THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Case No. 000665

Antonio Lazaro .....Employee, Appellant,

v.

Burriss Electrical, Employer, and
South Carolina Guaranty Association.....Carrier, Respondents.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

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.

First, Claimant now contends the compensation rate was never addressed and Claimant asked the Single Commissioner to 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 over his hourly rate or a recalculation based on a W2. Defendants opposed this request.

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, Claimant also sought an additional lump sum in the amount of $325,000.00 or more to pay for college 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 based on the evidence submitted. Defendants opposed this request.

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.

Third, Claimant also requested an assessment of penalties and interest related to 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. Defendants conceded Claimant was entitled to $90.85 in interest based on the three (3) days the payment was overdue. 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. This payment has been made to Claimant.

This matter came to a hearing before the Single Commissioner on July 7, 2014 on Claimant's Request for Hearing seeking (1) a second lump sum, (2) an increase in the compensation rate, and (3) fines, penalties, and/or interest related to the first lump sum. A Decision and Order was issued on May 28, 2015[1]. The Single Commissioner denied Claimant's request for a compensation rate increase, denied Claimant's request for a new lump sum, denied Claimant's request for fines and penalties, and awarded Claimant $90.85 in interest. Claimant timely appealed the Single Commissioner Decision and Order to the Full Commission. The Full Commission held a review hearing on September 21, 2015. Both parties were fully heard on the matters. The Full Commission issued its Decision and Order on December 23, 2015. The Full Commission FULLY AFFIRMED the Single Commissioner. Claimant filed a Motion to Reconsider. Claimant's Motion to Reconsider was DENIED on February 22, 2016. This appeal followed.

[1] The reason for the lengthy delay is that both parties asked any decision be held in abeyance to attempt a resolution of the issues. No resolution was agreed upon and the parties asked the Commissioner to issue the Order.

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 me 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.

At the Hearing, Claimant 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 at a higher rate of pay because of his inability to speak fluent English. Claimant did not contest his inability to speak English. The letter indicated that only one of Employer's non-English speaking employees[2] have mastered the English language well enough to serve as a project manager or superintendent.

[2] As will become painfully apparent, Claimant has repeatedly argued in his brief about a disparate pay scale between "Hispanic" and "non-Hispanic" employees. The evidence reflects that a majority of Employer's Hispanic employees are lower paid than other employees. However, the dichotomy between the pay scales is clearly set out as reflective of the ability, or inability, to speak fluent English. The inability to speak fluent English means the employee is less skilled for Employer's purposes and thus is paid at a slightly lower rate. This would be true regardless of the employees' nationalities or heritage. This is reflected in both Employer's letter and the trial transcript. Claimant has attempted to forge an issue out of thin air for this appeal related to some apparent alleged racial bias of Employer which simply holds no water when the actual evidence is reviewed.

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 experienced/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 boot 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. Defendants submit there is no conceivable 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 only 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.

LEGAL ARGUMENT

I. THE FULL COMMISSION DID NOT ERR BY DENYING CLAIMANT'S REQUEST FOR AN ADDITIONAL LUMP SUM.

Claimant asserts the Full Commission erred by denying the $300,00-$325,000 additional lump sum request because the request was "in the best interest of the Claimant and/or his dependents."

First, as briefly addressed at the hearing, Defendants believe that there is no more than $210,000.00 of benefits remaining after lump sums and attorney's fees are deducted[3]. That amount may be lower depending on calculation of present day value of the attorney's fee. Regardless, a hearing to determine remaining benefits will need to be conducted by the Commission prior to an additional lump sum award, if one is granted.

As a threshold issue, Defendants contend that no additional lump sums can be granted. Defendant 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. As noted above, 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. 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 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.

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[3] This estimate is now more than a year old and the amount owing at this time is under $200,000.00.

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 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. There is no conceivable scenario in which receiving less money per week for the rest of his life is in Claimant's or his dependents best interest.

It is clear from the testimony that there is a factual basis to deny Claimant's request for an additional lump sum because it is not in the best interest of the family to receive less money.

The second basis for denying lump sum is grounded in clear legal precedent. 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**..." This case is still good law in South Carolina. While this case was decided when S.C. Code Ann. § 42-9-300 was still in effect, the Legislature's change to that statue only removed the "in unusual cases" language. The effect of the statute remained unchanged. Likewise, the ruling by the Supreme Court that when medical evidence shows a claimant will not survive long enough to see the full lump sum, that lump sum cannot be granted, is unaffected by the minor change in the statute.

