THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018-UP-352
(SC Ct. App. Heard May 17, 2018 -
Filed August 8, 2018)

Decidora Lazaro, on behalf of the Estate of Antonio Lazaro, Employee,.....Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 20th, 2018.

QUESTIONS PRESENTED

I. ARE THIS COURT'S OPINIONS HOLDING THAT THE COMMISSION IS REQUIRED TO MAKE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON EACH "ESSENTIAL" ISSUE BEFORE IT FOR DECISION THAT ARE SUFFICIENTLY DEFINITE AND DETAILED ENOUGH TO ALLOW FOR JUDICIAL REVIEW STILL THE LAW OF THIS STATE AND DID THE COURT OF APPEALS ERR BY NOT FOLLOWING THOSE OPINIONS?

II. MAY THE DEFENDANTS TAKE BENEFIT FROM THE INJURY WHICH CAUSED BRAIN DEATH AND MR. LAZARO BEING IN A VEGETATIVE STATE POST-INJURY, TO ESTABLISH A SHORTENED LIFE EXPECTENCY CONTRARY TO MR. LAZARO'S LIFE EXPECTENCY AS ESTABLISHED BY S.C. CODE §19-1-150 AND DID THE COURT OF APPEALS ERR BY FAILING TO FOLLOW THE OPINIONS OF THIS COURT WHICH CONSIDER ONLY PRE-INJURY FACTORS?

III. DOES THIS COURT AGREE THAT THE RACIST BIGOTED COMPARISON COMPARING MR. LAZARO, AN ELECTRICIAN AND NATURALIZED AMERICAN CITIZEN (1991) WHO IS ALSO SPANISH, TO NON-ENGLISH-SPEAKING HISPANIC EMPLOYEES IS NOT A PROPER LEGAL BASIS FOR DETERMINING THE APPLICABLE AVERAGE WEEKLY WAGE AS A MATTER OF LAW UNDER S.C. CODE §42-1-40 ESPECIALLY WHERE THERE IS NO EVIDENCE MR. LAZARO IS NON-ENGLISH SPEAKING?

IV. SINCE THIS COURT HAS HELD THAT WHETHER EXCEPTIONAL REASONS EXIST IN THE DETERMINATION OF THE APPLICABLE AVERAGE WEEKLY WAGE UNDER S.C. CODE §42-1-40 IS A MATTER OF LAW FOR DETERMINATION BY THE COURTS UNDER THE FACTS, DID THE COURT OF APPEALS NOT FULFILL ITS CONSTITUTIONAL MANDATE TO FOLLOW THE OPINIONS OF THIS COURT?

V. WHERE THE COMMISSION HELD THAT THERE IS A 500-WEEK CAP ON A LIFETIME BENEFITS AWARD WHICH IS CONTRARY TO THIS COURT'S OPINIONS; BOTH ON THAT BASIS AND ON ITS RESPONSIBILITY UNDER THE APPELLATE COURT RULES, SHOULD THE COURT OF APPEALS HAVE ADDRESSED THAT ISSUE IN ITS DECISION?

VI. DID THE COURT OF APPEALS ATTEMPT TO LEGISLATE IN ITS OPINION?

STATEMENT OF THE CASE

A review of the Statement of Facts found in the Petitioner's Final Appellate Brief at pages three through nine is important to an understanding as to the Questions upon which certiorari is requested. From the Date of Accident July 6, 2007 through 2010, temporary weekly compensation was paid through Mrs. Lazaro. The South Carolina Workers' Compensation Commission in 2010 declared Mr. Lazaro totally/permanently disabled and granted the injured worker (who is in a vegetative state), and his dependents a partial lump sum and specifically provided in that Award that they could request additional partial lump sums in the best interest of Mr. Lazaro and/or his dependents pursuant to Statute. Commissioner Beck's Order specifically made detailed findings of fact and conclusions of law and in his Statement of the Case, he specifically states:

> "While I agree with the Claimant that under the South Carolina Supreme Court decisions and the statutory law that the Mortality Tables are to be used for determining the total value of a claim and the granting of a lump sum and while I agree that the law provides that I must provide and order a lump sum where it is in the best interest of the Claimant and/or his dependents, at this point, I find the information and evidence submitted for granting a partial lump sum more than to pay off the home, grant money to buy one car and to pay off the debts as listed in the Financial Declaration to be not convincing **to transfer Mr. Lazaro's benefits** from the insurance company to his guardian ...
>
> ... Again when more definitive information is provided concerning looking for college and

