

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

---

Case No. 2011-CP-23-898

---

Michael Jarrard, ..... Respondent,

v.

Federal Express Corporation, ..... Appellant.

---

**RECEIVED**

MAY 11 2012

SC Court of Appeals

**MOTION FOR LEAVE TO FILE  
AMENDED NOTICE OF APPEAL**

---

Federal Express Corporation hereby moves for leave to amend the Notice of Appeal previously filed on December 2, 2011. The proposed Amended Notice of Appeal is attached to this Motion as Exhibit A. In support of this Motion, Federal Express states as follows:

1. This is a worker's compensation matter. At issue are two orders of the Workers' Compensation Commission. In its order of April 22, 2010, the Commission affirmed an award of a partial lump sum for Respondent to pay his attorney's fees and to make repairs on his home. In its order of July 21, 2010, the Commission affirmed an award of full-time attendant care by Respondent's wife.

2. Federal Express appealed both orders to the circuit court, which

held a single hearing on July 25, 2011. The parties' arguments during the hearing focused almost exclusively on the attendant care order.

3. On November 3, 2011, the circuit court entered two separate orders, one affirming the April 22, 2010 lump-sum award and the other affirming the July 21, 2010 attendant-care order.

4. Federal Express filed its Notice of Appeal on December 2, 2011. As required by Rule 203(d)(2), SCACR, Federal Express attached a copy of the circuit court decision affirming the April 22, 2010 lump-sum award, but it inadvertently did not attach a copy of the decision affirming the July 21, 2010 attendant-care award.

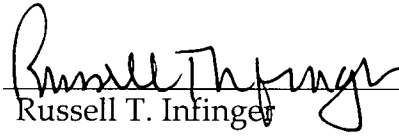
5. Undersigned counsel discovered the oversight in the course of drafting the brief, and accordingly now moves for leave to file an Amended Notice of Appeal to which both decisions of November 3, 2011 are attached.

6. Respondent will not be prejudiced by the granting of this Motion. The July 21, 2010 attendant-care award was the primary focus of the circuit court hearing, and thus there is no undue surprise. Further, Respondent will have the full 30 days allotted by Rule 208(a)(2) to file his initial brief. *See Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435-36 (Ct. App. 1995) (forgiving appellant's error in neglecting to appeal one of a series of cases tried together and holding that a non-prejudicial clerical error is not fatal to an appeal).

Accordingly, Federal Express respectfully requests leave to file an

Amended Notice of Appeal.

May 9, 2012

A handwritten signature in black ink, appearing to read "Russell T. Infinger", is written over a horizontal line.

Russell T. Infinger  
NEXSEN PRUET, LLC  
PO Drawer 10648  
Greenville, South Carolina 29603  
Tel: 864-282-1122  
SC Bar No. 2886  
[rinfinger@nexsenpruet.com](mailto:rinfinger@nexsenpruet.com)

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

---

Case No. 2011-CP-23-898

---

Michael Jarrard, ..... Respondent,

v.

Federal Express Corporation, ..... Appellant.

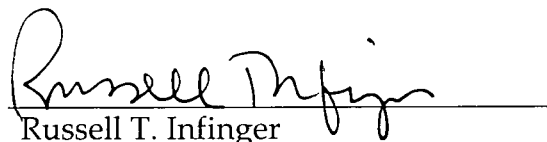
---

**PROOF OF SERVICE**

---

I certify that I have served the foregoing Motion for Leave to File Amended Notice of Appeal on Michael Jarrard by depositing a copy of same in the United States Mail, postage prepaid, on May 9, 2012, addressed to his attorney of record, C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29611.

May 9, 2012



Russell T. Infinger  
NEXSEN PRUET, LLC  
PO Drawer 10648  
Greenville, South Carolina 29603  
Tel: 864-282-1122  
[rinfinger@nexsenpruet.com](mailto:rinfinger@nexsenpruet.com)

Attorney for Appellant

# NEXSEN | PRUET

**Russell T. Infinger**  
Member  
Admitted in SC, MS

May 14, 2012

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: *Michael Jarrard v. Federal Express Corporation*  
Case Tracking #: 2011-CP-23-898  
Our File No.: 23908.49

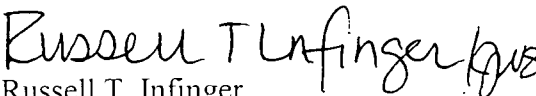
Dear Ms. Kitchings:

Enclosed please find three copies of Exhibit A which was inadvertently omitted from the Motion for Leave to File Amended Notice of Appeal.