In the present case, with the attorney's fee award, Defendants have paid benefits through approximately August 12, 2034. Claimant's maximum life expectancy based on the uncontroverted medical evidence is, at most, through June 2024. As of today, Defendants have paid over nine (9) years of benefits more than Claimant's life expectancy. The Ashley case clearly prohibits this Commission from awarding any additional lump sums. Therefore, the Decision and Order of the Full Commission must be affirmed.

II. THE FULL COMMISSION DID NOT ERR IN FINDING CLAIMANT HAS A VESTED RIGHT TO ONLY 500 WEEKS OF BENEFITS

This exception raised by Claimant again asserts there is some mythical "500 week cap" on benefits in lifetime cases. There is not a "500 week cap" on benefits in lifetime cases. Claimant's counsel appears to be confused by the words "vested" and/or "vested interest" and/or "vested right." The Full Commission did not make any findings related to a "500 week cap." The Full Commission's specific conclusion of law on this "issue" states "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."

The case law is clear that when a case involves lifetime benefits, the claimant is only vested in 500 weeks of those benefits until those benefits are earned. Those benefits are only earned by surviving to week 501, 502, 503, and so on and so forth. In short, a claimant is not vested in week 501 until week 501 arrives. The applicable case law states that if a claimant is awarded lifetime benefits and passes away prior to the 500-week cap,

benefits are only payable to 500 weeks[4]. *See* Floyd v. C.B. Askins & Co., 382 S.C. 84, 675 S.E.2d 450 (S.C. App. 2009). Similarly, if a claimant is awarded lifetime benefits and passes away after surpassing the 500-week cap, benefits are terminated as of the date of death. *See* Glover by Cauthen v. Suitt Const. Co., 318 S.C. 465, 458 S.E.2d 535 (S.C. 1995). All benefits paid after the statutory 500-week period are to be paid weekly. S.C. Code Ann. §§ 42-9-230, -250.

In sum, the case law on this issue is quite clear that a claimant with a lifetime award is only vested in the first 500 weeks of benefits. Thereafter, the benefits only accrue on a week to week basis. Therefore, the Full Commission did not err when it found there was a 500 week vested limit to benefits and the Decision and Order must be affirmed.

III. THE HEARING COMMISSIONER DID NOT ERR BY CONSIDERING MEDICAL EVIDENCE RELATED TO LIFE EXPECTANCY.

Claimant filed for the underlying hearing and sought an additional lump sum of up to $325,000. Despite this fact, Claimant asserts in this exception that evidence of Claimant's life expectancy is irrelevant to further lump sum awards. Based on well-established case law, the medical evidence of life expectancy is wholly and directly relevant to Claimant's requests.

Claimant did not submit any medical evidence for consideration. Defendant submitted a written opinion from the treating physician. Therefore, the medical evidence

[4] This issue was discussed in Floyd, *supra*. While in that claim the 500 week award of benefits on Claimant's death was not appealed, making it the law of the case, the Court of Appeals did affirm the reduction of lifetime benefits to a fixed time award of 500 weeks when the claimant passed away prior to the 500 week statutory cap and had a lifetime commuted value balance of 987.48 weeks.

is undisputed and uncontroverted. The uncontroverted medical evidence submitted shows that Claimant has, at most, 10 years of life expectancy remaining. In Martin v. Martin, 296 S.C. 436, 373 S.E.2d 706 (S.C. App. 1988), the Court of Appeals held that **mortality tables may be disregarded if there is competent evidence to challenge the use of the mortality table in considering life expectancy**. That determination was reiterated in Haselden v. Davis, wherein the Court of Appeals stated "...the [mortality] table below shall be received in all courts and by all persons having power to determine litigation as evidence **(along with other evidence as to his health, constitution and habits)** of the life expectancy of such person. 341 S.C. 486, 534 S.E.2d 295 (S.C. App. 2000) (emphasis added). It is clear that the mortality tables alone are not conclusive on the issues of life expectancy and that when competent evidence is presented contradicting the mortality tables they may be disregarded[5]. Further, Ashley v. Ware Shoals, 210 S.C. 273, 42 S.E.2d 390 (S.C. 1947) 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**..."

