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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee.....Respondent,

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier.....Petitioners

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
VOL. III

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STATEMENT OF ISSUES ON APPEAL

Claimant's Appeal:

1. Did the Workers' Compensation Commission err as a matter of law in basing the Average Weekly Wage on the previous 4 quarters when basing it on the previous 52 weeks was consistent with the statute and would have been more fair to the parties?

Employer and Carrier's Appeal:

2. Whether substantial evidence supports the Commission's factual findings that Ramey was on light duty restrictions from March 24, 2011 and that the Employer unilaterally withdrew its offer of employment suitable to her capacity; thus requiring the Employer to pay temporary total disability compensation benefits during Ramey's period of disability?

STATEMENT OF THE CASE

This appeal arises out of a workers' compensation claim filed by the Appellant/Respondent, Gayla Ramey. Ramey was employed for nine years as a registered nurse for the Employer Unihealth Post Acute Care. Employer was insured by American Zurich Insurance Company.

On March 11, 2011, she suffered an injury by accident of when she fell on a flight of steps. Ramey injured her back and right arm. The Employer and Carrier accepted her claim and provided medical benefits.

On March 21, 2011, Employer discharged Ramey allegedly for falsifying records to get paid for one hour on March 18, 2011, while she was at the doctor that day treating for her injuries. Thereafter, the Employer refused to pay temporary total disability compensation despite Ramey being under work restrictions and not at maximum medical improvement..

Ramey timely filed a Form 50 (Request for Hearing) seeking medical treatment and temporary total disability compensation from the date of her termination and continuing. [R. p. 30]. Employer timely filed a Form 51 denying the claim for temporary compensation on the grounds that Ramey had been fired for cause. [R. p. 33].

A hearing was held before Commissioner Bryan G. Lyndon on August 10, 2011. Commissioner Lyndon issued a Decision and Order on September 28, 2011. [R. pp. 3-16]. In that Order, the Commissioner ordered the Employer to pay "temporary total disability compensation from March 24, 2011 to the present and continuing." [R. p. 14]. He also set the compensation rate at $671.58 based on an average weekly wage of $1,007.32 as calculated on the Form 20 prepared by the Employer. [R. p. 10, Finding of Fact 1].

Both parties timely appealed from this Order. Ramey appealed the rulings regarding the

compensation rate. Employer appealed the requirement to pay temporary total disability compensation from March 24, 2011.

The Appellate Panel heard oral arguments on March 20, 2012. By Decision and Order dated May 23, 2012, the Appellate Panel affirmed the Decision and Order of the Single Commissioner. [R. pp. 17-28].

These cross-appeals followed.

STATEMENT OF THE FACTS

Gayla Ramey was employed for nine years as a registered nurse for the Employer Unihealth Post Acute Care. Her job duties included numerous physical tasks including turning patients, helping patients move, and helping patients get in and out of wheelchairs.

On March 11, 2011, Ramey clocked in with a hand scanner. Shortly thereafter, she fell, was injured, and was immediately sent to Doctor's Care for treatment. She did not clock out when she went to the doctor and was paid for her normal hours – including the time at the doctor's office.

Doctor's Care put Ramey on work restrictions of no more than 30 minutes per hour on her feet; limited use of the back; no use of the right arm; 10-pound lifting restriction; and no repetitive bending, twisting, stooping, squatting or pushing. [R. pp. 342-343]. The Employer refused to respect these restrictions and kept her working full duty. Two other employees, Tammy Watkins and Lisa Jacobs, were also required to work full duty despite being under medical restrictions from work-related injuries.

On March 18, 2011, Ramey returned to Doctor's Care. She asked the doctor to take her off work restrictions because she needed to help with understaffing on her floor and she was afraid she would be fired if she remained under medical restrictions.

As the hand scanner was not working that day, Ramey was required to submit a written "request for missed time" form. Both of her immediate supervisors, Carrie Ray and Tonya Shephard, reviewed and approved the form as submitted. Both supervisors knew Ramey had left work for her doctor's appointment that morning when they approved the form. Ramey submitted time from 7:00 a.m. to 10:30 a.m. – which included the roughly one hour she spent going to the doctor.

On March 21, 2011, Employer discharged Ramey allegedly for falsifying records to get paid for the one hour she was at the doctor on March 18th.

Ramey returned to Doctor's Care on March 24, 2011. [R. p. 350]. She was placed back on work restrictions. [R. p. 351]. Ramey returned several more times to Doctor's Care – she was continued on work restrictions at each visit. [R. pp. 351-360]. Her last visit was on April 8, 2011 when she was referred to an orthopaedic surgeon. [R. p. 358]. Defendants refused to provide medical care from that point forward until the day of the hearing. [R. p. 100, lines 2-6].

