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 REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

OTHER AUTHORITIES

I. The Commission abused its discretion in awarding the lump sum payment in this case.

Nothing in Claimant's Brief negates the fact that the Commission abused its discretion in awarding the lump sum payment in this case. Contrary to Claimant's assertion otherwise, Appellants quite clearly set forth the standard on appeal for showing an abuse of discretion. (App. Br. p. 2). Appellants repeat that standard here for Claimant's benefit: "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). The Commission's decision here meets both prongs of the abuse of discretion standard, as demonstrated in Appellant's Brief and below.

First, as noted in Appellants' Brief, the Commission's Decision does not indicate how the lump sum award in this case is in the best interest of Claimant or his dependents. Despite Claimant's assertions, the Commission does not "set out in meticulous findings in accordance with the law a detailed finding of fact ..." (Resp. Br. p. 5), on this issue. Instead, the Full Commission simply recites various arguments and comes to the conclusion that making the lump sump award would be in "Claimant and his dependents" best interest, (Commission Decision, R. p. 14), without any discussion of how it arrived at its conclusion. Given the purpose of an award of benefits under the Act, paying down exorbitant credit card debt (nearly $13,000 in credit debt to Penny's) and allowing for the purchase of what amounts to a luxury automobile clearly is not in the best interest of either Claimant or his dependents.[1] Instead, the workers' compensation scheme "serves a social function by providing the injured employee with sufficient income and medical care to keep him from destitution ... [it] is not designed to compensate the employee for

[1] Even the Single Commissioner agreed that "Mrs. Lazaro could very well run out and **incur a lot of additional debt** or divorce the Claimant ..." (Single Commissioner Decision, R. p. 17) (emphasis added).

his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." Wigfall v. Tideland Util., Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 108 (2003).

Prior case law addressing whether a lump sum payment is in a claimant's (or his dependents') best interest is still good law, despite Claimant's attempts to dismiss those cases entirely. The prior lump sum payment provision, Section 42-9-300, had two prongs – the "unusual cases" prong and the "in the best interest of the claimant or his dependents" prong. Section 42-9-301 dropped the unusual cases or circumstances prong, which is no longer part of the analysis. However, Appellants have not argued that Claimant has to demonstrate "unusual circumstances." Instead, Appellants assert that case law interpreting whether a lump sum payment is in a claimant's (or his dependents') best interest is still good law and should be applied in this case. *See, e.g.*, Woods v. Sumter Stresscrete Inc., 266 S.C. 245, 250, 222 S.E.2d 760, 762 (1976) (explaining that benefits under the Act are part of an income protection scheme, which is best served through periodic payments, and that "the relief afforded by a lump sum payment" may be "temporary only, bringing about greater economic trouble in the future"); Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 280, 42 S.E.2d 390, 393 (1947) (explaining the purpose of periodic wage payments "is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society"). While Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941) is still good law, there is nothing that makes it "most precedential" or more precedential, (Resp. Br. p. 12), than later Supreme Court cases explaining the policies and purposes underlying the Workers' Compensation Act ("Act"), particularly as that Act has been amended and revised throughout the decades. Even allowing that Cokely is long-standing precedent, Ashley v. Ware Shoals was decided a mere six year after

Cokely. Furthermore, despite an attempt to analogize the instant case to Cokely, the two cases bear no similarity. The issue in Cokely was whether the claimant's parents were wholly or partly dependent on the deceased employee. In essence, it was a dependency hearing, not a request for a lump sum payment of lifetime benefits.

Appellants do not "gloss over" the fact that both parties agreed that the Single Commissioner could make a decision in this case based on the APA Submissions and the Pre-Hearing conference. What Appellants do submit is that there is nothing the APA Submissions or any evidence proffered at the Pre-Hearing conference that demonstrates anything more than that two of the three family vehicles have over 100,000 miles. (*See* R. pp. 38-64, 71-78). That fact alone, however, does not prove they are unsafe to drive either locally or out of town. Many people rely on vehicles with over 100,000 miles. Furthermore, even if, for the sake of argument, a need for a reliable vehicle had been established, there is absolutely no evidence that the family could not have purchased a reliable used vehicle or, if a new vehicle was absolutely necessary, why it would need to cost up to $30,000. Such a purchase is an extravagance and in that respect runs counter to the policies underlying workers' compensation benefits.

