THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable Aisha Taylor, The Honorable Andrea C. Roche
and The Honorable Gene McCaskill

WCC No. 1104798
Appellate Case No. 2013-001611

Kenneth Smith, Employee/Claimant/Respondent,

-v-

Marion Builders Group, LLC and
Builders Mutual Insurance Company,

Defendants/Appellants.

INITIAL BRIEF OF APPELLANT

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September 4, 2013
Columbia, South Carolina

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STATEMENT OF ISSUE ON APPEAL

Did the Appellate Panel of the Workers' Compensation Commission err in calculating the Claimant's average weekly wage and corresponding compensation rate by dividing the Claimant's total income in 2010 by forty-three (43) weeks instead of fifty-two (52) weeks?

STATEMENT OF THE CASE

Appellants, Marion Builders Group, LLC ("Marion Builders") and Builders Mutual Insurance Company ("BMIC") seek review and reversal of the June 24, 2013 Decision and Order of the Workers' Compensation Commission Appellate Panel, which adopted the Findings of Fact and Conclusions of Law of the December 17, 2012 Decision and Order of Commissioner Susan S. Barden 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." (Appellate Panel Decision and Order, June 24, 2013, p. 5.) Commissioner Andrea C. Roche, however, did not join in the Appellate Panel's Order and voted "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." (Appellate Panel Decision and Order, p. 6.)

This case arises out of an admitted injury sustained by the Claimant on April 4, 2011. The Claimant worked only approximately twelve (12) hours for Marion Builders. He was injured his second day on the job. Following the Claimant's injury, Defendants

immediately began making temporary total disability payments to the Claimant based on an average weekly wage of $408.00. The average weekly wage was based on a report made by the Claimant's boss, Todd Mack[1], to the adjustor of BMIC shortly after the Claimant's injury.[2] The Claimant, however, asserted that he was supposed to be paid $20.00 per hour for forty (40) hours per week while working for Marion Builders. A Hearing was set before the Hearing Commissioner upon the Form 50, Employee's Request for Hearing and Form 51 filed by the Defendants, on October 24, 2012.

The Hearing Commissioner held that the Claimant's 2010 Income Tax Return most nearly approximated the amount the Claimant would be earning were it not for the injury. Thereafter, the Claimant appealed the Decision and Order of the Hearing Commissioner.

A Hearing was held before the Appellate Panel on April 16, 2013. On June 24, 2013 the Appellate Panel adopted the Findings of Fact and Conclusions of Law of the Hearing Commissioner, but amended the Decision and Order to recalculate the Claimant's average weekly wage. Defendants timely appealed the Appellate Panel's Decision and Order.

FACTS OF THE CASE

This case presents a challenge in determining the Claimant's actual weekly wage and corresponding compensation rate because, inter alia: the Claimant worked only twelve hours for Marion Builders; the Claimant's boss has offered conflicting reports on

[1] Todd Mack was a subcontractor of Marion Builders Group, LLC and hired the Claimant.

[2] The compensation rate was calculated based on an hourly rate of $12.00 per hour for thirty-four (34) hours per week.

the Claimant's hourly wage and expected work hours; and the Claimant's profession has left him without work for significant periods of time.

Todd Mack, a subcontractor of Marion Builders and the Claimant's boss, testified at the hearing and was found to be a non-credible witness by the Hearing Commissioner. (Decision and Order, December 17, 2012, Findings of Fact, ¶¶ 18-19.) Mr. Mack testified that when he hired the Claimant, he was going to pay the Claimant $12.00 per hour (Hr. Tr. p. 16), but that he unilaterally decided to pay the Claimant $20.00 per hour when the Claimant brought his tools and equipment to the job site (Hr. Tr. p. 16).[1] Mr. Mack testified that this decision was also based on the Claimant's knowledge and experience (Hr. Tr. pp. 21-22.), even though he knew of the Claimant's experience when he agreed to hire the Claimant for $12.00 per hour (Hr. Tr. p. 23.) "Mr. Mack's testimony at the hearing was inconsistent with his prior representations to 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." (Decision and Order, Findings of Fact, ¶18.)

