THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0710622

Antonio Lazaro, by and through his GAL Decidora Lazaro, Employee, ... Respondent,

v.

Burriss Electrical, Inc., Employer, and CompTrust AGC of the Carolinas, Carrier, ... Appellants.

FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 2

ARGUMENTS

I. The Commission erred as a matter of law when it awarded the lump sum payment to Claimant's family 3

II. The Commission's Award of $30,000 for a new vehicle constitutes an abuse of discretion 7

III. Awarding the lump sum payment ordered in this case contravenes the basic policies underlying the workers' compensation statute 10

CONCLUSION 14

TABLE OF AUTHORITIES
CASES

Airco, Inc. v. Hollington,
269 S.C. 152, 236 S.E.2d 804 (1977) 5

Ashley v. Ware Shoals Mfg. Co.,
210 S.C. 273, 42 S.E.2d 390 (1947) 4

Brunson v. Wal-Mart Stores, Inc.,
344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) 13

Case v. Hermitage Cotton Mills,
236 S.C. 515, 115 S.E.2d 57 (1960) 11, 13

Clark v. Cantrell,
339 S.C. 369, 529 S.E.2d 528 (2000) 10

Conner v. City of Forest Acres,
363 S.C. 460, 611 S.E.2d 905 (2005) 2

Cook v. Mack's Transf. & Storage,
291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986) 11

Cox v. BellSouth Telecom.,
356 S.C. 468, 589 S.E.2d 766 (Ct. App. 2003) 5

Etheredge v. Monsanto Co.,
349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) 2

Glenn v. Columbia Silica Sand Co.,
236 S.C. 13, 112 S.E.2d 711 (1960) 12

Glover v. Suitt Constr. Co.,
318 S.C. 465, 458 S.E.2d 535 (1995) 7

Hill v. Jones,
255 S.C. 219, 178 S.E.2d 142 (1970) 5

James v. Anne's Inc.,
390 S.C. 188, 701 S.E.2d 730 (2010) 7

Johnson v. Pennsylvania Millers Mut. Ins. Co.,
292 S.C. 33, 354 S.E.2d 791 (Ct. App. 1987) 12

Lark v. Bi-Lo,
276 S.C. 130, 276 S.E.2d 304 (1981) 2

Mizell v. Raybestos-Manhattan, Inc.,
281 S.C. 430, 315 S.E.2d 123 (1984) 11

Nelson v. Taylor,
347 S.C. 210, 553 S.E.2d 488 (2001) 2

Pilgrim v. Eaton,
391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010) 12, 13

Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Prog.,
449 U.S. 268, 101 S. Ct. 509 (1980) 12

Stephenson v. Rice Servs., Inc.,
323 S.C. 113, 473 S.E.2d 699 (1996) 11

Thompson v. South Carolina Steel Erectors,
369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006) 3, 5, 6

Tiller v. Nat'l Health Care Ctr.,
334 S.C. 333, 513 S.E.2d 843 (1999) 2-3

Wigfall v. Tideland Util., Inc.,
354 S.C. 100, 580 S.E.2d 100 (2003) 3, 10, 11

Woods v. Sumter Stresscrete Inc.,
266 S.C. 245, 222 S.E.2d 760 (1976) 3-4

STATUTES

S.C. Code Ann. § 1-23-380 (Supp. 2010) 2

S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010) 2

S.C. Code Ann. § 42-9-301 (Supp. 2010) 2, 3, 5

former S.C. Code § 42-9-300 (Supp. 1980) 3

OTHER AUTHORITIES

Larson's Workmen's Compensation Law, Section 82-71 4

http://cars.about.com/od/helpforcarbuyers/tp/Cheapest_09.01.htm 10

STATEMENT OF ISSUES ON APPEAL

I. Whether the Commission erred as a matter of law when it awarded the lump sum payment to Claimant's family?

II. Whether the Commission's Award of $30,000 for a new vehicle constitutes an abuse of discretion?

III. Whether awarding the lump sum payment ordered in this case contravenes the basic policies underlying the workers' compensation statute?

