

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE WORKERS' COMPENSATION COMMISSION CORRECTLY CALCULATE CLAIMANT'S AVERAGE WEEKLY WAGE AND RESULTING COMPENSATION RATE UTILIZING A METHOD THAT WAS FAIR TO BOTH THE CLAIMANT AND THE EMPLOYER

STATEMENT OF THE CASE

This case arises out of an admitted accident and injury sustained by the Claimant on April 4, 2011. Claimant sustained injuries to his right wrist, elbow, spine, neck, ribs and mouth when he fell from a scaffold landing on concrete while working as a carpenter for Defendant Marion Builders Group, LLC. At the time of the accident and injury, Claimant had been working for this employer for only approximately 12 hours.

FACTS OF THE CASE

The determination of Claimant's average weekly wage and compensation rate was originally based on information purported to have been received by Defendant Carrier from a sub-contractor which allegedly indicated Claimant was paid \$12.00 per hour for 32 to 34 hours per week. Defendant Carrier began making payments based on an average weekly wage of \$408.00 with a corresponding compensation rate of \$272.01. Claimant has consistently asserted that he was supposed to be paid \$20.00 per hour which would translate to an average weekly wage of \$800.00 with a resulting compensation rate of \$533.60.

The evidence of the case contains multiple tax returns filed by Claimant beginning in 2006. The 2006 tax return showed a gross income for Claimant's construction company in the amount of \$393,391.00 with business related expenses reported as being

\$374,282.00, (R.pp. 128-131). Claimant testified that he tried to put most of the money back into the business purchasing trucks and work vans and providing crews with tools and accessories, (R.p. 288).

Claimant's 2010 tax return showed a gross business income of \$63,625.00 with expenses of \$34,850.00 yielding a net income of \$28,775.00. Claimant testified that he believed he worked approximately 12 weeks in 2010 and nowhere near 52 weeks to yield this income. (R.p. 290-291). The Appellate Panel found that the 2010 income should be divided by 43 weeks not 12 or 52.

Claimant's 2011 tax return showed a net income of \$20,157.00 all of which was earned in the first 3 months of that year before he was injured on April 4, 2011.

Claimant has about 33 years experience as a framing carpenter and 12 to 14 years as a sub-contractor and business owner in the construction industry.

ARGUMENT

- I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY ARRIVED AT A AVERAGE WEEKLY WAGE AND RESULTING COMPENSATION RATE WHICH WAS BASED ON AN APPROXIMATION WHICH WAS FAIR TO BOTH THE CLAIMANT AND THE EMPLOYER.

The Workers' Compensation Statute which sets forth several different methods for calculating a claimant's average weekly wage provides an elasticity and flexibility toward always achieving the ultimate objective of reflecting fairly a

claimant's probable future earning loss capacity. Sellers v. Pinedale Residential Center, 350 S.C. 183 564 S.E.2d 694. "The objective of wage calculation for workers' compensation purposes is to arrive at a fair approximation of the claimant's probable future earning capacity." A disability workers' compensation claims reaches into the future not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings for purposes of calculating the claimant's average weekly wage. Id.

The Appellant states in its Brief that "this case presents a challenge in determining the Claimant's actual weekly wage and corresponding compensation rate..." Respondent concurs in this succinct statement but this challenge is the responsibility of the Workers' Compensation Commission to establish a average weekly wage and compensation rate by whatever method or combination of methods which are equitable under the circumstances. In the present case, the Commission has met this challenge by applying mathematical calculations to the facts of the case. Even if the methods of calculation maybe somewhat circumspect, the overriding principle is the achievement of a fair and equitable compensation rate by whatever method. "It is evident that the aim in calculating a wage base is to fairly approximate the employee's earning capacity, and that method may be resorted to which 'will most nearly approximate the amount

which the injured employee would be earning were it not for the injury.'" Foreman v. Jackson Minit Markets, Inc., S.C. 217 S.E.2d 214.