Please place Exhibit A with the Motion for Leave to File Amended Notice of Appeal. By copy of this letter I am forwarding a copy to Respondent's counsel.

Thank you for your assistance in this matter.

Very truly yours,

  
Russell T. Infinger

RTI/bc  
Enclosures  
cc: C. Daniel Vega, Esquire w/encl.

Charleston  
Charlotte  
Columbia  
Greensboro  
**Greenville**  
Hilton Head  
Myrtle Beach  
Raleigh

55 East Camperdown Way  
Suite 400 (29601)  
PO Drawer 10648  
Greenville, SC 29603-0648  
www.nexsenpruet.com

T 864.282.1122  
F 864.477.2611  
E RInfinger@nexsenpruet.com  
Nexsen Pruet, LLC  
**Attorneys and Counselors at Law**

RECEIVED  
MAY 17 2012  
SC Court of Appeals

# EXHIBIT A

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

---

Case No. 2011-CP-23-898

---

Michael Jarrard, ..... Respondent,

v.

Federal Express Corporation, ..... Appellant.

---

**AMENDED NOTICE OF APPEAL**

---

Federal Express Corporation appeals the Orders of The Honorable Edward W. Miller dated November 3, 2011. Appellant received copies of the Orders on November 9, 2011.

May 9, 2012

---

Russell T. Infinger  
NEXSEN PRUET, LLC  
PO Drawer 10648  
Greenville, South Carolina 29603  
Tel: 864-282-1122  
SC Bar No. 2886  
[rinfinger@nexsenpruet.com](mailto:rinfinger@nexsenpruet.com)

Attorneys for Appellant

Other Counsel of Record:  
C. Daniel Vega, Esquire  
Chappell Smith & Arden  
P.O. Box 12330  
Columbia, SC 29611

Attorney for Respondent

**RECEIVED**  
MAY 17 2012  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ..... Respondent,

v.

Federal Express Corporation, ..... Appellant.

**PROOF OF SERVICE**

I certify that I have served the foregoing Amended Notice of Appeal on Michael Jarrard by depositing a copy of same in the United States Mail, postage prepaid, on \_\_\_\_\_, addressed to his attorney of record, C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29611.

May \_\_\_\_, 2012

**RECEIVED**  
MAY 17 2012  
SC Court of Appeals

Russell T. Infinger  
NEXSEN PRUET, LLC  
PO Drawer 10648  
Greenville, South Carolina 29603  
Tel: 864-282-1122  
[rinfinger@nexsenpruet.com](mailto:rinfinger@nexsenpruet.com)

Attorney for Appellant

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Michael Jarrard,

Claimant/Respondent,

vs.

Federal Express,

Employer and Self-Insured/Petitioner.

NOV -3 PM 2: 21  
FILED-CLERK OF COURT  
GREENVILLE, SC  
2011

IN THE CIRCUIT COURT

Case No. 10-CP-23-7077

**ORDER**

(Non-Jury Appeal from Workers' Compensation Commission)

**INTRODUCTION**

In this non-jury appeal from an Order of the Full Commission of the Workers' Compensation Commission, this matter comes before this Court on Petitioner's appeal concerning the Respondent's entitlement to ongoing medical care and other treatment and whether the 3-member panel of the Workers' Compensation Commission properly affirmed the decision of the Single Commissioner.

Counsel for the Employer & Petitioner, Federal Express, and the Claimant & Respondent, Michael Jarrard, submitted memoranda of law related to the present appeal, which the court has considered.

A hearing was held on July 25, 2011. At the hearing, the Claimant & Respondent was represented by C. Daniel Vega. The Petitioner & Employer was represented by Russell T. Infinger.

**STATEMENT OF THE CASE**

This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard (hereinafter, "Respondent"), WCC No.: 0217907. The Respondent sustained work-related

#1  
8/27

injuries due to exposure to chemical products resulting in damage to his pulmonary system and brain damage due to the aggravation of a pre-existing brain tumor. In a July 14, 2006 Order, Commissioner Childs found that the Respondent was entitled to full-time attendant care pursuant to a Life Care Plan. The Full Commission affirmed this Order in its entirety on January 8, 2007. In an Order dated October 3, 2008, Judge James R. Barber, III found that the "Full Commission rightly determined Claimant suffered injury by accident in the course of scope of employment." After the Petitioner failed to appeal that Order to the court of appeals, Commissioner Childs' initial Order became the controlling law of the claim.

