THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner
Melody L. James, Commissioner
Mike Campbell, Commissioner

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SC Court of Appeals

WCC File No. 1202328

Appellate Case No. 2017-001518

James Smith Harrison, Jr.

Appellant,

v.

SC Wind and Hail Underwriting Association,

Employer, and

Liberty Mutual Fire Insurance Company,

Carrier, Respondents.

INITIAL BRIEF OF APPELLANT

William L. Smith, II, Esquire, Bar. No. 5226
Chappell, Smith & Arden
Post Office Box 12330
2801 Devine Street, Suite 300
Columbia, South Carolina 29211
PH: (803) 929-3600
bsmith@csa-law.com
ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Commission erred as a matter of law in failing to apply *Thompson v. S.C. Steel Erectors*, when the *Thompson* holding is directly applicable to the case at the bar?

II. Was the Appellate Panel of the South Carolina Workers' Compensation Commission's Decision and Order insufficient, for it contains conclusory findings of fact made upon unlawful procedure?

STATEMENT OF THE CASE

Appellant, James Smith Harrison, Jr. ("Harrison") suffered compensable injuries to his right lower extremity when he fell from a step ladder on February 27, 2012. Harrison filed a Form 50 requesting a hearing, and in due course, South Carolina Wind and Hail Underwriting Association, Employer, and Liberty Mutual Fire Insurance Company, Carrier, (collectively, "Respondents"), filed a form 51 admitting Harrison's right lower extremity injury but disputing Harrison's entitlement to further medical treatment and disputing the severity of his injuries. Prior to the requested hearing, however, the parties entered a settlement agreement on all issues except Harrison's entitlement to a modification of a bathroom and the installation of a lift at his retirement home, both of which are necessary to make the first floor and first floor bathroom of the home handicap accessible. Thereafter, the parties were heard by Commissioner Aisha G. Taylor who found Harrison was not entitled to modification of his secondary home.

Harrison appealed asserting Commissioner Taylor erred in several of her findings and conclusions, particularly those regarding her analysis and application of the holdings from *Thompson v. South Carolina Steel Erectors*, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006). However, the Commission affirmed the order with only minor modifications. Specifically, the Commission added a finding of fact that Harrison's request for modifications is speculative and the order did not preclude Harrison from later seeking modifications of a second home. Ultimately, the Commission denied Harrison's request for modification of his second home.

STATEMENT OF FACTS

Harrison is a sixty-six year-old man who is employed in Columbia by the South Carolina Wind and Hail Underwriting Association and South Carolina Property and Casualty Insurance Guarantee Association. (Hr. Tr. p. 10). He is married and has two adult children. (Hr. Tr. p. 10). On February 27, 2012, in the course and scope of his employment and in the furtherance of his employer's business, Harrison slipped off a step ladder, fell, passed out, and hit the concrete floor in such a way that he shattered his tibia and fibula.[1] (Hr. Tr. p. 11). Specifically, Harrison suffered comminuted fractures of his tibia and fibula, which later revealed peroneal nerve damage. (Claimant's APA p. 137). Additionally, Harrison developed a significant methicillin-resistant staphylococcus aureus infection (MRSA) in his surgical wound,[2] which necessitated an emergency surgery, six skin grafts, a wound vac, and intravenous antibiotics for two months. (Claimant's APA p. 177; Hr. Tr. p. 11).

As a consequence of those injuries, surgeries, and infections, Harrison underwent two-and-a-half years of physical therapy. (Hr. Tr. p. 11). Despite efforts in physical therapy, Harrison's injuries necessitate permanent work restrictions that limit him to light-duty work and prohibit prolonged standing, kneeling, squatting, and crawling. (Claimant's APA p. 9). Additionally, Harrison's physician noted he does not have the dynamic balance to reciprocally climb stairs. (Claimant's APA p. 6). Harrison testified in accord, stating he suffers during and after using stairs and stating that he is concerned with falling. (Hr. Tr. p. 14). Because of his inabilities and the risk

[1] The tibia and fibula are the two long bones in the distal half a human leg.

