

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER RECEIVED

Antonio Lazaro v Burriss Electrical
SCWCC: 0710622
Commissioners: Taylor, James, Beck

MAR 28 2016

SC Court of Appeals

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conferer on a **Motion for Rehearing**. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission hereby;

Dismissed as Interlocutory. Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;

Granted. Denied. Dismissed Set for Hearing.

BEFORE THE;

Hearing Comm. Jurisdictional Comm. Full Commission.

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter Order consistent with the Court's directive.

Remand to Panel as indicated below.

Barden James Taylor
 Beck Campbell Wilkerson
 McCaskill

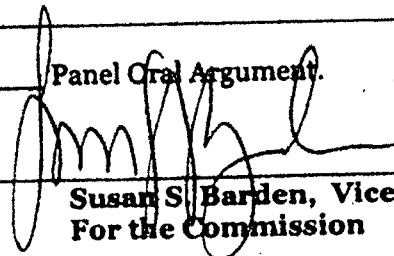
Remand for Order consistent with the Order of the Court.

Remand to the Hearing Commissioner.
 Remand to the Jurisdictional Commissioner.

Other: _____

Remand: Panel Oral Argument. En Banc Oral Argument.

AND IT IS SO ORDERED.



Susan S. Barden, Vice-Chair
For the Commission

Columbia, South Carolina

2/22 2016

CONCURRING:

Commissioner Susan S. Barden
Commissioner Melody James
Commissioner Aisha Taylor
Commissioner Avery Wilkerson
Commissioner Michael Campbell
Commissioner Gene McCaskill

NOT PARTICIPATING:

DISSENTING:

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This 22nd day of February, 2016.

By: 
SCWCC Judicial Department

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 0710622

Antonio Lazaro

EMPLOYEE,
CLAIMANT/RESPONDENT

VS.

Burriss Electrical

EMPLOYER,

AND

South Carolina Guaranty Association

CARRIER,
DEFENDANTS/APPELLANTS,

Appellate Panel Review held in Columbia, South
Carolina, on September 21, 2015 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

RECEIVED

MAR 28 2016

December 23rd, 2015 SC Court of Appeals

APPEARANCES: Claimant/Appellant represented by Preston F. McDaniel, Esquire
Defendants/Respondents represented by Brett H. Bayne

STATEMENT OF THE CASE

This matter came before the Single Commissioner for hearing on July 7, 2014 on Claimant's Request for Hearing seeking (1) a second lump sum, (2) an increase in the compensation rate, (3) fines, penalties, and/or interest related to the first lump sum, and

This claim arises out of an admitted injury sustained by Claimant on July 6, 2007. Claimant suffered severe injuries and is in a persistent vegetative state. Claimant requested that Defendants pay out a partial lump sum of his lifetime benefits award in order to pay off assorted debts and purchase a new car. On October 14, 2010, Commissioner Beck ordered that Claimant was entitled to a partial lump sum of his lifetime benefits award in the amount of \$152,568.75. Commissioner Beck found that \$122,568.75 was to be used to pay off assorted debts and up to an additional \$30,000.00 was to be used for the purchase of an automobile. Commissioner Beck indicated that any balance remaining from these two payments would be refunded to Defendants. The Full Commission affirmed Commissioner Beck's Order on April 20, 2011. Thereafter, this claim was appealed to the Court of Appeals. The Court of Appeals affirmed the Full Commission's Decision and Order on February 6, 2014. A petition for rehearing was denied.

Claimant contends the compensation rate has never been addressed and Claimant has now asked this Commission to determine and increase his compensation rate by as much as 12.8% per year every year since the accident. Alternatively, he asked for lockstep raises of .50 per year or a recalculation based on a W2. Claimant bases this request on S.C. Code Ann. § 42-1-40(2), Supreme Court decisions, and Claimant's past wage and work experience. Claimant next asked for an additional lump sum in the amount of \$325,000.00 or more to pay for colleges and provide a steady income stream of \$369.00 per week for the first 10 years and then \$334.14 or \$393.55 per week after the first ten years. Claimant finally requested an assessment of penalties

and interest for the first lump sum payment. It is agreed that the lump sum was paid on June 2, 2014. It is agreed that S.C. Code Ann. 42-9-240 mandates interest to be assessed starting seven (7) days after the award becomes final and that 42-9-90 mandates a 10% penalty be assessed starting fourteen (14) days after the interest begins to accrue. The award in this case was paid ten (10) days after it became final.