The Hearing Exhibits included the Claimant's 2006 and 2011 Federal Income Tax Returns. The 2006 Tax Returns revealed the Claimant had a total income in 2006 of $19,109.00, although his gross income was $393,391.00. (Cl. Ex. 5.) However, the Claimant testified that his total income and his total expenses ($374,282.00) were properly reported on his 2006 Tax Return. (Hr. Tr. pp. 58-60; Cl. Ex. 1; Def. Ex. 1.) The

[1] On cross examination, Mr. Mack testified that the only tools the Claimant brought to the jobsite that he did not already have were an aluminum walk board valued at approximately $500-$600 and safety equipment, including a harness, valued at $100.

Claimant's 2011 Tax Return included a Tax Return Comparison sheet showing the Claimant's total income for tax years 2009, 2010, and 2011. (Def. Ex. 1.) In 2009, the Claimant's total income was $16,410.00; in 2010, $28,775.00; and in 2011, $20,157.00. Id. The Claimant admitted that his total income in 2010 was properly reported as $28,775.00. (Hr. Tr. p. 56.)

Also included in Claimant's submissions was a bank envelope from GrandSouth Bank. Handwritten on the envelope was "Kenny 12 hours." (Cl. Ex. 6.) The Claimant testified that the envelope was given to him by Todd Mack and contained $200.00. (Hr. Tr. pp. 52-53.) The $200.00 was compensation for Claimants twelve hours of work.

The Claimant also testified at the Hearing. The Claimant disputed that he agreed to work for $12.00 per hour, but admitted that he had been without work for significant periods of time since 2008. The Claimant testified that finding work was so difficult that he "worked one week at His House ... for $248 a month so [he] could pay [his] light bill. That's how bad the economy was." (Hr. Tr. p. 63.)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of a decision by the Appellate Panel. Carolinas Recycling Grp. v. S.C. Second Injury Fund, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this Court may reverse or modify the Appellate Panel's decision if the substantive rights of the appellant have been prejudiced because the decision is "affected by an error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-

23-380(5)(e-f). This Court may not substitute its judgment for that of the Commission on the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stephen v. Avins Const. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996). Substantial evidence is evidence that would allow reasonable minds to reach the same conclusion as the appellate panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

ARGUMENT

The Hearing Commissioner properly found that the Claimant's average weekly wage and corresponding compensation rate should be calculated based on the Claimant's total income as reported on the Claimant's 2010 Federal Tax Return and divided by fifty-two (52) weeks. The Decision and Order of the Appellate Panel modifying the Decision and Order of the Hearing Commissioner arbitrarily reduces the number of weeks that one year (fifty-two weeks) of wage records should be divided by to forty-three weeks, after the use of circular calculations unsupported by the record.

The Workers' Compensation Act defines average weekly wage for computing compensation and provides a primary method of calculation and three alternative methods. Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App. 2011). The primary method to calculate average weekly wage is to take the total wages paid for the last four completed quarters prior to the injury divided by fifty-two weeks or the actual number of weeks for which the wages are paid, whichever is less. S.C. Code Ann. § 42-1-40. "The commission must use this method unless, 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." Pilgrim at 44-45, 703 S.E.2d at 244 (quoting S.C.

Code Ann. § 42-1-40). This method is not available in this case because the Claimant only worked for Marion Builders for approximately twelve (12) hours.

When the primary method for calculating average weekly wages is unavailable, the Commission "is required to consider which alternative method for calculating average weekly wage it will use." Id. at 45, 703 S.E. 2d at 244.

The alternative methods for calculating average weekly wage are: (1) dividing the Claimant's earnings by the number of weeks and parts thereof during which the employee earned wages; (2) to consider the average weekly wage of a person of the same grade and character employed in the same class of employment; and (3) such other method as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. S.C. Code Ann. § 42-1-40. Both the Hearing Commissioner and the Appellate Panel ruled that the final alternative method for calculating average weekly wage is the only available method in this case.