> expenses in that regard and the expenses of college and the needs of the children, then the family may come back and request additional money through an additional partial lump sum payment ...
>
> ... **Findings of Fact**
>
> ... 5. That in making the partial lump sum award in this case, I find that all the other information and basis for requesting an additional award is speculative at this point but that the dependents and/or the Claimant may request a further lump sum or lump sums at any time in the future pursuant to a determination at that time as to what is in the best interest of the Claimant and/or his dependents ...
>
> ... **CONCLUSIONS OF LAW**
>
> ... 1. ... Under S.C. Code §42-9-10, ... and under S.C. Code §42-9-301, the decision is made as to the granting of a partial lump sum in this matter." (R. p. 8, 14, 16).

Commissioner Beck meticulously went through the appropriate issues to be considered and the requests that had been made for a partial lump sum at that time.

That partial lump sum Award was appealed and the SC Court of Appeals affirmed on February 6, 2014 and denied a Petition for Rehearing on April 10, 2014; with (R., pp. 19-23; p. 24). Remittitur being sent May 23, 2014. (R., p. 25).

Pursuant to that partial lump sum Award, Mr. Lazaro's dependents through his Guardian ad Litem, General Guardian and wife, Ms. Decidora Lazaro, filed a Form 50 requesting an additional partial lump sum on February 19, 2014. (R., pp. 53-59). A responsive Form 51 was filed on behalf of the Employer

and the SC Guaranty Association due to the insolvency of CompTrust AGC of the Carolinas which was subsequently set for hearing. (R., pp. 60-62; R., pp. 63-64). The Claimant filed his Pre-Hearing Brief and Administrative Procedures Act submissions and the Defendants filed a responsive Pre-Hearing Brief and Administrative Procedures Act admissions. (R., pp. 65-87; pp. 88-114). A hearing was held on the partial lump sum request which included a request for penalties and fines for untimely payment of the original partial lump sum Award in the amount of $152,568.75 within fourteen (14) days after the final Order of the SC Court of Appeals filed April 10, 2014. A hearing was held July 7th on the Request for Partial Lump Sum and the Commissioner issued his notes for decision on July 14, 2014 denying the Request for Partial Lump Sum and denying penalties and interest on the original partial lump sum Award. (R., pp. 365-367).

Subsequently Requests for Amendment and/or Reconsideration were filed on April 13th and 15th, 2015 and the final Decision was filed by the Hearing Commissioner May 28, 2015 on the Form 50 and 51. A second Order was issued that day granting a defense Motion to immediately stop compensation off the front-end until August 29, 2021; reversed on Appeal (R., pp. 365-371; R., pp. 26-37).

A Request for Review was filed June 11, 2015 setting forth various Grounds for review by the Full Commission. (R., pp. 115-122). Claimant and Defendants filed their respective Briefs with the Full Commission (R., pp. 123-144; pp. 145-161) and a Full Commission Hearing was held September 21, 2015. A request for A Proposed Order (corrected) affirming the decision was forwarded to Defendants' Counsel on October 21, 2015, and the Full Commission Order was filed on December 23, 2015. (R., pp. 38-51). A Motion for Rehearing was filed on January 19, 2016 and a Judicial Conference Decision was issued denying the Motion for Rehearing on February 22, 2016. (R., pp. 162-170; P. 52). A timely Notice of Intent to Appeal the Decisions of the Hearing Commissioner and Commission was filed March 23, 2016 along with detailed exceptions. (R., pp. 171-183). Final Briefs were filed September 13, 2016. Arguments were heard May 17, 2018 and the Court of Appeals filed its Unpublished Opinion on August 8, 2018. Petition for Rehearing was filed August 20, 2018 which was denied on September 20th, 2018.

ARGUMENTS

I. THIS COURT'S OPINIONS HOLDING THAT THE COMMISSION IS REQUIRED TO MAKE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON EACH "ESSENTIAL" ISSUE BEFORE IT FOR DECISION THAT ARE SUFFICIENTLY DEFINITE AND DETAILED ENOUGH TO ALLOW FOR JUDICIAL REVIEW ARE STILL THE LAW OF THIS STATE AND THE COURT OF APPEALS ERRED BY NOT FOLLOWING THOSE OPINIONS.