STATEMENT OF THE CASE

Claimant Antonio Lazaro sustained an admitted physical brain injury on July 6, 2007 arising out of and in the course of his employment with Burriss Electrical, Inc. ("Employer"). CompTrust AGC of South Carolina provided Burriss with workers' compensation insurance at the time of Claimant's injury (jointly referred to herein as "Appellants"). As a result of his injuries, Claimant remains in a permanent vegetative state and is unlikely to recover. (Order and Award of the Single Commissioner, filed October 14, 2010, R. pp. 12, 20) ("Single Commissioner Order"). Claimant's medical care, as well as weekly benefits, are being paid for by Appellants. (Single Commissioner Order, R. p. 21). Claimant and his wife, Decidora Lazaro, have two sons, who were 17 and 16 years of age at the time of the hearing. (Single Commissioner Order, R. p. 13). Claimant's wife has been named his Guardian ad Litem. Claimant is hospitalized permanently at the Brian Center. (R. p. 68, lines 10-11) (R. p.70, lines 12-13).

The parties appeared before Single Commissioner T. Scott Beck on July 28, 2010 to determine whether Claimant's dependents are entitled to a partial lump sum payment of Claimant's lifetime benefits.[1] Single Commissioner Beck held that Claimant was entitled to a partial lump sum payment of $152,568.75 to completely pay off Claimant's mortgage, to pay off the family's outstanding credit card and loan debt,[2] and to purchase a new car valued up to $30,000. (Single Commissioner Order, R. pp. 20-21). The Single Commissioner also directed that the monies be paid to Claimant's counsel to pay off the

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[1] The parties participated in a lengthy pre-hearing conference with Commissioner Beck, during which the parties consented to him reaching his decision based on their proffer of what the evidence would show. No formal recorded hearing was held. (Single Commissioner Order, R. pp. 10-11).

[2] An amended financial declaration was submitted during the pre-hearing conference. (Single Commissioner Order, R. p. 9).

listed debts and to purchase a new vehicle, and instructed that any remaining balance be returned to Appellants.

Appellants timely appealed to the Full Commission. The Full Commission held a hearing on February 23, 2011 and issued its decision affirming the Single Commissioner on April 20, 2011. (Decision and Order of the Full Commission, filed April 20, 2011, R. pp. 1-7) ("Commission Decision"). Appellants timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is governed by S.C. Code Ann. § 1-23-380 (Supp. 2007) of the Administrative Procedures Act (hereafter "the APA"); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Generally under the APA, a decision of the South Carolina Workers' Compensation Commission should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007); *see also* Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

Where the Commission awards a lump sum payment under S.C. Code Ann. § 42-9-301, the standard of review on appeal is abuse of discretion. "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); Nelson v. Taylor, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (2001). In addition, it is axiomatic that workers' compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care

Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Finally, because it is in derogation of the common law, South Carolina courts are bound to strictly construe the provisions of the workers' compensation statute. Wigfall v. Tideland Util., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003).

ARGUMENTS

I. The Commission erred as a matter of law when it awarded the lump sum payment to Claimant's family.

The Commission made its lump sum payment award in this case under section 42-9-301. That provision allows the Commission to make lump sum distributions from a lifetime benefits award when the Commission "deems it not to be contrary to the best interest of the employee or his dependents . . ." S.C. Code Ann. § 42-9-301. In addition, "the Commission must consider whether the award will cause a hardship to the employer or carrier." Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 616, 632 S.E.2d 874, 880 (Ct. App. 2006). By failing to properly analyze or set forth how the lump sum award was in Claimant's best interest, and by failing to address the hardship such an award will cause to the employer and/or carrier, the Commission erred as a matter of law and its decision should be reversed and remanded.

Although current Section 42-9-301 does not require the Commission to find unusual circumstances in order to award a lump sum payment,[3] the requirement that the Commission find that the lump sum distribution be in the best interest of the claimant or his dependents remains. Furthermore, the reasoning in cases interpreting and applying this "best interest" requirement is still valid and applicable. For instance, in Woods v.