Ramey was seen by Dr. Timothy Zgleszewski on July 19, 2011. Dr. Zgleszewski opined she was not at MMI, required additional treatment for her injuries, and "would be at risk for further injury if she returns to work before the additional treatment is rendered." [R. pp. 365-369].

A hearing was held before Commissioner G. Bryan Lyndon on August 10, 2011. In the pre-trial conference, Employer conceded it was required to provide treatment through an orthopaedic surgeon. The hearing went forward on two issues: (1) whether Employer was required to pay temporary total disability compensation; and (2) the average weekly wage and compensation rate.

At the hearing, Employer denied Ramey should receive temporary total disability benefits because she was terminated for cause. [R. p. 102, lines 8-12]. Commissioner Lyndon ordered the Employer to pay "temporary total disability compensation from March 24, 2011 to the present and continuing." [R. p. 14].

The Commissioner also set the compensation rate at $671.58 based on an average weekly wage of $1,007.32 as calculated on the Form 20 prepared by the Employer. Ramey had argued for a compensation rate of $704.32 based on an average weekly wage of $1099.17. The figure was based on her actual earnings over the 52 weeks immediately prior to her accident.

STANDARD OF REVIEW

The appellate court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). However, the appellate court may reverse the full commission's decision if it is based on an error of law. Therrell v. Jerry's Inc., 370 S.C. 22, 26, 633 S.E.2d 893, 894-95 (2006). The issue of interpretation of a statute is a question of law for the Court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

The Appellate Panel erred in basing the average weekly wage on the Form 20 because the statute defines average weekly wage as "the period of fifty-two weeks immediately preceding the date of the injury" and because using the Form 20 would be unfair to the parties.

The Workers' Compensation Commission held as a matter of law that: "The Claimants compensation rate is $671.58. This finding is based upon the average weekly wage of $1007.32 on the Employers Form 20 which covers the last four quarters of the Claimants employment." [R. p. 10, 13, Finding of Fact 1; Conclusion of Law 2]. Ramey contends that in this particular case, the correct average weekly wage should be based on her last 52 weeks of wages; rather than the last four quarters. This would result in a higher average weekly wage of $1,099.17 – which in turn would result in the compensation rate being capped at the 2011 maximum of $704.32. As these figures are undisputedly correct, this is purely a legal issue.

Section 42-1-40 defines average weekly wages as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . ." S.C. Code Ann. § 42-1-40 (2007). If this definition is applied, then the correct average weekly wage is clearly $1,099.17.

The contradiction here arises because the statute goes on to state: "'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." Id. The regulation governing calculation of the compensation rate further provides:

> Wage information shall be provided by the employer. *The employer shall report gross wages*, not net, and shall include gross pay allowed for vacations, bonuses, overtime, and allowances of any character made to an employee in lieu of wages as specified in a wage contract. 25A S.C.Code Ann. Reg. 67-1630(B)(2004)(emphasis added).

As illustrated in this case, there is an obvious contradiction in the statute. Mandating the use of the previous four quarters may result in a different – perhaps significantly different – average weekly wage than shown in the previous 52 weeks earnings.

The only logical means of reconciling the contradiction is to treat the reference to the previous four quarters reported to the Department of Employment and Workforce as a means of authenticating the payroll records. This ensures that an employer will not mistakenly use net wages instead of gross wages. However, even then, it is not a complete assurance of accuracy. Some employers pay their employees under the table or partially through tips. See Pizza Hut Delivery v. Blackwell, 204 Ga.App. 112, 418 S.E.2d 639 (Ga. App. 1992)(unreported tips must be included in the claimant's average weekly wage. This is the only interpretation consistent with the plain language of the statute itself along with the purpose of temporary compensation to substitute for a worker's paycheck. Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

The Commission's role is sharply limited to determining from the evidence the actual wages an injured worker earned, and from that finding deriving the correct compensation rate. As the actual wages earned by Ramey over the preceding 52 weeks are undisputedly higher than those reflected on the Form 20, the Commission should have found the average weekly wage to be greater than $1,099.17 as a matter of law.

The starting point for analysis of this question is the statute defining "average weekly wages". Employer contends the Commission must rely on the wage records because the statute states "'Average weekly wages' 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 Employment Security Commission's Employer contribution reports . . ." S.C. Code Ann. § 42-1-40 (1996). The parties agree the Commission based the average weekly wage on this part of the statute.

The statute further provides "When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to 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 (1996). In this case, relying on the Form 20 is patently unfair to Ramey. Employer should not earn a windfall in the workers' compensation claim simply because Ramey was hurt in the last month of a quarter in which her earnings were higher than the year before. Cf. McLeod v. South Carolina Ins. Co., 272 S.C. 254, 251 S.E.2d 193 (1979)("It would, therefore, not be appropriate or equitable to allow the Defendant (carrier) to derive a windfall benefit by taking credit against any sums received from other sources or to permit the carrier not to make payments which are admittedly due under the Workmen's Compensation laws of the State . . .").