Furthermore, regardless of whether or not this Court would find on the facts that the award causes a hardship on the employer or carrier, the obligation to make that factual finding rests with the Commission, not the appellate court. Under Section 42-9-301, "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) (emphasis added).[2] The Commission utterly failed to discuss whether its award would cause a

[2] Claimant alleges that the basis of the lump sum award in Thompson "is very similar to the basis that the lump sum was awarded in this case." (Resp. Br. p. 4). The cases have virtually nothing in common. In Thompson, the lump sum payment was for a house that the claimant and his wife had been planning and saving in order to purchase, that would be outfitted to accommodate his paraplegia. Here, the lump sum payment goes to pay off, among other debts,

hardship to the employer or carrier. Such failure constitutes an error of law, *see* Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977); Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970), and, therefore, this case must be remanded to the Commission for a finding on this issue.[3]

II. Claimant's award does not constitute a property interest.

Citing Last v. MSI Constr. Co., 305 S.C. 349, 409 S.E.2d 334 (1991), Claimant makes the sweeping statement that a claimant has a property interest in a compensation award made by the Commission "subject only to payout as the Commission deems appropriate." (Resp. Br. p. 7). Last, however, does not support so broad a statement. First, Last concerned entitlement to on-going temporary total benefits, paid while the claimant was undergoing medical treatment, not a lump sum payment of lifetime benefits under Section 42-9-301. Second, in Last, the issue was whether an employer simply could stop paying temporary total benefits without filing a stop payment application and obtaining a ruling from the Commission that it was entitled to do so because of the claimant's alleged refusal of medical treatment. In Last, the claimant was not complying with medical treatment because he was incarcerated. The employer argued that S.C. Code Ann. § 42-1-470 (which provides that, "[e]xcept as otherwise specifically provided in this article, this Title shall not apply to State, county or municipal prisoners and convicts") precluded the claimant from receiving benefits for his pre-incarceration injury. It was in the context of this analysis that the Court stated "entitlement to workers' compensation benefits constitutes a property interest," and declined "to construe 42-1-470 to unconstitutionally deprive an inmate of

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a very high credit card debt and to purchase what amounts to a high end vehicle, bringing the total of family-owned vehicles to four.

[3] The Commission does note that it took into consideration "the arguments of the Defendants and especially the insurance company that the award ... is not in the best interest of the insurance company at this point in time to make a larger award." (Commission Decision, R. pp. 3-4). However, saying that the Commission has considered an argument that the payment is not in a party's best interest is a far cry from a finding that the award will not create a hardship to the employer or the carrier.

a property interest **without due process of law**." 305 S.C. at 352, 409 S.E.2d at 336 (emphasis added). In essence, the claimant was entitled to notice and a hearing before his temporary total disability benefits could be terminated by the employer.

Here, Claimant asserts that any time a claimant demands a lump sum payment, the Commission is required to order it unless it finds that the payment is not in a claimant's (or his dependents') best interest. (Resp. Br. pp. 7-8). The Act simply does not mandate a lump sum payment upon request, even if a claimant demonstrates that such would be in his or his dependents' best interest, which Claimant has failed to prove here.[4] The statute provides, in pertinent part, that "[w]henever any weekly payment has been continued for not less than six weeks, the liability therefore **may**, when the employee so requests and the commission deems it not to be contrary to the best interest of the employee or his dependents ..." and the Commission determines that it would not work a hardship to the employer or carrier, be ordered paid in a lump sum. S.C. Code Ann. § 42-9-301 (emphasis added). Use of the term "may" means this section is permissive, not mandatory. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 426, 593 S.E.2d 462, 468 (2004) (the Legislature's use of the term "may" in a statute is permissive, not mandatory).

In Last, the Court cited Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987) for the proposition that entitlement to workers' compensation benefits constitutes a property interest. However, all that Orszula decided was that a workers' compensation award that had been received by one spouse (a check in the amount of $16,000) should be classified as marital property and thereby subject to apportionment by the Family Court. 292 S.C. at 265, 356 S.E.2d

[4] Claimant's counsel's assertions that he merely asked for what Claimant "would do for his family were he able to do so," and "would want done," (Resp. Br. pp. 8-9) are no more than unsupported speculation, which cannot serve as the basis for an award. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (workers' compensation awards "must not be based on surmise, conjecture or speculation").

at 114. Neither Last nor Orszula stand for the proposition that Claimant puts forth here – that an award of lifetime benefits constitutes a property interest such that he or his dependents are entitled to draw against that award in any manner they so desire, essentially turning the workers' compensation insurer into the family's private banker. Appellants do not and have not argued that Claimant and his dependents are not entitled to the payment of weekly compensation benefits as ordered by the Commission; Appellants do, however, dispute that a claimant or his dependents can come to the Commission at any time to extract money to pay down extravagant credit card debt or to purchase high-end automobiles and, in the process, draw large sums out of a lifetime award that is meant to serve as substitute weekly wages, designed to keep the family from destitution.