At the Appellate Hearing the Claimant made no objection to the use of the third alternative method, but took the position that the Hearing Commissioner's finding of average weekly wage did not most nearly approximate what the Claimant would be earning. The Appellate Panel in turn found that the final alternative method for calculating the Claimant's average weekly wage should be utilized and particularly the Claimant's total income in 2010. However, the Appellate Panel's use of the Claimant's 2010 total income to calculate average weekly wage is merely illusory because of the circular mathematic calculation. This Court should reverse the Decision and Order of the Appellate Panel because the Appellate Panel erred in its calculation of the Claimant's average weekly wage.

A. The Appellate Panel's Calculation of Average Weekly Wage is Erroneous, Arbitrary and Carpricous

The Appellate Panel's Decision and Order provides that the Claimant's 2010 total income should be divided by forty-three (43) weeks "based on an hourly wage of $16.67 multiplied by forty (40) hours per week and then divided into the Claimant's 2010 tax return earnings."

The math used for calculating the average weekly wage is circular and unsupported by the evidence. The Appellate Panel's calculations are as follows:

1. Suggested hourly rate X suggested hours per week = weekly wage

   ($16.67 X 40) = **$666.80**

2. Claimant's 2010 total income ÷ weekly wage = total weeks

   ($28,775 ÷ $666.80) = **43.154 weeks** (rounded to 43 in Order)

3. Claimant's 2010 total income ÷ total weeks = average weekly wage

   (28,775 ÷ 43.154) = **$666.80**

As is evidenced above, the majority of the Appellate Panel did not actually utilize the Claimant's 2010 total income at all. The result of dividing into the same number (2010 total income) twice is to effectively remove the number from the equation. In reality, the Appellate Panel made an unsupported factual finding that the Claimant's hourly rate was $16.67 and that the Claimant's average hours per week would have been forty (40) hours. Using those numbers, the Panel determined the Claimant was making $666.80 per week; however, that was not the ultimate equation used to calculate average weekly wage. The Panel then divided the Claimant's total income by

$666.80, and determined that the Claimant's average weekly wage should therefore be calculated by dividing the Claimant's total income in 2010 by forty-three (43) weeks.

There is simply no rational purpose for the Appellate Panel's calculation, particularly for dividing the Claimant's 2010 total income by $666.80 and then by forty-three (43) weeks. In sum, the Appellate Panel's calculation is not grounded in law or logic and is erroneous, arbitrary and capricious. Therefore, this Court should reverse the Decision and Order of the Appellate Panel.

B. The Appellate Panel's Calculation of Average Weekly Wage is Against the Substantial Weight of the Evidence.

In addition to the illogical, circular calculation of average weekly wage, the Appellate Panel's calculation is based on wage information against the substantial weight of the evidence. First, there is no evidence the Claimant would work forty (40) hours per week in the future. In fact, the Hearing Commissioner and the Appellate Panel found that Todd Mack and his crew worked an average of 32-36 hours per week for Marion Builders and worked a similar schedule thereafter. (Decision and Order, Appellate Panel Decision and Order, Finding of Fact ¶ 6.)

Further, there has been no factual finding that the Claimant's hourly rate was $16.67 per hour. The only evidence supporting such a finding is that the Claimant was paid $200 for approximately twelve (12) hours of work. However, the Claimant himself testified that he was not being paid $16.67 per hour. Todd Mack never testified that the Claimant's hourly rate was $16.67. Furthermore, the Hearing Commissioner and the Appellate Panel concluded as a matter of law that "[t]he Claimant's total income in 2010 indicates that the Claimant's hourly rate of pay is $16.27 per hour where the Claimant

worked 34 hours per week. (Decision and Order, Appellate Panel Decision and Order, Conclusion of Law ¶ 12.)

