THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2016-000665

Antonio Lazaro, Employee, ... Appellant,

v.

Burriss Electrical, Employer, and
South Carolina Guaranty Association,
Carrier, ...Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COMMISSION ERR AS MATTER OF LAW BY FAILING TO REFER TO AND MAKE A DECISION ON THE SINGULAR ISSUE BEFORE THE COMMISSION IN REFERENCE TO A PARTIAL LUMP SUM WHICH IS A PARTIAL LUMP SUM REQUESTED BY A CLAIMANT MUST BE GRANTED BY THE COMMISSION UNLESS THE COMMISSION FINDS THAT IT IS NOT IN THE BEST INTEREST OF THE EMPLOYEE OR HIS DEPENDENTS?

II. DID THE COMMISSION ERR AS A MATTER OF LAW BY FINDING THAT A CLAIMANT HAS A VESTED RIGHT TO ONLY 500 WEEKS OF BENEFITS AND BY APPLYING CASE LAW DECIDED UNDER DEATH BENEFIT STATUTES OF THE ACT WHEREIN THE CLAIMANT IS ALIVE NOW AND AT THE TIME OF THE LUMP SUM REQUEST?

III. DID THE COMMISSION ERR AS A MATTER OF LAW BY CONSIDERING EVIDENCE OF THE CLAIMANT'S LIFE EXPECTANCY POST-ACCIDENT INSTEAD OF CONSIDERING THE CLAIMANT'S LIFE EXPECTANCY PRIOR TO AND AT THE TIME OF THE ACCIDENT AND ANY EVIDENCE THEREON?

IV. DID THE COMMISSION ERR AS A MATTER OF LAW BY FAILING TO APPLY THE CASES DECIDED UNDER AND THE STATUTORY AUTHORITY FOR GRANTING AN INCREASE IN THE COMPENSATION RATE UNDER SC CODE §42-1-40 AND §42-9-10 AND THEREBY FAILING TO INCREASE THE COMPENSATION RATE?

V. DID THE COMMISSION ERR AS A MATTER OF LAW BY COMPARING THE CLAIMANT FOR WAGE EARNING CAPACITY PURPOSES UNDER SC CODE §42-1-40 TO ONLY NON-ENGLISH SPEAKING HISPANIC EMPLOYEES?

STATEMENT OF THE CASE

The South Carolina Workers' Compensation Commission in 2010 granted the injured worker (who is in a vegetative state), and his dependents a partial lump sum and specifically provided in that Award that the Claimant could request additional partial lump sums in the best interest of the Claimant and/or his dependents pursuant to Statute. That partial lump sum Award was appealed and the SC Court of Appeals affirmed that Decision on February 6, 2014 and thereafter based on a Petition for Rehearing, denied the Petition by Order of the Court dated April 10, 2014. (R., pp. 19-23; p. 24). The Remittitur was issued on May 23, 2014. (R., p. 25).

Pursuant to that partial lump sum Award, the Claimant and his dependents through his Guardian ad Litem and General Guardian and wife, Ms. Decidora Lazaro, filed a Form 50 requesting an additional partial lump sum on February 19, 2014. (R., pp. 53-59). A responsive Form 51 was filed on behalf of the Employer and the SC Guaranty Association due to the insolvency of CompTrust AGC of the Carolinas, and the matter was subsequently set for hearing. (R., pp. 60-62; R., pp. 63-64). The Claimant filed his Pre-Hearing Brief and Administrative Procedures Act submissions and the Defendants filed a responsive Pre-Hearing Brief and Administrative Procedures Act admissions. (R., pp. 65-87; pp. 88-114). A hearing was held on the partial

lump sum request which included a request for penalties and fines for untimely payment of the original Award of a partial lump sum in the amount of $152,568.75 within fourteen (14) days after the final Order of the SC Court of Appeals on no later than April 10, 2014. A hearing was held on the Request for Partial Lump Sum and the Commissioner issued his notes for a decision on July 14, 2014 denying the Request for Partial Lump Sum and denying penalties and interest on the original partial lump sum that had been Awarded by the Commission. (R., pp. 365-367).

