

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

WCC File No. 1202328

Appellate Case No. 2017-001518

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NOV 08 2018

SC Court of Appeals

James Smith Harrison, Jr.

Appellant,

v.

SC Wind and Hail Underwriting Association,

Employer, and

Liberty Mutual Fire Insurance Company,

Carrier, Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | |
|---------------------------|----|
| Table of Authorities..... | ii |
| Arguments..... | 1 |
| Conclusion..... | 7 |

TABLE OF AUTHORITIES

South Carolina Cases

Pressley v. REA Constr. Co., 374 S.C. 283, 648 S.E.2d 283 (Ct. App. 2007)..... 3

Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 632 S.E.2d 874
(Ct. App. 2006)..... *Passim*

ARGUMENT

This appeal concerns the equitable application of the *Thompson v. S.C. Steel Erectors* holding. 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006). The primary question is whether the South Carolina Workers' Compensation Commission ("Commission") erred as a matter of law in finding Claimant James Harrison ("Harrison") was not entitled to modification of his second home. Harrison argues the answer to that question is yes, for the facts and circumstances surrounding his claim are similar to those in *Thompson* and the facts and circumstances of his claim meet the test espoused by the Court when it found Thompson was entitled to modifications of a second home. The Commission, however, essentially held that *Thompson* only applies to claimants who rent their homes and ruled as if home ownership or duplication were the only considerations taken by this Court when it ordered modifications of Thompson's second, and at the time of the opinion, nonexistent home. The Commission, instead, should have considered each of facts this Court found important in *Thompson*. The Commission's failure to do so was an error of law and proper application of the facts of Harrison's injuries would show his entitlement to modifications as a matter of law.

A. Home Modifications Distinguished from Lump Sum

Respondents have repeatedly attempted to distinguish the facts at hand from *Thompson* by erroneously conflating the two distinct issues at play in *Thompson*. Thompson was awarded benefits, but the defendants in his case denied his entitlement to modification of a second home and denied his entitlement to collect the last 13% of his benefits in a lump sum. *Id.* Those were two distinct issues: Thompson sought a lump sum of his benefits to pay for the base price of an unmodified home and also sought to have the carrier pay for the additional expense of modifying

a home to meet his special needs that resulted from his work place injury. *Id.* at 612, 632 S.E.2d at 877.

Therefore, the assertion by Respondents that “The issue in *Thompson* was further compounded by the fact that Thompson was seeking payment for the home modifications out of the ‘back end’ of his life time award” is patently erroneous. This court dealt with the two issues, a lump sum award and modification of a second home, in two separate sections of the *Thompson* opinion. *Id.* Moreover, the Court stated expressly that “neither the upfitting award nor the funds for the therapeutic and exercise equipment are to be deducted from Thompson’s lifetime benefits.” *Id.* at 611 n. 1, 632 S.E.2d at 877 n. 1. Thompson’s request for a lump sum to purchase a home in no way compounds the issue at bar. Thompson sought and was permitted to receive the commuted value of the last 13% of his lifetime benefits in a lump sum to build an unmodified house. *Id.* at 610, 632 S.E.2d at 877. If the *Thompson* opinion stopped there, both Thompson and Harrison would have been in the same condition: Owning a home they cannot use as a result of their on the job injuries. However, the *Thompson* Court went further and ordered the carrier provide, and not deduct from his life time benefits, the modifications necessary to make a second, unmodified home safe to live in. *Id.* at 611 n. 1, 632 S.E.2d at 877 n. 1. That is what Harrison requests—the modifications necessary to make a second home safe.

B. Duplication and Home Ownership are not Dispositive.

When this Court decided *Thompson*, it first addressed the Thompsons’ intentions with regard to where they would live. *Id.* at 620, 632 S.E.2d at 882. In so addressing, the Court looked at the Thompsons’ stated plans, it looked at the Thompsons’ finances, and it considered whether it would be fair to preclude the Thompsons from utilizing their second home. *Id.* This Court completed that analysis and found the evidence it considered cut in favor of Thompson’s