[2] Methicillin-resistant staphylococcus aureus infection is a strain of staphylococcus aureus (commonly referred to as a "staph infection") that has developed significant resistance to antibiotics, including all forms of penicillin and cephalosporin. MRSA is commonly a hospital acquired infection, and when it affects surgical wounds, can result in serious health risks due to its antibiotic resistance. Common symptoms of MRSA that has taken hold in human tissue are large bumps that quickly become larger and painful deep, pus-filled boils.

involved, Harrison's authorized treating physician ordered his *homes* be outfitted with chair lifts to rectify the risk and pain associated with the stairs at his homes. (Claimant's APA p. 6). Additionally, Harrison's doctor ordered *all* of Harrison's bathrooms receive modifications to make them handicap accessible. (Claimant's APA p. 6). Harrison is at maximum medical improvement, but his physicians believe he will need—as a result of his workplace injury—additional surgeries including removal of hardware and a total knee replacement. (Claimant's APA p. 9).

Respondents ultimately complied with Harrison's physician's orders regarding bathroom modification and a stair lift for his home in Columbia yet have consistently denied their responsibility to modify his second home. (Hr. Tr. p. 8). Harrison, to explain his need, testified comprehensively about his second home, including past, present, and future intended use. (Hr. T. pp. 13-21). Prior to Harrison's injury, he and his family traditionally spent Thanksgiving, summer vacations, and bi-monthly visits at the home. (Hr. Tr. p. 14). Conversely, since his accident, Harrison has only been able to visit the home four to five times, and on all but one occasion he was there on his employer's business. (Hr. Tr. p. 15).

Harrison also testified about he and his wife's retirement plans with the home. (Hr. Tr. p. 15). Two-and-a-half hours before Harrison's accident, his wife officially retired. (Hr. Tr. p. 13). That day originally marked the couple's transition to spending over half of their time at their second home. (Hr. Tr. p. 13). Harrison testified if the modifications are made to his home so living there is feasible, he intends to spend over half of each year there, up to as much as eight or nine months out of each year. (Hr. Tr. p. 15). He explained his intention to continue working until his son graduates law school, which has now occurred, and he testified that he intended to then begin the process of retiring and moving to his second home. (Hr. Tr. p. 15). However, none of

that is currently possible, because Harrison cannot safely ingress or egress from the home. (Hr. Tr. p. 14).

Prior to the hearing the parties reached settlement on all matters except Harrison's right to have his second home modified.[3] (Hr. Tr. p. 5-6). Harrison contended he was entitled to a second home modification pursuant to *Thompson*. Respondents, however, argued Harrison had no authority on which to premise his claim by conflating the two issues, partial lump sum benefits and modification of a second home, that were discussed in *Thompson*. (*Id.*; Hr. Tr. p. 8). Commissioner Taylor, nonetheless, found *Thompson* was distinguishable, drawing a distinction between a rental home and an owned home. Moreover, Commissioner Taylor held that distinction was further influenced by the expectation of future lifetime residency and use. (Taylor Order pp. 3-4). Likewise, Commissioner Taylor found modifications of Harrison's second home were not a reasonable and necessary medical cost despite the authorized treating physician's order to the contrary. (Taylor order p. 4; Claimant's APA p. 6).

Harrison appealed these findings, and the Appellate Panel upheld the order with only minor modifications. Specifically, adding a finding that Harrison's request was speculative and that its order did not preclude Harrison from seeking modifications once he moved full time to his second home. (Full Comm. Order pp. 5-6). This appeal followed.

[3] While Respondents initially contested the degree to which Harrison was injured and denied his entitlement to compensation for modifications for his Columbia home, those issues were eventually resolved by settlement and not subject of this appeal. (Hr. Tr. p. 5).