Subsequently Requests for Amendment and/or Reconsideration were filed on April 13th and 15th, 2015 and the final Decision and Order was issued by the Hearing Commissioner on May 28, 2015 on the Form 50 and 51. A second Order was issued on that date but is not the subject of this appeal. (R., pp. 368-371; R., pp. 26-37).

A timely Request for Review was filed on June 11, 2015 setting forth various Grounds for review by the Full Commission. (R., pp. 115-122). A Briefing Schedule was set and the Claimant filed his Brief to the Full Commission and the Defendants subsequently filed their responsive Brief to the Full Commission. (R., pp. 123-144; pp. 145-161). A Full Commission Hearing was held on September 21, 2015; a Proposed Order (corrected) was forwarded to Counsel for the Defendants on

October 21, 2015, and the Full Commission Order was filed on December 23, 2015. (R., pp. 38-51). A timely Motion for Rehearing was filed on January 19, 2016 and a Judicial Conference Decision was issued denying the Motion for Rehearing on February 22, 2016. (R., pp. 162-170; P. 52). A timely Notice of Intent to Appeal that Decision of the Commission was filed and this appeal follows. (R., pp. 171-183).

STATEMENT OF FACTS

Mr. Lazaro (hereinafter "Claimant"), a naturalized American citizen, citizenship finalized 1991, (fact important to position/evidence of the Defendants at hearing as to non-English speaking Hispanic) has been in a vegetative state since his accident on July 6, 2007, in an air-conditioned hospital bed being fed through a tube, and therefore any request for partial lump sums, including the initial one and the one that is the subject of this appeal, were requested primarily for the benefit of the Claimant's dependents.

In the first request in 2010 for a hearing and award, the Claimant requested an award of total and permanent disability with lifetime benefits (due to his total disability being denied going into that first hearing); and for a partial lump sum pursuant to Statute SC Code §42-9-301 (the Commission shall award a partial lump sum as requested unless it finds that it is not in the, "best interest of the employee **or his dependents**").

The Hearing Commissioner filed an Award on October 14, 2010 awarding a partial lump sum to pay off the Claimant's home, pay off family debt, and allow for the purchase of an automobile. More importantly to this appeal, he specifically noted based on the facts and situation of the family at that time that the Claimant could request further lump sums in the future; specifically noting as a basis for such additional requests the necessities and costs of attending college and expenses related to college and to guarantee an income stream to the family under the Claimant's Award entitling him to compensation benefits, at a minimum, for the life expectancy of the Claimant which vested at the time of and under that Award. That Award also specifically provided that the issue of the applicable average weekly wage and compensation rate was reserved for later decision. (R., pp. 1-18).

Pursuant to that Award and the statute, on February 19, 2015, the Claimant filed for a second partial lump sum and requested an adjustment of the average weekly wage and compensation rate based on our Supreme Court/Court of Appeals decisions under SC Code §42-1-40. The Claimant through his Guardian and spouse requested a partial lump sum and specifically requested that the partial lump sum be put into an annuity tied to both the Claimant and the Claimant's wife's life

so that the Claimant and his family would have a guaranteed income stream for their lives.