In fact, the South Carolina Supreme Court has practically refuted the position that all compensation awards constitute a property interest for all purposes. If a compensation award constituted a property interest, a claimant's heirs would have an inherent claim to the award in the event of a claimant's passing. However, "since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments." Stone v. Roadway Express, 367 S.C. 575, 585, 627 S.E.2d 695, 700 (2006), *citing Larson's Workers' Compensation Law* (2000) §§ 89.01; 89.03. Our Workers' Compensation Act contains a provision for payment, under certain circumstances, of the unpaid balance of compensation when an employee dies. S.C. Code Ann. § 42-9-280. Under that section, the legislature has determined "as is its prerogative," that "dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member ... or lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof." Stone, 367 S.C. at 585, 627 S.E.2d

at 700. Conversely, "the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not." Id., 627 S.E.2d at 700 (noting the "legislative distinction between 'physical loss' and 'wage loss'").

It is key to note that the same reasoning applies to awards made under S.C. Code Ann. § 42-9-10(C) for physical brain injury. Floyd v. C.B. Askins & Co., 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009). In Floyd, the claimant suffered a serious physical brain injury and was awarded lifetime benefits with an estimated remaining life expectancy of 987.48 weeks. After receiving only 254 weeks of compensation, the claimant died of causes unrelated to the compensable accident (an aneurism in his abdomen). Replying on section 42-9-280, the claimant's wife argued she was entitled to the balance of 987.48 weeks compensation, which the Single Commissioner awarded. The Full Commission partially affirmed but limited her recovery to the balance of 500 weeks. On appeal, this Court reversed and held that "Section 42-9-280 does not include awards made under paragraph (C) among those that survive a claimant's death from an unrelated cause." 382 S.C. at 89-90, 675 S.E.2d at 453. Consequently, this Court held that 'it is also logical benefits would terminate upon such a claimant's death from an unrelated cause." 382 S.C. at 90, 675 S.E.2d at 453.[5] If, in fact, the claimant and his dependents had a property interest in the lifetime award, at a minimum, it could not be terminated or reduced upon his death from an unrelated cause. That simply is not the case. The rights and duties under the workers' compensation scheme are set by statute and cannot be expanded even for equitable reasons. *See, e.g.*, Wigfall, 354 S.C. at 116-17, 580 S.E.2d at 108-09 (courts "are not at liberty to extend by construction the meaning implicit in the language found in the Workmen's Compensation Act in

[5] In Floyd, the insurer did not appeal the Commission's award of the remainder of the 500 weeks of compensation, so the issue of whether that award was appropriate was not before this Court. Id., 675 S.E.2d at 453.

order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt").

III. This Court should deny Claimant's request for attorneys' fees and costs.

For a number of reasons, this Court should reject Claimant's request for attorneys' fees under the Frivolous Proceedings Act ("FPA"). First, Claimant did not raise this issue to the Commission and, therefore, it is not preserved for appeal. *See, e.g.*, Cullen v. McNeal, 390 S.C. 470, 492, 702 S.E.2d 378, 390 (Ct. App. 2010) (issues not raised to a lower tribunal are not preserved for appellate review); Stone, 367 S.C. at 582, 627 S.E.2d at 298 (holding that "[o]nly issues raised [to] and ruled upon by the commission are cognizable on appeal").

Second, even if Claimant prevails in this appeal, that fact alone does not entitled him to attorneys fees. The general rule in South Carolina is that a prevailing party is not entitled to attorneys fees unless authorized by statute or provided for in a contract. Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978); Global Protection Corp. v. Halbsersberg, 332 S.C. 149, 160, 503 S.E.2d 483, 489 (Ct. App. 1998) (same and finding in that case, governed by the Uniform Trade Practices Act, that the UTPA provided for awarding attorneys fees to the prevailing party).

