

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

W.C.C. No. 1301480

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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.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

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

Respondent Ronnie McDonald fails to demonstrate that the Commission's decision to award him a lump sum award is not an abuse of discretion. Citing only two cases and one statutory provision, Respondent's brief is light on authority and support in the Record but, instead, depends heavily on non-record material and unsupported allegations and innuendo. At the end of the day, because the Commission's award of a lump sum payment is wholly unsupported, it is an abuse of discretion and should be reversed by this Court.

A. Respondent has failed to identify any evidence of a need for a lump sum payment.

Setting aside embellishments, such as depicting his work-related accident as a "deathly accident," (Resp. Br. p. 3), Respondent suggests testimony that does not exist and substantively relies on evidence that is not in the Record. In particular, Respondent discusses a "Motion to include Newly Discovered Evidence," ("Motion") on page 9 of his Brief. He asserts that that evidence showed he 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." (Resp. Br. p. 9).

First, neither the Motion nor the proffered Newly Discovered Evidence is in the appellate Record. As a result, this Court should disregard Respondent's unsupported allegations of what that evidence might show. Second, even if this Court considers Respondent's allegation regarding the foreclosure action, which Appellants do not believe would be proper, the existence of that action does not advance Respondent's case. As is evidenced by Appellants' response to the Commission in opposition to Respondent's Motion, neither Respondent nor his wife own the

mobile home that is the subject of the foreclosure action referenced on page 9 of his Brief. Instead, the foreclosure action asserted that both Respondent and his wife were merely “renter[s]/tenant[s]/trespasser[s] residing in the 2000 General/Augustine (28x60) Mobil Home ... and [had] no legal or equitable right to possession of the mobile home.” (Response to Respondent’s Motion for Admission of Additional and Newly Discovered Evidence, dated Oct. 9, 2015, R. p. 47 ¶ 5). As Appellants stated in their opposition, “because [Respondent] has no legal or equitable right [in the mobile home], a lump sum payment to pay for someone else’s property is not appropriate.” (R. p. 47 ¶ 5). Rather than bolstering his argument that a lump sum award would be in Respondent’s best interest, his assertion that he needs a lump sum payment in order to pay off someone else’s debt shows that making a lump sum payment would *not* be in the best interest of Respondent or his dependents.

In addition, the fact that his direct employer, J Mac’s Express, did not pay benefits for the seven months following his January 7, 2013 accident, (Resp. Br. p. 3) (2013 Single Commissioner Decision, R. p. 32), has no bearing whatsoever on Respondent’s financial situation as of the 2015 Single Commissioner hearing.¹ The 2013 Single Commissioner Decision not only found that Blakely Logging was Respondent’s statutory employer, but also ordered Appellants to pay “temporary total disability benefits from January 7, 2013, to the present and continuing, until further order of the Commission or agreement of the parties,” with a credit for \$600 already paid. Appellants also were ordered to reimburse Respondent and/or pay

¹ Respondent’s reference to this issue is an apparent attempt to bring this case within the fact pattern of Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 736 S.E.2d 672 (Ct. App. 2012). However, in Swilling, unlike the present case, the claimant testified that he was “‘close to losing [his] house,’ and he had to ‘get food stamps and beg for money’ to support his family.” 401 S.C. at 189, 736 S.E.2d at 678. Here, there is no such testimony.

for all causally-related medicals. (R. pp. 37-40). There is no evidence that Appellants did not comply completely with the 2013 Single Commissioner Decision, meaning any lapse in benefits payable to Respondent was addressed in 2013 and is completely irrelevant to Respondent's financial status in 2015. Furthermore, contrary to the suggestion on page 3 of his Brief, Respondent never testified that he was behind in any bills as a result of his direct employer's failure to pay temporary total benefits from January to August 2013. (R. pp. 53-74).

The fact that Respondent's wife was not working at the time of the Single Commissioner hearing likewise should not factor into the determination of whether a lump sum payment is appropriate here. First, Respondent's wife left her job as a bus driver due to "personal problems with her on her job," and not because of an inability to work or in order to care for Respondent. (R. p. 67, lines 5-8). Second, there appears to be no impediment to her obtaining gainful employment and, in fact, she was looking for work at the time of the hearing. (R. p. 67, lines 20-21).

Unlike the claimants in Cox v. Mills, 286 S.C. 226, 332 S.E.2d 562 (Ct. App. 1985) or Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct. App. 2006), Respondent did not testify or provide evidence that he was behind on any particular bill or account. Respondent certainly did not testify "that he is behind in his bills as a result of bringing in less income because of this work injury," as he alleges in his Brief. (Resp. Br. p. 5).² He only testified that his finances were "kind of rough," and that prior to his injury he was not often behind on his bills, although he did sometimes fall behind even then. (R. p. 64, lines 3-5, 19-23). In fact, when asked if he had any financial issues going on other than his problems with the

² Tellingly, Respondent does not cite to the transcript because there was no such testimony.

Internal Revenue Service, he answered unequivocally that he did not. (R. p. 72, lines 21-23). Although Respondent testified that he owned his own home, (R. p. 64, lines 1-2), he never testified that he was behind on his house payments or mortgage, as his brief suggests. As noted above, neither Respondent nor his wife have any ownership interest whatsoever in the mobile home that was the subject of a foreclosure action. Respondent quotes at length from the Single Commissioner hearing transcript, (Resp. Br. pp. 4-9); however, the only testimony that addresses his alleged “need for payment in lump sum” was that finances were a little rough and that sometimes he has to borrow money to pay his bills. However, he also admitted that, prior to his injury, he sometimes fell behind on paying his bills.