The substantial evidence in this case is that the Claimant would not work an average of forty (40) hours per week and was not supposed to be paid $16.67. Therefore, this Court should reverse the Decision and Order of the Appellate Panel.

C. The Appellate Panel Improperly Calculated the Claimant's Average Weekly Wage by Multiplying $16.67 by Forty Hours Per Week

The Appellate Panel's Decision and Order effectively removed the import of the Claimant's 2010 total income from the equation and improperly calculated the Claimant's average weekly wage by multiplying an arbitrary hourly wage by an arbitrary number of hours. However, assuming for the sake of this argument that those numbers were supported by the record, the Appellate Panel's ruling on average weekly wage would nonetheless be improper.

In Pilgrim v. Eaton this Court held that the Commission's calculation of average weekly wage was an error of law where the claimant's hourly rate of $18.00 per hour was multiplied by forty (40) hours per week and where the claimant only worked for the employer for 29.5 hours. 391 S.C. 38, 44, 703 S.E.2d 241, 244. This Court reasoned that 29.5 hours of wage data was insufficient to "yield a reasonably accurate calculation of an average that is designed to be based on a year of data." Id. at 46, 703 S.E.2d at 245.

In this case, the same rationale applies. By removing the Claimant's 2010 total income from the equation, the Appellate Panel has constructively applied the same wage calculation here as was applied in Pilgrim. Twelve hours of work is simply

insufficient wage information to yield a reasonably accurate wage calculation intended to be based on a year of data. Therefore, the Appellate Panel erred in calculating the Claimant's average weekly wage.

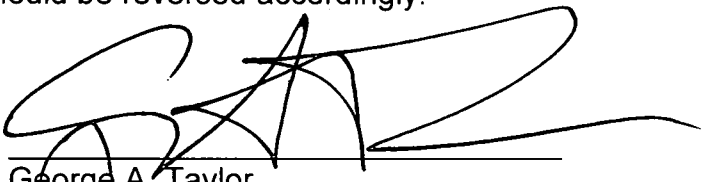
D. The Appellate Panel's Determination of Average Weekly Wage is Unfair and Unjust to The Defendants.

The Appellate Panel's calculation of average weekly wage is unfair and inequitable to the Defendants. In determining the methodology for calculating average weekly wage, the court must consider whether the calculation yields a result that is "fair and just" to both parties. Pugh v. Piedmont Mechanical, 396 S.C. 31, 39-40, 719 S.E.2d 676, 680-81 (Ct. App. 2011).

Based on the evidence submitted in this case, the Claimant's total income in 2010 was higher than his total income in any other year. In fact, the Claimant's 2006 Federal Tax Return reveals that Claimant's total income in 2006 was only $19,109.00, a year the Claimant claims was a "beautiful" year for him. (Hr. Tr. pp. 57-58.) Frankly, dividing one year of wage data from 2010 by fifty-two weeks weighed more closely in favor of the Claimant than the Defendants. This is particularly true given: (1) that 2010 was the most profitable year for which the Claimant provided wage records; (2) the Claimant admitted that the very nature of his profession has left him without steady work since 2008; and (3) the Claimant's speculative future earnings would be dependent on work being provided by Todd Mack, a witness found non-credible by the Hearing Commissioner. To now divide the Claimant's most profitable year by forty-three weeks instead of fifty-two weeks, with no rationale basis, is unfair and inequitable to the Defendants.

CONCLUSION

The Appellate Panel's Decision and Order as respects the Claimant's average weekly wage is based on circular mathematics, is against the substantial weight of the evidence, is grounded in an improper method for calculating average weekly wage and is unfair and unjust to the Defendants. Because the Appellate Panel so erred, the Appellate Panel's Decision and Order should be reversed accordingly.



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PROOF OF SERVICE

I certify that I served the **Initial Brief of Appellants** on all counsel of record by depositing copies of same in the United States Mail, first-class postage prepaid, on September 4, 2013, addressed as follows:

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