The cases cited herein make it clear that not only is the medical evidence of life expectancy relevant and proper but that the uncontested and uncontroverted medical

[5] Glover, as cited by Claimant, contains no language related to utilizing the mortality table in related to benefits in a lifetime case. Glover is a very narrow decision. Glover stands only for the proposition that it would be unfair to award an attorney's fee that is less than a portion of the full lifetime benefits because it may result in an attorney receiving a lesser fee than in a claim that is not a lifetime benefits case. Therefore, the Glover court held that it was "adequate" to use the mortality table only to determine an attorney's fee.

evidence required a denial of any additional lump sums in this case. Therefore, the Full Commission did not err in relying on established precedent in reviewing and relying on the uncontested and uncontroverted medical evidence presented at the hearing and the Decision and Order should be affirmed.

IV. THE HEARING COMMISSIONER DID NOT ERR BY REFUSING TO INCREASE CLAIMANT'S COMPENSATION RATE

Claimant argued that his compensation rate should be increased in one of three possible ways: (1) a percentage increase of up to 12.8% per year every year since the accident; (2) lockstep raises of .50 per hour per year; or (3) recalculated based on aW2. Despite Claimant's requests, 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 calculated based on the four quarters preceding the injury. The mere fact that a claimant might be making more today than at the time of the injury does not constitute an extraordinary reason to increase the compensation rate. Even, assuming *arguendo*, it was a reason to increase the compensation rate, Claimant presented no evidence to support his claim for an increased compensation rate.

The only actual evidence presented at the hearing related to compensation rate was a wage sheet and letter from Burriss Electrical. The wage sheet shows that the three employees hired immediately before and immediately after Claimant make an average of $13.80 per hour in 2014. 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 $16.50 per hour).

However, despite the possibility of making more money today, 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.

Elliott and Roberts set out exactly the same thing Claimant has attempted in the present case. He is seeking an increase in compensation for what would be annual merit, cost of living, and or lockstep increases. This is simply not permitted under the laws of South Carolina. Therefore, the Full Commission did not err by refusing to increase the compensation rate and the Decision and Order should be affirmed.

V. THE HEARING COMMISSIONER DID NOT ERR BY COMPARING CLAIMANT'S WAGES TO OTHER NON-ENGLISH SPEAKING EMPLOYEES.

The undersigned would first point out that this exception is entirely irrelevant as it is merely a red herring designed to obfuscate the underlying compensation rate increase issue previously discussed. The comparable employee issue is irrelevant because the compensation rate was properly denied as Elliott and Roberts clearly prohibit the increase in compensation rate sought by Claimant.

However, for purposes of the brief, Defendants will address this issue. The record is clear that there is no "racist" or "anti-Hispanic" evidence, position, or findings by the Commission. The evidence presented on the compensation rate topic consisted solely of a wage sheet and letter from Employer. **Claimant did not present any actual evidence on this issue. More importantly, Claimant did not contest that he did not speak English.** The letter presented contains a discussion and explanation for the different classes of employees within Employer. Specifically, the letter states that Employer has project managers/superintendents, foremen, and electricians. It notes that each of these jobs has increasing levels of responsibility (electricians being the least, Claimant was an electrician) and increasing levels of pay (again, electricians being the least). Specifically, it states "we believe the increased responsibility of the foreman and superintendents should maintain some difference in pay commensurate with that responsibility." The letter clearly sets out that in order to be in a position with greater responsibility—e.g. project lead, superintendent, or foreman—the employee was required to speak fluent English because "...our customers, engineers and architects have an expectation of excellent communication. **This requires the ability to communicate quickly and effectively in English.**" (emphasis added). Employer notes in the letter "...to date none of our Spanish speaking employees have mastered English well enough to represent the company in management projects." Claimant was not fluent in English. This was undisputed at the hearing despite Claimant's wife and son testifying (note: Claimant had the burden of proof to justify the requested compensation rate increase, he not only failed to prove Claimant was fluent in English—he failed to present any evidence on this point). In fact, Claimant was one of Employer's highest paid electricians.

"For reference, the highest paid -- and I'm sure this is just probably a Hispanic electrician; I'm sure that I was just -- they were just trying to equate -- **I'm sure there's no difference in the pay of the Hispanic electricians than to other electricians** -- but he's paid seventeen fifty ($17.50)."

Single Comm. Hr'g Tr. 22:4-11

"I'm sure that they don't have other non-Hispanic electricians being paid more..."