As to the average weekly wage and compensation rate, the Claimant requested an increase and presented evidence to support and took the position that based on his W-2 income for the year preceding his injury; his work/pay history of raises up to and including the date of his accident; and considering the facts that the average weekly wage in the State had escalated an average of 3% per year; and considering the Supreme Court decisions holding that wage loss calculation/ compensation must be thought of in terms of the Claimant's future loss of earning capacity; and considering what he would be making at the present time assuming a normal progression in wages, that the Commission should increase the compensation rate to fairly compensate him for his lost earning capacity from the injury. (R., pp. 65-87). The Defendants responded by submitted wage information from employees employed before and after his date of hire through the present time, but took the position that a comparison of current wages for all electricians should not be made. Instead the Commission should <u>only</u> compare his wages to fellow "non-English speaking" <u>Hispanic</u> workers with the company. In taking this position they made the general statement that their "Hispanic" workers were not fluent in English and therefore do not make as much money as other electricians. They excluded at least one

Hispanic worker from consideration because he was in management because he was, "fluent in English". (R., pp. 242-243; pp. 286-287). They also orally made the unsupported statement at hearing that Mr. Lazaro, a naturalized American citizen who has been in the Country since at least five (5) years before 1991 was not fluent in English and deserved to be lumped in with all of the other, "non-English speaking" Hispanics. (R., pp. 286-287). Note: there is absolutely no evidence in the Record that Mr. Lazaro could not speak English fluently or otherwise.

In response to the request for a partial lump sum to be put into an annuity to guaranty an income stream to the Claimant and his dependents as being in the best interest of the employee **or his dependents**, the Defendants took the position that since the widow was now working three (3) jobs to make up for the loss of income and her son had to drop out of college and was working to raise income to go back to college; and taking into consideration the Claimant's Social Security payments, that the family had a greater income on a monthly basis now than at the last hearing. Therefore, it was not in the best interest of the dependents to grant this partial lump sum. (R., pp. 249-254). They also asserted that since the other son, Antonio Lazaro, Jr. had to drop out of college due to loans and was in the military serving our Country, that the partial lump sum should not be granted to help pay off the student loan of Antonio because he

would have borrowed the money anyway. (R., pp. 293-295). They also took the positions that although the requested annuity would be tied to the life of both his dependent wife and to the Claimant's life and would thus guarantee an income stream to his dependents as long as either one of them was alive; and even though the annuity would grant a residual payment to the dependents, because the income stream would be slightly less than the current compensation rate; and further because should Mr. Lazaro die tomorrow all weekly payments to his dependents would stop; that the partial lump sum should not be granted. Their other basis was a legal one based on a 1947 case decided under previous SC Code §42-9-300 and not SC Code §42-9-301 (which completely flipped the burden of proof and the basis upon which a lump sum is granted) which set forth the rationale and considerations for denying a lump sum in that case under that statute.

The Commissioner, over request to modify, signed an Order which, as drafted, misstated the position of the Claimant as to his request for an increase in the compensation rate for exceptional reasons. (R., pp. 365-367). He also stated that the Claimant was making an argument based on pay raises after the accident instead of being based on his wage record with the employer prior to the injury. He also based his decision on a comparison of Mr. Lazaro as a, "non-English speaking Hispanic"

to other non-English speaking Hispanic electricians instead of the entire body of electricians working for the company. He denied the partial lump sum without any Finding of Fact or Conclusion of Law referring to the statute providing that a partial lump sum must be made unless there is a finding that it is not in the best interest of the Claimant or his dependents. (R., pp. 26-37). The only Finding for the denial in the Order was that the family had more money to spend on a monthly now; that the family had no debt, except for a car payment for the son; and that as to the student loan, he found they would not have paid that off even if it hadn't been for the accident. Without referring to the standard of why it was not in the best interest of the Claimant or his dependents, he also considered the fact that one son had dropped out of college to work to earn money to go back to school and was therefore no longer fully dependent on the family for support. He also took into consideration the Claimant's limited life span <u>after</u> the accident because of injuries from the accident thus allowing the Defendants to take advantage of the accident in reference to the lifespan. (R., pp. 365-367; pp. 26-37).

In the Order he also denied penalties, fines and interest for untimely payment of the first Award because it was paid ten (10) days after the Remittitur based on the representations by the Defendants as to what the case law held. In his Conclusions

of Law, he also specifically found that a claimant has only a, "vested interest in 500 weeks of workers' compensation benefits" basing that conclusion on two (2) statutes based on the death of a claimant. From that Decision, this Appeal follows.