Again, Respondent did not testify as to any particular bill or account or financial obligation for which he needed a lump sum payment to resolve. In fact, Respondent adopted “all facts mentioned in the Appellants’ Factual Background as if written here verbatim.” (Resp. Br. p. 1). Those facts include that Respondent “did not testify to any outstanding debt that he could not pay or that was overdue, including attorney’s fees,” and that, other than his “problems with the IRS from issues when [he] was running [his] own business,” Respondent did not have “[a]ny other kind of financial issue ... going on right now.” (App. Br. pp. 3-4).

There is absolutely no evidence in this record of any need for a lump sum payment.

B. Respondent has failed to identify any evidence that he can manage the finances of a lump sum payment prudently.

Respondent’s arguments only confirm that a lump sum award would not be in his and his dependents’ best interest. As noted above, the allegation that Respondent testified that “he is behind in his bills as a result of bringing in less income because of this work injury,” (Resp. Br. p. 5), is unsupported. Moreover, his assertion bolsters the conclusion that he is unable to manage

his finances: if he is unable to manage his finances with regular weekly payments coming in, even at the reduced workers' compensation rate,³ it is nonsensical to think he can manage a lump sum payment so as to provide for himself and his family over the long-term. "Experience has taught that ... income-protection is best accomplished through periodic income payments." Woods v. Sumter Stresscrete Inc., 266 S.C. 245, 247, 222 S.E.2d 760, 761 (1976); *see also* Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 280, 42 S.E.2d 390, 393 (1947) (the purpose of paying workers' compensation benefits in regular installments "is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society").

Respondent fails to identify any evidence that demonstrates he can handle a large sum of money and/or that such an award would be in his and his dependents' best interest. The fact that he obtained his Commercial Driver's License without going to truck driving school does not indicate that he can or will manage a large lump sum payment successfully. There is no correlation between obtaining a CDL and managing finances successfully, including prudently handling a large sum of money so as to take care of a family over a span of time. This is clearly demonstrated by the fact that Respondent was unable to manage the tax obligations of his single-truck trucking business. (R. p. 72, lines 7-20).

At the end of the day, the evidence shows that Respondent does not have and has never had a checking or a savings 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 conceded that there is no indication that he ever

³ Respondent's compensation rate was set in 2013, in an order that Respondent did not appeal. (Single Commissioner Decision and Order, filed Aug. 13, 2013, R. p. 38).

would open his own bank account or would be put on his wife's account. (R. p. 85, lines 20-24). Respondent has never had more than \$20,000 at any one time, nor has he ever invested money. (R. p. 72, lines 3-6).

Respondent's argument in response is that "Respondent is used to having money" because he "made good money as a truck driver," earning an estimated \$90,000 per year between 2003-2010. (Resp. Br. p. 4). However, those earnings would have been received on a regular pay schedule, spread throughout each year, just as workers' compensation benefits normally are paid. This fact does not support Respondent's argument that a lump sum payment would be in his best interest but, instead, shows the exact opposite: that Respondent's best interests are served through "periodic income payments." Woods, 266 S.C. at 247, 222 S.E.2d at 761.

Respondent also fails to effectively counter the evidence concerning the vocational evaluations that revealed sub-functional math and reading scores. Although Respondent may have testified that he did not believe he had any problem with reading, writing and basic mathematics, the reality is that both vocational experts determined Respondent's skills are on a Third or Fourth grade level at best.⁴ Testing by Page Rehabilitation Services, Inc. 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). These scores were confirmed in a July 14, 2014 vocational evaluation performed by Fi-Fi Jubran at the request of Respondent's counsel. (R. p. 94 (Word Reading at a

⁴ Both evaluators indicated that Respondent put forth good/focused effort on the testing. (R. pp. 94, 100). Ms. Jubran also reported that Respondent "indicates his eye sight is poor and he can barely see print. Anyway, he indicates he does not read very well," and that he "maintained a D average. He indicated he was okay in Math but barely got by in English." (R. p. 93).

4.7 grade level and Math Computation at a 4.6 grade level)). Ms. Jubran's conclusion that Respondent "does not have basic math skills required in many manufacturing jobs," (R. p. 95), only confirms that a lump sum award would not be in Respondent's best interest or that of his dependents. As noted above, Respondent adopted "all facts mentioned in the Appellants' Factual Background as if written here verbatim," (Resp. Br. p. 1), which include the results and conclusions of the vocational evaluators. (App. Br. pp. 4-5).

It is also important to keep in mind that the Commission Decision in this case was a split decision, with Commissioner Susan S. Barden dissenting. Commissioner Barden stated 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. p. 16). Here, there is even less evidence than there was in Woods 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.

There is absolutely no evidence: 1) regarding any particular bill or payment on which Respondent is behind, 2) regarding any particular need for a lump sum payment or how it would be spent, or 3) that Respondent would be able to manage a lump sum payment prudently. As a result, the Commission Decision is wholly without evidentiary support and its award of a lump sum payment is an abuse of discretion and should be reversed.

CONCLUSION

For all the reasons stated herein and in Appellants' Brief, 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,

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October 14, 2016



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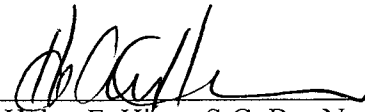
Of which Gregg Blakely Logging, Inc. and
Palmetto Timber Fund are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Appellants Gregg Blakely Logging, Inc. and Palmetto Timber Fund complies with Rule 211(b), SCACR. The undersigned also certifies that this Reply 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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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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