

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No.: 0717624

Appellate Case No. 2017-001518

James Smith Harrison, Jr., (Employee/Claimant),Appellant,

v.

S.C. Wind and Hail Underwriting Association (Employer), and
Liberty Mutual Fire Insurance Company (Carrier) Respondents.

RESPONDENTS' INITIAL BRIEF

RECEIVED
OCT 29 2018
SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission correctly applied the law in Thompson v. S.C. Steel Erectors in holding that pursuant to S.C. Code Ann. §42-15-60, Appellant's request for modifications to his retirement home is not a reasonable and necessary medical cost.
2. Whether the Workers' Compensation Commission's Decision and Order was sufficient with regards to its findings of fact and complied with S.C. Code Ann. §42-15-40(A).

STATEMENT OF THE CASE

This is a case involving a workers' compensation matter. On February 27, 2012, Appellant was involved in an admitted accident arising out of and in the course of his employment when he slipped and fell off a stool, causing compensable injuries to his right leg. Respondents provided Appellant with authorized causally related medical treatment pursuant to S.C. Code Ann. §42-15-60, and on February 19, 2014, Appellant was placed at maximum medical improvement ("MMI") by his authorized treating physician. (Claimant's APA, p.6).

On June 8, 2015, Appellant filed a Form 50 request for hearing, wherein he requested additional medical treatment and examination for his "right leg and whole person," including, "reimbursement for home modifications to primary and secondary homes." In addition, Appellant sought an award of permanent partial disability (PPD) to his right leg. (Claimant's F.50). On July 8, 2015, Respondents filed a timely Form 51 answer to request for hearing (Defendants Form 51), and a hearing was scheduled on November 10, 2015.

At the outset of the November 10, 2015 hearing, Appellant stated to the Single Commissioner that the parties resolved the issues of permanent partial disability and modifications to Appellant's primary residence, and therefore the sole issue before the Single Commissioner was Appellant's request for an order requiring Respondents to provide modifications to Appellant's secondary/vacation home. (Hr. Tr., p.5, lines 12-25 and p.6, lines 1-2). Appellant argued his request was in accordance with S.C. Code Ann. §42-15-60 and supported by the South Carolina Court of Appeals decision in Thompson v. S.C. Steel Erectors.¹ Conversely, Respondents argued there is nothing in the Workers' Compensation Act that allows for the relief sought by Appellant, and the facts in the Thompson case were distinguishable from the case at hand and not controlling law on the issue before the Commissioner. (Hr. Tr. p.8, lines 1-4 and lines 9-14). The Single

¹ 369 S.C. 606, 632 S.E.2nd 874 (S.C.App. 2006)

Commissioner heard testimony of Appellant and reviewed the complete evidence submitted by both Appellant and Respondents, and on August 22, 2016, the Single Commissioner issued a Decision and Order, wherein she found (1) the present case was distinguishable from Thompson, and (2) requiring Respondents to make modifications to Appellant's retirement home would be unfair and unduly burdensome on Respondents, when Appellant currently has a primary residence in which he resides. (Single Comm. Order, p.4, Finding of Fact #6).

Appellant appealed the Single Commissioner's decision to the Workers' Compensation Full Commission Appellate Panel ("Appellate Panel"). Both parties briefed the issues and oral arguments were held before the Appellate Panel on November 15, 2016. On June 13, 2017, the Full Commission issued an Appellate Panel Decision and Order, wherein they affirmed the Findings of Fact and Conclusions of Law of the Single Commissioner with amendments. (App. Panel Order, p.4) Specifically, the Appellate Panel added two (2) additional findings of fact, stating (1) "[Appellant's] request for modifications to his vacation home is speculative," and (2) "at such time as [Appellant] converts the vacation home into his primary residence, nothing in this Order precludes [Appellant] from seeking benefits to up fit the residence at that time." (App. Panel Order, p.5, Findings of Fact #7 and #8). The Appellate Panel did not modify any of the Single Commissioner's previously stated findings of fact or conclusions of law. (App. Panel Order, pp.5-6).

On July 11, 2017, Appellant served and filed its Notice of Intent to Appeal of appeal in this Court. This appeal follows.

