

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 RESPONDENT

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues of Appeals iv

Statement of the Case 1

Arguments

I. THE COMMISSION DID NOT ERR AS A MATTER OF LAW
WHEN IT AWARDED A LUMP SUM PAYMENT TO THE
CLAIMANT'S GUARDIAN AD LITEM AND GUARDIAN AND
DEPENDENT, HIS WIFE, MRS. DECIDORA LAZARO 3

II. THE COMMISSION DID NOT ERR IN ITS AWARD OF UP TO
\$30,000.00 FOR THE PURCHASE OF THE NEW VEHICLE
WHERE THERE IS NO EVIDENCE TO SUBSTANTIATE THAT
THIS IS AN ABUSE OF DISCRETION. 9

III. THE COMMISSION DID NOT ERR IN AWARDING THE LUMP
SUM PAYMENT IN THIS CASE AND SUCH LUMP SUM AS
ORDERED DOES NOT CONTRAVENE THE BASIC POLICIES
UNDERLYING THE WORKERS' COMPENSATION STATUTE... 12

Conclusion 14

TABLE OF AUTHORITIES

Cases

Cokely v. Robert Lee, Inc.,
197 S.C. 157, 14 S.E.2d 889 (1941)12, 13

Last v. MSI Const. Co., 305 S.C. 349, 409
S.E.2d 334 (1991)7

Thompson v. SC Steel Erectors,
369 S.C. 606, 632 S.E.2d 874 (SC App. 2006)4

Statutes

S.C. Code § S.C. Code 42-9-301 (Supp. 2010) 3, 7

S.C. Code § S.C. Code 42-9-300 (Supp. 2010) 6, 7

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION ERR AS A MATTER OF LAW WHEN IT AWARDED A LUMP SUM PAYMENT TO THE CLAIMANT'S GUARDIAN AD LITEM AND GUARDIAN AND DEPENDENT, HIS WIFE, MRS. DECIDORA LAZARO?

- II. DID THE COMMISSION ERR IN ITS AWARD OF UP TO \$30,000.00 FOR THE PURCHASE OF THE NEW VEHICLE AND WHERE IS NO EVIDENCE TO SUBSTANTIATE THAT THIS IS AN ABUSE OF DISCRETION?

- III. DID THE COMMISSION ERR IN AWARDING THE LUMP SUM PAYMENT IN THIS CASE AND DOES SUCH LUMP SUM AS ORDERED CONTRAVENE THE BASIC POLICIES UNDERLYING THE WORKERS' COMPENSATION STATUTE?

STATEMENT OF THE CASE

Mr. Antonio Lazaro is a 41 year old naturalized American born on July 4th who was working as an electrician when he was electrocuted by high voltage electricity and when a fellow employee saw what was happening, kicked the ladder out from underneath the Claimant causing him to fall approximately twelve (12) feet to the floor resulting in his heart stopping for a long period of time. The Claimant suffered an anoxic brain injury and has been in a vegetative state ever since the accident. When the Defendants/Appellants refused to enter into a Form 16 settlement agreeing that Mr. Lazaro was totally and permanently disabled, Respondent's Counsel filed a Form 50 requesting a determination that he was totally and permanently disabled due to his physical brain injury and requesting a partial lump sum of benefits in the best interest of Mr. Lazaro and his dependents. The Claimant has three (3) dependents, his wife Mrs. Decidora Lazaro and two sons aged 17 years old and 16 years old at the time of the Hearing. (R. pp. 25-28; pp. 4 and 6).

When the Claimant filed the Form 50 requesting a Hearing on the issue of permanency and requesting a partial lump sum after a determination that he was totally and permanently disabled and entitled to lifetime compensation

benefits, the Appellants filed a responsive Form 51 in which they denied that Mr. Lazaro was permanently and totally disabled. (R. pp. 29-30). Subsequent to a hearing being scheduled to be held on July 28, 2010, the Respondent filed his Pre-Hearing Brief and APA Submissions. (R. pp. 31-55). The Appellants then filed their responsive Pre-Hearing Brief and APA Submissions. (R. pp. 56-64). The Commissioner held a long pre-hearing conference in which he considered all of the evidence that would and would not be considered by him. It was agreed by the parties that the Commissioner would make his decision based on that pre-hearing conference and so the Record was not formally opened. (R. pp. 9-11). Therefore the Record consists of the pleadings, Pre-Hearing Briefs, APA Submissions and the Commissioner's Order. The Respondent has no objection and would concur in the remainder of the Statement of the Case as submitted by the Appellants with the exception that the Notice of Intent to Appeal filed in this matter, contrary to the requirements of the Appellate Court Rules, only had attached the Decision of the Full Commission which affirmed the Hearing Commissioner's Decision in total and did not contain or have attached to that Notice of Appeal a copy of the original Hearing Commissioner's Decision. From that

Decision and the Decision of the Full Commission affirming the Hearing Commissioner's Decision, this appeal followed.