ARGUMENTS

I. THE COMMISSION ERRED AS MATTER OF LAW BY FAILING TO REFER TO AND MAKE A DECISION ON THE SINGULAR ISSUE BEFORE THE COMMISSION IN REFERENCE TO A PARTIAL LUMP SUM WHICH IS A PARTIAL LUMP SUM REQUESTED BY A CLAIMANT MUST BE GRANTED BY THE COMMISSION UNLESS THE COMMISSION FINDS THAT IT IS NOT IN THE BEST INTEREST OF THE EMPLOYEE OR HIS DEPENDENTS.

SC Code §42-9-301 specifically provides that where an employee or his dependents makes a request for a lump sum that the Commission shall make the lump sum award, "when the employee so requests and the Commission deems it not to be contrary to the best interest of the employee **or his dependents ...**".

The Commission is required by law to make detailed Findings of Fact and Conclusions of Law that are sufficiently detailed and definite enough on every "essential issue" before the Commission for decision so that an appellate court may determine that the decision is based on the facts and that the law has been properly applied. Drake v. Raybestos Manhattan, Inc., 241 SC 116, 127 SE2d 288, (1962). Smith v. NCCI, Inc., 369 SC 236, 631 SE2d 268, (2006). In this case, the Hearing Commissioner, as affirmed in toto by the Commission, made absolutely no Findings of Fact as to the statutory requirement that a lump sum

when requested must be made unless the Commission finds that the payment of a lump sum is not in the best interest of the "employee or his dependents". Instead the denial was based on the Finding of Fact that, "the testimony . . . revealed the family has more money to spend now on a monthly basis . . ." and, "has no debt with the exception of a car payment . . . and Antonio, Jr.'s student loan . . .".

In this case, the Claimant had a vested entitlement to lifetime compensation benefits with a residual value as to the remaining compensation due exceeding $350,000.00. At the time of the hearing, the Claimant through his GAL in the best interest of his dependents was requesting that he be granted a partial lump sum of approximately $300,000.00 to $325,000.00 to be paid into an annuity or annuities that would guaranty an income stream to his dependents no matter when he passed away. The Supreme Court has tied or held that the meaning and value of vested lifetime benefits is based on the life expectancy of the Claimant under the SC Mortality Table which establishes a finite and definite framework in which to make such partial lump sum awards. There is simply no discussion nor finding as to how such a partial lump sum award as requested is not in the best interest of an employee **or his dependents**. The Commission must make Findings of Fact under the law on each essential issue

before it for decision. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970).

Further, the Defendants and the Commission's reliance on the case of Ashley v. Ware Shoals Mfg. Co., 216 S.C. 273, 42 S.E.2d 390 (1947), is not only misplaced, it is wrong. That case was decided under the previous lump sum statute and the requirements the Claimant had to meet to be entitled to a lump sum including he had to prove his was an "unusual" case, SC Code §42-9-300 whereas under SC Code §42-9-301, our current lump sum statute, the specific requirements have been totally flipped where now the Commission must make the Award to a Claimant upon request unless it finds that it is not in the best interest of the Claimant or his dependents to make such Award. There is simply no reference in the Commissioner's Award to this standard or as to how it is not in the best interest of the dependents to have a guaranteed income stream based on his vested right to lifetime benefits which will assure those benefits and that income stream to them for as long as either he or his dependent wife lives. Further, there is no reference or even citation of SC Code §42-9-301 in the Conclusions of Law. The decision of the Hearing Commissioner as affirmed by the Commission failed completely to either cite to or to address the legal standard and/or the best interest of the dependents and therefore the

decision must be reversed as a matter of law. Hill v. Jones, supra.