A hearing was held on August 27, 2009, to determine the rate at which the Respondent's wife should be compensated for the attendant care Respondent's wife had been providing since November 2002 and whether the Respondent was entitled to bathroom repairs to better accommodate his disability. In his January 4, 2010 Order, Commissioner Wilkerson found Respondent's wife was entitled to payment for attendant care administered from November 14, 2002, to the present and continuing for the rest of the Respondent's life (affirming the July 14, 2006 Order). Respondent's wife was awarded payment at a rate of \$12.00 per hour, 20 hours per day, 7 days per week in order to compensate her for the full-time attendant care she provides for her husband. Commissioner Wilkerson also found Respondent was entitled to have his bathroom remodeled in order to accommodate the special needs that are the result of his disability. The Petitioner appealed the decision of the Commissioner Wilkerson to the Full Commission, where it was affirmed in its entirety in an order dated July 21, 2010.

Now, Petitioner, pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, petitions this court for judicial review of the Order of the South Carolina Workers' Compensation Commission dated July 21, 2010; and by reference the Order of July 14, 2006. Petitioner alleges the Commission made errors of law in finding Respondent was entitled to compensation for the

attendant care his wife provides and that Respondent was entitled to repairs to his bathroom to suit his needs in light of his disability. Respondent contends the Commission's order was entirely in compliance with the Act and, therefore, Respondent is entitled to back payment of attendant care and payment for bathroom repairs.

### STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this Court can reverse or modify the decision of the Workers' Compensation Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

The Commission is the ultimate fact finder in workers' compensation cases. *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 541, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

## FINDINGS

After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court makes the following findings of law:

The totally disabling brain injury suffered by the Respondent entitles him to lifetime compensation and medical care, pursuant to S.C. Code Ann. § 42-15-60 (C). In coming to the decision to allow the attendant care in his January 4, 2010 Order, Commissioner Wilkerson reviewed a Life Care Plan prepared by Sarah Lustig, a Registered Nurse and Certified Life Care Planner. Nurse Lustig collaborated with the Respondent's treating physician, Dr. Edwin Scott, in forming this plan. Nurse Lustig and Dr. Scott agreed after extensive observation and collaboration that the Respondent was in need of full-time attendant care and that his wife was well-qualified to provide it. Upon a review of the cost of attendant care services in the surrounding area, Nurse Lustig concluded these services would cost \$12.00 per hour. Finally, Respondent's wife testified at the hearing she used all of her waking time to provide care for her husband, sleeping 4.5 interrupted hours per night. Defendants offered no contradicting evidence and the Full Commission found the witnesses to be credible and the plans of the medical professionals to be in accordance with substantial evidence. Therefore, Respondent was awarded attendant medical care to be provided by his wife at the rate of \$12.00 per hour for 20 hours per day and 7 days per week from November 14, 2002 to the present and continuing for the rest of the Respondent's life.

Additionally, in her Life Care Plan, Nurse Lustig testified Respondent would need remodeling work done on his bathroom in order to make it functional in light of his disabilities. Petitioner offered no contradicting evidence on this point. Like the award of the attendant care,

Commissioner Wilkerson found this award to be entirely reasonable and in accordance with substantial evidence.

Section 42-15-60 (C) of the South Carolina Code provides “[i]n cases in which total and permanent disability results, reasonable and necessary nursing services . . . and other treatment . . . shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit.” S.C. Code Ann. § 42-15-60. Therefore, unlike other types of medical care where the Defendants have the right to control the medical provider, attendant care gives the employer less control. Additionally, the medical professionals in charge of the Respondent’s case determined that the attendant care to be provided by his wife was entirely reasonable and necessary. The Full Commission reviewed this award and determined that it was in compliance with the statute in its July 21, 2010 Order.

In its appeal, Petitioner also alleges Respondent is not entitled to an award of attendant medical care from November 14, 2002, because the Respondent did not request this care until 2009. Petitioner contends an employee cannot receive back payment for medical care unless the employee has requested this care and the employer has notice of that request. The claimant contends, and a review of the Commission file demonstrates, claimant alleged entitlement to attendant care on multiple Form 58 pre-hearing briefs dated March 9, 2004 and May 18, 2004. The Order of Commissioner Childs issued July 14, 2006 included an award for attendant care with which defendants refused to comply. For this reason, the Claimant sought a hearing before Commissioner Wilkerson, who issued his Order granting the Claimant attendant care on January 4, 2010. This Order was later affirmed in its entirety by the Full Commission.