Under No. 2 of its Opinion, the Court of Appeals held that the, "evidence supports the Commission's finding that this second lump sum payment was not in Claimant's or Dependents' best interests". There is nothing, no citation to any alleged evidence, in the Opinion supporting that conclusory statement. The "essential" issue before the Court (Brief Argument I p. 9) and the Commission was there any evidence on which to deny an Award under S.C. Code §42-9-301. A conclusory statement, a total disregard for this Court's Opinions.

In large part because the injured worker's right to trial by jury was taken away as part of "The Grand Bargain"[1] and the worker's entitlement to benefits was placed in the hands of a one man or woman jury, this Court established the principle that the Commission is required to make detailed Findings of Fact and Conclusions of Law that are sufficiently detailed and definite enough on every, "essential factual issue" before the Commission for decision so that an Appellate Court may determine that the decision is based on the facts and that the law has been

[1] The demise of the Grand Bargain: compensation for injured workers in the 21st century, Emily A. Spieler, 69 Rutgers Univ. L.R. 881 (May 2017).

properly applied. While that principle has been reiterated in numerous Opinions of this Court, only one will be cited for reference: Drake v. Raybestos Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962) and one other Opinion will be discussed for illustration of this Court's application of the principle. In Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970), this Court stated that one of the questions for decision by the Court was,

> "Whether the award of the Commission is fatally deficient for failure to sufficiently state the reasons for the conclusion reached and for failure to apply the correct rule of law with reference to the burden of proof." (emp. added).

The issue in that case was factually compensability under the Rule of Law, burden of proof, and the Court criticized and reversed the Commission's decision because the Commission's decision contained only, "brief references to the testimony and no reasons were stated for the factual finding that the claim was compensable." (emp. added).

This current case involved a request for a partial lump sum under S.C. Code §42-9-301 which specifically provides that,

> "when the employee so requests and the Commission deems it not to be contrary to the best interest of the employee **or** his dependents ...", (emp. added),

the Commission may make an award of a lump sum. Therefore, there were two (2), "essential factual issues" before the Commission for decision: 1. Has the employee made a request for a partial lump sum; and

2. Did the Commission deem it to be or not to be contrary to the best interest of the employee or his dependents?

First, the Court will find upon review of the Order of the Hearing Commissioner as affirmed by the Full Commission, that the Commission made no detailed Findings of Fact even mentioning addressing or referencing whether or not the payment of a partial lump sum was or was not contrary to the best interest of the employee or his dependents. (ROA, p. 33-36; P. 47-51).

Further, there is absolutely no reference, mention or citation in either the Findings of Fact or the Conclusions of Law of the applicable "Rule of Law" S.C. Code §42-9-301 under which the request for a partial lump sum was made. See: Form 50 Attachment, p. 2; Pre-Hearing Brief "Legal Issues", p. 6, (ROA, p. 56, p. 72). The only semblance of a reference to the law is under No. 8 which cited from a case decided under S.C. Code §42-9-300, Repealed in 1983, 1983 Act No. 92 §6 and replaced by S.C. Code §42-9-301. The standard for granting a lump sum under the repealed statute was totally opposite to the standard under §42-9-301 and provided a lump sum was not to be made over the objection of the employer except in "unusual circumstances". One of the principles of legal research 101 is you do not quote/cite especially to a quasi-judicial body a decision based on a repealed statute; especially where, as here the statute is replaced and the replacement materially alters or was enacted to

address the abuses of the old statute. One has only to read the cases under repealed S.C. Code §42-9-300 to see how the insurer could object and use the objection as a "bargaining chip": to save 10, 20, 30 percent or more where the injured worker requests a lump sum. James v. Anne's, Inc., 390 S.C. 188, 701 S.E.2d 730 (2010); i.e., legislative intent.

Since there are absolutely no Findings of Fact or Conclusions of Law on the, "essential factual issues", for decision and since the wrong Rule of law was applied, the Court of Appeals failed to meet it constitutional mandate by following the precedents of this Court and reversing the decision.

