

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1104798

SC Court of Appeals
JUL 25 2013
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KENNETH SMITH, EMPLOYEE, CLAIMANT/APPELLANT

vs.

MARION BUILDERS GROUP, LLC
AND
BUILDERS MUTUAL INSURANCE COMPANY, DEFENDANTS/RESPONDENTS

Hearing: April 16, 2013
Columbia, South Carolina

Appearances: For the Claimant/Appellant:
Everett H. Garner, Esquire, of Holler Dennis Corbett
Ormand Plante & Garner
Columbia, South Carolina

For the Defendants/Respondents:
George A. Taylor, Esquire, of Callison Tighe & Robinson
Columbia, South Carolina

Purpose of Hearing: Order Majority Affirm with Amendment

Decision and Order: By Aisha Taylor, Andrea C. Roche and Gene McCaskill

Filed:

6/24, 2013

STATEMENT OF THE CASE

This matter came before the Appellate Panel of the South Carolina Workers' Compensation on April 16, 2013 per notice timely and properly served on all parties of interest. The matter was heard before the Hearing Commissioner on October 24, 2012 in Greenville, South Carolina, pursuant to the Form 50, Employee's Request for Hearing, and Form 51 filed by the Defendants.

The only issue before the Hearing Commissioner and likewise before this Appellate Panel was the Claimant's proper compensation rate. The Decision and Order of the Hearing Commissioner dated December 17, 2012, contains the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Claimant was injured by accident in the course and scope of his employment with Defendant Marion Builders on April 4, 2011, when he fell from a scaffold and landed on concrete.
2. The Claimant is an experienced carpenter with over 30 years of experience in the trade.
3. The Claimant's business income was negatively affected by the economic downturn beginning in approximately 2008.
4. The Claimant did not establish that he was earning \$20 per hour while employed by Defendant Marion Builders Construction Company.
5. The Defendants did not establish that the Claimant was being paid \$12 per hour while employed by Defendant Marion Builders Construction Company.
6. Mr. Mack and his crew worked an average of 32-36 hours per week for Defendant Marion Builders and worked a similar schedule thereafter.
7. The Claimant was hired by Mr. Mack to work for Defendant Marion Builders Construction Company.

8. Prior to being hired by Mr. Mack, the Claimant was unemployed.

9. The Claimant experienced large intervals of unemployment from 2008 until his employment with Defendant Marion Builders.

10. Prior to 2009, the Claimant's construction company, Kenneth Construction, employed other workers besides the Claimant; however, in 2010 and 2011, neither Kenneth Construction nor the Claimant employed anyone other than the Claimant.

11. The Claimant's first day of work for Defendant Marion Builders was April 3, 2011, one day before his injury.

12. The Claimant worked a total of approximately 12 hours while employed by Defendant Marion Builders.

13. The Claimant was paid \$200 for his work for Defendant Marion Builders. The Claimant was paid in cash contained in an envelope from GrandSouth Bank. The Claimant was paid by Mr. Mack. The pay was intended to be compensation for all of Claimant's work for Defendant Marion Builders. If Claimant's wage was calculated based upon the wages actually paid to him, the Claimant's wage would be \$16.67 per hour.

14. The Claimant's Total Income in 2010 was \$28,775.00

15. The Claimant's Total Income in 2009 was \$16,410.00

16. The Claimant's Total Income in 2006 was \$19,109.00

17. The U.S. Bureau reports a national median income of carpenters to be \$19.24 per hour and the South Carolina median income of carpenters to be \$15.86 per hour.

18. Mr. Mack's testimony at the hearing was inconsistent with his prior representations to Defendant Builders Mutual Insurance Company. Mr. Mack's testimony at the hearing was inconsistent with his prior testimony during his deposition. Mr. Mack's testimony regarding the Claimant's initial wage rate and corresponding pay raise was inconsistent and non-credible. Mr. Mack is found to be a non-credible witness.

19. This Commission has no doubt that Claimant's extensive experience as a carpenter would render him worthy of compensation from employment of \$20 an hour or more in a stable economy.

CONCLUSIONS OF LAW

Accordingly, as provided by S.C. Code Ann. §42-17-40, it is hereby determined as a matter of law that:

1. The Claimant suffered a compensable injury by accident in accordance with S.C. Code §42-1-160.

2. S.C. Code §42-1-40 is applicable in defining "average weekly wage". S.C. Code §42-1-40 sets forth a primary method for calculating average weekly wage and sets forth four alternative methods. The primary method for calculating average weekly wage is to take the total wages paid for the last four completed quarters prior to the injury divided by fifty-two or by the actual number of weeks for which the wages are paid, whichever is less.

3. Where the Claimant's employment lasted for a period of less than 12 months, the most appropriate alternative method to calculate average weekly wage must be utilized. S.C. Code §42-1-40.

4. The alternative method utilized in calculating average weekly wage must most nearly approximate the amount which the injured employee would be earning were it not for the injury. S.C. Code §42-1-40.