ARGUMENTS

I. THE COMMISSION DID NOT ERR AS A MATTER OF LAW WHEN IT AWARDED A LUMP SUM PAYMENT TO THE CLAIMANT'S GUARDIAN AD LITEM AND GUARDIAN AND DEPENDENT, HIS WIFE, MRS. DECIDORA LAZARO.

The Appellants are seeking to overturn the granting of a partial lump sum payment to Mr. Lazaro and his dependents, based on the lifetime benefits award which had been made by the Commissioner at the hearing, under S.C. Code 42-9-301. They appropriately set out that the Commission, "shall" make a lump sum award where requested, however, they do not exactly set out the Statute the way it is written which shall be interpreted in favor of benefits to the injured worker and/or his dependents. The Statute actually provides in reference to a partial lump sum payment in pertinent part 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, or when it will prevent undue hardship on the employer or his insurance carrier, without prejudicing the interest of the employee or his dependents be redeemed, in whole or in part, by the payment of the employer of a lump sum which shall be fixed by the Commission . . . upon a finding by the Commission that a lump sum payment shall be made, the burden of proof as to the abuse of discretion in such findings shall be upon the employer or carrier in any appeal proceedings." (Emphasis added).

Therefore, the Appellants have the burden of proof before the Commission and before this Court to prove an abuse of discretion. The Respondent would submit that the Appellants have submitted no evidence of an abuse of discretion in any fashion.

In support of their argument, the Appellants cite to the case of and ask this Court to apply its decision in Thompson v. SC Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (SC App. 2006). The Respondent would also ask that the Court apply the specific holding and decision by this Court as to both the law and the facts in reaching that decision in this case. What the Court will find is that what the Commission considered to support the making a partial lump sum award of the benefits due to the Claimant in the best interest of the Claimant or his dependents in that case is very similar to the basis that the lump sum was awarded in this case.

In this case, the Commissioner's Statement of the Case sets forth the evidence (the parties stipulated that the over one and one half (1 ½) hour off the Record discussion with the Commissioner, the APA Submissions and the financial statement and exhibits would constitute the Record) that he considered wherein he meticulously goes

through the arguments of both parties and the entire basis on which the Claimant was requesting a lump sum in this case. He then set out in meticulous findings in accordance with the law a detailed finding of fact setting forth those elements from the statement of the case summarizing the evidence on which he was awarding a partial lump sum which included to pay off the family home, to buy the family a car that was drivable and usable and to pay off existing debt (emphasis added).

In addition, contrary to the Appellants argument, this Court will not find any valid reason set out in the Statement of the Case that the Defendants put forward that would show that making such an award would cause a hardship on the employer and/or carrier. There is simply no evidence of that in the Record and in fact there is no evidence this argument was made to the Hearing Commissioner or to the Full Commission for that matter. There also is no evidence that the payment of a partial lump sum to be put into and to be paid from Claimant's Counsel's Trust Account to pay off existing debt, their mortgage, and to buy a usable car is contrary to the best interests of either the Claimant or his dependents and especially his dependents whose best interests the statute specifically requires the Commission to consider. Therefore, the Hearing

Commissioner's Statement of the Case in this case sets out the evidence that was considered and the findings of fact which is very detailed and definite and set forth those elements for which an Award was made and as to why that Award was made. Again, the Defendants gloss over the fact that the Statute requires that on appeal they must show an abuse of discretion and the Respondents would submit to the Court that they have absolutely not shown any abuse of discretion in this case in making the partial lump sum that was made.

