

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Appellate Panel

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W.C.C. No. 1301480

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**RECEIVED**  
OCT 17 2016  
SC Court of Appeals

Ronnie McDonald, Employee..... Respondent,

v.

J Mac's Express, LLC, Direct Employer,  
Gregg Blakely Logging, Inc., Statutory Employer Employers, and  
WC Uninsured Employers Fund and Palmetto Timber Fund, Carriers, Defendants  
Of which Gregg Blakely Logging, Inc. and  
Palmetto Timber Fund are the ..... Appellants.

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**BRIEF OF APPELLANTS**

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## STATEMENT OF ISSUE ON APPEAL

- I. WHETHER THE COMMISSION ERRED AND COMMITTED AN ABUSE OF DISCRETION IN AWARDING A LUMP SUM PAYMENT IN THIS CASE?

## STATEMENT OF THE CASE

Appellants Gregg Blakely Logging, Inc. and Palmetto Timber Fund seek reversal of the South Carolina Workers' Compensation Commission decision in this case to the extent it awarded benefits to be paid in a lump sum. Respondent Ronnie McDonald, claimant below, was employed directly by J Mac's Express, LLC (Gregg Blakely Logging was Respondents' statutory employer)<sup>1</sup> when he sustained a work-related injury to his left ankle, left knee, left thigh and bilateral hips on January 7, 2013. Appellants accepted the claim and provided medical care.

Respondent filed a Form 50 Request for Hearing, seeking a determination of permanent benefits and additional medical care. (Form 50, dated Jan. 8, 2015, R. p. 41). Appellants responded, denying Respondent was in need of additional medical care and seeking credit for any overpayment of temporary disability benefits. (Form 51, dated Feb. 6, 2015, R. p. 42).

The parties filed pre-hearing briefs and APA submissions, and were heard by Single Commissioner T. Scott Beck on March 25, 2015. Commissioner Beck issued an Order on July 15, 2015, finding, among other things, that Respondent had reached maximum medical improvement on December 9, 2014 and that he was totally and permanently disabled pursuant to S.C. Code Ann. § 42-9-10. Commissioner Beck also found that, "Claimant has demonstrated a need for the monetary benefit of his claim to be paid in a lump sum amount ... [and] that a lump sum award would be in his best interest in that he is a homeowner, he is able to manage his own finances and he has legal fees which he is not able to pay outside of an award in lump sum." (Single Commissioner Order, filed July 15, 2015, R. p. 24).

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<sup>1</sup> Gregg Blakely Logging had been determined to be Respondents' statutory employer in a prior decision in this case issued by Commissioner Susan S. Barden. (Single Commissioner Decision and Order, filed Aug. 13, 2013, R. pp. 29-40). That decision was not appealed.

Appellants timely appealed to the Full Commission, challenging the award of a lump sum payment, arguing that Respondent had not demonstrated a need for a lump sum payment nor had he proven that such payment would be in his best interest. (Form 30, dated July 27, 2015, R. pp. 43-45).

An Appellate Panel of the Full Commission heard oral argument on October 19, 2015, and issued a split decision on February 11, 2016. Two reviewing Commissioners affirmed the Single Commissioner Order, finding that Respondent had demonstrated a need for a lump sum payment, that a lump sum payment would be in his best interest and that he was able to manage his own finances. However, one of the Appellate Panel Commissioners, Commissioner Susan S. Barden, dissented, pointing out that Respondent, “does not have a bank account; nor is he on his wife’s account. The Claimant has tax difficulties, too. I would not order a total lump sum payment for the Claimant. I would order a partial lump sum, only for attorney’s fees.” (Order of Appellate Panel, filed Feb. 11, 2016, R. pp. 2-16).

Appellants timely appealed to this Court.

### **FACTUAL BACKGROUND**

At the time of the hearing before Commissioner Beck, Respondent was 47 years old and had obtained a high school diploma. (R. p. 59, lines 5-10). Respondent testified that he has worked as a truck driver for 28-29 years. (R. p. 59, line 17 – p. 60, line 1). Respondent has been married for 26 years. (R. p. 63, lines 24-25). Respondent testified that, although his wife previously had worked as a bus driver, she was not working at the time, “due to personal problems with her on her job.” (R. p. 67, lines 2-8). He has three children, ranging in age from seven years of age, to 23 and 25 years of age. All three of his children and wife depend on

Respondent for support. (R. p. 67, line 22 – p. 68, line 3) (R. p. 71, lines 19-25). Respondent testified that he owns his own home. (R. p. 64, lines 1-2).