STATEMENT OF THE FACTS/EVIDENCE

Appellant sustained an injury by accident arising out of and in the course of employment on February 27, 2012, causing injury to his right leg. As a result of his accident and related injuries, Respondents provided Appellant with appropriate medical care and treatment in accordance with S.C. Code Ann. §42-15-60. On February 19, 2014, Appellant's authorized treating physician, Dr. Coleman Fowble, placed Appellant at MMI and assigned 57% impairment to the right leg. (Claimant's APA, p.6). Specifically, Dr. Fowble stated:

At this point, I think he is at maximum medical improvement. He will need a 40 hour work weeks with limited standing. He will need a wheelchair and [valet] parking etc for his travel for work. I'm try to get a lift installed in his house and modifications to his bathroom because he as difficulty getting up the stairs and getting in and out of the shower. (Claimant's APA, p.6).

At the November 10, 2015 hearing, Appellant testified that he was currently the Executive Director of the South Carolina Wind & Hail Association and the South Carolina Property and Casualty Insurance Guarantee Association. (Hr. Tr. p.10, lines 14-17). Appellant testified he works less than forty hours per week and earns \$264,000.00 per year. (Hr. Tr. p.12, lines 18-19, p. 22, line 9).

Appellant testified his primary residence is in Columbia, SC, and at the time of the hearing, his primary residence had already been modified to accommodate his injuries. (Hr. Tr. p.12, lines 25 and p.13, line 3). Appellant testified that his secondary/vacation home, a beach house located in Pawley's Island, SC, has been in various parts of his family since 1987, (Hr. Tr. p.14, lines 2-3), and Appellant continues to visit the beach house and spend the night. (Hr. Tr. p.15, lines 2-3). Appellant testified that he planned to move to his vacation home when he retires, although he did not know the actual date he planned to retire. Appellant testified it will be at least two and a half years from the time of the hearing until he planned to retire, and probably even longer. (Hr. Tr. p.

15, lines 10-16). In fact, less than two (2) months before the hearing, Appellant presented a lecture self-entitled “Being a Workers Compensation Claimant for Fun & Profit.” (Defendants’ APA Exhibit A-1).

STANDARD OF REVIEW

In workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the “substantial evidence” rule as the standard for judicial review of a decision of the Commission:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (d) affected by other error of law; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers’ compensation appeals, may only overturn a conclusion of the Workers’ Compensation Commission if that conclusion is “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY APPLIED THE LAW IN THOMPSON V. S.C. STEEL ERECTORS IN HOLDING THAT PURSUANT TO S.C CODE ANN. §42-15-60, APPELLANT'S REQUEST FOR MODIFICATIONS TO HIS VACATION HOME WERE NOT A REASONABLE AND NECESSARY MEDICAL COST, AND SUCH MODIFICATIONS WOULD BE UNFAIR AND UNDULY BURDENSOME TO RESPONDENTS.

Appellant's argument that the Commission erred in finding that the holding in Thompson v. S.C. Steel Erectors is distinguishable from the present case is without merit. Not only are the facts in Thompson starkly distinguishable from the facts in this case, but the essence of the Court's holding in Thompson is simply not applicable to the request made by Appellant.

The basis for the Court's decision in Thompson was to ensure that a paraplegic injured worker and his wife and two children had a primary residence to live in, which was up fitted to

accommodate Mr. Thompson's paraplegic condition. In this case on the other hand, Appellant asks this Court to require Respondents to pay for modifications to a secondary vacation home, while Appellant already owns and lives in a primary residence that Respondents agreed to up fit. The difference in these two situations cannot be understated and must be viewed in light of the overall purpose of the Workers' Compensation system, which includes providing "sure, prompt, and '**reasonable' income and medical benefits** to work related victims."²The purpose of the workers compensation system does not include a responsibility to provide injured workers with modifications to multiple secondary vacation homes. In this case, the Appellate Panel addressed this point specifically with the addition of two (2) amendments to the Single Commissioner's Decision and Order, stating that the current request for modifications to Appellant's vacation home are speculative, and at this time, there is nothing in their Order that precludes Appellant from seeking modifications to his vacation home when he does retire and converts his vacation home into his primary residence. The Appellate Panel made it clear that under the law of Thompson, until Appellant seeks to convert his vacation home into his primary residence, Appellant's request for modifications to his vacation home are simply not ripe for adjudication.

A. The facts in Thompson v. S.C. Steel Erectors are distinguishable from the facts in the present case in that Thompson is dealing with modifications to an injured worker's primary residence.