In addition, the Appellants argue that several cases that were decided under that predecessor Statute, S.C. Code §42-9-300 as it existed prior to 1980 should be applied to the current case and still constitute good law. In this regard, the Respondent would first point out simply that that predecessor Statute provided specifically that a lump sum when requested by the Claimant could only be made and the Respondent would reiterate could only be made, in "unusual cases." We must look to the Legislative intent and that Statute was specifically amended to take out that requirement so that a lump sum payment must be made to a Claimant when requested unless the Commission finds it is not in the best interest of the Claimant or his/her dependents. Also, and probably more importantly, the

Legislature when it repealed S.C. Code 42-9-300 and substituted it with S.C. Code 42-9-301 also added the provision that on appeal the burden of proof is on the insurance carrier to prove that the Commission's award of a lump sum constitutes an abuse of discretion, one of the highest and hardest burdens to reach. The Respondent would submit that this also indicates that it was the legislative intent to ensure that when a claimant requests a lump sum of his benefits (Respondent would point out that where an Award is made of benefits by the Commission, the claimant has a property interest in those benefits and those are his benefits as awarded by the Commission subject only to payout as the Commission deems appropriate. Last v. MSI Const. Co., 305 S.C. 349 409 S.E.2d 334 (1991)), that those benefits shall be paid to the injured worker unless the Commission determines that it is not in the injured workers' best interest or in the best interest of his dependents.

Further, as pointed out above, the Commission is required to make a lump sum where it is in the best interest of the Claimant or his dependents. Respondent's Counsel argued to the Commissioner and asked the Commissioner to do what Mr. Lazaro would do for his family were he able to do so. Mr. Lazaro is in a permanent

vegetative state and is being fed by a tube. He is brain dead. Respondent's Counsel would submit that he would want done exactly what he would have done prior to his accident for his family; he would have provided for their support to the extent that he could. The allegation that his widow may squander the money as being some kind of a justification is not only speculation it is outrageous. There is simply no evidence to support that accusation and Counsel would submit that is nothing but speculation. Further, the uncontradicted evidence establishes that out of the three (3) cars that the family has, only one (1) car is actually safe to be driven out of town and only one (1) of which has less than 100,000 miles. The Commissioner after allowing the purchase of one (1) car not to exceed \$30,000.00 noted that children in most families drive, "hand me downs". The provision of one (1) car for the family needs, would allow one (1) car for the boys who are of driving age to use and would allow Mrs. Lazaro to go back and forth to work, to drive to the nursing home to visit her husband which she does daily every day for 1 ½ hours and to then drive to the flea market on Saturday and Sunday which she does every week to make additional money because of the loss of income from her husband and it would allow a car for the boys to quit being dependent upon

friends and teachers and school officials to take them to their soccer games, school and school functions and making at least another car available while their mother is working to provide income for the family. There is absolutely no evidence in the Record that this is contrary to the best interest of this family; that that is not what Mr. Lazaro would want or that there is any hardship created on the insurance carrier or the employer by the payment of a lump sum. The issue is blatantly without merit and the Decision of the Commission should be affirmed.

III. THE COMMISSION DID NOT ERR IN ITS AWARD OF UP TO \$30,000.00 FOR THE PURCHASE OF THE NEW VEHICLE WHERE THERE IS NO EVIDENCE TO SUBSTANTIATE THAT THIS IS AN ABUSE OF DISCRETION.

At the outset, the Appellants skim over the fact that where a claimant or his Guardian requests a lump sum, the Commission is duty bound to determine whether or not that request for a lump sum is contrary to the best interest of the, "claimant or his dependents." The Appellants have put forth no evidence that the purchase of an automobile is either contrary to the best interest of the Claimant's dependents or that the award of a lump sum for that purpose is contrary to the best interest of the Claimant or his dependents. It is a given fact to which the parties agree that the Claimant is in a vegetative state and he is being

fed by a tube and will be there for the remainder of his life. He will never need a car. The Appellants very importantly gloss over the fact that they agreed and allowed the Commissioner to make his decision on whether or not to grant a lump sum in all respects for whatever items he determined to grant a lump sum based on the pre-hearing conference and APA Submissions. For the Appellants now to argue on appeal that the Commissioner's Finding based on that presentation that two (2) of those automobiles were unsafe to drive out of town is contrary to the evidence that the Appellants, and the Respondent would like to reiterate the Appellants, agreed would be considered by the Commissioner to make his decision on that issue. Based on the evidence presented, that decision is not the subject of conjecture and speculation and what is in the Record is that two (2) out of the three (3) vehicles are not usable and are not safe. What is in the Record is a request for and evidence to support the purchase of not only one (1) vehicle but two (2), which the wife could use to drive to work, to visit her husband and to run the family part-time business on the weekends at the flea market to provide the income that has been lost due to her husband's horrifying accident and injury, and one the boys could use instead of friends, teachers and fellow school administrators who are

