

THE STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

NOV 21 2016

SC Court of Appeals

W.C.C. No. 1301480

Ronnie McDonald, Employee.....Respondent,

Employee/Claimant/Respondent,

v.

J Mac's Express, LLC, Direct Employer,

Employer/Appellant,

Gregg Blakely Logging, Inc., Statutory Employer and
WC Uninsured Employers' Fund and Palmetto Timber Fund, Carriers, Defendants

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

BRIEF OF RESPONDENT

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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

Respondent relies on Appellants' statement of the issues.

FACTUAL BACKGROUND

Respondent adopts all facts mentioned in the Appellants' Factual Background as if written here verbatim. All other relevant facts are included in the discussion of the argument for why Respondent believes the Court should affirm the Commission's decision to allow payment in lump sum.

STANDARD OF REVIEW

A Commission award of a lump sum payment pursuant to S. C. Code Ann. Section 42-9-301 is reviewed on appeal under the abuse of discretion standard. Thompson v. South Carolina Steel Erectors, 369 S.C. at 616, 632 S.E.2d at 880 (Ct. App. 2006). "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." *Id.* at 878. "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." *Id.*

ARGUMENT

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

It is Respondent's position that the Commission's award of lump sum payment of benefits in this case is wholly supported by the evidence.

Appellants site the case of Thompson v. Steel Erectors, 369 S.C. at 616, 632 S.E.2d at 880 (Ct. App. 2006). In that case, the Court held "[i]n determining whether to award a lump-sum payment to a claimant, the Commission must consider whether the award will

cause a hardship to the employer or carrier and whether the payment would be in the best interest of the claimant and his family.” The Court in Thompson, also stated that “[a]n 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.” *Id.* Appellants also cite S. C. Code Ann. Section 42-9-301, “[u]pon the finding by the commission that a lump sum payment should be made, the burden of proof as to the abuse of discretion in such finding shall be upon the employer or carrier in any appeal proceedings.” Based on the above case and statute, it is important to note that the Appellants never testified or presented evidence that the payment in lump sum would create a hardship. Therefore, Respondent takes the position that the burden of proof as to whether the Commission abused its discretion in awarding lump sum payment is on the Appellants and that the only issue before the Court is whether the payment would be in the best interest of the Respondent and his family.

Just like there was evidence in Swilling v. Pride Masonry of Gaffney, (401 S. C. 178, 736 S.E.2d 672, 678 (Ct. App. 2012) that Mr. Swilling was in financial distress caused by Pride’s cessation of payments five months prior to the hearing before the single commissioner, there is evidence in this case that the same thing happened to Respondent. In Single Commissioner, Susan Barden’s Order dated, August 13, 2013, one of her Findings of Fact was the following: “17. Claimant to receive temporary total disability benefits from January 7, 2013, to the present and continuing.” (Single Commissioner Order, filed August 13, 2013, R. p. 37) Respondent was in a deathly accident on January 7, 2013 when he was dragged by a log on a crane, causing bilateral hip fractures, left ACL tear of the left knee, pelvis and left ankle pain. These conditions caused numerous

surgeries. In addition to his condition at the time of the injury and his inability to work at all, Respondent and his family were without monies to pay bills for over seven (7) months and he was unable to receive weekly temporary total benefits until after that hearing.

Prior to this injury, Claimant was earning substantially more money than the weekly benefits he is currently receiving. At that hearing on August 13, 2013, Commissioner Barden also made the following finding: "22. Claimant's average weekly wage is \$608.18, yielding a compensation rate of \$405.47." (Single Commissioner Order dated August 13, 2013, R. p. 38) Therefore, Respondent is currently receiving \$202.71 less money per week than what he was accustomed to having to support himself and his family. He also had his wife income to depend on prior to his injury but at some point and shortly after his injury, she became unemployed and the family no longer has her income to depend on. (R. p. 67, line 6-7, 15-17) So not only is Respondent having to manage a household budget with about a third less of the money he was used to having, his wife is no longer employed. Appellants certainly have a high burden to prove that the Commission's decision to award lump sum is wholly unsupported by the evidence.