STANDARD OF REVIEW

"Under the Administrative Procedures Act (APA)," a court reviewing the decision of an administrative agency "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law." *Pollack v. S. Wine & Spirits of Am.*, 405 S.C. 9, 13–14, 747 S.E.2d 430, 432 (2013) (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2015)). The Court of Appeals may reverse the Appellate Panel's decision if the Claimant's "substantial rights have been prejudiced because the decision is affected by an error of law." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Any reasonable doubt as to the construction of the [Workers' Compensation Act] will be resolved in favor of coverage." *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 416 S.E.2d 639 (1992). Any factual determinations of the Workers' Compensation Commission may be overturned if they are not supported by substantial evidence. *Jones v. Ga.-Pac. Corp.*, 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003). "'Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action.'" *Id.* (quoting *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)).

ARGUMENTS

The issue before this Court is simple. It is the application of the *Thompson* decision for modifications of more than one dwelling. At its core, this Court in *Thompson* recognized that a plain reading of the Workers' Compensation Act requires an equitable application of the expressed benefits the Act provides in situations it does not directly contemplate. Thompson had a house in which he could reside, but despite the fact he was domiciled there, this Court recognized that he could not be expected to utilize only that home for the remainder of life. The same is true here; Harrison has a home in which he is currently resides, but expecting he never use and never move to his second home is unreasonable. The essence of this case is clear: Harrison owns two homes that he fully utilized prior to his catastrophic injury. He can no longer utilize his second home without modifications. The failure of the Commission to authorize the modification of his home second amounts to an order that he must sell his home or maintain a home that he cannot safely use.

The Commission erred as a matter of law in its Order. This Court should reverse the Commission and order Respondents modify Harrison's second home.

I. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred as a Matter of Law in Failing to Apply *Thompson v. S.C. Steel Erectors*, for the *Thompson* holding is directly applicable to the case at the bar.

The Appellate Panel erred in holding *Thompson* is distinguishable from the present case. In *Thompson* this Court held the Commission has the authority to award necessary accommodations "such as handicapped-accessible showers and baths, wider halls and door openings, and handicap ramps." *Id.* at 619, 632 S.E.2d at 881–82. Indeed, it is axiomatic that the Commission may order home modifications. *See e.g.*, *Birch v. Mail Contractors of Am. & Lumerman's Mut. Cas. Co.*, No. 0116065, 2011 WL 7781372 at *2 (S.C. Work. Comp. Comm.

Aug. 5, 2011)(ordering defendants immediately modify the claimant's home and requiring defendants pay for any modification induced upgrades needed to bring the home to compliance with county codes); *Minett v. Caro. Conf. of Seventh Day Adventists & Am. Manu. Mut. Ins. Co.*, No. 9824084, 2003 WL 24054682 at *5 (S.C. Work. Comp. Comm. (Feb. 24, 2003) (ordering defendants find suitable housing for the claimant or modify housing for the claimant); *Coaxum v. Moss d/b/a Moss Constr., et. al.*, No. 0812944, 2010 WL 4842902 at *15-16 (S.C. Work. Comp. Comm.) (ordering defendants compensate the claimant's family for their expenses incurred in obtaining suitable housing for the claimant).

In addressing modification, the *Thompson* Court set forth the full extent of the home modifications to which a claimant might be entitled by acknowledging the full responsibility of modification in certain circumstances. In *Thompson*, the carrier had already accepted that it was responsible for one set of modifications and argued their liability was limited to only modifying one home that the claimant currently resided in full time. The Court, however, disagreed, stating "duplication of [a] previous upfit . . . is not dispositive" of the employer or carrier's immunity from ever modifying more than one home. *Thompson*, 369 S.C. at 619–20, 632 S.E.2d at 882.[4] The Court unambiguously stated, "the upfitting award" shall not "be deducted from Thompsons' lifetime benefits." *Id.* at 611 n.1, 632 S.E.2d at 877 n.1. Moreover, the Court specified "the amount of the upfit, while a lump sum in common parlance, is not part of (and is not to be deducted from) the benefits award." *Id.* at 619, 632 S.E.2d at 881. When so holding, the Court relied on section 42-15-60 of the South Carolina Code, which provides for medical costs and has no relevance to the partial lump sum of Thompson's lifetime benefits. *Id.* at 619, 632 S.E.2d at 881.