First, Defendants contend there is no mechanism under the Act that allows the Commission to increase the compensation rate based on cost of living increases, merit based increases, lock step wage increases, or W2 wages. The Commission assigns a compensation rate based on the four quarters preceding the injury. The mere fact that a claimant may be making more today than at the time of the injury does not constitute an extraordinary reason to increase the compensation rate. Defendants pointed to two cases expressly prohibit a retroactive increase in the compensation rate based on annual, time based, and/or lock step raises. Elliott v. S.C. Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (S.C. App. 2004), holds that "...a standard cost of living increase or step increase based on longevity of service..." does not constitute an exceptional reason under S.C. Code Ann. § 42-1-40. Further, Roberts v. McNair Law Firm, 366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005) holds that a post-injury merit increase does not constitute an extraordinary or exceptional reason to increase the compensation rate.

Second, Defendants contended that no additional lump sums can be granted. Defendants presented two separate bases for this contention—one factual and one legal. The factual basis for denying an additional lump sum is grounded in the testimony of the witnesses. Defendants contended the testimony by Claimant's wife and son does not show that an additional lump sum is in the best interest of the Claimant or his dependents. Additionally, Claimant has asked for the lump sum to provide a steady income stream of \$369.00 per week for the next 10 years. After

that, proposed annuities would pay either \$334.00 or \$393.00 per week depending on which annuity is chosen. Claimant's family currently receives \$406.00 per week in a guaranteed income stream in the form of workers' compensation benefits. Defendants contend there is no scenario in which receiving less money per week for the rest of his life is in Claimant's or his dependents best interest. Defendants' second basis for denying a second lump sum is grounded in legal precedent. Defendants rely on Ashley v. Ware Shoals, 210 S.C. 273, 42 S.E.2d 390 (S.C. 1947) which is a Supreme Court case that states "...if the total disability is such that... a serious question is presented regarding the likelihood of the employee's living the length of time required to complete the installment payments, the allowance of a lump sum settlement over the objection of the employer or carrier would constitute an abuse of discretion..." In the present case, with the attorney's fee award, Defendants contend they have paid benefits through August 12, 2033. Claimant's maximum life expectancy based on the uncontroverted medical evidence is, at most, through June 2024. Defendants have paid over nine (9) years of benefits more than Claimant's life expectancy. Defendants contend the Ashley case clearly prohibits this Commission from awarding any additional lump sums.

Finally, Defendant contend that Claimant is only entitled to three days' interest related to the payment of the prior award. Defendants point to the new case of Hudson v. Lancaster Convalescent Center, Appellate Case No. 2011-194189, Filed January 8, 2014. In that case, the Court of Appeals defines at what point an award becomes final. The Court stated "...the Guaranty will only be responsible for interest from the date that this lump-sum award became final, which under the statute is April 27, 2004, seven days from the date of the order of remittitur from the Court of Appeals. In the present case, the Court of Appeals provided the Order of Remittitur on May 23, 2014. The payment was made on June 2, 2014—ten (10) days

after the remittitur. Therefore, Defendants contend they are not liable for any penalty pursuant to 42-9-90 and are responsible for three (3) days of interest pursuant to 42-9-240. Defendants contend three days of interest at the statutory judgment rate of 7.25% is equal to \$90.85.

EVIDENCE OF THE CASE

This case has a long history related to the medical evidence and underlying hearings. The pertinent issues for the hearing on the 50/51 before the Full Commission related to a review of the Commission file, prior Orders, payments by Defendants, medical records, and other records, as well as testimony of Claimant's wife and son.

Claimant first asked for an increase in compensation rate. The only evidence presented at the hearing related to compensation rate was a wage sheet and letter from Burriss Electrical. The letter submitted by Defendants indicates that there was a wage and hiring freeze in 2007 and that Defendant Burriss had to lay off half of its employees. Further, the letter indicates that Claimant would have only been eligible for lockstep raises of .50 per hour and, at most, he would be making \$2.00 per hour more today (or \$15.50-16.50 per hour). Finally, the letter suggested and representations at the hearing through counsel reflected the opinion that Claimant would not have been eligible for a supervisor or management position because of his inability to speak fluent English. The letter indicated that none of Employer's Hispanic employees have mastered the English language well enough to serve as a project manager or superintendent. Employer reportedly required employees in supervisory positions to be fluent in English because of their interaction with architects and engineers. Claimant did not submit any evidence that he would have been a supervisor or manager and/or would have been making a supervisor or manager level salary. Defendants' position was that, if a compensation rate increase was granted, he should be compared to other similarly situated non-English speaking employees.