II. THE DEFENDANTS MAY NOT TAKE THE BENEFIT OF THE INJURY WHICH CAUSED BRAIN DEATH AND MR. LAZARO BEING IN A VEGETATIVE STATE POST-INJURY TO ESTABLISH A SHORTENED LIFE EXPECTENCY CONTRARY TO MR. LAZARO'S LIFE EXPECTENCY AS ESTABLISHED BY S.C. CODE §19-1-150 AND THE COURT OF APPEALS ERRED BY NOT FOLLOWING THE OPINIONS OF THIS COURT WHICH CONSIDER ONLY PRE-INJURY FACTORS?

Over objection of Mr. Lazaro's counsel, that it was contrary to case law and statute, the Defendants were allowed to put into evidence, post-injury evidence to establish that due to the injury causing brain damage and Mr. Lazaro being in a vegetative state, it was probable he would not live more than five (5) years. In other words, while the law establishes as a matter of law based on the Mortality Tables S.C. Code §19-1-150 and other pre-injury evidence how long Mr. Lazaro will live, i.e., his legal life, for argument and determining loss of

income to him and him family, the Defendants argue they should get the benefit of the injury causing his shortened life span in reference their obligation to pay to him his lifetime Award. Mr. Lazaro, among many arguments, argued that the very purpose of the mortality table is so that a plaintiff or claimant on the one side cannot argue that he/she will live to be 100 and on the other the defendants cannot argue that he/she will liveno more than one (1) week.

The argument that the Defendants should get the benefit of the injury to limit their responsibility to pay is so ludicrous that it is impossible to find any case, referencing back to the very first Opinions of this Court concerning the Mortality Table and its application, where that argument, "post-injury" condition, has ever been raised. Since the very first decisions, it has been basically considered black letter law or a given that the facts and evidence concerning the health condition of a plaintiff or claimant referred to their condition, "pre-injury". For example, in one of the very first cases concerning the Mortality Table Clifton v. Southern Railroad Company, 87 S.C. 324, 69 S.E. 513 (1910), this Court stated:

> "Whether a person 27-years-old would be expected to live 37-years longer would depend upon a variety of circumstances, such as health, constitution, occupation, habits, hereditary tendencies, etc. But we know that tables of mortality are based upon past

> experience taken from the lives of persons of normal health, constitution, habits, etc. as a basic guide. As there was no testimony that Plaintiff was not such a person, **when she was injured**, we think the error was harmless." (emp. added).

Since the inception of the lifetime Award, this Court beginning with Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995) has held that the Mortality Table provides an adequate basis upon which to determine the present-day value of a lifetime compensation Award in reference to a request for a partial lump sum. This Court also, in Glover by Cauthen v. Suitt Construction Co., supra, this Court actually rejected a similar argument to the one made here which was made in that case in reference to attorneys fees. The Court held that it would lead to an absurd result to hold that because the claimant due to his severely disabled condition caused by the injury (i.e., post-injury) might die the next day that the defendants should be allowed be avoid paying attorneys fees based on the claimant's life expectancy. That is exactly the same argument that is made here; we get the benefit of the injury and do not have to pay a partial lump sum because he may die. As part of this Court's Opinion, the Court in James v. Anne's, Inc., supra in affirming its prior decision in Cauthen, and the Court of Appeals decisions since holding that the Commission may issue partial lump sums to a worker in a lifetime benefits Award based on the Mortality Tables, reiterated the

fundamental principle of interpretation and application of the Act, "to ensure the best interests of the injured worker are protected." 390 S.C at 199, 730 S.E.2d at 735.

Not only did the Court of Appeals fail to apply the Opinions of this Court but it actually improperly applied its own decision holding that only the pre-injury and not post-injury medical condition, and other pre-injury evidence is to be considered along with the Mortality Tables. In Haselden v. Davis, 341 SC 486, 534 SE2d 295, (SC app. 2000); affirmed 353 SC 481, 579 SE2d 293, (2003), the Court of Appeals, and this Court affirmed the Opinion, held that the jury should consider the mortality table,

> ". . . together with other evidence in the case bearing on the Plaintiff's health, age and physical condition **before the injury** and death in determining the probable length of the Plaintiff's life." (emp. added).

Both this Court and the Court of Appeals in Haselden recognized that in reference to the Mortality Table, and facts that the fact-finder under §19-1-150 may consider, refers to the facts prior to the injury. The Defendants may not take advantage of the injury to limit their pay out; such is abhorrent to the law. This Court should grant Certiorari, reverse this decision and reassert its Opinions.

