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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0710622

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SC Court of Appeals

Antonio Lazaro, by and
through his GAL Decidora Lazaro, Claimant ..... Respondent,

v.

Burriss Electrical, Employer,
and
CompTrust AGC of the Carolinas ..... Petitioners.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioners petition this Court to rehear its Opinion in the above-captioned case, Opinion No. 2014-UP-064 (Ct. App. filed Feb. 6, 2014).[1] Petitioners received this Court's Opinion No. 2014-UP-064 on February 7, 2014.

This Court overlooked and/or misconstrued the fact that the Commission's partial lump sum payment award constitutes an abuse of discretion. "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the

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[1] As this Court has been advised, CompTrust AGC of the Carolinas, a/k/a CAGC Insurance Company, has been declared insolvent, and the South Carolina Guaranty Association has assumed certain obligations of the insolvent insurer. Although the South Carolina Workers' Compensation Commission issued an Administrative Order stating that all pending matters are stayed until April 16, 2014, and although S.C. Code Ann. § 38-31-160 provides that, "[a]ll proceedings involving covered claims in which the insolvent insurer is a party or is obligated to defend a party in any court in this State must be stayed ninety days from the date of insolvency ...," out of an abundance of caution, Petitioners are filing this Petition for Rehearing so as to preserve their jurisdictional ability to appeal this Court's Opinion No. 2014-UP-064 furhter.

conclusions reached are controlled by an error of law." Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); Nelson v. Taylor, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (2001). The Commission's decision here meets both prongs of the abuse of discretion standard.

I. This Court overlooked and/or misconstrued S.C. Code Ann. § 42-9-301 and Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006) by upholding the Commission award of the partial lump sum payment.

In ruling that the Commission did not abuse its discretion in awarding the partial lump sum payment in this case, this Court overlooked the Commission's fail ure to properly analyze or set forth findings as to how the lump sum award was in Claimant's (or his dependents') best interest, as is required by S.C. Code Ann. § 42-9-301. Section 42-9-301 allows the Commission to make lump sum distributions from a lifetime benefits award when the Commission "deems it not to be contrary to the best interest of the employee or his dependents . . ." S.C. Code Ann. § 42-9-301. The Commission made the award without sufficient explanation or findings of fact showing how this partial lump sum payment was in the best interest of Claimant or his dependents. *See* Hill v. Jones, 255 S.C. 219, 223-224, 178 S.E.2d 142, 144 (1970) (holding that, "not only must findings of fact be made upon the essential factual issues, but ... they must be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings"); Shealy v. Algernon Blair, Inc., 250 S.C. 106, 109-110, 156 S.E.2d 646, 648 (1967) (explaining that it is the Commission's duty "to make specific findings upon which a claimant's entitlement to compensation may rest .... awards

without such specific findings do not comply with the requirements of the act and are illegal").

This Court overlooked the fact that, although current Section 42-9-301 does not require the Commission to find unusual circumstances in order to award a lump sum payment, the Commission still is required to determine whether a lump sum distribution is in the best interest of the claimant or his dependents. Prior case law interpreting and applying the "best interest" requirement remains valid and applicable. This Court failed to properly consider the Supreme Court's ruling in Woods v. Sumter Stresscrete Inc., that benefits paid as support to dependents of an injured employee are "part of the income-protection system established by the provisions of the Workmen's Compensation Act. Experience has taught that this income-protection is ***best accomplished through periodic income payments***." 266 S.C. 245, 247, 222 S.E.2d 760, 761 (1976) (emphasis added), *citing* Larson's Workmen's Compensation Law, Section 82-71. This Court also completely ignored the holding in Ashley v. Ware Shoals Mfg. Co., that "[t]he principle involved in the compensation acts is that the benefits received are a substitute for the *wages* of the injured employee, and with this theory in mind almost all of the legislative bodies of the various States have provided for the payment of compensation in regular installments. ***The purpose of this method is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society***." 210 S.C. 273, 280, 42 S.E.2d 390, 393 (1947) (emphasis added). In the end, there is always a risk that, "the relief afforded by a lump sum payment" may be "temporary only, bringing about greater economic trouble in the future." Woods, 266 S.C. at 250, 222 S.E.2d at 762. This is particularly true where there is no explanation of

the "character of these obligations" or debts, which may have been for frivolous items. *See* Ashley, 210 S.C. at 288, 42 S.E.2d at 396.

In this case, the Commission did not explain how the lump sum payment would be in the Claimant's or his dependents' best interest. Clearly, Claimant's medical and physical needs are being met by Petitioners, so they are not part of the benefits analysis. As for Claimant's dependents, the Commission's award simply states, without any explanation of why or how, that the lump sum payment is in their best interest. (Single Commissioner Order, R. p. 21) (Commission Decision, R. pp. 2-3). Thus, this finding is inadequate as a matter of law because it provides no explanation of the basis for the Commission's Decision. *See, e.g.,* Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977) (Commission must make findings on essential factual issues with sufficient detail to enable the appellate court to determine whether the factual findings are supported by substantial evidence in the record).