[3] Current Section 42-9-301 replaced a prior provision of the workers' compensation statute that required that the claimant also establish unusual circumstances. *See*, former S.C. Code § 42-9-300, which required a finding that lump sum payments be restricted to "unusual cases". In 1984, this provision was deleted and replaced with what is currently Section 42-9-301.

Sumter Stresscrete Inc., 266 S.C. 245, 222 S.E.2d 760 (1976), the South Carolina Supreme Court observed that benefits paid as support to dependents of an injured employee "is part of the income-protection system established by the provisions of the Workmen's Compensation Act. Experience has taught that this income-protection is best accomplished through periodic income payments." 266 S.C. at 247, 222 S.E.2d at 761, *citing* Larson's Workmen's Compensation Law, Section 82-71 and Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E.2d 390 (1947). In Ashley, the Court explained that, "[t]he principle involved in the compensation acts is that the benefits received are a substitute for the *wages* of the injured employee, and with this theory in mind almost all of the legislative bodies of the various States have provided for the payment of compensation in regular installments. *The purpose of this method is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society.*" 210 S.C. at 280, 42 S.E.2d at 393 (emphasis added). In the end, there is always a risk that, "the relief afforded by a lump sum payment" may be "temporary only, bringing about greater economic trouble in the future." Woods, 266 S.C. at 250, 222 S.E.2d at 762. This is particularly true where there is no explanation of the "character of these obligations" or debts, which may have been for frivolous items. *See* Ashley, 210 S.C. at 288, 42 S.E.2d at 396. In this case, all the Commission knew when it ordered the lump sum payment was that the money was intended to pay off a mortgage and certain credit card debt, as well as to purchase a new vehicle. There is absolutely no assurance that Claimant's wife will not simply run up additional credit card debt and return seeking an additional lump sum payment. There is also no explanation of

why Claimant's dependents need a fourth vehicle and, even if so, why it needs to be a new vehicle and, if so, why it should be one that costs up to $30,000.

Furthermore, in the instant case, the Commission did not explain how the lump sum payment would be in the Claimant's or his dependents' best interest. Clearly, Claimant's medical and physical needs are being met by Appellants, so they are not part of the benefits analysis. As for Claimant's dependents, the Commission's award simply states, without any explanation of why or how, that the lump sum payment is in their best interest. (Single Commissioner Order, R. p. 21) (Commission Decision, R. pp. 2-3). Thus, this finding is inadequate as a matter of law because it provides no explanation of the basis for the Commission's Decision. *See, e.g.,* Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977) (Commission must make findings on essential factual issues with sufficient detail to enable the appellate court to determine whether the factual findings are supported by substantial evidence in the record); Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970) (same).

In Cox v. BellSouth Telecom., 356 S.C. 468, 589 S.E.2d 766 (Ct. App. 2003), this Court considered a lump sum payment requested by the claimant, who suffered severe injuries including brain damage, to purchase a home. This Court pointed out that, "[t]he risk that the beneficiary will squander the lump sum payment and be left as a ward of the state is reduced by allowing the commission discretion in deciding whether to award a lump sum payment with consideration of the factors set forth in section 42-9-301." 356 S.C. 473, 589 S.E.2d at 769. Thus, the Commission must analyze whether a particular disbursement is in the best interest of the claimant and whether it will "cause a hardship to the employer or carrier." Thompson, 369 S.C. at 616, 632 S.E.2d at 880. The

Commission's decision in this case fails to properly analyze and set forth how the lump sum payment is in Claimant's best interest, or to properly consider the burden on the employer or carrier. Therefore, it should be reversed and remanded. At a minimum, the Commission's decision should be rejected because it fails to explain in any way how the lump sum payment is in Claimant's best interest.