II. THE COMMISSION ERRED AS A MATTER OF LAW BY FINDING THAT A CLAIMANT HAS A VESTED RIGHT TO ONLY 500 WEEKS OF BENEFITS AND BY APPLYING CASE LAW DECIDED UNDER DEATH BENEFIT STATUTES OF THE ACT WHEREIN THE CLAIMANT IS ALIVE NOW AND AT THE TIME OF THE LUMP SUM REQUEST.

In reference to the Commissioner's Findings of Fact (#3) and Conclusions of Law (#2) that there is a 500-week cap on compensation, the Supreme Court has specifically held in the case of Glover by Cauthen v. Suitt Construction Company, 318 SC 465, 458 SE2d 535, (1995) that:

> "**SC Code Ann. §42-9-10 (1985) eliminates the 500-week cap on compensation for total, permanent disability due to physical brain damage, or when the injury renders the claimant paraplegic or quadriplegic.**" (Emphasis added).

And that,

> "The Mortality tables provide an adequate basis upon which to determine the present day value." (Emphasis added).

Thus, the commuting factor is not 500 weeks but is in fact the Claimant's lifetime as determined by the SC Mortality Table, SC Code §42-1-150. Therefore, at the time the Claimant was awarded a lifetime compensation award, the award that vested in him was based on the Mortality Table and the Claimant's life expectancy as of the date of that award. The Claimant cannot request a partial lump sum award greater than the residual value of his

life expectancy, nor can the value be decreased below his life expectancy; particularly where that decision was not appealed and has become the law of the case. The decision that a Claimant has a vested right to only 500 weeks served as the legal basis to deny the Appellant's request for a lump sum.

In addition to this error, the Commission also referred specifically to a death benefits statute §42-9-290, and relied on a case decided under that statute where the Claimant had died to support his finding. The Commission cannot assume facts and must base its decision on the facts before it. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965). In this case, unlike the statute, SC Code §42-9-290 and the case decided under it cited by the Commission wherein the Claimant had died and the claim was decided under that death statute's limitation of 500 weeks due to death of the Claimant, the Commissioner made a decision not based on evidence (Mr. Lazaro is alive) and on the unwarranted assumption that Mr. Lazaro would die before the 500 weeks. Therefore, the decision is based on speculation. The Commission therefore erred by relying on a 500-week cap as a basis for the decision to deny a partial lump sum award specifically where the Supreme Court has said there is no 500-week cap under a lifetime benefits award and has said and ruled definitively that the life expectancy table establishes the vested lifetime value for purposes of deciding any issue under

the Workers' Compensation Act tied to the lifespan of the Claimant.

III. THE COMMISSION ERRED AS A MATTER OF LAW BY CONSIDERING EVIDENCE OF THE CLAIMANT'S LIFE EXPECTANCY POST-ACCIDENT INSTEAD OF CONSIDERING THE CLAIMANT'S LIFE EXPECTANCY PRIOR TO AND AT THE TIME OF THE ACCIDENT AND ANY EVIDENCE THEREON.

As noted in previous arguments, the Supreme Court has tied partial lump sum awards and the value of lifetime compensation benefits to the life expectancy of the Claimant under the South Carolina Mortality Table, SC Code §19-1-150. The very purpose of that mortality table is to establish the Claimant's life expectancy at the time of and just before the triggering event, in this case, the accident requiring the need of that table. The very reason for the existence of the mortality table is to tie both parties to a set period of time to argue that the Claimant as a matter of law will live. The Claimant cannot argue he will live to be 100 and the Defendants cannot argue he will only live a week. Also, under the mortality tables, the Supreme Court has made it very clear that the Defendants cannot take advantage of a shortened life expectancy caused by the accident. Again, this is the very reason for the statute to exist. Contrary to the statute and the Supreme Court decision, this is exactly what the Defendants in this case sought to do and upon which the Commission relied.