Other cases awarding lump or partial lump sum payments include the requisite analysis and factual findings. *See* Thompson, 369 S.C. at 619-20, 632 S.E.2d at 881-82 (lump sum payment awarded to the claimant, who was a paraplegic, so that he could construct a house in a location with better schools to which he had been planning and saving to move his family, and that would include therapeutic exercise equipment); Glover v. Suitt Constr. Co., 318 S.C. 465, 469-70, 458 S.E.2d 535, 538 (1995) (finding that a lump sum payment of attorneys fees out of a lifetime award of damages in a brain injury case was in the best interest of the claimant because this was an amount the claimant already owed and, to do otherwise, "would have a tremendous chilling effect on the ability of the most severely injured employees to obtain the services of adequate

counsel"); James v. Anne's Inc., 390 S.C. 188, 202, 701 S.E.2d 730, 737 (2010) (opining that, awarding a lump sum payment that would be prorated over the claimant's lifetime so as to protect her Social Security Disability payments, "serves to further the Act's humane objectives"). There have been no comparable findings in the instant case regarding the partial lump sum payment.

In addition, this Court completely overlooked the requirement set forth in Thompson, that "the Commission must consider whether the award will cause a hardship to the employer or carrier." 369 S.C. at 616, 632 S.E.2d at 880. By failing to address the hardship such an award will cause to the employer and/or carrier, particularly in a case involving permanent brain damage as defined under S.C. Code Ann. § 42-9-10(c), the Commission erred as a matter of law and its decision should be reversed and remanded.

The reason the analysis required under Thompson is important is that, regardless of whether this Court believes Section 42-9-10(c) is based on the economic model or the medical model of recovery, it is clear that compensation awards under subsection (c) do not survive a claimant's demise. "[S]ince a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments." Stone v. Roadway Express, 367 S.C. 575, 585, 627 S.E.2d 695, 700 (2006), *citing Larson's Workers' Compensation Law* (2000) §§ 89.01; 89.03. Under S.C. Code Ann. § 42-9-280, the legislature has determined "as is its prerogative," that "dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member ... or lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof." Stone, 367 S.C. at 585, 627 S.E.2d at 700. Conversely, "the

dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not." Id., 627 S.E.2d at 700 (emphasis added) (noting the "legislative distinction between 'physical loss' and 'wage loss'").

In Floyd v. C.B. Askins & Co., 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009), this Court specifically held that "Section 42-9-280 does not include awards made under paragraph [42-9-10](C) among those that survive a claimant's death from an unrelated cause," and that such benefits "terminate upon such a claimant's death from an unrelated cause." 382 S.C. at 89-90, 675 S.E.2d at 453. Awarding partial lump sum payments in excessive amounts, as was done here, treats Claimant's award as if his dependents have a property interest in those benefits regardless of whether Claimant himself is living or deceased. The rights and duties under the workers' compensation scheme are set by statute and cannot be expanded even for equitable reasons. *See, e.g.,* Wigfall, 354 S.C. at 116-17, 580 S.E.2d at 108-09 (courts "are not at liberty to extend by construction the meaning implicit in the language found in the Workmen's Compensation Act in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt"). This Court failed to consider the hardship an excessive lump sum award causes to the employer/carrier in that, upon the claimant's death from an unrelated cause, the employer/carrier never will be unable to recover from his claimant's dependents any excess amounts paid.

Because this Court overlooked and/or misapprehended the significance of the Commission's failure to properly support its award, this court should grant rehearing and hold that the Commission Decision should be reversed.

II. This Court overlooked or misapprehended the fact that the Commission's Award of $30,000 for a new vehicle is excessive and constitutes an abuse of discretion.

At a minimum, the Commission's award of up to $30,000 for the purchase of a new vehicle for the family, which already has three cars, is excessive and constitutes an abuse of discretion. Substantial evidence does not support such an unwarranted amount. Claimant is unable to leave the Brian Center where he is hospitalized and being cared for, so the purchase of any vehicle clearly is not for his benefit. There simply is no evidence whatsoever that would justify spending up to $30,000 on a new family vehicle, a vehicle that clearly will not be used to provide transportation for Claimant. (R. p. 68, lines 6-11) (R. p. 70, lines 12-13). This Court overlooked the fact that, when the price allotted for Claimant's family to purchase a new vehicle was raised at the Full Commission hearing, Commissioner Lyndon believed the price reflected the need to purchase a vehicle that could transport Claimant. (R. p. 69, line 22 – p. 70, line 13). Thus, there is absolutely no evidence that a special or modified vehicle is necessary to accommodate Claimant's condition. The Order of $30,000 for a new vehicle simply amounts to a gratuitous and excessive award. This constitutes an abuse of discretion, which should be reversed.