Respondent testified that his wife handles all of his finances, although sometimes he pays the light bill and the phone bill himself. (R. p. 62, lines 9-21). Prior to his injury, he paid the light bill, the phone bill and the house payment. (R. p. 65, lines 14-16). Respondent does not have and has never had a bank account and pays all of his bills in cash. (R. p. 62, line 24 – p. 63, line 4) (R. p. 72, lines 1-2). Although his wife has a bank account, his name is not on that account. (R. p. 63, lines 5-8). Respondent has never had more than \$20,000 at any one time, nor has he ever invested money. (R. p. 72, lines 3-6). At argument before the Appellate Panel, Respondent's counsel acknowledged that there was no indication, assuming Respondent was awarded a lump sum, that he either would open his own bank account or be put on his wife's account. (R. p. 85, lines 20-24).<sup>2</sup>

Respondent testified that since his injury, finances were "kind of rough," and "sometimes I have to borrow to, you know, try to get my bills paid," and that, even prior to the injury, "[e]very blue moon I'd probably get a little behind and then get caught back up." (R. p. 64, lines 3-23). He did not testify to any outstanding debt that he could not pay or that was overdue, including attorney's fees.

Respondent testified that, at two different points in time, he owned his own truck, with which he ran a small business. (R. p. 68, line 22 – p. 69, line 6). Because he did not file the proper paperwork and pay the correct amount of taxes, Respondent ran into problems with the Internal Revenue Service concerning his trucking business. Respondent testified:

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<sup>2</sup> Counsel also admitted that they had not pled in the alternative for a partial lump sum payment of attorney's fees. (R. p. 86, line 21 – p. 87, line 2).

Q: Do you have any issues with the Internal Revenue Service at this time?

A: Yes.

Q: What are those issues?

A: I mean, that's my personal business with that.

Q: Yes, sir. Is that from when you had your own business before, when you were running your own truck?

A: Yes.

Q: You didn't pay the proper amount of taxes?

A: Yes.

Q: So you got problems with the IRS from issues when you were running your own business. Is that because you didn't file the proper paperwork and do all that stuff right?

A: Yes.

Q: Any other kind of financial issues you've got going on right now?

A: No.

(R. p. 72, lines 7-23).

As part of a vocational evaluation performed on November 6, 2014, evaluator George H. Page, of Page Rehabilitation Services, Inc., administered the Wide Range Achievement Test to evaluate Respondent's reading and math skills. That test revealed Respondent's "reading level to be a 3.8 grade level and math a 4.8 grade level. These scores reveal Mr. McDonald would have difficulty reading a newspaper or performing general math. One needs approximately a 6.0 grade level to have functional math and reading skills." (R. pp. 97-101, *see* p. 98). Similar scores were obtained by Fi-Fi Jubran in a July 14 2014 vocational evaluation ordered by Respondent's counsel. (R. pp. 88-96, *see* p. 94 (Word Reading at a 4.7 grade level and Math

Computation at a 4.6 grade level)). Ms. Jubran explained that Respondent's "results are inconsistent with his educational level except this Consultant was not surprised based on her experience with the population in this rural area and the school system." (R. p. 94). In fact, Ms. Jubran concluded that Respondent "does not have basic math skills required in many manufacturing jobs." (R. p. 95).

### **STANDARD OF REVIEW**

Judicial review of a Workers' Compensation Commission decision is governed by S.C. Code Ann. § 1-23-380 (Supp. 2014) of the Administrative Procedures Act. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a Commission decision 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(5).

A Commission award of a lump sum payment pursuant to Section 42-9-301 is reviewed on appeal under the abuse of discretion standard. Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 190, 736 S.E.2d 672, 678 (Ct. App. 2012). "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." Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct. App. 2006). In addition, 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).

## ARGUMENT

### **I. The Commission erred and committed an abuse of discretion in awarding a lump sum payment in this case.**

The Commission's award of a lump sum payment of benefits in this case is wholly unsupported by the evidence. There is no evidence that would justify a lump sum award; instead, the only evidence relevant to such inquiry demonstrates that a lump sum payment would not be in Respondent's best interest and/or that of his family. As such, the Commission abused its discretion and its award of a lump sum payment, which is based on nothing more than surmise, conjecture and speculation, must be reversed.

Lump sum payments are provided for under Section 42-9-301. That section provides, 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 by the employer of a lump sum which shall be fixed by the commission ..." S.C. Code Ann. § 42-9-301 (emphasis added). The burden of presenting facts sufficient to justify a lump sum award is, in the first instance, on the claimant. Woods v. Sumter Stresscrete Inc., 266 S.C. 245, 248, 222 S.E.2d 760, 761 (1976), *citing* Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 289, 42 S.E.2d 390, 397 (1947).