[4] While the *Thompson* case, upon which this exception is premised, dealt with several additional issues including a partial lump sum, the issue of modifications of a second home was distinct from those issues.

This distinction is further evidenced in *Pressley v. REA Construction Co.*, 374 S.C. 283, 648 S.E.2d 283 (Ct. App. 2007), in which this Court, while summarizing *Thompson*, stated "the employer [in *Thompson*] was required to both *advance* the sums to purchase the employee's new home and *pay* the cost to modify it. *Pressley*, 374 S.C. at 289, 648 S.E.2d at 304 (emphasis added).

In determining Thompson was entitled to a second upfit as a necessary medical cost, the Court relied on several facts from the record. First, the Court noted, "the modifications are necessitated *solely* by Thompson's admittedly compensable injury." *Thompson*, 369 S.C. at 619, 632 S.E.2d at 882 (emphasis in original). Second, the Court stated, "The bottom line is that Thompson cannot live in the [second] home without the modifications." *Id.* The Court recognized that the home would not "benefit Thompson without [the] additional modifications." *Id.* Third, to justify its holding, this Court acknowledged Thompson never intended to reside permanently in his current home and in fact intended to move prior to his injury "as evidenced by the $8,000 saved as of the time of the accident." *Id.* at 620, 632 S.E.2d at 882. Fourth, it was noted "no reasonable person could expect the Thompsons to live permanently in the uncle's rental home and completely abandon their hopes for some semblance of a normal life."

This Court's decision mirrors the North Carolina Court of Appeals' opinion, which interpreted North Carolina's analogous Workers Compensation laws as providing for multiple home modifications.[5] *See Timmons v. N.C. Dept. of Trans*, 473 S.E.2d 356, 359 (N.C. Ct. App.

[5] The North Carolina Code has been modified several times since the date of injury, 1980, in *Timmons*. However, the version of the code in 1980, which controlled in *Timmons* and was cited by the *Timmons* court stated, "[m]edical, surgical, hospital, nursing services, medicines, . . . rehabilitation services, and *other treatment* including medical and surgical supplies as may reasonably be required to. . . ." N.C. Gen. Stat. § 97–25 (1985) (emphasis added). The applicable and corresponding South Carolina provision reads "medical, surgical, hospital, and *other treatment* including medical and surgical supplies as reasonably may be required." S.C. Code Ann. § 42-15-60 (emphasis added).

1996). There, the North Carolina court required a carrier to modify several homes of an injured employee. Specifically the claimant initially lived in his parents' house, which the carrier had modified, then he moved to a handicap accessible apartment and then finally decided he wished to move to an apartment that was not yet handicap accessible. *Id.*; see *Anderson v. Baptist Medical Center*, 343 S.C. 487, 493, 541 S.E.2d 526, 529 (2001) ("[D]ecisions of North Carolina courts interpreting that state's workers' compensation statute are entitled to weight because the South Carolina statute was fashioned after North Carolina's."). Notwithstanding the fact the carrier had previously modified a home, the North Carolina Court ordered the carrier modify the third home. *Timmons*, 473 S.E.2d at 359.