Notwithstanding, Appellants also argue that because Respondent has never had more than \$20,000 at any given time, he is not capable of handling a large sum of money. The evidence clearly shows that Respondent is used to having money. Respondent has made good money as a truck driver. As part of the vocational evaluation performed on November 6, 2014, Page Rehabilitation Services, Inc, noted that Respondent had reported earning income of \$90,000.00 during the years of 2003-2010 as a truck driver. (R. p. 99)

Appellants further argue that Respondent's testing through Page Rehabilitation Services, Inc. revealed his reading level to be a 3.8 grade level and math a 4.8 grade level. At the time of his vocational evaluation, Respondent informed Page Rehabilitation Services, Inc, that he and his wife shared the activities of bookkeeping, scheduling and mileage books. (*Id.*) Defense counsel's cross-examination of Respondent at the Single Commissioner's hearing on March 25, 2015, clearly shows that he is capable of reading. In fact, he was able to pass his CDL for a commercial driver's license without going to truck driving school and only with the help of his father. Respondent testified under cross-examination to the following:

Q. You mentioned you're a high school graduate. You have no difficulty with reading and writing, do you, sir?

A. No.

Q. No difficulty with basic mathematics?

A. No.

Q. And you said you got your CDL, your Commercial Driver's License. You never went to truck driving school, did you, sir?

A. No.

Q. You did that on your own?

A. Yes, my father helped me with that.

(R. p. 68, lines 4-13)

In order to support his need for a lump sum payment, at the hearing, Respondent testified that he was 47 years old and had been married for 26 years. He also testified that he was pretty good at paying his bills until he got hurt working for the Appellant/Employer and had to rely on the available weekly temporary total benefits to

maintain his bills. He even testified that he is behind in his bills as a result of bringing in less income because of this work injury. He further testified that he now has to borrow money just to pay his bills such as his mortgage on his home, light bill, phone bill, etc. His wife has always maintained the family bank account, and he participates in paying their financial obligations. Respondent's testimony on his need for payment in lump sum is below:

Q. All right. What type of finances do you have coming in your house now?

A. Just workman's comp.

Q. And who handles those funds when they come in?

A. Well, my wife, she helps me with it.

Q. Okay. Tell me about it, how do y'all handle that?

A. Well, I pretty much -- me and her go over it, cash my check, and I let her, you know, pay whatever bills we need to pay.

Q. All right. Do you ever go and pay the bills yourself?

A. Sometime I do.

Q. Tell me what all you pay.

A. I go like pay the light bill and the phone bill.

Q. Okay. Have you and your wife filed bankruptcy?

A. No.

Q. All right. Do you ever have to write checks?

A. No.

(R. 62, lines 9-25)

Q. okay. Do y'all write checks in the home?

A. No.

Q. No? Y'all pay everything with cash?

A. Yes.

Q. Okay. Do y'all have a bank account?

A. Yeah, she does.

Q. Okay, your wife do. Is your name on that bank account?

A. No.

Q. No, okay. And does she use it just for saving?

A. Yes, just pretty much, you know, when she was working her payroll was going onto her bank card.

Q. All right. And you don't have any type of savings or any kind of accounts?

A. No.

Q. Okay. How are you with handling cash, yourself, handling money, yourself?

A. Pretty good with it.

Q. Tell me about it.

A. Well, I try to, you know, pretty much do all the things that I need -- the most important things to be done. And I try to hold money for whatever, you know, things that are coming up that we need to get paid, you know, like grocery and household needs that we need.

Q. Okay. And how long have you been married?

A. Twenty-six years.

(R. p. 63. lines 1-25)

Q. Do y'all own y'all home?

A. Yes.

Q. Okay. And how are the finances right now with you being out of work, how are things?

A. It's kind of rough.

Q. Tell me about it.

A. Well, sometime I have to borrow to, you know, try to get my bills paid. You know, and most the time I just don't have it to do it.