Claimant next asked for an additional lump sum of benefits in the amount of \$325,000 to pay for colleges and provide a steady income stream of \$369.00 per week for the first 10 years and then \$334.14 or \$393.55 per week after the first ten years. The testimony at the hearing by Claimant's wife and son does not show that an additional lump sum is in the best interest of the Claimant or his dependents. At the time of the accident, Claimant's wife was working one job and ran a flea market booth on the weekends. Claimant's wife testified she is no longer operating the booth but is now working three jobs. However, Claimant's wife testified the two additional jobs replaced the income derived from the flea market booth. Claimant's wife testified that the family is debt free (with the exception of a car purchased for their son) and that the family's take home pay has increased by over \$100.00 per week since the accident. Claimant's wife conceded that, if this accident did not happen, they would not have been able to pay for college. Rather, Claimant's wife testified that they would have still taken out loans for their sons to attend college. Claimant's wife testified Antonio, Jr. is no longer in college and has enlisted in the military and that he currently owes on student loans. Oliver testified that he is not in college currently and is working to save money to return to school.

Additionally, Claimant has asked for the lump sum to provide a steady income stream of \$369.00 per week for the next 10 years. After that, the annuities would pay either \$334.00 or \$393.00 per week tied to the life of Claimant and his wife depending on which annuity is chosen. Claimant's family currently receives \$406.00 per week in a guaranteed income stream in the form of workers' compensation benefits which will be paid while Claimant is alive. There is no scenario in which receiving less money per week for the rest of his life is in Claimant's or his dependents best interest.

Claimant did not present any evidence to the court related to life expectancy. Claimant took the position that life expectancy is to be based upon Claimant's condition before the accident. Defendants presented a questionnaire filled out by Claimant's authorized treating physician—Dr. Charmagne George. Dr. George indicated Claimant is likely 50% to live for 5 more years and less than 50% to live for 10 or more years due to Claimant's condition resulting from the accident. Dr. George also indicated her reasoning for these findings. She stated he has had three episodes requiring hospitalization. Claimant has been hospitalized two times in the prior six months for pneumonia, trachea-bronchitis, and sepsis. Claimant also is in renal failure and has experience respiratory infections. She concluded his current state following the accident leaves him at a much greater risk that common ailments could result in his death.

Claimant finally requested an assessment of penalties and interest for the first lump sum payment. It is agreed that the lump sum was paid on June 2, 2014.

SINGLE COMMISSIONER FINDINGS OF FACT

1. This matter came to a hearing on June 27, 2014. Order instructions were sent the parties on July 14, 2014¹.
2. The hearing before the undersigned covered both the Forms 50/51 and a Motion filed by Defendants. This Order covers only the Form 50/51.
3. Claimant's request for an additional lump sum is denied.
4. The denial of the lump sum is based on all testimony and the greater weight of the evidence presented. In particular, the testimony of Claimant's wife revealed the family has more money to spend now on a monthly basis than they did on the date of the accident. Claimant's wife also indicated the family has no debt with the exception of a

¹ The delay in filing of this Order was due to attempts between the parties to reach an agreement on certain issues related to both the Motion and the Forms 50/51. As no agreement was reached, this Order is now being filed.

car payment for their son and Antonio Jr's student loan of \$10,337.91 (which the family would have incurred even absent the accident).

5. The testimony of Claimant's son Oliver also reflects this position. Claimant's son also testified that he is no longer dependent on the family for full financial support as he is working.
6. Dr. George indicated Claimant is likely 50% to live for 5 more years and less than 50% to live for 10 or more years in his current condition following the underlying accident.
7. Dr. George stated Claimant has been hospitalized two times in the prior six months for pneumonia, trachea-bronchitis, and sepsis. Claimant also is in renal failure and has experience respiratory infections. She concluded his current state leaves him at a much greater risk that common ailments could result in his death.
8. Claimant's request for an increase in compensation rate is denied. This request is not supported by the evidence including the letter from the employer and the proposed compensation rates presented by Claimant. (*See* Def. APA 1, Cl. APA 1, 3).
9. The letter submitted by Defendants indicates that there was a wage and hiring freeze in 2007 and that Defendant Burriss had to lay off half of its employees. Further, the letter indicates that Claimant would have only been eligible for lockstep raises of .50 per hour and, at most, he would be making \$2.00 per hour more today (or \$15.50-16.50 per hour).
10. Representations made at the hearing reflected the position that Claimant, who is non-English speaking Hispanic, was ineligible to be promoted to management or supervisory positions because of his inability to speak fluent English. The Defendant took the position that, if any wage increase be considered, Claimant should be compared to other non-English speaking Hispanic employees.