It is totally appropriate under §19-1-150 for the

factfinder to consider any health conditions or problems that the Claimant had prior to the accident or the triggering event in determining the Claimant's life expectancy. The Court of Appeals and Supreme Court have specifically so held in the case of Haselden v. Davis, 341 SC 486, 534 SE2d 295, (SC app. 2000); affirmed 353 SC 481, 579 SE2d 293, (2003). In Haselden, the Court of Appeals and Supreme Court specifically held that the jury should consider the mortality table,

> ". . . together with other evidence in the case bearing on the Plaintiff's health, age and physical condition **before the injury** and death in determining the probable length of the Plaintiff's life."

The Court held that it is inappropriate for the Defendants to obtain a benefit from the injury that lead to the Claimant's shortened lifespan which is exactly what the Commission sanctioned and the Defendants did by presenting evidence on a shortened lifespan. Again, the very reason for the mortality table is to prevent such arguments and the Commission's reliance on those arguments and that evidence constituted an abuse of discretion and was contrary to the law.

IV. THE COMMISSION ERRED AS A MATTER OF LAW BY FAILING TO APPLY THE CASES DECIDED UNDER AND THE STATUTORY AUTHORITY FOR GRANTING AN INCREASE IN THE COMPENSATION RATE UNDER SC CODE §42-1-40 AND §42-9-10 AND THEREBY FAILING TO INCREASE THE COMPENSATION RATE.

Under SC Code §42-1-40, paragraph 2, in determining the average weekly wage when the usual method of calculating an

average weekly wage will result in an average weekly wage which is unfair or does not properly represent the Claimant's future earning capacity, the Commission may resort to such other method as will most nearly approximate the amount which the injured worker, "would be earning were it not for the injury". SC Code §42-1-40 (Emphasis added).

Under that proviso, both our Supreme Court and this Court have increased the compensation rate as a matter of law. Elliott v. SC Dept. of Transportation, 362 S.C. 234, 607 S.E.2d 90 (2005). ("The determination of whether Elliott's raise constitutes an 'exceptional reason' for purposes of applying the standard wage calculation method provided by the Workers' Compensation Act is a question of law.") In the case of Booth v. Midland Trane Heating & Air Conditioning, 298 S.C. 251, 379 S.E.2d 730 (SC App. 1989), this Court in a case almost identical factually as compared to the facts in this case determined that the compensation rate should be increased. In the Booth case, Mr. Booth was hired in 1983 at $3.50 per hour. By the time of his injury on December 4, 1985, his salary had increased to $7.00 per hour. Quoting Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978), this Court reiterated that the,

> "objective of wage calculation is to arrive at a fair approximation of the Claimant's **probable future earning capacity**. His disability reaches into the future, not the past; his loss as a result of the injury

must be thought of in terms of its impact on probable future earnings."

Then in the case of Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 (SC App. 2002), this Court reiterated and applied this principle. Mr. Sellers was a young employee age 16, who became a paraplegic as a result of his injuries entitling him to lifetime compensation benefits. In that case, the Commission and our Appellate Courts applied the principles laid down in Bennett and Booth and held that because of his future loss of earning capacity that he was entitled to an ever escalating compensation rate wherein the compensation rate would increase from 1992, the date of the injury, until 2002 to the maximum compensation rate applicable in 1992. This Court also cited in support of that proposition a previous decision by the Supreme Court in the case of Stokes v. First National Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) which upheld an award entitling the claimant to a permanent partial loss of earning capacity award based on the maximum compensation rate and not just on the actual difference between his pre and post injury wages. Pre-injury Mr. Stokes was a vice-president over computer operations with high stress and high wage earning ability. Post-injury he could and did work in a low stress computer data entry position with lower wage earning future capacity but not in a high stress, high wage earning capacity. The Court and Commission