Q. And what about before this injury, how was things financially in the home?

A. Things was pretty decent.

Q. Tell me about it.

A. Well --

(Whereupon, transcription impossible due to cross talk.)?

A. When I was working, you know, I pretty much try to work -make enough money to pay whatever bill, you know, I needed to pay, and it was working out pretty good.

Q. Okay. So not behind on bills before the injury

A. No.

Q.-- or what would you say?

A. Every blue moon I'd probably get a little behind and then get caught back up.

Q. Okay.

A. But it wasn't, you know, like how it is now.

(R. p. 64, lines 1-25)

Q. All right. Now, bills that your wife go and pay, is it because she's the person that usually pays the bills or is it because of any physical problems that you have that you can't go pay the bills, or what?

A. Most of the time when I'm not feeling, you know, too good, you know, like I'm in pain, she'll go and pay the bills and everything, and, you know, get what we need.

Q. What about before this accident, how were you with paying the bills? What did you do before this accident?

A. Well, before the accident I used to go and, you know, take care of my bills. You know, like if I'm in town, you know, I'd go out on -- I'd call her, find out what's need to be done and I go ahead and get it done.

Q. And what kind of bills would that be, the ones that you'd take care of?

A. The house payment, light bill, phone bill.

(R. p. 65, lines 1-16)

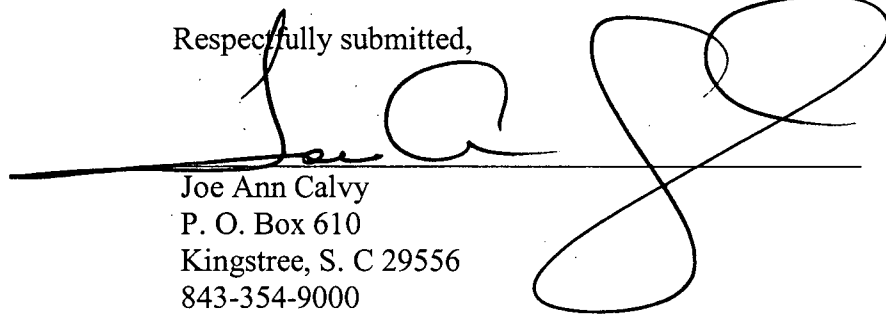
(R. p. 63, lines 9-25, R. p.63, lines 1-25, R. p. 64, lines 1-25, R. p.66, lines 1-16).

At the time of the hearing, Respondent filed a Motion to include Newly Discovered Evidence. If allowed, that evidence would show that because of the lack of his regular wages, the Respondent had a pending action filed against him for his failure to pay the mortgage on his mobile home and was in threat of losing the family home and needed payment in lump sum. The Commission believed that the evidence was cumulative towards the Respondent's request for lump sum payment and thus denied the admission. (Full Commission Transcript dated October 19, 2015 R. p. 80, lines 11-23)

CONCLUSION

Respondent prays that the Commission finds that the Commission did not abuse its discretion to grant him payment in lump sum and that the Court affirm the Commission's finding. The Appellants have failed to reach their burden of proving that the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "Joe Ann Calvy", is written over a horizontal line. To the right of the signature is a large, stylized scribble or flourish.

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November 14, 2016

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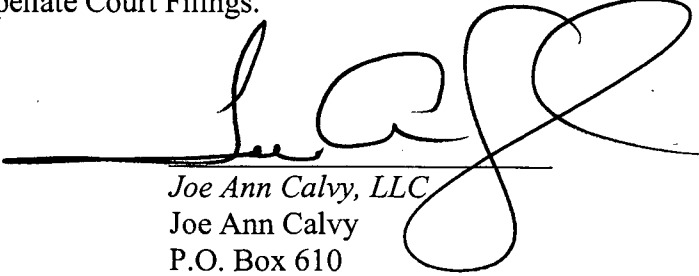
Gregg Blakely Logging, Inc., Statutory Employer and
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent, Ronnie McDonald, complies with 211 (b), SCACR and with the South Carolina Supreme Court's Order dated April 15, 2014 as to Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

November 17, 2016



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