No reported South Carolina case directly addresses the issue. South Carolina law consistently favors a flexible approach with a view toward 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). "The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability 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." Id. at 98-99, 245 S.E.2d at 131; see Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (upholding an award where an employee's future earning capacity was one of the factors the commissioner in deciding upon an award).

The cases demonstrate numerous examples of the exceptional circumstances requiring use of an alternative method to determine the average weekly wage. See, e.g. Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978)(reducing compensation rate to comport with actual annualized earnings noting the "calculation we hereby approve brings about a result fair to the employee and to the employer. It neither rewards the employee for working less than full time, nor punishes the employer for having given Bennett part-time employment after he declined full-time employment."); Forrest v. A.S. Price Mechanical, 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007)(including wages of all employers claimant regularly worked for even though he was not working for all employers at time of injury); Elliott v. S.C. Dep't of Transp., 362 S.C. 234, 607 S.E.2d 90 (Ct. App.2004)(as a matter of law, an earned pay increase qualified as an "exceptional reason" to recalculate claimant's average weekly wage); Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002)(exceptional circumstances existed requiring the average weekly wage of 16-year old rendered paraplegic in work-related accident to be based on the future earnings as testified to by a vocational expert); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001)(remanding for reconsideration of average weekly wage where it would be "grossly unfair to [employer] to require payments based on [seasonal employee's] dual employment status since he did not intend to work both jobs after the holidays"); Booth v. Midland Trane Heating and Air Conditioning, 298 S.C. 251, 379 S.E.2d 730 (Ct. App. 1989)(reversing

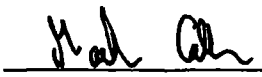
Commission's refusal to deviate from statutory formula when "as a matter of law . . . a wage increase of this magnitude [63%] in such a short period of time is exceptional."). The common theme running through these cases is that the Commission must use the most accurate method for calculating an employee's future actual earnings to ensure a fair result to both parties.

When, as here, the undisputed facts show the employee earned substantially more than reported on the Form 20 over the preceding 52 weeks, the Commission cannot arbitrarily limit the wages to a lower amount that the definition used in the statute. The Commission must be reversed because this result is grossly unfair to the employee. Therefore, the findings on the average weekly wage should be reversed..

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed and modified as to Ramey's average weekly wage and compensation rate. For the reasons argued in the Respondent's Brief of Appellant/Respondent, the Decision and Order awarding workers' compensation benefits to Gayla Ramey should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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TABLE OF AUTHORITIES

Case Law

Statutes/Regulations

STATEMENT OF ISSUES ON APPEAL

WHETHER THE COMMISSION PROPERLY DETERMINED CLAIMANT'S AVERAGE WEEKLY WAGE?

STATEMENT OF THE CASE

This claim arises out of an accident occurring on March 11, 2011, while Gayla Ramey ("Claimant") was working for Unihealth Post Acute Care ("Employer"). Subsequent to her alleged injury, and after she had been released to full duty, Claimant was terminated by Employer for falsifying paperwork in order to receive wages for time she was not at work. This claim was initially heard before Commissioner G. Bryan Lyndon on August 10, 2011, in Columbia, South Carolina. The Single Commissioner issued a Decision and Order on September 28, 2011, finding that Claimant sustained a compensable injury by accident on March 11, 2011, to her back and right upper extremity; was entitled to continuing temporary total disability compensation from March 24, 2011; and ordering the Employer to provide causally related medical treatment. An Appellate Panel of the South Carolina Workers' Compensation Commission held a hearing on this matter on March 20, 2012, and issued a Decision and Order, dated May 23, 2012, affirming the Single Commissioner's Findings of Fact and Rulings of Law in full and adopting the Single Commissioner's September 28, 2011, Decision and Order as the Decision and Order of the Appellate Panel.

In the Single Commissioner's September 28, 2011, as affirmed by the Full Commission, the Commissioner ordered Defendants to pay Claimant temporary total disability ("TTD") benefits from the date of her termination to the present and continuing. The Commissioner found that Claimant's compensation rate is $671.58 based on an average weekly wage of $1,007.32. The Commissioner based the calculation of Claimant's compensation rate on Employer's Form 20 which covered the last four quarters of Claimant's employment. Claimant's

entitlement to TTD benefits has been appealed by Defendants. Claimant has separately appealed the Commission's finding as to Claimant's average weekly wage.