11. Claimant presented no evidence of his ability to speak English to support that he would have been promoted to a supervisor or management level position.
12. The Court of Appeals issued a remittitur in this matter on the prior lump sum on May 23, 2014.
13. Payment of the Order and lump sum was made on June 2, 2014—ten days after the remittitur.
14. Claimant's request for fines and penalties related to the prior lump sum is denied.
15. Claimant is awarded \$90.85—equivalent to three days' interest—for delay in payment of the prior award. No additional fines were considered or awarded.

SINGLE COMMISSIONER CONCLUSIONS OF LAW

1. Pursuant to the Act, jurisdiction and venue are proper with the South Carolina Workers' Compensation Commission.
2. Pursuant to the Act, a claimant only has a vested interest in 500 weeks of workers' compensation benefits. See S.C. Code Ann. §§ 42-9-10, -290.
3. There is no mechanism under the Act that allows the Commission to increase the compensation rate based on cost of living increases, merit based increases, lock step wage increases, or W2 wages.
4. The Commission assigns a compensation rate based on the four quarters preceding the injury.
5. The mere fact that a claimant may be making more today than at the time of the injury does not constitute an extraordinary reason to increase the compensation rate.

6. Elliott v. S.C. Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (S.C. App. 2004), holds that "...a standard cost of living increase or step increase based on longevity of service..." does not constitute an exceptional reason under S.C. Code Ann. § 42-1-40.
7. Roberts v. McNair Law Firm, 366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005) holds that a post-injury merit increase does not constitute an extraordinary or exceptional reason to increase the compensation rate.
8. Ashley v. Ware Shoals, 210 S.C. 273, 42 S.E.2d 390 (S.C. 1947) is a Supreme Court case that states "...if the total disability is such that...a serious question is presented regarding the likelihood of the employee's living the length of time required to complete the installment payments, the allowance of a lump sum settlement over the objection of the employer or carrier would constitute an abuse of discretion..."
9. In Hudson v. Lancaster Convalescent Center, Appellate Case No. 2011-194189, Filed January 8, 2014, the Court of Appeals clearly defines at what point an award becomes final. The Court stated "...the Guaranty will only be responsible for interest from the date that this lump-sum award became final, which under the statute is April 27, 2004, seven days from the date of the order of remittitur from the Court of Appeals.
10. I further find the Haselden, Silks and Booth cases cited by Claimant do not apply in this proceeding. I do find the Elliott and Ashley cases do apply and utilized them in forming my conclusions based on a greater weight of the evidence.

FULL COMMISSION FINDINGS OF FACT

1. This matter came to a hearing on September 21, 2015. Order instructions were sent the parties on October 21, 2015.

2. The hearing before the Full Commission covered both the Forms 50/51 and a Motion filed by Defendants. This Order covers only the Form 50/51.
3. Claimant's request for an additional lump sum is denied.
4. The denial of the lump sum is based on all testimony and the greater weight of the evidence presented. In particular, the testimony of Claimant's wife revealed the family has more money to spend now on a monthly basis than they did on the date of the accident. Claimant's wife also indicated the family has no debt with the exception of a car payment for their son and Antonio Jr's student loan of \$10,337.91 (which the family would have incurred even absent the accident).
5. The testimony of Claimant's son Oliver also reflects this position. Claimant's son also testified that he is no longer dependent on the family for full financial support as he is working.
6. Dr. George indicated Claimant is likely 50% to live for 5 more years and less than 50% to live for 10 or more years in his current condition following the underlying accident.
7. Dr. George stated Claimant has been hospitalized two times in the prior six months for pneumonia, trachea-bronchitis, and sepsis. Claimant also is in renal failure and has experience respiratory infections. She concluded his current state leaves him at a much greater risk that common ailments could result in his death.
8. Claimant's request for an increase in compensation rate is denied. This request is not supported by the evidence including the letter from the employer and the proposed compensation rates presented by Claimant. (*See* Def. APA 1, Cl. APA 1, 3).
9. The letter submitted by Defendants indicates that there was a wage and hiring freeze in 2007 and that Defendant Burriss had to lay off half of its employees. Further, the letter

indicates that Claimant would have only been eligible for lockstep raises of .50 per hour and, at most, he would be making \$2.00 per hour more today (or \$15.50-16.50 per hour).