entitlement to modifications of a second home. *Id.* If this Court considers the same evidence Harrison has offered in the record, it will find this factor cuts in favor of modifications as well. First, Harrison testified that his plan is to use his retirement home full time upon his retirement and intended to begin that transition on the day of his accident. (Hr. Tr. 13–16). Second, Harrison owns his second home, which offers much more support to the contention that, preinjury, Harrison intended to move to that home, than does saving \$8,000.00 prior to an injury. (Hr. Tr. p. 14). Third, as with Thompson, a legal decree precluding Harrison’s dream of moving to his beach home would be unreasonable. Finally, Harrison used his second home regularly prior to his work place injury; it is unreasonable to assert he must sell his home or cease using it because he suffered an injury at work. In *Pressley v. REA Const. Co. Inc.*, this Court stated that the *Thompson* Court “held the employer must also pay to upfit [Thompsons second] home *because* ‘the modifications [were] necessitated solely by [Thompson’s] admittedly compensable work injury.’” 374 S.C. 283, 189, 648 S.E.2d 301, 304 (Ct. App. 2007) (emphasis added).

Second, this Court addressed the carrier’s concerns of duplication. *Thompson*, 369 S.C. at 620, 632 S.E.2d at 882. In support of its decision to order additional modifications, the Court noted that additional modifications were required for Thompson’s first home; his home was already handicap accessible, but would need modifications to enable the home to support Thompson’s needed exercise equipment. Then the Court noted that the carrier knew when it modified Thompson’s first house that he could not be expected to remain there for the remainder of his life. *Id.* Here, the carrier also knew that Harrison did not intend to stay in his Columbia home for the remainder of his life. In fact, Harrison requested modification of his second home long before the carrier approved modifications of his Columbia home. (*See e.g.*, Form 50 6/9/15). Those modifications were eventually approved notwithstanding the carrier’s knowledge that

Harrison needed and was requesting modification of his retirement home. While the need for additional modifications was also noted by the *Thompson* Court, that factor should not cut against Harrison's entitlement, for the outcome if it did would be illogical. If Harrison's entitlement turned on whether he currently needs additional modifications for his Columbia home, then the Court would in effect be telling Harrison that he cannot get basic home modifications for his retirement until he has a need for exercise equipment or a need some other additional modification. Harrison's entitlement to basic modifications of his retirement home should not turn on whether he needs additional modifications to his Columbia home.

C. *Thompson* Specifically Applies to the Modification of Multiple Homes

The point of the *Thompson* opinion is that a carrier cannot avoid its responsibility to modify a second home, when modifications are indicated by the authorized treating physician simply because the carrier had modified another home for the same claimant. The opinion has nothing to do with the payment of "moves," and the *Thompson* opinion does not reference a request to have the carrier pay to "move" Thompson to his new home. *Id.* The *Thompson* Court specifically required the carrier to modify multiple homes. In the case of Thompson, the home had not even been built when this Court ordered its modification.

Respondents have, if not expressly then impliedly, stated that modification of Harrison's retirement home will be proper once he moves to his retirement home fulltime. (*See* Respondent's Brief p. 14, "The Single Commissioner even noted the secondary/vacation home would need to [sic] up fitted and modified when Appellant actually did retire and move in to [sic] the home, a fact that was not appealed by Respondents."). This implication is illogical and frankly, dangerous. The home Harrison seeks to have modified is elevated, such that the first floor of the home is one story up. (Hr. Tr. p. 17). There is no way to access the home except through the use of a flight of

stairs. (Hr. Tr. p. 18). Harrison cannot safely climb stairs and he cannot safely step into an unmodified shower. (Hr. Tr. pp. 18–19; Claimant’s APA No. 1 p. 6). Nonetheless, Respondents seek to force Harrison to move to that home in order to prove that he intends to make that his primary residence. That was not the case in *Thompson*. There was no mandate in the *Thompson* opinion that Thompson first move into the second home once construction was completed to prove that he was actually going to use it full time before modifications would be ordered.

Moreover, to tell Harrison he must move to his retirement before modifications will be proper is patently unreasonable in light of what that process will entail. Harrison was injured on February 27, 2012. (Claimant’s Form 50). He lived in his Columbia home from that date, except for the weeks he spent in the hospital, until after November of 2015 with no modifications; modifications that were not approved until the eve of the hearing in this matter. Despite the burden imposed by not being able to sleep in a bedroom, his situation was tenable while living in Columbia for he could sleep on the first floor of the house and avoid stairs. (Claimant’s APA p. 6). However, sleeping in a roll away hospital bed on the ground level of home on stilts, like Harrison’s retirement home, is not possible. Therefore, based on the prior history of this claim, Harrison would be expected to move to his retirement home, climb a flight stairs at least daily, which is contrary to the authorized treating physician’s orders, for more than three years and eight months. This burden was not imposed on Thompson and should not be imposed on Harrison.