III. This Court misconstrued Petitioner's arguments regarding how the partial lump sum payment ordered in this case contravenes the basic policies underlying the workers' compensation statute.

The Single Commissioner Order, which the Full Commission approved in its entirety, reads as if the Commission is attempting to make the Claimant and his family "whole" from the disruption caused by his injury. However, making an injured party "whole" is a tort concept, not a workers' compensation concept. *See, e.g.*, Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (explaining that, in a tort action,

the goal of actual or compensatory damages is "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred"). Instead, our workers' compensation system displaces traditional tort law in order "to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation." Wigfall, 354 S.C. at 115, 580 S.E.2d at 107. Part of the balance struck and one of the trade-offs embedded in the Workers' Compensation Act is that, "the amount of compensation available under the Act may be substantially less than could be recovered in a successful common law action . . ." Cook v. Mack's Transf. & Storage, 291 S.C. 84, 87, 352 S.E.2d 296, 298 (Ct. App. 1986).[2] Thus, the goal of workers' compensation payments is not to put the family as close as possible, through monetary disbursements, to the place it would have been had Claimant's accident not occurred but, rather, "to compensate [him] in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of his employment." Id. at 86, 352 S.E.2d at 298.

In fact, the South Carolina Supreme Court explicitly has rejected "the assumption that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries." Wigfall, 354 S.C. at 115, 580 S.E.2d at 108; *see also* Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) (because workers' "compensation is based not upon need but upon wages, it may in some instances and may not in others be sufficient . . . to enable the injured employee to live without being a burden to others"); Mizell v. Raybestos-Manhattan, Inc., 281 S.C. 430, 433, 315 S.E.2d 123, 125 (1984) (noting that "the purpose of workers' compensation [is] to provide

[2] The counter-balance is that a claimant no longer needs to prove fault on the part of his employer. Cook, 291 S.C. at 87, 352 S.E.2d at 298.

sustenance to injured workers and their families") (emphasis added); Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996) (stating that the "goal of workers' compensation is to compensate workers for reductions in their earning power caused by work-related injuries or accidents"); Pilgrim v. Eaton, 391 S.C. 38, 50, 703 S.E.2d 241, 247 (Ct. App. 2010) (observing that "the overriding goal of the Workers' Compensation Act 'is to compensate workers for reductions in their earning power caused by work-related injuries'"). Awarding excessive partial lump sum payments, as was done in this case, is in direct conflict with these well-established goals of the workers' compensation system.

Furthermore, although claimants routinely cite cases that hold that the workers' compensation statute is to be liberally construed in their favor, *see, e.g.*, Case, 236 S.C. at 531, 115 S.E.2d at 66, this Court failed to recognize that the application of the workers' compensation statute must be fairly applied to *both* the claimant and the employer/insurer. *See, e.g.*, Case, 236 S.C. at 534, 115 S.E.2d at 67; Pilgrim, 391 S.C. at 50, 703 S.E.2d at 247 (noting in the context of calculating a claimant's weekly wage amount that it must be "fair to both the worker *and the employer*") (emphasis added); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (rejecting a weekly wage calculation that was "grossly unfair" to the employer and remanding to the Commission to make a factual determination on the wage issue that would be "a more fair result"). Given that a compensation award under Section 42-9-10(c) does not survive the claimant's demise, excessive partial lump sum awards are undeniably unfair to an employer who never will be able to recoup any part of the payment to which it is entitled upon a claimant's death.

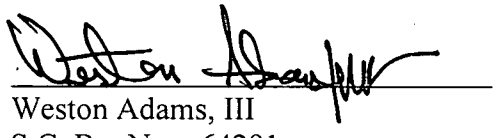
Finally, Petitioners agree with this Court's resolution of Claimant's motion for attorneys' fees and costs and do not seek rehearing of that part of the Opinion.

CONCLUSION

For all the reasons set forth herein, Petitioners respectfully request that this Court rehear its decision in this case, and reverse the Commission's award of the partial lump sum payment of $152,568.75. In the alternative, in the event this Court determines Claimant is entitled to a partial lump sum payment in some amount, this Court should reduce that award to payment of the balance on Claimant's mortgage, and reverse the award to the extent it covers excessive credit card debt and the cost of a new vehicle up to $30,000.

Respectfully submitted,

February 21, 2014



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PROOF OF SERVICE

I certify that I have served the Petitioners' **Petition for Rehearing** on Antonio Lazaro, by and through his GAL Decidora Lazaro, by depositing a copy of it in the United States Mail, postage prepaid, addressed to counsel of record:

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