In addition, the lump sum award in this case is different in kind from the lump sum payments previously authorized by the Commission. In Thompson, this Court upheld a lump sum payment to the claimant, who was rendered a paraplegic as a result of a work-related injury, so that he could construct a house and install therapeutic exercise equipment. This Court further ordered that an additional amount be included in the award for modifications to the house to meet the needs of his disability. 369 S.C. at 619-20, 632 S.E.2d at 881-82. The insurer argued that, because it had already expended approximately $35,000 to upfit the rental home in which the claimant was living, the additional award to construct and upfit a new home to meet his needs was an abuse of discretion. In determining that the expenditure of funds to build and modify a new house was not "wasteful or unreasonable," this Court pointed to the fact that, prior to the injury, the claimant and his wife had been planning to move to another county with better schools and had been saving to build a new house. 369 S.C. at 616-17, 632 S.E.2d at 880. Here, there is no evidence that Claimant and his wife were planning or saving to buy a brand new $30,000 vehicle, or that such a purchase would be anything other than squandering his benefits on what is essentially a luxury car – which Appellants assert is a wasteful and unreasonable purpose.

In Glover v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995), the South Carolina Supreme Court held that a lump sum payment of attorneys fees out of a lifetime award of damages in a brain injury case was in the best interest of the claimant because this was an amount the claimant already owed and, to do otherwise, "would have a tremendous chilling effect on the ability of the most severely injured employees to obtain the services of adequate counsel." 318 S.C. at 469-70, 458 S.E.2d at 538. There has been no suggestion that the lump sum payment in this case is to pay attorneys' fees or that denial of the payment would have any wide-reaching affect on the ability of injured employees to pursue workers' compensation claims.

Most recently, in James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010), the South Carolina Supreme Court opined that, awarding a lump sum payment that would be prorated over the claimant's lifetime so as to protect her Social Security Disability payments, "serves to further the Act's humane objectives." 390 S.C. at 202, 701 S.E.2d at 737. There has been no suggestion in the instant case that the lump sum payment is intended to preserve Social Security Disability benefits.

Because there has been no explanation of how the award of a lump sum payment in this case is in Claimant's best interest, the Commission's Order should be reversed.

II. The Commission's Award of $30,000 for a new vehicle constitutes an abuse of discretion.

At a minimum, the Commission's award of up to $30,000 for the purchase of a new vehicle for the family constitutes an abuse of discretion. There is no evidence in the record to support such an award. First, the record clearly reflects that Claimant's family already owns three cars: a 2004 Dodge Durango, a 1996 Honda Civic, and a 1991 Ford Aerostar Van. The two older vehicles are noted in the Commissioner's Order as having

125,000 and 145,000 miles respectively which, the Commission concludes on nothing more than pure conjecture and speculation, makes them unsafe "to drive out of town." (Commission Decision, R. p. 4) (*see also* Single Commissioner Order, R. p. 16). There is simply no evidence in the record that supports a finding that the Claimant's family needs more than three vehicles, nor is there any evidence that supports the Commission's conclusion that an automobile is unsafe to drive out of town once it reaches 100,000 miles.

Second, Claimant himself no longer is able to drive. Claimant is unable to leave the Brian Center where he is hospitalized so the purchase of any vehicle clearly is not for his benefit. (R. p. 68, lines 6-11) (R. p. 70, lines 12-13). It is unclear why having one less driver in the family results in the need for a new vehicle. Even if Claimant argues that his children are currently of driving age, there is simply no evidence that the family needs a fourth, brand new vehicle worth up to $30,000. Even assuming (without conceding) that one or both of the cars with mileage over 100,000 miles are "unsafe to drive out of town," the Dodge Durango has under 100,000 miles and there is no indication that the Claimant's wife and two children have an abundance of occasions where they need to drive out of town *separately*. The children attend school near their home and there is no evidence that Claimant's wife works out of town; therefore, the two additional cars, (which have thus far been sufficient for the family), should continue to reasonably meet the family's needs.