D. Harrison’s Injuries are Severe

As a result of his on the job accident, Harrison did not simply suffer a minor lower extremity injury; he shattered both bones in the lower half of his leg, just below the knee. (Hr. Tr. p. 11). He suffered from severe peroneal nerve damage, and he developed a serious MRSA infection. (Claimant’s APA p. 137; Hr. Tr. p. 11). As a consequence of those injuries, he endured

multiple surgeries, six skin grafts, weeks with a wound vac, weeks in the hospital, and two-and-a-half years of physical therapy. This was not a rolled ankle from which Harrison could make a full recovery. Despite the work of his physicians and his efforts in physical therapy, he suffered a permanent 57% impairment to his right leg, as opined by the Respondents' selected physician. (Claimant's APA p. 6).

Thus, to avow that Harrison is seeking any type of net gain as a result of this litigation is fallacious. Respondents, nevertheless, cite the title of a presentation Harrison gave to members of the insurance industry in support of their argument that Harrison is in some way seeking gratuitous benefits. However, Harrison testified at length about his presentation and how the title was simply a "teaser" and the substance of the presentation was the issues he had personally experienced with workers' compensation. (Hr. Tr. 20). Harrison testified his presentation covered the story of nurse attempting to make him walk prior to any surgery when doing so was strictly contraindicated. (Hr. Tr. 20). His presentation covered how having an assigned nurse case manager can become an obstacle to getting things done. (Hr. Tr. 20). He spoke on the state of mind that results from sitting alone with no one speaking to him or updating him on his condition. (Hr. Tr. 20). He further discussed the number of past due bills that were sent to his house and sent to collections despite the fact that the workers' compensation carrier was solely and undisputedly responsible for those bills. (Hr. Tr. 20). And finally, he presented on the issues that face claimants, like himself, when they are given easy, uncontrolled access to highly addictive pain medications without any counseling on pain management or alternatives to opioid prescriptions. (Hr. Tr. 21). When asked further about his experience and the accusation that he presented about making money as a workers' compensation claimant, Harrison testified "I don't think anyone believes that I had fun or made any money or wanted to be me." (Hr. Tr. 21). Harrison knows he will never be made

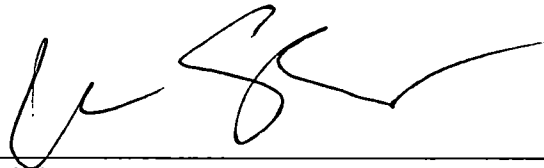
whole again and simply requests an order providing him with the modifications prescribed by his treating physician.

CONCLUSION

Based on the foregoing, the Commission's denial of Harrison's entitlement to modifications of his second home should be reversed as a matter of law.

November 8, 2018

Respectfully Submitted,



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Proof of Service

I certify that I have served *Appellant's Initial Reply Brief* on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2018, addressed to their attorneys of record, W. Strat Stavrou, Jr. and John G. Coggiola, 3600 Forest Drive, Suite 204, Columbia, South Carolina 29204.

November 8, 2018

Respectfully Submitted,



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November 8, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
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Re: James Smith Harrison, Jr. v. SC Wind and Hail Underwriting Assn SC Court of Appeals
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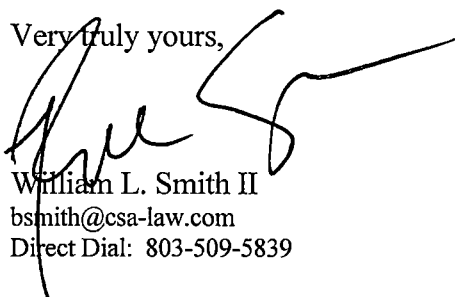
Dear Ms. Kitchings:

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

1. Initial Reply Brief of Appellant
2. Proof of Service

Thank you for your assistance in this matter.

Very truly yours,


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WLS/jdg
Enclosures

cc: John G. Coggiola, Esquire
W. S. Stavrou, Jr., Esquire