10. Representations made at the hearing reflected the position that Claimant, who is non-English speaking Hispanic, was ineligible to be promoted to management or supervisory positions because of his inability to speak fluent English. The Defendant took the position that, if any wage increase be considered, Claimant should be compared to other non-English speaking Hispanic employees.
11. Claimant presented no evidence of his ability to speak English to support that he would have been promoted to a supervisor or management level position.
12. The Court of Appeals issued a remittitur in this matter on the prior lump sum on May 23, 2014.
13. Payment of the Order and lump sum was made on June 2, 2014—ten days after the remittitur.
14. Claimant's request for fines and penalties related to the prior lump sum is denied. Claimant also failed to raise this issue in his brief to the Full Commission.
15. Claimant is awarded \$90.85—equivalent to three days' interest—for delay in payment of the prior award. No additional fines were considered or awarded.

FULL COMMISSION CONCLUSIONS OF LAW

1. Pursuant to the Act, jurisdiction and venue are proper with the South Carolina Workers' Compensation Commission.
2. Pursuant to the Act, a claimant only has a vested interest in 500 weeks of workers' compensation benefits. See S.C. Code Ann. §§ 42-9-10, -290.

3. There is no mechanism under the Act that allows the Commission to increase the compensation rate based on cost of living increases, merit based increases, lock step wage increases, or W2 wages.
4. The Commission assigns a compensation rate based on the four quarters preceding the injury.
5. The mere fact that a claimant may be making more today than at the time of the injury does not constitute an extraordinary reason to increase the compensation rate.
6. Elliott v. S.C. Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (S.C. App. 2004), holds that "...a standard cost of living increase or step increase based on longevity of service..." does not constitute an exceptional reason under S.C. Code Ann. § 42-1-40.
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9. In Hudson v. Lancaster Convalescent Center, Appellate Case No. 2011-194189, Filed January 8, 2014, the Court of Appeals clearly defines at what point an award becomes final. The Court stated "...the Guaranty will only be responsible for interest from the date that this lump-sum award became final, which under the statute is April 27, 2004, seven days from the date of the order of remittitur from the Court of Appeals.

10. We further find the Haselden, Silks and Booth cases cited by Claimant do not apply in this proceeding. I do find the Elliott and Ashley cases do apply and utilized them in forming my conclusions based on a greater weight of the evidence.

DECISION AND ORDER OF THE FULL COMMISSION

The Panel, after due and proper consideration of Claimant's Request for Hearing and the issues raised therein, FULLY AFFIRMS the Single Commissioner's Decision and Order.

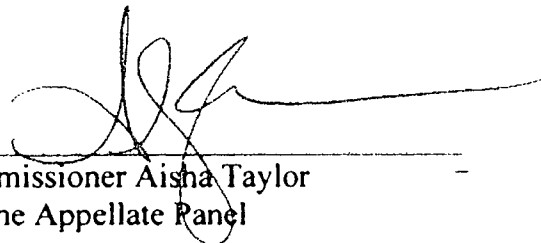
IT IS HEREBY ORDERED that Claimant's request for an additional lump sum is DENIED.

IT IS FURTHER ORDERED that Claimant's request for an increase in compensation rate is DENIED.

IT IS FURTHER ORDERED that Claimant's request for fines or penalties related to the prior lump sum is DENIED.

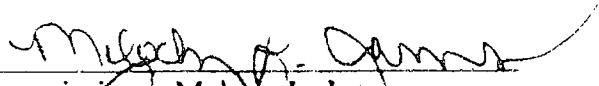
IT IS FURTHER ORDERED that Claimant is entitled to \$90.85 in interest for the delay in payment of the prior lump sum.

AND IT IS SO ORDERED.

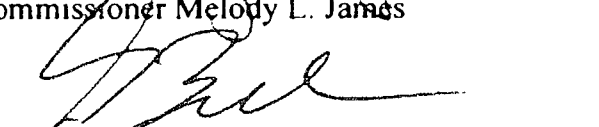


Commissioner Aisha Taylor
For the Appellate Panel

WE CONCUR:



Commissioner Melody L. James



Commissioner T. Scott Beck

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 Kim Falls on December 23, 2015