it fails to focus on the jurisdictional question before the Court.

The Fund contends that following *Cole*, there have been various challenges to the application of the Second Injury Fund's right of subrogation. It cites two decisions in support of this contention: *Manley v. Mulligan Construction*, 107 S.W.3d 285 (Mo.App.E.D. 2003); and *Flannery v. Breckenridge*, 224 S.W.3d 138 (Mo.App.E.D. 2007). (Fund's Substitute Appellant's Brief, 12-13, 16, 18).

³ Nor could Employee make such an argument. At hearing, the parties stipulated that the Fund had a subrogation interest in the third-party action. (L.F.17-31).

The Fund errs in relying on the decisions in *Manley* and *Flannery*. As a review of *Manley* and *Flannery* demonstrate, they are *Per Curium* decisions of the Court of Appeals, issued under Rule 84.16(6). Such decisions are not binding, and have no precedential effect. *Executive Bd. Of Mo. Baptist Convention v. Windermere Baptist Conference Center*, 280 S.W.3d 678, 691 n.11 (Mo.App.W.D. 2009). Thus, neither decision is dispositive on the jurisdictional issue before the Court.

The Fund's argument – that the legislature has acquiesced to the ruling in *Cole*, recognizing that the Fund possesses an equitable subrogation interest – misses the mark. (Fund's Substitute Appellant's Brief, 13-14). Again, the Employee is not arguing that the Fund does not possess an equitable subrogation interest. The only question is which entity – a circuit court or the Commission – possesses jurisdiction to issue a ruling regarding the amount of the Fund's subrogation recovery from the proceeds obtained by the Employee in the third-party action.

The Court must reject the Fund's argument that the Commission possessed sufficient facts on which to determine its subrogation recovery. (Fund's Substitute Appellant's Brief, 17-19). In making this argument, the Fund ignores the findings made by the Commission in its Award. Therein, the Commission found that at Hearing, no evidence was presented regarding the date the settlement was reached in the third-party action, the amount employer paid to Employee prior to the settlement in the third-party action, or whether there was any evidence presented in the third-party action regarding the Employee's comparative fault. (L.F.34-49). In the absence of this information, the Commission does not possess sufficient facts to determine the amount of the Fund's

subrogation recovery, if any, from the proceeds of the settlement in the Employee's third-party action.

Two final arguments made by the Fund must be addressed. First, the Fund asserts that it would be impractical to require it to file an equity suit in circuit court, where the Commission can decide the employer's subrogation recovery. (Fund's Substitute Appellant's Brief, 16). This argument is based upon an incorrect assumption – namely, that the Commission is the only entity possessing jurisdiction to determine the employer's subrogation recovery from the proceeds of the settlement in the third-party action. This assumption is unfounded. The Fund could file a declaratory judgment action against the employer in circuit court. In that action, the Fund could ask the circuit court to determine the amount of the employer's subrogation recovery, as well as the amount of its subrogation recovery, if any, from the monies secured in the third-party action. With both employer and the Fund as parties in a declaratory judgment action, the subrogation recovery of both parties could be determined in a single proceeding.

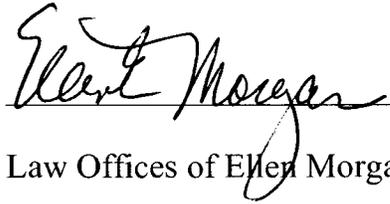
Finally, the Fund argues that the Commission does not have to decide the employer's subrogation recovery before it can determine the Fund's subrogation recovery. (Fund's Substitute Appellant's Brief, 17-19). As the Commission's Award clearly shows, the Fund's obligation to pay permanent total disability benefits does not arise until the employer's liability for permanent partial disability benefits has ended. The Commission found that employer's liability for permanent partial disability commenced on October 7, 2002, and ended on May 19, 2006. The Fund's obligation for permanent total disability began on May 20, 2006, and continues thereafter, for the

remainder of the Employee's lifetime. (L.F.34-49). Since the Fund's legal obligation to pay permanent total disability did not arise until such time as the employer's obligation to pay permanent partial disability benefits to the Employee had been satisfied, the employer's subrogation recovery must be determined before the Fund's subrogation recovery, if any, can be calculated. The Fund's argument to the contrary must be rejected.

CONCLUSION

The Commission's Award must be affirmed. The Second Injury Fund possesses an equitable subrogation interest in the proceeds secured by the Employee in the settlement of his third-party action. Since the Fund's subrogation interest is equitable, and not statutory, the Commission does not possess jurisdiction to render a decision regarding the amount of the Fund's subrogation recovery. As an administrative agency, the Commission cannot exercise judicial functions or render a judgment. The Fund's subrogation recovery, if any, from the proceeds of the third-party action must be determined by a circuit court sitting in equity.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent this 27th day of September, 2009, to:
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CERTIFICATE OF COMPLIANCE

This Brief complied with Rule 84.06(b) and contains 10,274 words. To the best of my knowledge and belief, the enclosed disc has been scanned and is virus-free.



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APPENDIX

Award of ALJ Carlisle.....A1-A15

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