Single Comm. Hr'g Tr. 23:8-10

"Mr. McDaniel: -- since there was -- since it was referenced to, again, to Hispanics and, of course, first of all, I don't think you're going to hear any evidence in reference to Mr. Lazaro's English ability, you know, but -- so, we don't know what he would have done. But the other thing is, that I noticed on there that two (2) of the people on here are making seventeen fifty ($17.50) is Garcia -- Aswaldo Garcia and Lorenzo Cabello...And they are both making seventeen ($17.00) and seventeen fifty($17.50).

Mr. Gallagher: **And they speak English.**

Mr. McDaniel: Well --

Mr. Gallagher: I mean, **that's what the letter says** if you want to look at that.

Commissioner Wilkerson: No, I -- I put it on there. I understand.

Mr. Gallagher: **The letter said they speak English --**

Commissioner Wilkerson: I understand. I'll read it all. Yes, you just looked at it.

Mr. McDaniel: -- well, and -- and we don't know what -- **and my point being is also we don't know -- I -- I -- let's say they speak very good English** but I -- I don't know what they would testify to about his ability."

Single Comm. Hr'g Tr. 103:5 – 104:13

The wage sheet similarly reflects there are no "racist" or "anti-Hispanic" sentiments by Employer. Claimant bases this wild and outrageous accusation on a mistaken belief that Employer's Hispanic employees are paid less than other employees. A review of the wage sheet submitted show that this is patently false. For reference, Claimant was making $14.50 per hour at the time of the accident and was one of Employer's highest paid electricians. The wage sheet reflects there are thirty (30) employees making the same hourly wage or less. Of these thirty (30) employees, only eleven (11) are Hispanic. The other nineteen (19) are non-Hispanic employees. In spite of this, rather than simply presenting evidence to support his claim—of which there is none—Claimant's attorney alleges Employer, the undersigned, the Single Commissioner, and the Full Commission all conspired to engage in a racist analysis of the clear evidence to deny an increase in compensation rate. Claimant's counsel goes on to compare the Decision and Order to the type of virulent racism that led to the Emanuel AME Church slayings. The undersigned finds this comparison personally offensive and outragoues as Claimant's attorney has directly accused the undersigned of racial profiling and directly compared him to a racially motivated mass murderer. This type of commentary is sanctionable and this Court should consider a heavy penalty against Claimant's counsel for such accusations.

However, even setting aside the lack of evidence issue for Claimant, at the hearing in this matter, **Claimant put his position on the record that there was no disparate pay between Hispanic and non-Hispanic employees**. Specifically, when discussing the above referenced letter, he stated the following on three separate occasions:

The record is clear that even Claimant did not take exception at the time to the dichotomy between English and non-English (or non-fluent English) speaking employees until the preparation of his brief. Further, the issue of "Hispanic" vs. "non-English speaking" was only included in the Decision and Order at the persistent insistence of Claimant who demanded its inclusion on multiple occasions prior to the final Decision and Order being filed. These occasions included multiple conference calls with the Single Commissioner, letters to the Single Commissioner, and Claimant's own handwritten notes on draft versions of the final Decision and Order. It is curious that Claimant demanded the inclusion of intentionally racially tinged information not contained anywhere in the record in the Decision and Order only to then file an appeal attacking the very same information he demanded be included in the Decision and Order.

Nevertheless, the record is clear that there is no "racist" or otherwise "discriminatory" language, intent, or evidence in the record. The record is clear and undisputed the division of wage earners with Employer centers on specific skill sets and fluency or ability to speak English (thus increasing job responsibilities). The record is clear and undisputed that Employer had 30 employees with same or lower wages as Claimant and nineteen (19) of those are non-Hispanic employees. The record is clear the compensation rate increase was properly denied pursuant to established case law and precedent because Claimant's only basis for the increase was either (1) percentage increases, (2) lockstep hourly increases, or (3) prior years' W2s. The Act does not provide any mechanism for retroactively increasing the compensation rate seven (7) years later simply because a claimant would be making more money seven (7) years later. Further, this entire exception raised by Claimant is based on an unsubstantiated and

wholly fabricated belief that Employer pays Hispanic employees less than non-Hispanic employees—a position Claimant knows to be false based on the evidence and testimony submitted. Therefore, the Decision and Order should be affirmed in its entirety.

CONCLUSION

For all the foregoing reasons, the Commission should AFFIRM the Full Commission Decision and Order in its entirety.

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