The Claimant also contends § 42-15-60 of the South Carolina Code requires employer to provide medical care “as reasonably may be required” once a compensable injury has occurred. S.C. Code Ann. § 42-15-60. The court of appeals has determined the commission is “not outside

its discretion in ordering the [employer] to pay for [medical treatment], once it determined the treatment was medically necessary.” *Clark v. Aiken County Gov't*, 366 S.C. 102, 114, 620 S.E.2d 99, 100 (Ct. App. 2005). This is regardless of whether employer had notice of the treatment or the employee has requested that treatment. *Id.*

Neither the Workers' Compensation Act nor the case law reveals any interpretation in accordance with the Petitioner's reading of the requirements for notice in order for Claimant to receive compensable medical care. Once the employer has notice that the accident occurs, pursuant to § 42-15-20, it is obligated to provide reasonably necessary medical care to the employee, if the injury is a compensable one. S.C. Code Ann. § 42-15-20. In *Clark*, the employee received medical care without requesting it from his employer or giving his employer notice that he was to receive the care. *Clark* at 106-107, 620 S.E.2d at 101. However, because the treatment was determined to be medically necessary, neither prior notice nor a prior request was required in order for the Commission to order the employer to pay for the care. *Id.* at 114, 620 S.E.2d at 100. In the present case, the Commission found, as an uncontroverted fact, the attendant care is reasonably and medically necessary.

While South Carolina appellate courts have never decided a case regarding the payment of back benefits for attendant care, the Court of Appeals of North Carolina has upheld the retroactive payment of attendant care benefits. Like South Carolina, North Carolina does not require pre-approval of attendant care performed by a family member in a Workers' Compensation case. The court stated “N.C.G.S. § 97-90(a) does not require pre-approval of fees charged by health care providers, except for physicians, hospitals, or other medical facilities. Plaintiff's brother does not fit into the exceptions for N.C.G.S. § 97-90(a). This interpretation is consistent with our case law, which has allowed compensation to health care providers similar to plaintiff's brother, without the Commission's pre-approval.” *Boylan v. Verizon Wireless*, 201

N.C. App. 81, 86, 685 S.E.2d 155, 159 (Ct. App. 2009) (quoting *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 253-54 (Ct. App. 2002)).

*Boylan* and its line of reasoning was favorably adopted in a case in the Court of Common Pleas of South Carolina, *McDaniel v. Hans Lenger, LLC*, 2011-CP-46-0464 (2011). In *McDaniel*, the Commissioner found Claimant required 24-hour attendant care since the date of the injury in 2006, but failed to award attendant care benefits until they were requested in 2009. *Id.* The court found that because Claimant was entitled to treatment and care between 2006 and 2009, the Commission committed an error of law in failing to award those benefits during that time. *Id.*

The final argument of Petitioner is that the Full Commission improperly affirmed the Order of the Single Commissioner because it did not come to a majority opinion in making this determination. Section 42-3-20 of the South Carolina Code allows three-member panels to review decisions of the Single Commissioner. S.C. Code Ann. § 42-3-20. It also states that “[t]he decisions of three-member panels have the same force and effect as full commission reviews.” *Id.* The process by which these appeals take place is laid out in Regulation 67-709. S.C. Code Ann. Regs. 67-709. (2010). Subsection (E) allows for the Commission to modify the findings of the Single Commissioner but notes that “a vote to affirm and modify is deemed a vote to affirm.” *Id.*

In the Full Commission’s 2010 Order, Commissioner Huffstetler voted to affirm, Commissioner Williams voted to provide the benefits from 2005, and Commissioner Beck voted to provide the benefits from 2009. While the Commissioners noted their position on these issues, the Full Commission nevertheless affirmed the Single Commissioner’s decision *in its entirety*. These other opinions did not affect the Commission’s decision to affirm the award of attendant care benefits from 2002, and Commissioners Williams and Beck voted to affirm and

modify. Regardless of this fact, the rulings of Commissioners Beck and Williams to award benefits only from the date of the request for that medical care is not in accordance with the previously discussed case law.