found that even the application of the maximum compensation rate would only partially compensate him for the Claimant's future loss of earning capacity. Again in the case of Elliott v. SC Dept. of Transportation, supra, this Court found that merit based increases before the accident in the claimant's wages should be applied prospectively into the future to determine the average weekly wage that would apply in that case. In the case of Forrest v. A.S. Price Mechanical, 373 S.C. 303, 644 S.E.2d 784 (SC App. 2007) reh. den., cert. den., this Court held that where a gentleman normally worked year round at two (2) jobs, both a full-time and a part-time job, this income justified the prospective increase in the average weekly wage and compensation rate going forward. Also, where a Claimant worked dual employment even simply during the holiday season, exceptional reasons existed for increasing the Claimant's compensation rate prospectively. Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 543 S.E.2d 732 (SC App. 2001). Similar reasons were found to exist in the case of Brown v. Peoplease, 402 S.C. 476, 741 S.E.2d 761 (SC App. 2013).

Based on the facts of this case and in accordance with the law as established by our Supreme Court and this Court, the Claimant would submit that his average weekly wage and compensation rate should be increased to adequately compensate him and his family for his future loss of earning capacity. The

Claimant asked nothing more and nothing less than for the Commission to apply a compensation rate based on what he would have been earning at the time of hearing for his family but for the injury.

The undisputed evidence from his W-2 alone established that the Appellant's pre-injury wages divided by 52 weeks resulted in a higher average weekly wage and resulting compensation rate than was being paid by the carrier to the Claimant. There was no explanation as to how the original Form 20 was calculated and there was no evidence presented to dispute that in the year prior to the date of the accident in 2006, the Claimant's average weekly wages as reported on his W-2 resulted in an average weekly wage of $646.17 with a resulting compensation rate (assuming he worked the entire 52 weeks) of no less than $430.80. On this basis alone, the Appellant's compensation rate should have been increased by $24.44/week. The Commission did not even address this argument in the Statement of the Case or the Findings which, in and of itself, is an error of law and represents a total disregard of the Commission's responsibility to liberally interpret the Act in favor of benefits for the injured worker and his family. The primary purpose of the Workers' Compensation Act is to protect the worker. Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941). It is remedial legislation which is entitled to a liberal construction in order

to accomplish the ends and purposes for which it was enacted. Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, 190 S.E.2d 751 (1972).

Next, the evidence established a consistent pattern of wage increases on behalf of the Claimant and based on a review of this Court's decision in Booth v. Midland Trane, supra, the Appellant would submit the facts are almost identical to Mr. Booth's situation. Mr. Lazaro was hired in December of 2003 and in less than three and a half (3 ½) years, he went from $10.00 an hour to $14.50 per hour representing a $4.50 per hour increase which represents a 45% increase in his salary in only three and a half (3 ½) years and also a 12.86% annual salary increase. According to that, in just four (4) years or in other words by 2011, his salary should have increased to $18.50-$19.00 an hour. The Commission did not address this evidence and did not even apply all of the electricians' salaries with the employer to the average weekly wage issue. When this Court looks at the Record, it will find that all three (3) employees that were hired at approximately the same time as the Claimant, as reflected by the employer's records, were making $17.50 to $18.00 an hour. There is simply no contrary evidence. Contrary to what the Respondents asserted and what the Commission found, the Claimant was not requesting consideration of post-injury wage increases but was in fact asking the Commission to project

his future earning capacity which the Commission is required by law to do into the future and which can only be based on his past earning experience and facts in existence and put into evidence at the time of the hearing.

Next, the undisputed evidence establishes that prior to the injury the Claimant with his wife was operating a flea market booth and was making additional income and after the accident the Claimant's wife to make up for that lost income had to work three (3) jobs. The amount of money that she was making was put into the Record and on the basis of this undisputed evidence, the Commissioner should have increased the compensation rate in accordance with the past Supreme Court and Court of Appeals decisions.