In Thompson v. S.C. Steel Erectors, Clint Thompson ("Thompson") was involved in an admitted work accident when he was struck by a 3000 lb. steel beam, causing spinal injuries resulting in paraplegia. 369 S.C. 606, 632 S.E.2nd 874, 977 (S.C.App. 2006). At the time of his accident, Thompson and his wife and two children were renting a home from Thompson's uncle

² *South Carolina Workers Compensation Law Annotated 2017*, Overview to Workers' Compensation Law in South Carolina, p.1

for \$200.00/month, well below the market rate of approximately \$600.00. (Id.). Following his accident, Defendants paid approximately \$35,000.00 for modifications to the Thompson family's rental home to accommodate Thompson's injuries. (Id.)

Thompson filed a claim with the Workers Compensation Commission seeking lifetime benefits as a result of paraplegia pursuant to S.C. Code Ann. 42-9-10(C), and seeking additional money from Defendants to up fit a new home he and his family were moving into and to render it habitable for a paraplegic. (Id.) The issue in Thompson was further compounded by the fact that Thompson was seeking payment for the home modifications out the "back end" of his lifetime award, which is not an issue in this case, but this Court's holding regarding the Defendants obligation to up fit multiple homes remains directly applicable.

When addressing its decision to require the Defendants to up fit the new home the Thompson family planned to move into, this Court stated that they were "mindful this award may involve duplication" of the previous up fit of the rental home; however, this Court stated that this fact standing alone was not dispositive. Specifically, this Court stated:

Moreover, while we acknowledge the understandable opposition of the employer or insurance carrier to the prospect of paying for multiple **moves, the present posture of this case does not warrant those concerns.** The result we reach today is influenced by two factors.
(Id. at 882).

This Court specifically stated that this result involved paying for **multiple moves as opposed to multiple homes.** Nothing in the Thompson decision allows for a finding that an employer/ carrier should be required to pay for an injured workers' multiple homes.

With regards to the relevant factors addressed by this Court in Thompson, this Court first pointed out that the Thompson's never intended to reside permanently in the uncle's rental home, since prior to Thompson's injury, the family planned to move to a permanent home in response

to the best interests of their children and their education, and as evidenced by the fact that Thompson had already saved \$8,000.00 towards the purchase of their new home as of the time of the accident. (Id. at 882).

Second, this Court noted that Defendants' claim of "duplication" in Thompson was only partially true, since substantial additional modifications would be required to the uncle's home would be required if the Thompsons were to remain living there.

The facts of this case are clearly distinguishable from Thompson. At the time of Appellant's accident, he already lived in a paid for primary residence, and Respondents agreed to up fit Appellant's primary residence to accommodate his physical restrictions. Further, unlike Thompson, who was permanently and total disabled as a result of his paraplegia, Appellant was continuing to work. Specifically, Appellant testified before the Single Commissioner, "I mean – I don't work the 60-70 hours a week that I used to. Probably work just under 40. I'm able to do a lot of my job, which involves travelling, because my employer is very generous. (Hr. Tr., p.12, lines 17-21). Appellant's intention to continue working was further evidenced by the lecture Appellant presented less than two (2) months prior to his hearing, which was self-entitled "Being a Workers Compensation Claimant for Fun & Profit." (Defendants' APA Exhibit A-1).

More important, not only was Appellant continuing to work at the time of his hearing, Appellant testified he had only "general" plans to retire, with no concrete ending date to his employment. Specifically, Appellant testified as follows:

Q: Okay. Well, how much – Did you have a goal or a plan as to when you were going to retire before you got hurt?

A: I have a – a general plan. My son is in school and will complete school in two-and-a-half years, and when he does, that opens the door for me to retire.

Q: Okay.

A: Whether I'll retire that day or not, I don't know, but that's – I know I need to work at least through then and probably a little later.
(Hr. Tr., p.15, lines 7-16).

Appellant is not seeking modifications to a primary residence so that he and his family have a place to live, but instead asks this Court to grant modifications to a secondary/vacation home at the beach. When asked to describe the use of his secondary/vacation home at the time of his accident, Appellant testified, "We spent, traditionally spent Thanksgiving there. We were able to spend our summer vacations there. Spent a lot of weekends when my son was younger. And before he had a girlfriend, we used to go down there like every other weekend." (Hr. Tr., p.14, lines 8-12). Appellant's descriptions of his Pawley's Island home are clearly that of a secondary/vacation home, and not a description of necessary roof over him and his family's heads.