Third, the rights and duties between Claimant and Appellants are governed by the South Carolina Workers' Compensation Act, not the FPA. *See* Wigfall, 354 S.C. at 110, 580 S.E.2d at 105 (holding that "[w]orkers' compensation statutes provide an exclusive compensatory system in derogation of common law rights" and, as such, South Carolina courts are bound to strictly construe the provisions of the Act); Cook v. Mack's Transf. & Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986) (stating that "[t]he compensation afforded by the Act is statutory in character, and the right of any claimant thereto is dependent upon the terms and conditions of the

statue [*citations omitted*] These include the procedures for adjudicating a compensation claim as well as the terms and conditions of substantive entitlement").[6] The Act does not award attorneys fees to a prevailing party. Instead, the Act contains only a few provisions for awarding attorneys' fees, none of which is applicable here. *See* S.C. Code Ann. § 42-1-560 (providing for attorneys' fees in situations involving third party liability); S.C. Code Ann. § 42-3-175 (providing that, where a claimant brings an action to enforce a prior order of the Commission to provide medical care or pay benefits, and the Commission determines the employer failed to provide medical care or pay benefits "without good cause," the employer "must pay the claimant's attorneys' fees and costs of enforcing the order," as well as other sanctions the Commission may impose); S.C. Code Ann. § 42-7-310 (providing that the Commission may be entitled to attorneys' fees if it has to bring suit to collect equitable assessments from carriers to fund the Second Injury Fund). Claimant did not and, in fact, could not allege he is entitled to attorneys' fees under any of these sections.

As for the allegation that Appellants' arguments are frivolous, Section 42-17-80 of the Act provides for penalties in such instances, but does not provide for attorneys' fees. That section provides that, if the Commission determines that a proceeding have been "brought, prosecuted or defended without reasonable grounds, it may assess the whole cost of the proceedings upon the party who has brought or defended them." S.C. Code Ann. § 42-17-80; *see also* S.C. Code Reg. § 67-614. As noted above, Claimant did not raise this issue to the Commission and it is not preserved for appeal. In any event, even if he had, Section 42-17-80 provides only for the payment of the costs of the hearing but not attorneys' fees.

[6] The Commission is authorized to decide all questions arising under the Act; "except as otherwise provided in this Title." S.C. Code Ann. § 42-3-180.

Finally, although Appellants assert that the provisions of the Workers' Compensation Act govern Claimant's claim and that the FPA is inapplicable, they address Claimant's specific request for attorneys' fees under the FPA out of an abundance of caution. Because this cause of action arose in 2007, Claimant presumably is alleging that the revised provisions of the FPA apply to this case. S.C. Code Ann. § 15-36-10 (2011). Even if it were applicable, which it is not, Claimant's request should be denied under the FPA. First, Claimant has failed to specify what defenses or arguments it claims are frivolous and why. Second, Section 15-36-10(C)(1) provides that "[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered ... upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous." S.C. Code Ann. § 15-36-10(C)(1). Claimant has never filed a motion, either with the Commission or this Court, seeking sanctions. A party is entitled to a 30-day notice, which Claimant has failed to provide in this case, and an opportunity to respond before sanctions are imposed. S.C. Code Ann. § 15-36-10 (D).

Unless the tribunal finds "by a **preponderance of the evidence** that an attorney, party or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant **shall not be sanctioned**." S.C. Code Ann. § 15-36-10(C)(2) (emphasis added). Thus, Claimant would need to show, by a preponderance of the evidence that, under the same circumstances, a reasonable attorney would believe the defenses raised by Appellants were "clearly not warranted" under either the facts or existing law, and that there is no good faith argument for "the extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). "Obviously the mere loss of a case does not subject a party ... to a suit by the winner for Sanctions; if it did, the Court System could not function." Southeastern Site Prep, LLC v. Atlantic Coast Bldrs. & Contractors, LLC, 394 S.C. 97, 103, 713 S.E.2d 650, 653 (Ct. App.

2011). Claimant has presented no evidence or pointed to any defense that supports his claim for attorneys' fees even under the FPA and his request for such should be denied.

CONCLUSION

For all the reasons stated in Appellants' Brief and herein, this Court should rule that the Commission abused its discretion in ordering the lump sum payment in this case and reverse its Decision. In the alternative and at a minimum, in the event this Court finds that a partial lump sum payment is warranted, this Court should reduce that award to payment of the balance of Claimant's mortgage alone. Finally, this Court should deny Claimant's request for attorneys' fees.

Respectfully Submitted,

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December 21, 2012

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PROOF OF COMPLIANCE

The undersigned certifies that the Final Reply Brief of Appellants Burriss Electrical and CompTrust AGC of the Carolinas comply with Rule 211(b), SCACR. The undersigned further certifies that the Final Reply 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.

December 21, 2012

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