5. In determining which alternative method to use, the Court considers the practicability of the method, and whether the calculation yields a result that is "fair and just" to both parties. Pugh v. Piedmont Mechanical, 396 S.C. 31, 39, 719 S.E.2d 676, 680 (Ct. App. 2011).

6. The Claimant's average weekly wage should be calculated based on the Claimant's 2010 Federal Income Tax Return because the 2010 Federal Income Tax Return most nearly approximates the amount which the Claimant would be earning were it not for the injury. The Claimant's 2010 Federal Income Tax Return reveals that the Claimant earned \$28,775.00 in 2010.

7. The primary method for calculating average weekly wage is not available in this case because the Claimant was not employed by Defendant Marion Builders for fifty-two weeks.

8. The method for calculating average weekly wage by dividing total wages by the actual number of weeks for which wages were paid is not an available method for calculating average weekly wage in this case because the Claimant only worked approximately 12 hours over the period of two days.

9. The alternative method for calculating average weekly wage by utilizing the average weekly wage which was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community is not the best alternative method in this case. Use of this method would be impracticable and would yield a result that is not fair and just based on the particular circumstances of this case, particularly the fact that the Claimant admitted he spent substantial periods of time without work since approximately 2008.

10. To calculate Claimant's compensation rate based upon Claimant's claim he was to be paid \$20 per hour for approximately 40 hours per week for 52 weeks is likewise unfair and unjust to Defendants where the Claimant admitted that he has not maintained steady employment since 2008 and where Claimant would be depending upon work from Mr. Mack, a witness this Commissioner has found non-credible.

11. To calculate Claimant's compensation rate based upon Mr. Mack's representation to Defendant Builders Mutual would be unfair and unjust to the Claimant where Mr. Mack has been found to be non-credible by this Commissioner.

12. The Claimant's 2010 Total Income indicates the Claimant's hourly rate of pay is \$16.27 per hour where the Claimant worked 34 hours per week. Though not dispositive of the Claimant's actual hourly rate, the Commissioner finds that the amount yielded from the Claimant's 2010 Total Income to be consistent with Mr. Leonard's testimony that the National Bureau of Labor Statistics reports a median wage for carpenters in South Carolina to be \$15.86 and a mean wage of \$16.53.

13. Though not dispositive of the Claimant's actual hourly rate, the Commissioner finds that the amount yielded from the Claimant's 2010 Total Income to be very close to the actual amount (\$16.67) Claimant was paid for 12 hours of work.

14. §42-1-100 of the South Carolina Code of Laws is applicable in defining "compensation".

15. The Claimant's compensation rate is \$369.10 based upon an Average Weekly Wage of \$553.37, pursuant to S.C. Code § 42-1-40.

16. Use of Claimant's 2010 Total Income reported on his Federal Tax Return is the most practicable method for calculating the Claimant's compensation rate based upon the particular facts of this case.

APPELLATE REVIEW

Pursuant to S.C. Code Ann. § 42-17-50, in an Appellate Review, the Appellant Panel shall review the award; and, if good grounds be shown, may reconsider the evidence, receive further evidence, rehear the parties and amend the award. The Appellate Panel may make its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct. App. 1984).

After reviewing the evidence and hearing the arguments of counsel, the majority of the Appellate Panel has determined that the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct and incorporated herein by reference as if set forth verbatim herein, with the following amendment.

The majority amends the Decision and Order of the Hearing Commissioner to find the average weekly wage to reflect calculation based on forty-three (43) weeks worked during 2010. This is based on an hourly wage of \$16.67 times forty (40) hours per week and then divided into the Claimant's 2010 tax return earnings.

The majority finds that this specific calculation most nearly approximates the amount which Claimant would be earning if not for the injury and most nearly achieves the ultimate objective of reflecting fairly a Claimant's probable future earning loss. Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002).

Accordingly, the Findings of Fact and Conclusions of Law, as modified by the majority of the Appellate Panel shall become, and hereby are, the law of the case; and, therefore, the Decision and Order is affirmed as amended.

ORDER

NOW THEREFORE IT IS ORDERED that the Findings of Fact and Conclusions of Law from the Hearing Commissioner's Decision and Order dated December 17, 2012 are affirmed by the majority of the Appellate Panel with amendment, amending: (1) Conclusion of Law No. 6, so as to provide for a conclusion that the Claimant's average weekly wage should be calculated by dividing the Claimant's Total Income in 2010 by forty-three (43) weeks, not fifty-two (52) weeks; and (2) Conclusion of Law No. 15, so as to provide for a compensation rate of \$446.15 based upon an average weekly wage of \$666.80.

In all other respects the Decision and Order of the Hearing Commissioner dated December 17, 2012 is fully and completely affirmed in all respects.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Aisha Taylor, Commissioner



McCaskill, Commissioner

Commissioner Andrea C. Roche votes to affirm the Decision and Order of the Hearing Commissioner with no amendment, with the following comment:

I think the Single Commissioner's decision was well-reasoned and I see no error.



Andrea C. Roche, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on June 24, 2013