Even if Appellant did intend to eventually move his family to Pawley's Island after he retired, Appellant could not even testify with any certainty as to when, if at all, he planned to do so. As such, the Single Commissioner correctly held that Thompson was distinguishable since the Defendants in Thompson knew at the time they up fitted the rental home that Thompson and his family "could not expected to remain there for the rest of their lives," and continuing to pay under market value rent to an uncle who was helping them out.

There is nothing in the evidence in the record to suggest that if he chose to, Appellant in this case couldn't be expected to remain in the primary residence he and his family already own. There was never any indication they could not be expected to remain there, but instead only a question of if and when Appellant decided to retire and move to the beach, converting his secondary/vacation home into a primary residence.

Further, Appellant attempts to rely on the North Carolina decision of Timmons v. N.C. Dept. of Transportation, in which the Defendants paid for modifications to multiple homes for the injured worker when the injured worker initially lived in his parent's house, he then moved to a handicap accessible apartment, and then he finally moved to an apartment that was not yet handicap accessible. 473 S.E.2nd 356 (N.C.Ct.App. 1996). Respondents argue that although North Carolina's workers compensation statute is entitled to great weight, our Supreme Court has specifically stated, "However, where North Carolina's public policy and equity principles differ materially, South Carolina's legislative and judicial pronouncements must prevail." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 114-115, 580 S.E.2nd 100, 107 (S.C. 2003).

Regardless of the fact that the decision in this case should be made in light of the Legislative and judicial pronouncements supporting South Carolina's public policy and equity principles, similarly to Thompson, the Timmons case is distinguishable from the present case because it involved modifications to multiple houses as a result of the injured worker changing primary residences. (Id. at 359). Nothing in Timmons allowed for modifications to multiple homes simultaneously owned and lived in by the injured worker at the same time. On the contrary, these were modifications based on multiple **moves**, just like this Court addressed in Thompson.

For the reasons set forth above, Respondents respectfully request this Court deny Appellant's request to up fit his secondary/vacation home, and submit that any ruling to modify or up fit Appellant's secondary/vacation home at this time is speculative and not ripe. There is nothing in the Workers Compensation Act or the holding in Thompson that supports Appellant's request for modifications to multiple homes in addition to his primary residence, and as such, Respondents request that this Court affirm the decision of the Workers' Compensation Commission.

II. THE WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL DECISION AND ORDER WAS SUFFICIENT WITH REGARDS TO ITS FINDINGS OF FACT AND COMPLIED WITH THE REQUIREMENTS OF S.C. CODE ANN. §42-15-40(A).

A. Appellant failed to properly preserve the issue of the sufficiency of the Commission's Order on appeal, and therefore the argument is not properly before the Appellate Court.

Respondents first assert that Appellant has failed to preserve the issue of the sufficiency of the Commission's Order. S.C. Code Ann. §42-17-50 requires a party to file a petition for review ("Form 30") within fourteen (14) days from the date when notice of award shall have been given. The Form 30 is to be accompanied by a complete list of questions presented. The questions presented should encompass all exceptions to the Hearing Commissioner's decision which counsel intends to argue before the Appellate Panel. Grounds not specified in the questions presented cannot be considered by the Appellate Panel.³ The same requirements of preserving issues for appeal applies when the case is appealed from the Commission Appellate Panel to the Court of Appeals. In previous cases, the South Carolina Supreme Court held that the Circuit Court appropriately refused to consider three (3) new exceptions because they had not been properly presented to and passed upon by the Appellate Panel. (*See Bush v. Gingrey Brothers*, 232 S.C. 20, 100 S.E.2nd 821 (S.C. 1957)). The timely proper presentation of exceptions and questions presented are the only means of allowing the Appellate Court to address the issue. As the Supreme Court has previously held, in the absence of proper exception there is nothing for an Appellate Court to review. *Odom v. County of Florence, supra*, 258 S.C. 480, 189 S.E.2nd 293 (S.C. 1972).

In this case, the only questions presented by Appellant in his Form 30 request for commission review involved (1) whether the Single Commissioner erred in finding the present

³ Beard, Poteat, Lamar, Sumwalt, Bluestein, Sullivan, *The Law of Workers' Compensation Insurance in South Carolina, Sixth Edition*, 2012, Chpt. 10, §XXXII(A), p.461.

case was distinguishable from Thompson, (2) whether the Single Commissioner erred in finding modifications to Appellant's retirement home would be unfair and unduly burdensome on Defendants, (3) whether the Single Commissioner erred in refusing modifications to Appellant's second home when the evidence showed Appellant used both homes prior to his accident and was unable to use the second home after the accident, and finally (4) whether the Single Commissioner erred in her order denying modification to Appellant's retirement/second home in light of the greater weight and preponderance of the evidence in the record. Appellant failed to raise any question or exception involving the sufficiency of the Commissioner's Order as he now attempts to argue for the first time in his initial brief. As such, Appellant failed to properly preserve this argument, and therefore this Court should not entertain this portion of Appellant's brief and should affirm the findings of the Commission for the reasons set forth above.

