

**ARKANSAS COURT OF APPEALS**

No. CA08-1449

ROBERT MAULDING

APPELLANT

V.

PRICE'S UTILITY CONTRACTORS,  
INC., CINCINNATI INDEMNITY CO.,  
SECOND INJURY FUND, and DEATH &  
PERMANENT TOTAL DISABILITY  
FUND

APPELLEES

Opinion Delivered January 13, 2010

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. F603594]

SUPPLEMENTAL OPINION ON DENIAL  
OF PETITION FOR REHEARING

**M. MICHAEL KINARD, Judge**

Appellees/cross-appellants Price's Utility and Cincinnati petitioned this court for rehearing, arguing that the opinion in *Maulding v. Price's Utility Contractors, Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915, erroneously declined to address their argument that appellant was precluded under Arkansas Code Annotated section 11-9-505(b)(3) from receiving wage-loss benefits. We stated in our previous opinion that because appellees had failed to raise their section 11-9-505(b)(3) argument below, it was not preserved for our review. We stand by that conclusion but write this supplemental opinion to explain the reasoning behind it.

Appellees first raised the section 11-9-505(b) defense (that appellant had failed to cooperate with an offered program of job assistance) in a posthearing brief. Appellees' point that there was testimony at the hearing that appellant was not cooperating with an offered program of job-placement assistance is of no consequence, nor is their assertion—which we



Cite as 2010 Ark. App. 51

have no way of confirming—that “this argument was made and was argued at length on appeal before the Full Commission.” We believe that appellees raised this argument too late, as appellant was not made aware of the asserted defense or given an opportunity to present evidence to refute it. Neither the Administrative Law Judge (ALJ) nor the Commission made a finding that a section 11-9-505(b)(3) defense was supported by the evidence proffered at the hearing. Appellees did not obtain a ruling on the applicability of section 11-9-505(b)(3) at the Commission level. The Commission affirmed and adopted the opinion of the ALJ, who awarded wage-loss benefits to appellant without mention of section 11-9-505. Due to appellees’ failure to obtain a ruling on this issue from the Commission, the issue is not preserved and our review of same is precluded. See *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996).

Accordingly, appellees’ petition for rehearing is denied.

VAUGHT, C.J., and PITTMAN, HART, GLADWIN, and MARSHALL, JJ., agree.

*Diana M. Maulding*, for appellant.

*Frye Law Firm, P.A.*, by: *Cynthia E. Rogers*, for appellees.