III. THIS COURT SHOULD NOT AGREE THAT THE RACIST BIGOTED COMPARISON COMPARING MR. LAZARO, AN ELECTRICIAN AND NATURALIZED AMERICAN CITIZEN (1991) WHO IS ALSO SPANISH, TO NON-ENGLISH SPEAKING HISPANIC EMPLOYEES IS NOT A PROPER LEGAL BASIS FOR DETERMINING THE APPLICABLE AVERAGE WEEKLY WAGE AS A MATTER OF LAW UNDER S.C. CODE §42-1-40 ESPECIALLY WHERE THERE IS NO EVIDENCE MR. LAZARO IS NON-ENGLISH SPEAKING.

The Commission had never called upon to address the applicable average weekly wage and had held that issue in abeyance at the first request for a partial lump sum. (ROA, p. 17. Conclusion of Law No. 6 and Order and Award).

Mr. Lazaro asked for a determination of the applicable average weekly wage and an increase under S.C. Code §42-1-40 based on several different facts including: 1) His salary for the calendar year prior to injury; 2) a comparison between what he was earning as an electrician in 2007 as compared to what he would be earning as an electrician at the time of hearing, 2014; 3) his pre-injury number of raises/increase in wages 45% ($4.50.hr) over just 3.5 yrs; and 4) a comparison to current electricians at the time of hearing ($18/hr). The Defendants, in addition to a chart of current employees/rates of pay, submitted an employer letter over objection which referenced that the highest paid, "Hispanic electrician" was paid $17.50 an hour due to his mastery of both English and Spanish. The letter also referenced that none of employer's current Spanish-speaking employees had mastered English well enough to be part of

management in their projects. There is **no** reference in employer's letter to "non-English speaking Hispanics". (ROA, p. 363).

At the hearing while no witness testified for the Defendants and Ms. Lazaro and her son both testified in English and while it was agreed that Mr. Lazaro was a naturalized American citizen, Citizenship 1991, as one of the Findings of Fact No. 10 denying an increase in the average weekly wage the Commissioner found that based on, "Representations made at the hearing" that the Claimant was a, "non-English speaking Hispanic," that his inability to, "speak fluent English, prevented him from being promosed to, "management" or in a, "supervisory position" and that Mr. Lazaro:

> "should be compared to other non-English speaking Hispanic employees". (ROA, p. 34).

The Commissioner also made a finding that the Claimant presented no evidence of his ability to speak English in reference to him not being promoted to a supervisory or management level position. (ROA, p. 34).

Based on a review of the evidence in the Record, even the employer did not state that Mr. Lazaro was a, "non-English speaking Hispanic," nor did they even ask for a comparison of Mr. Lazaro to, "non-English speaking" Hispanics.

It goes without saying and without need of citation that the Commissioner's decision and Findings of Fact must be based on the evidence. Not only are these Findings of Fact not based on the evidence, but the further questions are: is it appropriate in a determination of the average weekly wage as a matter of law to add race as a basis of comparing workers. The earning capacity and average weekly wage of a worker is based on the claimant's age, education, background and experience; not whether they are Hispanic, white, black or Indian. In addition to the fact there is no evidence Mr. Lazaro could not speak English, to the extent his ability or inability to speak English would have affected his capacity to earn income as an electrician, the evidence upon which the Commissioner had to rely showed that Mr. Lazaro had a 45% increase in his salary over the 3 ½ year period prior to injury ($10/hr-$14.50/hr); according to the employer he would have been making at least $2.50 more than other electricians; and that a Hispanic electrician was making $17.50 and the highest pay for an electrician with the company was $18.00 per hour. The Hearing Commissioner's decision to make a comparison of Mr. Lazaro to non-English speaking Hispanic employees is not based on the evidence and it is nothing more and nothing less than a bigoted unsupported comparison that has no place in our law and particularly no place under, "essential factual issue" before

the Commissioner; i.e., a determination of the applicable average weekly wage as a matter of law.

IV. SINCE THIS COURT HAS HELD THAT WHETHER EXCEPTIONAL REASONS EXIST IN THE DETERMINATION OF THE APPLICABLE AVERAGE WEEKLY WAGE UNDER S.C. CODE §42-1-40 IS A MATTER OF LAW FOR DETERMINATION BY THE COURTS UNDER THE FACTS, THE COURT OF APPEALS DID NOT FULFILL ITS CONSTITUTIONAL MANDATE TO FOLLOW THE OPINIONS OF THIS COURT.