Moreover, as indicated above, the record clearly reflects that this vehicle is not intended to provide transportation for Claimant in his vegetative state. (R. p. 68, lines 6-11). In fact, when the price allotted for Claimant's family to purchase a new vehicle was

raised at the Full Commission hearing, it was evident that at least Commissioner Lyndon believed the price reflected the need to purchase a vehicle that could transport Claimant.

> COMMISSIONER LYNDON: I'm just saying it seems to me – the first thing you mentioned was the price of the car. I mean, surely the good – I don't know he can get too much for less than 25,000 if he has to be put in it lying down. I don't know.
>
> COMMISSINOER ROCHE: This is a car for his family. This is not a car for the Claimant; is that –
>
> Mr. McDANIEL: It's a car for the family.
>
> COMMISSINOER ROCHE: It's not a car for the Claimant ever to be in.
>
> COMMISSINOER LYNDON: Right. Can he not ride at all?
>
> COMMISSINOER ROCHE: No.
>
> COMMISSINOER LYNDON: He's in a bed?
>
> MR. McDANIEL: He's in Brian Center and will be there for the remainder of his life.

(R. p. 69, line 22 – p. 70, line 13). Thus, there is absolutely no evidence that a special or modified vehicle is necessary to accommodate Claimant's condition. The Order of $30,000 for a new vehicle simply amounts to a gratuitous and excessive award.

Even if the record supported a need for Claimant's family to purchase an additional vehicle, which Appellants do not concede, there is absolutely no evidence supporting the choice of a new, rather than a used vehicle, which arguably would serve the same purposes for a better value. Likewise, even if Claimant were entitled to specifically a brand new car, which Appellants do not concede, there is no evidence to support the conclusion that it must be a vehicle worth up to $30,000. The award goes beyond what is justifiably necessary.[4] Currently, there are at least 11 brand new 2011

[4] To argue that the amount awarded for the new vehicle is "only" up to $30,000 and that the Claimant's

cars with a sticker price of less than $15,000 and there are at least 20 brand new 2011 cars with a sticker price of less than $17,000. (http://cars.about.com/od/helpforcarbuyers/tp/Cheapest_09.01.htm). In this case, awarding Claimant's dependents up to $30,000 for the purchase of an additional vehicle, a brand new expensive car, particularly where, as here, the family already owns three vehicles and absolutely no evidence has been produced that any of them is unreliable (other than unsupported speculations regarding the reliability of two vehicles with over 100,000 miles), it is an abuse of discretion on which the Commission should be reversed.

III. Awarding the lump sum payment ordered in this case contravenes the basic policies underlying the workers' compensation statute.

Much of the Single Commissioner Order, which the Full Commission approved in its entirety, reads as if the Commission is attempting to make the Claimant and his family "whole" from the disruption caused by his injury. However, making an injured party "whole" is a tort concept. *See, e.g.*, Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (explaining that, in a tort action, the goal of actual or compensatory damages is "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred"). However, our workers' compensation system was intended to *displace* traditional tort law in order "to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation." Wigfall, 354 S.C. at 115, 580 S.E.2d at 107. Noting the balance struck and the trade-offs embedded in the Workers' Compensation Act, this Court has recognized that "the amount of compensation available under the Act may be

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counsel is instructed to return to Appellants any amounts not expended is empty comfort. Under the Commission's Decision, Claimant's dependents can, and very well may, spend every penny of the $30,000 on a brand new car. There is no incentive for them to do otherwise.

substantially less than could be recovered in a successful common law action . . ." Cook v. Mack's Transf. & Storage, 291 S.C. 84, 87, 352 S.E.2d 296, 298 (Ct. App. 1986). Thus, the goal of workers' compensation payments are not to put the family as close as is possible, through monetary disbursements, to the place it would have been had Claimant's accident not occurred but, rather, "to compensate [him] in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of his employment." Id. at 86, 352 S.E.2d at 298.