Here, the facts of Harrison's accident and his current situation are similar to those of the *Timmons* and *Thompson* cases, and when applying *Thompson*'s factors warrants reversal as to modification. First, like in *Thompson*, the modifications of Harrison's second home are necessitated *solely* by Harrison's admittedly compensable injury. (*See* Claimant's APA p. 6; Form 51). Second, the result is Harrison cannot live in his retirement home without the modifications; it would simply be unsafe and contrary to his physician's order for him to do so. (Claimant's APA p. 6). Third, while the *Thompson* Court was concerned Thompson would not benefit from the hypothetical home without modifications, the issue here is more concrete; Harrison cannot benefit from a home he currently owns unless it is modified. (Claimant's APA p. 6). This Court believed the fact Thompson had saved $8,000 to build a new home was sufficient evidence to show his family intended to take on a full home payment even though his family only paid one-third of the market value to rent the home in which they were living at the time of the accident. *Id.* at 611, 20, 632 S.E.2d at 877, 82. Harrison, on the other hand, already owns his retirement home. (Hr. Tr. p. 14). This fact, in conjunction with his testimony of his retirement plans (Hr. Tr. pp. 13–14),

demonstrates Harrison had an intent, supported by greater evidence than in *Thompson*, to move to his retirement home upon his fast approaching retirement. Fourth, a reasonable person could not expect Harrison to live permanently in his Columbia home and completely abandon his hope of moving to his retirement home. (Hr. Tr. 13–15). Accordingly, the Appellate Panel erred in finding *Thompson* distinguishable and this Court should reverse.

II. The Appellate Panel of the South Carolina Workers' Compensation Commission's Decision and Order is Insufficient, for it Contains Conclusory Findings of Fact Made upon Unlawful Procedure.

The Appellate Panel's Decision and Order is insufficient, for it contains conclusory findings of fact made on unlawful procedure. This Court is given the authority to review and rectify errors that are made upon unlawful procedure, that are clearly erroneous, or that are arbitrary or capricious. S.C. Code Ann. § 1-23-380 (5)(d)–(f). To make such review possible, section 42-15-40 (A) requires the Commission provide "a statement of the findings of fact, [a statement of the] rulings of law, and [a statement of] other matters pertinent to the questions at issue." This is required so that a reviewing court can compare detailed findings of fact and law with the evidence to determine if the general order, award, or findings can be supported. *See e.g., Baldwin v. James River Corp.,* 304 S.C. 485, 486, 405 S.E.2d 421, 422 (Ct. App. 1991) (quoting 73A C.J.S. Public Administrative Law and Procedure § 145 at 113 (1983) ("'[G]eneralized, conclusory, or incomplete findings will not suffice as findings of fact.'")). *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 127, 127 S.E.2d 288, 294 (1962) (holding an order of the Commission is insufficient when it contains only a generic finding that the claim was duly filed and an unsupported finding that the claimant became aware of her condition when her physician told her).

When adequate findings are not present, the reviewing court cannot properly determine the sufficiency or accuracy of the order and must remand to the lower tribunal so that the appropriate findings and conclusions may be made. *See Drake*, 241 S.C. at 127, 127 S.E.2d at 294 (holding remand is proper where there are controverted and undecided issues of fact, for the appellate courts cannot make those factual determinations).

Here, the Commission failed to address pertinent factors, as outlined by this Court, including: whether Harrison's claim was necessitated solely by his work place injury, whether he can benefit from his second home, whether he intended to remain in his Columbia home forever, or whether a reasonable person would expect Harrison to give up on his hope of using his retirement home. (*See generally* Comm. Order). By summarily ruling and ignoring these well-established factors, the import and precedent of *Thompson* is lost, resulting in nothing more than a conclusory finding of fact. Further, the Order fails to making findings as to Harrison's injuries and wholly ignores the medical evidence presented to it. (Comm. Order pp. 4-5). Absent from the order is a determination on whether Harrison's authorized treating physician had ordered that his homes be modified. (Comm. Order pp. 4-5; Claimant's APA p. 6). Instead, the Order states, "Defendants had already agreed to the *recommended* uplift and modification of his primary residence *as requested by* [Harrison]." (Comm. Order p. 5 (emphasis added)). Harrison did not simply ask the carrier to upfit his homes because he felt like it; his employer/ carrier selected physician asserted that he had a medical need for the modifications. This dispute turns on Harrison's entitlement to those modifications, but the Commission's sole finding relating to his medical need for modifications states its findings in an ambiguous and undetailed manner.