South Carolina Constitution Article V, Section 9 requires the Court of Appeals where this Court has spoken to apply those Opinions.

This Court has repeatedly held in reference to a determination as to whether there are exceptional reasons to increase or change the average weekly wage to appropriately reflect the future loss of earning capacity of an injured worker under S.C. Code §42-1-40 that this is a decision to be made upon review by the Courts as a matter of law.

Without string citation, this Court has held, for example in the case of Elliott v. South Carolina Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (2005) that, "the determination of whether Elliott's raise constitutes an "exceptional reason" for purposes of applying the standard wage calculation method applied by the Workers' Compensation Act is a question of law". This Court has also held which is the basis for all decisions under §42-1-40 that the objective of wage calculation is to arrive at a fair approximation of the

Claimant's probable future earning capacity. Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978).

In this case in this unpublished opinion, the Court of Appeals simply dodged this issue and its responsibility under both this Court's Opinions and its own and found simply that the Commission did not err in refusing to increase Claimant's compensation rate and then set out a string of citations and quotations but no facts. The Court simply did not address the issue as a matter of law as to whether or not under the facts exceptional reasons existed to increase the average weekly wage and whether the Commission erred in refusing to increase the compensation rate. In that regard, the undisputed evidence is that Mr. Lazaro's income for the year prior to the date of the accident, (without regard to any other facts) would result in an average weekly wage of $646.17 and a compensation rate of $430.80. He also had a 45% increase in his hourly rate from $10 to $14.50/hr. The Court of Appeals simply did not make a decision on this issue as required by law; i.e., do those fact(s) constitute exceptional reasons under the Opinions of this Court and, did the Court of Appeals fail to apply this Court's opinions in derogation of its constitutional duty.

V. THE COMMISSION HELD THAT THERE IS A 500-WEEK CAP ON A LIFETIME BENEFITS AWARD WHICH IS CONTRARY TO THIS COURT'S OPINIONS; BOTH ON THAT BASIS AND ON ITS RESPONSIBILITY UNDER THE APPELLATE COURT RULES, THE COURT OF APPEALS ERRED BY NOT ADDRESSING THAT ISSUE IN ITS DECISION.

In its unpublished Opinion, the Court of Appeals notes that one of the issues raised by Mr. Lazaro was that the Commission erred by making a finding that he was entitled to, "only 500 weeks of benefits." In Glover by Cauthen v. Suitt Construction Co., supra, this Court specifically held that when S.C. Code §42-9-10 (1985) was amended to include an award for lifetime compensation benefits, subsection D, it "eliminated the 500-week cap on compensation" as to those Awards.

The Court of Appeals did not address this issue and simply ruled in the Opinion that it did not have to address that issue because of its resolution on other issues. In support of that proposition, the Court of Appeals cited to a decision by this Court, Futch v. McAlister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999).

Unfortunately, the Futch decision is a decision by this Court applied to this Court as the Supreme Court of our State and the Appellate Court Rules. Futch does not apply to the Court of Appeals both because it did not make that holding as to the Court of Appeals but more importantly the S.C. Appellate Court Rules, Rule 220(b) requires every point distinctly raised for decision must be stated in writing along with the reason for the Court's decision on that issue except under certain exceptions. The only exception to addressing, "every point"

raised in writing does not apply to the Court of Appeals but applies only to this Court under SCACR, 220(b)(1). As to the Court of Appeals, the Court of Appeals must address every issue raised in its decisions and must set out the reason for that decision unless under the circumstances SCACR, Rule 220(b)(2) applies which is that the Court of Appeals finds that the point is, "manifestly without merit". There is no such finding made.

This finding that there is a 500-week cap left to stand, could be the law of the case and the Full Commission decision, affirming that Finding of Fact is now being published to the world and is contrary to the Opinions of this Court that there is no 500-week cap. While the unpublished Opinion (which are published in the Advance Sheets, WestLaw and Lexis/Nexis) are not precedent, the Full Commission decision would and will be. If a claimant lives more than 500-weeks as Mr. Lazaro did, what effect will that have on lump sum payments of the injured worker's, "Award"? It is the worker's "Award" (money) subject only to payment as awarded by the Commission, i.e., weekly, partial lump sum, Pet. Heh., p.3). This issue must be reviewed.