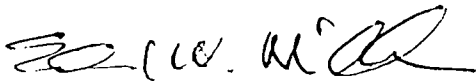
**CONCLUSION**

After due deliberation, review of the memoranda, case law, exhibits, and argument of counsel, the Court makes the following rulings:

Because the decision of the Full Commission in affirming Commissioner Wilkerson's 2010 Order was made in accordance with substantial evidence and without error of law, the Petitioner's appeal to overturn the award of Claimant's bathroom repairs and attendant care is DENIED;

The Order of the Full Commission, dated July 21, 2010, and by reference the Order of July 14, 2006, is hereby AFFIRMED by this Court, and the Claimant is entitled to bathroom repairs and attendant care; the attendant care is to be provided by his wife in accordance with the July 21, 2010 Order of Commissioner Wilkerson;

**AND IT IS SO ORDERED!**



The Honorable Edward W. Miller  
Circuit Court Judge

Greenville, SC

Date: November 3, 2011

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2010CP2307077

IN THE COURT OF COMMON PLEAS

Michael Jarrard vs. Federal Express Corporation

FILED - DEPT. OF COURT  
GREENVILLE, SC 29601  
PAUL B. WICKENSIMER

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRCP;  Rule 41(a),
  - SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRCP;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;  Reversed;  Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: \_\_\_\_\_

\_\_\_\_\_  
PRESIDING JUDGE -

This judgment was entered on the 3rd day of November, 2011, and a copy mailed first class this 3rd day of November, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

C Daniel Vega Chappell Smith & Arden P O Box  
12330 Columbia, SC 29611

Russell Thomas Infinger Nexsen Pruet, Llc P.O.  
Drawer 10648 Greenville, SC 296030648

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Michael Jarrard,

Claimant/Respondent,

vs.

Federal Express,

Employer and Self-Insured/Petitioners.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER

IN THE CIRCUIT COURT

2011 NOV - 7 A 11:30

Case No. 11-CP-23-898

**ORDER**

(Non-Jury Appeal from Workers' Compensation  
Commission)

**INTRODUCTION**

In this non-jury appeal from an Order of the Full Commission of the Workers' Compensation Commission, this matter comes before this Court on Petitioner's appeal concerning the Respondent's entitlement to a partial lump sum award as part of his Workers' Compensation claim.

Counsel for the Employer & Petitioner, Federal Express, and the Claimant & Respondent, Michael Jarrard, submitted memoranda of law related to the present appeal, which the court has considered.

A hearing was held on July 25, 2011. At the hearing, the Claimant & Respondent was represented by C. Daniel Vega. The Petitioner & Employer was represented by Russell T. Infinger.

**STATEMENT OF THE CASE**

This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard (hereinafter, "Respondent"), WCC No.: 0217907. The Respondent sustained injuries due to exposure to chemical products on the job resulting in damage to his pulmonary system and brain;

#1  
201

and damage due to the aggravation of a pre-existing brain tumor. The Respondent was awarded lifetime medical care and treatment pursuant to § 42-9-10 for his physical brain injury, including full-time attendant care to be provided by his wife. The Respondent requested a partial lump sum payment in order to pay his attorney's fees and make repairs and additions to his home.

In an Order dated April 22, 2010, Commissioner Barden found that the Respondent's home is in need of repair after the Respondent submitted contractor bids detailing this repair and its cost. Commissioner Barden granted the fee petition for the Respondent's legal fees in this same Order. Ultimately, Commissioner Barden awarded \$9,900.00 for roof repair; replacement of the storage attachment, and replacement of windows at the Respondent's house; \$908.00 for the removal and replacement of the lavatory at the Respondent's house; \$5,500.00 for the installation of an HVAC unit at the Respondent's house; and \$169, 253.27 for payment of the Respondent's legal fees. The Full Commission affirmed the Single Commissioner's decision and sustained the Order of the Single Commissioner in its entirety in its own Order, dated January 7, 2011.

The Petitioners, pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, petitioned this court for judicial review of the Orders of the South Carolina Workers' Compensation Commission dated April 22, 2010 and January 7, 2011. The Petitioners allege the Commission made errors of law in finding the partial lump sum payment was in the best interest of the Respondent and not prejudicial to the defendant, the evidence did not support a finding that Petitioner must make a partial lump sum payment to cover the Respondent's legal costs, and the legal requirements for lump sum attorney fees were not supported by the Order.