In the present case, the Appellate Panel utilized 43 weeks as the number Claimant worked in 2010 instead of the approximately 12 to which he testified.

The Claimant/Respondent is also not particularly enamored with the compensation rate ultimately determined by the Commission; however, it is certainly within the province of the Commission to exercise its legitimate discretion in arriving at its conclusions. Claimant/Respondent has argued that the most equitable method of determining a fair compensation rate would be to assimilate 52 weeks from the weeks Claimant worked in 2010 with the weeks that he worked in 2011. The 2011 income when divided by the 3 month period of actual work would yield a compensation rate above the maximum and would be most indicative of the average weekly wage which Claimant would have been earning if not for the accident.

Also, the fact that Claimant has vast years of experience in the construction industry when considered in conjunction with the particular circumstances of this case prove convincingly that the Commission's findings are more than fair to the Employer. The likely effect of Claimant's injury on his probable earnings should be based more equitably on his vast experience and actual

earning capacity as illustrated in the past. Bennett v. Gary Smith Builders; 245 S.E.2d 129 (1978).

The Appellant's Brief focuses entirely on the methods of calculation without any legitimate assertion that the ultimate figure was unfair or inequitable. The Appellant does somewhat assert a specious argument in this regard by referencing Claimant's total income in 2010 which is misleadingly stated as \$19,109.00 when Claimant's gross income was \$393,391.00. The "beautiful year" referred to in Appellant's Brief certainly refers to the gross pay and not the net after expenses.

Regardless, the Workers' Compensation Commission Appellate Panel found an average weekly wage and compensation rate in this case in accordance with the mandated principles of the Act and interpretive case law cited herein.

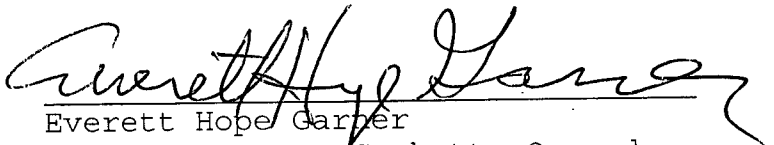
CONCLUSION

There are numerous cases in this State that have held that the Workers' Compensation Act is remedial legislation which is entitled to a liberal construction in order to accomplish the ends and purposes for which the Act was enacted. Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, S.E.2d 751 (1972); Baldwin v. Pepsi Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1959); Cokeley v. Robert E. Lee, Inc., 197 S.C. 157, 14 S.E.2d 889

(1941); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712
(1940).

In the present case, the finding of the Commission in regard to Claimant's average weekly wage and resulting compensation rate as derived by whatever means and methodology by the Commission are supported by substantial evidence. It is evident that the Commission intended to calculate a wage basis to fairly approximate Claimant's earning capacity and the substantial evidence supports the method resorted to as an approximation of the amount which Claimant would be earning if not for the injury.

Respectfully submitted,

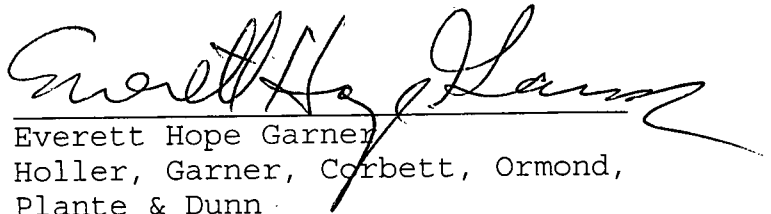

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February 10, 2014

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief contains all material proposed to be included by any of the parties and not any other material.

February 10, 2014



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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Marion Builders Group, LLC and Builders Mutual Insurance Company by depositing a copy of it in the United States mail, postage prepaid, on February 10, 2014, addressed to their attorney of record, George A. Taylor, Esquire, Callison, Tighe & Robinson, LLC, P.O. Box 1390, Columbia, SC 29202.

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