Prior to 1983, in order to prove entitlement to a lump sum payment, claimants had to prove both unusual circumstances and that a lump sum payment would be in his or her best interest. S.C. Code § 42-9-300 (repealed by 1983 Act No. 92, Section 6). In 1983, Section 42-9-

300 was repealed and replaced with Section 42-9-301. Section 42-9-301 did not create any new remedies for claimants – it simply enlarged the remedy available to claimants by removing the restriction that lump sum payments be awarded only in “unusual cases.” Hooks v. Southern Bell Tel. & Tel. Co., 291 S.C. 41, 43, 351 S.E.2d 900, 901 (Ct. App. 1986). However, the 1983 revision to the Act did *not* remove the requirement that a claimant prove that a lump sum payment would be in the *best interest* of the claimant and his or her family. Thompson, 369 S.C. at 616-617, 632 S.E.2d at 880 (the Commission still “must consider whether the [lump sum] award ... would be in the best interest of the claimant and his family,” or, in other words, whether “the award would be detrimental to [the claimant] or his family”). The ability to award lump sum and partial lump sum payments allows the Commission “to ensure the best interests of the injured worker are protected. The 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.” Cox v. BellSouth Tel., 356 S.C. 468, 473, 589 S.E.2d 766, 769 (Ct. App. 2003). However, “[e]xperience has taught that ... income-protection is best accomplished through periodic income payments.” Woods, 266 S.C. at 247, 248, 222 S.E.2d at 761.

Prior cases upholding lump sum awards are factually and substantively different from the facts before the Court in this case. For example, in Cox v. Mills, 286 S.C. 226, 332 S.E.2d 562 (Ct. App. 1985), this Court upheld a lump sum payment to a claimant where it was established that: 1) “he needed the lump-sum award to do major repair work on his house”; 2) “he would have to expend much larger sums later if these repairs were not done in a timely fashion”; and 3) the claimant had “demonstrated an ability to manage large sums of money in a prudent fashion.”

In Thompson, the claimant, who was married with two small children, testified that he needed the lump sum payment to buy a house for which he and his wife had already saved approximately \$8,000 as a down payment. There also was evidence that purchasing the house in an adjoining county would allow the claimant's children to attend better schools. 369 S.C. at 616-617, 632 S.E.2d at 880. In upholding the award, this Court found no evidence that "the funds would be squandered or that the purpose for which [the claimant] sought the funds was wasteful or unreasonable." 369 S.C. at 617, 632 S.E.2d at 880.

The claimant in Swilling testified that he needed the lump sum payment to relieve financial stress caused by the employer's cessation of payments five months prior to the Commission hearing, which had caused him to nearly lose his house and forced him to "get food stamps and beg for money" to support his family." 401 S.C. at 189, 736 S.E.2d at 678. This Court determined that this evidence adequately supported the Commission decision that the lump sum payment would be in the claimant's best interest. 401 S.C. at 190, 736 S.E.2d at 678.

Although this Court did not reach the issue of whether the claimant had shown a lump sum payment would be in her best interest in Cox v. BellSouth,<sup>3</sup> it noted the Commission's determination that the claimant's plan to use the lump sum payment to purchase a home constituted "valid reasons." 356 S.C. at 470, 589 S.E.2d at 767.

Here, in stark contrast, Respondent has not demonstrated any particular need for a lump sum payment, other than that finances are "a little rough" and sometimes he had "to borrow to, you know, try to get my bills paid." (R. p. 64, lines 3-9). He did not testify about any particular bill or financial obligation that he could not pay. Nor did he testify about how much he might

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<sup>3</sup> The issue before this Court in Cox v. BellSouth was whether the Commission could order a partial lump sum payment from the back end of a lifetime benefits award.

have been in debt, if any. In addition, Respondent admitted that being behind on paying bills was not new – he had gotten behind on paying his bills in the past. (R. p. 64, lines 19-23). He did not testify that he needed the lump sum to buy a house or to resolve any particular outstanding debt. In fact, he specifically testified that, other than his difficulties with the I.R.S., he had no financial issues pending:

Q: Any other kind of financial issues you've got going on right now?

A: No.

(R. p. 72, lines 21-23). There simply is no evidence whatsoever demonstrating a need for a lump sum payment and/or that a lump sum payment is in Respondent's best interest or in the best interest of his dependents.

Furthermore, Respondent has not proven an ability to manage a large sum of money prudently but, instead, testimony reveals he has never had a bank account, is not on his wife's bank account, has never handled a large sum of money, pays his bills in cash, and had gotten into trouble with the I.R.S. for difficulties arising out of his mismanagement the finances of his small trucking business. (R. p. 63, lines 1-14) (R. p. 72, lines 1-20). Awarding Respondent a lump sum payment that is likely to be squandered will leave not only Respondent, but his wife and dependents in a far worse situation than they would be in under the stability of a weekly benefits payment.