#### **STANDARD OF REVIEW**

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

Under the APA, this Court can reverse or modify the decision of the Workers' Compensation Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

The Commission is the ultimate fact finder in workers' compensation cases. *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 541, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

### FINDINGS

After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court makes the following findings of law:

In Workers' Compensation cases the Claimant is entitled to recover a lump sum payment from the Defendant following an order of the Commission. South Carolina Code § 42-9-301 provides that lump sum benefits can be ordered by the Commission when it is deemed "not to be contrary to the best interest of the employee or his dependents." S.C. Code Ann. § 42-9-301 (2011). Illustrative of this principle is the ruling of the Court of Appeals in *Cox v. Mills*. *Cox v. Mills*, 286 S.C. 226, 332 S.E.2d 562 (Ct. App. 1985). In that case, the Court of Appeals found

that where the Claimant needed a lump sum payment to conduct repairs on his house and showed an ability to handle large sums of money in a prudent fashion, the Commission acted properly in granting his lump sum award request. Furthermore, the court held it had a limited scope of review in this situation, requiring only an analysis as to whether "there is substantial evidence of record to support the award." *Id.* at 227, 332 S.E.2d at 562 (citing *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981)). While S.C. Code § 42-9-10 states "no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits," the Claimant only requests the funds needed to make repairs, not a total lump sum award for his lifetime benefits. S.C. Code Ann. § 42-9-10 (2011).

In the present case, the Respondent submitted substantial evidence regarding his home repairs to the Commission, including plans and specific costs pertaining to the anticipated repairs. The Respondent only requests a partial lump sum payment for these needs, and has clearly and specifically outlined the specific reasons for his request. Like the Claimant in *Cox*, the Respondent needs a partial lump sum payment in order to make repairs to his house, which he otherwise would have made, but for his condition. In order to prevent the house from falling further into disrepair, the Respondent has shown that the award of this partial lump sum is in accordance with his best interest.

S.C. Regulation 67-1207 permits the Claimant's attorney to recover fees if the award is more than 100 weeks and there are not sufficient accrued weeks to pay the attorney's fee. S.C. Code Ann. Regs. 67-1207 (2011). The Claimant in *Glover by Cauthen v. Suitt Construction Company*, who was also receiving lifetime benefits, requested lump sum attorney's fees pursuant to S.C. Regulation 67-1207 and S.C. Code § 42-9-10. *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 468, 458 S.E.2d 535, 537 (1995). The court ruled "[t]he statute and regulation, when read together, clearly evince a legislative intent to permit recovery of lump sum attorney's

fee to any claimant who receives benefits in excess of one hundred weeks." *Id.* at 469, 458 S.E.2d at 538. The court noted the profound policy implications of refusing to allow claimants access to the funds with which to pay their attorney's fees, finding "this result would have a tremendous chilling effect on the ability of the most severely injured employees to obtain the services of adequate counsel." *Id.* at 470, 458 S.E.2d at 538 (citing *Corson v. Brown Products*, 120 N.H. 665, 421 A.2d 1005 (N.H. 1980)).

In the present case, the Order of the Commission is entirely in accordance with the relevant regulations, statutes, and case law. The Respondent has received a lifetime benefit award and the accrued benefits of the Respondent are not enough to cover his legal costs. The Petitioners have offered no other reason as to why the attorney fee award should be overturned upon judicial review.

### CONCLUSION

After due deliberation, review of the memoranda, case law, exhibits, and argument of counsel, the Court makes the following rulings:

Because the Respondent submitted substantial evidence detailing the need for significant home repairs that will both help his home from falling into further disrepair and help in the aid of his medical care, the Petitioner's appeal to overturn the partial lump sum award for the Respondent's home repairs is DENIED;

Because the Respondent received a lifetime benefit award and the accrued benefits of the Respondent are not enough to cover his legal fees, the Petitioner's appeal to overturn the partial lump sum award for the Respondent's home repairs is DENIED;

The Order of Commissioner Barden, dated April 22, 2010, and the Order of the Full Commission, dated January 7, 2011, affirming the prior Order of Commissioner Barden, are hereby AFFIRMED by this Court, and the Respondent is entitled to a partial lump sum payment

from the Petitioner for the costs as specified in the April 22, 2010 Order of Commissioner

Barden.

**AND IT IS SO ORDERED!**

A handwritten signature in black ink, appearing to read 'E. W. Miller', written in a cursive style.

The Honorable Edward W. Miller  
Circuit Court Judge

Greenville, SC

Date: November 3, 2011