now having to carry the children around to teacher conferences, soccer tournaments because Mr. Lazaro cannot help and which is available for them to use since both of them are about ready to go to college. The Commissioner chose to allow the family to purchase one (1) automobile which can again be used by Mrs. Lazaro and the other vehicle then becomes as the Commissioner referred to it, "a hand me down" that the boys can use, both of whom are of driving age, to attend school and school functions and also one of whom can use when he goes off to college or work.

Again, the Appellants have utterly failed in their burden of proof of establishing an abuse of discretion. It is very apropos to note that the Appellants steer away from even mentioning what an abuse of discretion standard is under our law as this Court has determined it to be. Respondent's Counsel will not do that job for them as this Court well knows what a high standard burden of proof that is and the Respondent would submit again that the Appellants have utterly failed in meeting that burden of proof. This issue is patently without merit and this appeal should be dismissed.

III. THE COMMISSION DID NOT ERR IN AWARDING THE LUMP SUM PAYMENT IN THIS CASE AND SUCH LUMP SUM AS ORDERED DOES NOT CONTRAVENE THE BASIC POLICIES UNDERLYING THE WORKERS' COMPENSATION STATUTE.

The Appellants in this case argue the fundamental purposes of the Act and that the Act was not intended to make the family whole as is the case in a tort action and in essence argues that the Act was only created to, "partially" compensate the worker which is one of the fundamental purposes with the other being to prevent him and his dependents from becoming public charges. Counsel for the Respondent will assume that the Appellants, having considered the cases that the Appellants cite, well know that all the South Carolina cases that are cited by the Appellants in their Brief either by direct or indirect citation refer and cite to the original cases that date back to the very dawn of the Act itself as setting out the fundamental purposes for the creation of the Act. Respondent's Counsel is well aware that this Court is aware of those fundamental concepts but will reiterate them and will refer to the most precedential case setting out those that being the case of Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941) which brings together the previous statements of the Court beginning in 1937 and

summarizes those statements or precedents of the Court as follows:

"Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted and to avoid any incongruous or harsh results. Phillips v. Dixie Stores, supra; Rudd v. Fairforest Finishing Company, supra; Layton v. Hammond-Brown-Jennings Company, supra; Bannister v. Shepherd, supra; Ham v. Mullins Lumber Co., supra; March Banks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825; Patterson v. Courtenay Manufacturing Co., _____ S.C. _____, 14 S.E.2d 16, decided April 2, 1941." (Emphasis Added). 14 S.E.2d at 893-894.

Ironically, this most cited case, that being Cokely v. Robert Lee, Inc., supra, involved a case of dependency where the insurance carrier was trying to deny or limit the amount of benefits payable to the dependents of the injured worker, just like they are in this case. The Respondent would agree with the Appellants to the extent that Respondent's Counsel wishes that in this case he could sue whoever left that power on, resulting in this claimant being in a vegetative state and his family left without the

benefit of his association, aid and comfort and support for the remainder of their lives. The granting of a lump sum in this case is not contrary to the purposes for which the Act was created which were to partially prevent, to the extent that the Act allows, the Claimant and his dependents from becoming charges upon society. How can it be argued that paying off their family home, providing transportation and paying off their debts will not help to prevent them from becoming a charge on society. The Award made by the Commission is in accordance with the evidence; it is not contrary to the best interest of the dependents of the Claimant and the Appellants have utterly failed in their burden upon appeal to show that there was an abuse of discretion in any manner in the lump sum award that was made. The issue is without merit.

CONCLUSION

For all the foregoing reasons, the Decision of the Commission should be affirmed. In addition, because of the total lack of evidentiary support for any argument made and the total lack of any legal precedent to support any argument made, this Court should review the Record and the arguments made both before the Full Commission and before this Court and find that the Appellants have violated the

Frivolous Proceedings Act and award the Respondent attorneys' fees and costs in defending this appeal.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of
Respondent complies with Rule 211(b), SCACR.



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