Finally, the Record establishes that Mr. Lazaro was an outstanding employee and as previously set forth in both the Order of Commissioner Beck and at this hearing he was a valued employee who did everything he could and was entitled to and did receive every wage increase possible prior to his injury. If one determines that Mr. Lazaro's wages would only have increased to $17.50, which is the low end of employees hired as electricians almost identically at the same time he was, he would have an average weekly wage of $700.00 and a compensation rate of $466.69; assuming that there was no overtime. This is over $60.00/week higher than the compensation rate applied in this

case. Again the Commission is required to apply a liberal interpretation of the Act and is required by all of our Appellate Court decisions to consider the loss of earning capacity stretching into the future. But for this accident, Mr. Lazaro would have been making a lot more money for his family and as this Court and the Supreme Court have held, as a matter of law, that the average weekly wage should be increased to reflect that loss of earning capacity into the future.

Therefore, based on the facts of this case and in accordance with the law as established by our Supreme Court and this Court, the Appellant would submit that his average weekly wage and compensation rate should be increased to adequately compensate him and his family for his loss of earning capacity due to the accident. The Appellant asked nothing more and nothing less than for the Commission to apply a compensation rate based on what he would have been earning at this time for his family but for the injury.

V. THE COMMISSION ERRED AS A MATTER OF LAW BY COMPARING THE CLAIMANT FOR WAGE EARNING CAPACITY PURPOSES UNDER SC CODE §42-1-40 TO ONLY NON-ENGLISH SPEAKING HISPANIC EMPLOYEES.

There is simply no evidence in the Record that Mr. Lazaro was a non-English speaking Hispanic employee and the Commission erred in its finding and analysis under SC Code §42-1-40 by not considering the wages of all electricians who worked for the company at the time of hearing. In addition to there being no

evidence to support the assumption that he was non-English speaking or that a comparison should only be made to Hispanics, this consideration by the Commission violated the Appellant's constitutional right to equal protection by finding that the, "Claimant should be compared to other non-English speaking Hispanic employees". This is an invalid, unconstitutional comparison that is not justified by the evidence under the analysis of the evidence under SC Code §42-1-40 and the factual decision as to whether exceptional reasons exist to increase the average weekly wage and compensation rate. While the Appellant is not per se raising an equal protection violation, what the Appellant is arguing is the decision of the Commission on the essential issue of whether there are exceptional reasons to increase the compensation included a constitutionally suspect consideration of race in the analysis and limited the analysis to just employment with the employer. There was no evidence that Mr. Lazaro was "non-English speaking" and/or that he would not be making the same wages, as a "Hispanic", as would any other non-Hispanic electrician working for any employer at the time of the hearing; not just the employer. The decision of the Commission should be reversed based on this improper comparison made by the Commission of the evidence alone.

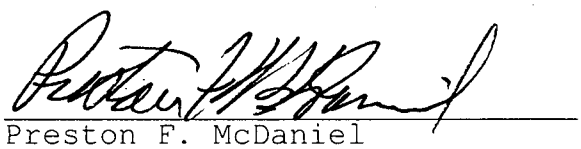
Not only is this comparison abhorrent to Counsel for the Claimant personally, our Governor after the slayings in

Charleston based on race committed our State to ending race under our laws. It is exactly this type of unsupported racial profiling and comment that lead to that tragedy and which has no place in our system of government. This was an absolute improper consideration by the Commission under §42-1-40.

CONCLUSION

For all the foregoing reasons, the Decision of the Commission should be reversed and this matter remanded to the Commission for a de novo hearing on the Claimant's request for a partial lump sum. Further, due to the undisputed nature of the evidence and the exceptional reasons in the Record, this Court should increase the average weekly wage and compensation rate under the Act in accordance with the decisions of the Supreme Court and this Court to compensate Mr. Lazaro's family partially for his loss of earning capacity.

Respectfully submitted,



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September 13, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

RECEIVED
SEP 13 2016
SC Court of Appeals

Appellate Case No. 2016-000665

Antonio Lazaro, Employee, ... Appellant,

v.

Burriss Electrical, Employer, and
South Carolina Guaranty Association,
Carrier, ...Respondents.

CERTIFICATE OF COUNSEL

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

Dated: September 13, 2013

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