B. Regardless of Appellant's failure to properly preserve the issue for appeal, the Commission's Order was sufficient with regards to its findings of fact and complied with S.C. Code Ann. §42-15-40(A).

Regardless of Appellant's failure to properly preserve the issue of the sufficiency of the Commission's Order on appeal, Respondents address Appellant's argument anyway and submit that it is without merit.

Appellant argues that the commission's Order was insufficient and contained conclusory findings of fact made on unlawful procedure. In support of its argument, Appellant seems to argue that the Commission failed to address what Appellant considered to be the four (4) "pertinent factors" as outline by the Court of Appeals in Thompson. In reality, the Court in Thompson said the result in that decision was based on two (2) factors. (Thompson at 882). First, that fact that the Thompsons never intended to reside permanently in the uncle's rental home. (Id.) The Single Commissioner addressed this factor in this case, stating the Thompson

family “could not be expected to remain there for the rest of their lives,” but Appellant currently resided in a permanent primary home, which he owned for years, and Respondents agreed to up fit and modify. (Single Comm. Order, p.4, Findings of Fact #2-5). The second factor addressed by this Court in Thompson, was the fact that the carrier’s claim of duplication was only partially true because substantial additional modifications to the uncle’s rental home would be required were the Thompsons to remain there. (Thompson at 882). Essentially, this point was also addressed by the Single Commissioner’s Order since she noted Respondents’ agreement to up fit and modify Appellant’s current primary residence. (Single Comm. Order, p.4, Finding of Fact #4)

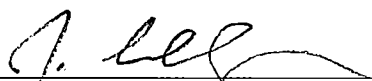
The Single Commissioner concluded that since Appellant already had a primary purchased residence that Respondents agreed to up fit and modify, it would be unfair and unduly burdensome to require Respondents to make modifications to his secondary/vacation home, since he already has a primary home in which he currently resides. The Single Commissioner even noted the secondary/vacation home would need to up fitted and modified when Appellant actually did retire and move in to the home, a fact that was not appealed by Respondents.

As such, the Single Commissioner’s Order decision was not made on a basis that duplication alone was dispositive, but clearly illustrated that the decision was based on the fact that Appellant already had an up fitted primary residence of his own that he and his family could live in. For the reasons set forth above, Respondents’ request that this Court deny Appellant’s request for modifications to his secondary vacation home and affirm the decision of the Workers’ Compensation Commission.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny Appellant's request for modifications to his secondary/vacation home and affirm the decision of the South Carolina Workers' Compensation Commission.

Respectfully Submitted,



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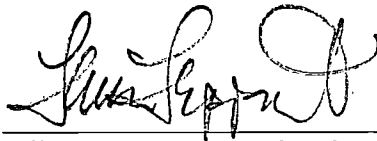
v.

S.C. Wind and Hail Underwriting Association (Employer), and
Liberty Mutual Fire Insurance Company (Carrier) Respondents.

PROOF OF SERVICE

I certify that I, Leslie Leppert, paralegal to J. Gabriel Coggiola, Esquire, have properly served **Respondents' Initial Brief and Designation of Matter to be Included in the Record**, on Appellant by mailing a copy of the same by United States Mail with first class postage prepaid to the following address on October 29, 2018:

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October 29, 2018

Hand Delivery

The Honorable Jenny Abbott Kitchings
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P.O. Box 11629
Columbia, SC 29211

Re: Jay S. Harrison, Jr. vs SC Wind & Hail Underwriting Assoc.
SCWCC No.: 1202328
Appellate Case No.: 2017-001518

RECEIVED
OCT 29 2018
SC Court of Appeals

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, SCACR, please find enclosed for filing one copy of the Respondents' Initial Brief and Respondents' Designation of Matter to be Included in the Record on Appeal, along with Proof of Service for the same.

By copy of this letter, I am also serving a copy of the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal on the attorney for the Appellant.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



John Gabriel Coggiola

JGC/jgc

Enclosure(s)

cc: Mr. William L. Smith, II
Mr. Douglas Walker (via email)