The South Carolina Supreme Court has rejected "the assumption that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries." Wigfall, 354 S.C. at 115, 580 S.E.2d at 108. In fact, South Carolina cases setting forth the purposes of the Act's remedial provisions speak in terms of sustaining, but not providing a windfall or serving as a personal banker to, an injured claimant. For example, in Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960), the Supreme Court explained that, because workers' "compensation is based not upon need but upon wages, it may in some instances and may not in others be sufficient . . . to enable the injured employee to live without being a burden to others. To say that the purpose of such legislation is to prevent his becoming a public charge is perhaps to overstate the case, for as matters now stand its aim is to aid in, rather than to insure, the accomplishment of that end." *See also* Mizell v. Raybestos-Manhattan, Inc., 281 S.C. 430, 433, 315 S.E.2d 123, 125 (1984) (noting that "the purpose of workers' compensation [is] to provide *sustenance* to injured workers and their families") (emphasis added); Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996) (stating that the "goal of workers' compensation is to compensate workers for reductions in their

earning power caused by work-related injuries or accidents"); Pilgrim v. Eaton, 391 S.C. 38, 50, 703 S.E.2d 241, 247 (Ct. App. 2010) (observing that "the overriding goal of the Workers' Compensation Act 'is to compensate workers for reductions in their earning power caused by work-related injuries'").

In Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Prog., 449 U.S. 268, 101 S. Ct. 509 (1980), the United States Supreme Court concluded a similar policy underlies the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA").[5] In Potomac Elec., the U.S. Supreme Court rejected the claimant's argument that the sole purpose of the LHWCA, "was to provide disabled workers with a complete remedy for their industrial injuries." Although the LHWCA "is indeed remedial in that it was intended to provide a certain recovery for employees who are injured in the job, . . . statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss." 449 U.S. at 281, 101 S. Ct. at 516. The Court noted that, as part of the legislative balance struck by the LHWCA, employees "are assured hospital and medical care and *subsistence* during the convalescence period." 449 U.S. at 282, 101 S. Ct. at 517 (emphasis added). The Commission's Decision in this case tilts the balance away from workers' compensation, which provides for basic needs and support, back toward tort-based compensation, which allows for overall compensatory, and sometimes excessive, awards. The Commission's Decision goes well beyond what may or may not be in the best interest of the Claimant's dependents and, with absolutely no basis in the record, pays off what well may be wasteful credit card

[5] South Carolina courts have long relied on analyses of the LHWCA because that act is similar in many aspects to the South Carolina workers' compensation statute. *See, e.g.*, Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960); Johnson v. Pennsylvania Millers Mut. Ins. Co., 292 S.C. 33, 354 S.E.2d 791 (Ct. App. 1987).

debt and awards them up to $30,000 for the purchase of a new vehicle in addition to the three they already own. Such an award is an abuse of discretion.

Furthermore, although claimants routinely cite cases that hold that the workers' compensation statute is to be liberally construed in their favor, *see, e.g.*, Case, 236 S.C. at 531, 115 S.E.2d at 66, courts also recognize that the application of the workers' compensation statute must be fairly applied to both the claimant and the employer/insurer. S*ee, e.g.*, Case, 236 S.C. at 534, 115 S.E.2d at 67; Pilgrim, 391 S.C. at 50, 703 S.E.2d at 247 (noting in the context of calculating a claimant's weekly wage amount that it must be "fair to both the worker *and the employer*") (emphasis added); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (rejecting a weekly wage calculation that was "grossly unfair" to the employer and remanding to the Commission to make a factual determination on the wage issue that would be "a more fair result"). A similar balance must be struck in this case.

CONCLUSION

Appellants respectfully request that this Court reverse the Commission and hold that Claimant is not entitled to a lump sum payment. In the alternative, in the event this Court determines Claimant is entitled to a lump sum payment, this Court should reduce that award to payment of the balance on Claimant's mortgage, and reverse the award to the extent it covers credit card debt and the cost of a new vehicle up to $30,000.

Respectfully submitted,

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PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellants Burriss Electrical and CompTrust AGC of the Carolinas comply with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief of Burriss Electrical and CompTrust AGC of the Carolinas comply with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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