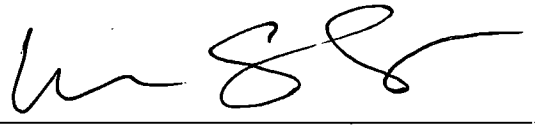
Furthermore, the Commission made a conclusory finding that additional modifications would be unfair and unduly burdensome "when [Harrison] currently has a residence in which he

resides." (Comm. Order p. 5). This is like *Baldwin, supra*, in that this Court has no way of addressing the sufficiency of that finding without knowing which facts the Commission relied upon in reaching that finding. As *Thompson* indicates, the presence of a current primary residence does not make the modification of a second home per se unfair or unduly burdensome. 369 S.C. at 619–20, 632 S.E.2d at 882 ("We are not unmindful that this award may involve some duplication . . . , but this fact, standing alone, is not dispositive."). The Commission offered no additional findings of fact to support its finding of undue burden. (Comm. Order pp. 4-5). Therefore, the Commission has either decided duplication alone is dispositive or relied upon some other facts that it did not include in its order.

CONCLUSION

For these reasons, Harrison respectfully requests the Order of the South Carolina Workers' Compensation Appellate Panel be reversed. Alternatively, Harrison requests this Court remand this matter to the Commission so that it may make factual determinations that are sufficient to undergo appellate review.

Respectfully Submitted,



September 28, 2018

William L. Smith, II
Chappell Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC 29201
PH: (803) 929-3600
bsmith@csa-law.com
ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA

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James Smith Harrison, Jr. — Appellant,

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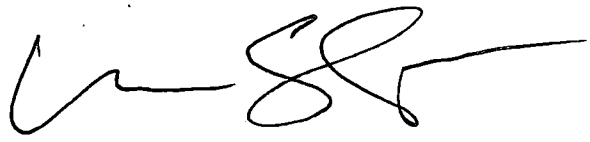
Liberty Mutual Fire Insurance Company, — Carrier, Respondents.

Proof of Service

I certify that I have served *Appellant's Initial Brief* and *Designation of Matters to be Included in the Record* on Appeal on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on September 28, 2018, addressed to their attorneys of record, W. Strat Stavrou, Jr. and John G. Coggiola, 3600 Forest Drive, Suite 204, Columbia, South Carolina 29204.

September 28, 2018

Respectfully Submitted,



William L. Smith II
2801 Devine Street, Suite 300
Columbia, SC 29201
PH: (803) 929-3600
bsmith@csa-law.com
ATTORNEY FOR APPELLANT

Part of the CSA-LAW NETWORK

CSA LAW

CHAPPELL SMITH & ARDEN, P.A.

Licensed to practice
in South Carolina,
North Carolina,
Georgia and the
District of Columbia

PO Box 12330
Columbia, SC 29211
803.929.3600
Fax 803.929.3604
800.531.9780

www.CSA-LAW.com

September 28, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, South Carolina 29211

Re: James Smith Harrison, Jr. v. SC Wind and Hail Underwriting Assn.
SCWCC No.: 1202328
Appellate Case No.:2017-001518

Dear Ms. Kitchins:

Enclosed please find the following documents for filing regarding the above referenced matter:

1. Initial Brief of Appellant
2. Appellant's Designation of Matters to be Included in the Record on Appeal
3. Proof of Service

Thank you for your assistance in this matter.

Very truly yours,

William L. Smith II
bsmith@csa-law.com
Direct Dial: 803-509-5839

WLS/jdg
Enclosures
cc: John G. Coggiola, Esquire
W. S. Stavrou, Jr., Esquire