VI. THE COURT OF APPEALS ATTEMPTED TO LEGISLATE IN ITS OPINION.

In Glover by Cauthen v. Suitt Const. Co., supra, this Court applied the time-honored construction principles to the wording of S.C. Code §42-9-10(D) and held that because the statute prohibited only "total" lump sums it was not the legislative

intent to bar partial lump sums. The Court then noted in (footnote 4):

> "Employer contends our interpretation of §42-9-10 will permit the Commission to order partial lump sum benefits to a claimant awarded lifetime benefits, a result clearly not intended by the legislature. The sole issue presently before this Court is lump sum payment of attorney's fees and, accordingly, we decline to address Employer's contention. In any event, if, as Employer suggests, the statute and Regulation may be so construed, the matter is one for the General Assembly."

Under No. 2 of the Court of Appeals Opinion, the Court held that the request for a partial lump sum was "tantamount to a total lump sum." Mr. Lazaro's dependents received weekly checks from July 6, 2007 through and continuing at the time of the request. In Cauthen, this Court simply applied the law as passed by the legislature S.C. Code 19-1-150 (1976) which establishes the legal age for any of our rights under law for all of us in any legal matter and applied that to the law as passed by the legislature, S.C. Code §42-9-301. Therefore, any request made at the time this request was made was a partial lump sum request. Our law says "or dependents"; our law says, "lifetime', our law says, "further earning capacity," our law says, "it's to partially compensable" and our law says, "to prevent" the worker, "or dependents" from, "becoming charges on society." It does not say Mrs. Lazaro work three jobs to make up for Mr. Lazaro's wage loss; son drop out of school due to

debt and joint the army; son do not go to college and work to help your mother, because we think that under a lifetime Award to Mr. Lazaro, the legislative should have added the words, "partial" or "tantamount." If the legislature wants to change the law that is its prerogative, not the Court of Appeals.

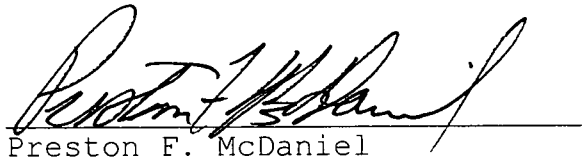
Their responsibility is to render opinions based on the law as passed by the General Assembly and under the Opinions of this Court where it has spoken.

CONCLUSION

This Court should grant Certification on all Questions Presented and should reaffirm that the Commission is required to make detailed Findings of Fact and Conclusion of Law on every essential issue presented for the decision. The Court should reaffirm that the factors that are to be considered along with the life expectancy as established under S.C. Code §19-9-150 are pre-injury not post-injury and that the Defendants are not entitled to the benefit under law of the injury and post-injury factors that shorten or has the potential to shorten the Claimant's life expectancy. Based on the Record and under law, this Court should assert that racist, bigoted comparisons will not be tolerated and based on the record a comparison of Mr. Lazaro to non-English speaking Hispanic employees is not a proper consideration in establishing his average weekly wage under S.C. Code §42-1-40. This Court should grant Certification

and determine as matter of law whether or not there are exceptional reasons under S.C. Code §42-1-40 in determining the applicable average week wage for Mr. Lazaro and his family. The Court should reaffirm its Opinion that there is no 500-week cap in an Award made to an injured worker for lifetime compensation benefits; once the Award is made, the benefits to which the worker is entitled, are the worker's subject only to the payout ordered by the Commission. Reaffirm that it is not the place of the Court of Appeals to legislate and that any discrepancies and ambiguities in the wording of the Act is left to the legislature.

Respectfully submitted,



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October 22, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Antonio Lazaro, Employee, ... Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the **PETITION FOR WRIT OF CERTIORARI** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 22, 2018, addressed to its attorneys of record:

Brett H. Bayne, Esquire
McANGUS, GOUDELOCK & COURIE
Post Office Box 12519
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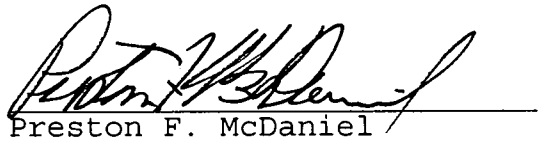

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