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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

WCC File No. 1514359
Appellate Case No. 2021-000633

Rachel J. Turner, Employee, ...Appellant-Respondent,

v.

Medustrial Healthcare Staffing Service and Condustrial
Inc; Guarantee Insurance Company; Countrywide
Staffing Solutions Group, Inc.; South Carolina
Department of Corrections; State Accident Fund; and
South Carolina Uninsured Employer's Fund, ... Respondents

of which Condustrial, Inc. f/k/a Medustrial Healthcare
Staffing Service, Employer, is the..Respondent-Appellant.

PETITION FOR REHEARING

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Statement of the Case

Pursuant to Rule 221(a), SCACR, the Respondents herein, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the Court of Appeals reconsider its unpublished opinion filed on March 27, 2024. The Respondents respectfully contend that the Court overlooked substantial evidence in the record and otherwise misapprehended arguments regarding the Commission's findings and calculation of the average weekly wage and compensation rate. Specifically, the Court found that by not making a precise factual finding as to why the traditional method of calculating Appellant's average weekly wage was impracticable, the Commission erred as a matter of law.

Arguments

I. The Court of Appeals overlooked and otherwise misapprehended arguments concerning the calculation of the Average Weekly Wage and Compensation Rate.

Pursuant to the South Carolina Workers' Compensation Act, average weekly wages are defined as the "earnings of the injured employee in the employment in which he was working at the time of the injury during the period fifty-two weeks immediately preceding the date of the injury…" S.C. Code Ann. § 42-1-40. Although the Section sets forth four alternative methods to calculate the average weekly wage, the Court relied unfairly upon the primary and traditional method of calculation, which requires that the average weekly wage must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid,

whichever is less. [1] Id. In the case at hand, there were no wages reported to the Department of Employment and Workforce on behalf of the Appellant.

However, § 42-1-40 also recognizes that "unusual circumstances relative to employment may occur. An elasticity or flexibility is permitted with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978).

Therefore, S.C. Code Ann § 42-1-40 specifically provides that, in situations where a traditional calculation "would be unfair, either to the employer or employee, such other method of computing average weekly wage may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." Id.

Despite the Court's assertions, the Commission found that the average weekly wage calculated by the Single Commissioner via the traditional method by "extrapolat[ing] from gross payments Claimant received before deduction of business expenses for federal income tax purposes" was erroneous because it failed to "fairly approximate Claimant's actual earnings." (R. p. 125). By applying the traditional method for calculating the Appellant's average weekly wage, the Commission recognized that such a calculation would result in an unfair windfall for the Appellant and thus, an exceptional reason existed for deviation.

The Commission's rationale for utilizing the fourth methodology to calculate the Appellant's average weekly wage is clearly stated as it "employed an analysis of [Appellant's] income tax returns to discern and approximate her 'actual earnings' in accordance with South

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[1] Although the Court reverts to the Single Commissioner's average weekly wage of $1,130.86 and compensation rate of $753.94 because the calculation "complied with the statutory requirement," the Court fails to acknowledge the lack of Contribution Reports from the South Carolina Department of Employment and Workforce to verify the wages reported, if any, pursuant to S.C. Code Ann. § 42-1-40.

Carolina law." (R. p. 126). Thus, relying upon Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991), and Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996), the Commission was able to properly discern the Appellant's "earnings" from her 2014 federal income taxes. In Wright, the Court held that a mileage deduction was no different from other expenses of doing business (e.g., hotels, meals, tools, classes, and insurance) and, as such, mileage reimbursements should not be included in wages for purposes of benefits. Wright, 306 S.C. at 334 – 335.

Additionally, in a lengthy analysis and discussion, the Court in Avins found several other examples where various business expenses were not included in computing the earnings for average weekly wage purposes:

> [A]utomobile allowances (See Bosworth v. 7-Up Distrib. Co., 355 S.E.2d 339 (Va. Ct. App. 1987)); mileage expenses (See Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct.App.1991)); equipment rentals (See Dickerson, Inc., et al. v. McCleary, 498 So.2d 651, 652 (Fla. Dist. Ct. App. 1986) ("[W]hen an employee furnishes both services and equipment, and the furnishing of equipment is a specified and substantial portion of the contract, the amount legally attributable to rental of the equipment should not be included in determining the employee's average weekly wage.")); labor, fuel, repair bills, and insurance (See Id.); and depreciation on business equipment, interest on business debts, and the purchase price of a saw (See Baldwin v. Piedmont Woodyards, Inc., 293 S.E.2d 814 (N.C. Ct. App. 1982) (expenses incurred in producing revenue should be deducted)).

Stephen v. Avins Const. Co., 324 S.C. 334.

Applying these principles, the Commission found several deductions that should be excluded when calculating the Appellant's earnings, including mileage and vehicle deductions, insurance, contract labor, continuing education, and uniforms. (R. p. 126). Based upon these deductions, the Commission properly found the Appellant's average weekly wage was $762.21 and her compensation rate was $508.17.

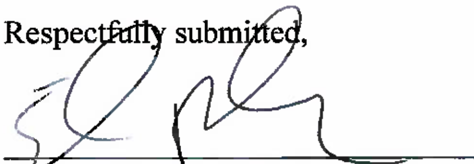
The Court found that the Appellate Panel erred in failing to make a factual finding as to why the Appellate Panel used an alternative method in determining the average weekly wage. Despite that finding, the Court reinstated the Single Commissioner's calculation of the average weekly wage. The Respondents contend that this constitutes error.

Pursuant to the above, the Respondents believe the Court may have overlooked and misapprehended these arguments when issuing its unpublished Opinion on March 27, 2024. Therefore, the Respondents respectfully request the Petition for Rehearing be granted and the decision of the Appellate Panel be affirmed on the issues set forth herein. In the alternative, the Respondents request that the Court remand the case to the Appellate Panel to make a finding as to its reasoning for deviating from the primary method of calculating the average weekly wage.

Conclusion

The Respondents, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the Court of Appeals grant the Petition for Rehearing, withdraw its unpublished Opinion from March 27, 2024, and issue a new Order affirming the Appellate Panel on the issues set forth herein.

Respectfully submitted,



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of which Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the..Respondent-Appellant.

CERTIFICATE OF MAILING

I hereby certify that I have served the foregoing Petition for Rehearing on behalf of Respondents South Carolina Department of Corrections and State Accident Fund on this 11TH day of April, 2024, via E-Mail, to the following E-Mail addresses, which are the addresses listed in AIS for the following attorneys of record:

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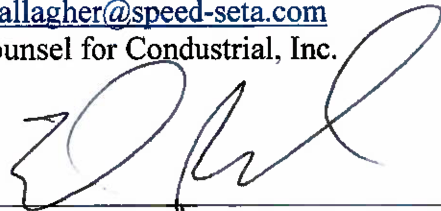

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Erin Farthing
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VIA ELECTRONIC MAIL ONLY (ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, South Carolina 29211

RE: Rachel Turner v. Medustrial Healthcare, et al
Appellant Case No.: 2021-000633
SAF Claim No.: 2015-3570

Dear Ms. Kitchings:

Enclosed please find for filing Petition for Rehearing on behalf of South Carolina Department of Corrections and South Carolina State Accident Fund with a Certificate of Mailing of the same in the above-referenced matter.

By copy of this correspondence, I am serving the other counsel of record with a copy of our Petition.

Sincerely,

Bonnie-Jean Thompson

Bonnie-Jean Thompson
Paralegal to Edwin P. Martin, Jr.
State Accident Fund
S.C. Bar Number 64172

/bjt
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