In Woods, the Supreme Court reversed a lump sum award even in the face of testimony from the decedent employee's widow that she would use the lump sum to pay off a mortgage, retire some debt and pay attorney's fees all of which financial obligations, for the most part, were current, with the remainder being invested in a local savings and loan company to obtain better

interest. In addition to finding that the case did not present any unusual circumstances, which is no longer a consideration, the Court reversed the Commission on the basis that the evidence failed to show that “the relief afforded by a lump sum payment would not be temporary only, bringing about greater economic trouble in the future.” 266 S.C. at 250, 222 S.E.2d at 762. Here, the case is even more compelling that a lump sum award would provide only temporary relief with likely greater economic trouble in the future. There is no identified debt that Respondent intends to “pay off” with the lump sum award; he has never had a bank account and pays all of his bills in cash; there is no indication that he will open his own bank account or be added to his wife’s account; he has fallen behind on paying bills prior to his injury; he has had difficulty managing the tax payments on his truck when he owned it himself; and his math skills tested well below that of a high school graduate, even below a functional sixth grade level. (R. pp. 62-65, 68-69, 72) (R. pp. 94, 98).

Although decided in 1947, the analysis for determining whether a lump sum payment is in a claimant’s best interest in Ashley is still good law. There, the Supreme 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. The Supreme Court ultimately held that the claimant’s explanation in that case that he had miscellaneous debt obligations was insufficient to support the lump sum award. 210 S.C. at 288-289, 42 S.E.2d at 396-397. As noted above, in the instant case, there is

absolutely no evidence of any particular or identified need for a lump sum payment, and all of the evidence points to a high risk that Respondent will not be able to manage such a large sum of money wisely so as to provide for himself and his dependents over his lifetime. As such, the Commission's award was an abuse of discretion and should be reversed.

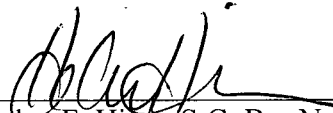
**CONCLUSION**

For all the reasons stated herein, this Court should reverse the Commission Decision to the extent that it awarded Respondent payment of his benefits in a lump sum award.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE, LLC

October 14, 2016



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Gregg Blakely Logging, Inc., Statutory Employer Employers, and  
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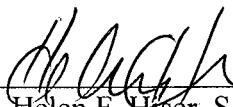
Of which Gregg Blakely Logging, Inc. and  
Palmetto Timber Fund are the ..... Appellants.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Brief of Appellants Gregg Blakely Logging, Inc. and Palmetto Timber Fund complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Appellants complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

October 14, 2016

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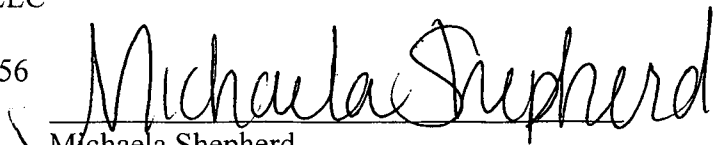
Of which Gregg Blakely Logging, Inc. and

Palmetto Timber Fund are the ..... Appellants.

**PROOF OF SERVICE**

I certify that I have served the final **Brief of Appellants** Gregg Blakely Logging, Inc. and Palmetto Timber Fund and **Reply Brief of Appellants** on Ronnie McDonald, by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2016, addressed to his attorney of record:

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October 14, 2016

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OCT 17 2016

SC Court of Appeals

**Via U.S. Mail**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

RE: Ronnie McDonald vs. Gregg Blakely and Walker, Hunter & Associates, Inc.  
Date of Accident: January 7, 2013  
WCC File No.: 1301480  
Our File No.: 2069.14007  
Claim No.: 0001-0145-10-0001  
Appeal Tracking No.: 2016-000480

Dear Ms. Kitchings:

Enclosed for filing please find the original and 16 copies of the final Brief of Appellants Gregg Blakely Logging, Inc. and Palmetto Timber Fund and Reply Brief of Appellants in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service for both final briefs. Please file these documents and return a clocked in copy in the enclosed, self-addressed stamped envelope.

If you have any questions, please do not hesitate to contact me

Very truly yours,

Helen F. Hiser

Enclosures

cc: Joe Ann Calvey, Esquire

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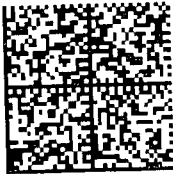
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