STANDARD OF REVIEW

"The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission." Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981)). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citation omitted). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). "Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact." Forrest, 373 S.C. at 306, 644 S.E.2d at 785 (citing S.C. Code § 1-23-380(A)(5)). The appellate court may reverse or modify the Appellate Panel's decision only if Claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Id. at 306, 644 S.E.2d at 785-86. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442. The possibility of drawing two inconsistent conclusions does not prevent the Appellate Panel's conclusions from being supported by substantial evidence. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

STATEMENT OF THE FACTS

At the time of the hearing in this matter, Claimant was a 50 year old registered nurse that had worked for Employer for nine years. Claimant testified that fell on some steps while at work on March 11, 2011. She testified that, immediately after her fall, she was sent to Doctor's Care for treatment. She testified that she had clocked-in that morning via hand-scanning device, but did not clock out when she was sent for treatment.

Claimant further testifies that she was given work restrictions by the providers at Doctor's Care on that first visit. She stated that she was told not to spend more than 30 minutes per hour on her feet; to limit the use of her back; no use of her right arm; no lifting greater than ten pounds; and no repetitive bending, twisting, stooping, squatting, or pushing. Claimant asserted that she continued working as normal and her restrictions were not accommodated. She asserted that she was required to walk all over the facility, do a great deal of paperwork, pull charts from overhead to file forms, and sometimes she had to push residents in wheelchairs. Claimant stated that she felt that the tasks she was doing were in violation of her restrictions, but that she was scared of losing her job.

On March 18, 2011, Claimant had another appointment with Doctor's Care. Claimant asserted that she attempted to clock-out around 7:30 that morning using the hand scanner, but that the scanner would not work when she tried to use it. Claimant stated that she left without doing anything further to sign out because she needed to get to the appointment. She stated that she returned at 9:45 that morning, and was told to go home about 45 minutes later by her supervisor Tonya Shepherd because Ms. Shepherd wanted her to work the next two days. Claimant stated that when she returned from the doctor, she completed a Request for Missed Time form to note the time she missed that would not be reflected on the punch clock due to the scanner malfunction. She indicated on the form the time period of 7:00 a.m. to 10:30 a.m. and

asserted that was meant to reflect her time missed for the appointment. She stated that she got the form approved by her supervisors, Carrie Ray and Tonya Shepherd, and that both of those supervisors knew that she had an appointment that morning. Claimant testified that it was her understanding that she would be paid for work time that she missed for appointments related to her work injury and that no one had advised her any differently. Following this appointment, Claimant was released to full duty by Doctor's Care with no restrictions.

Claimant was terminated by Employer three days later on March 21, 2011 for falsifying records by submitting a time sheet for compensation that did not reflect her actual time spent at work. Following her termination, Claimant returned to Doctor's Care for additional treatment, and was placed back on work restrictions. Claimant has not yet been released at MMI.

Following the August 20, 2011 hearing of this matter, the Single Commissioner found the Claimant was entitled to temporary total disability benefits from March 24, 2011 "to the present and continuing." In his order, the Single Commissioner found Claimant's compensation rate to be $671.58 based on an average weekly wage of $1,007.32 per the Form 20 prepared by Employer. Claimant contends that her average weekly wage should be $1,099.17 with a corresponding compensation rate of $704.32. The Appellate Panel of the Full Commissioner affirmed the Single Commissioner's order, including the finding related to Claimant's comp rate.

ARGUMENTS

I. The Commission correctly determined Claimant's average weekly wage.

The calculation of average weekly wage is expressly governed by statute. Under S.C. Code Ann. § 42-1-40:

> "Average weekly wages" . . . ***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.

(emphasis added). In accordance with the statutorily mandated formula, Defendant's prepared a Form 20, *Statement of Earnings of Injured Employee.* Based on the Form 20, Claimant's earnings for the four quarters immediately preceding the quarter in which the injury occurred was $52,380.47. Dividing this amount by 52 in accordance with this statute results in an average weekly wage of $1,007.32. Claimant, however, argues that a different formula should be applied in this case to come to a higher calculation of average weekly wage.

As an initial matter, Claimant's arguments are premised on her contention that the Commission should have made findings and conclusion based on facts that are not in evidence in this case. See Edwards v. Edwards, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). Claimant argues that calculating Claimant's average weekly wage by using the 52 weeks immediately preceding her injury would result in an average weekly wage of $1,099.17. While Claimant asserts that "these figures are undisputedly correct," there is no credible evidence in the record upon which this amount can be based or verified. On this basis alone, Claimant's appeal on this issue is without merit and the Commission's determination as to Claimant's average weekly wage and corresponding compensation rate should be affirmed.

Despite the absence of any evidence to support Claimant's position, the determination by the Commission of Claimant's average weekly wage was based on the plain application of the statute and was without error. It is axiomatic that where a statute's language is clear, courts must enforce the plain and clear meaning of the words used. See e.g., Cabiness v. Town of James Island, 393 S.C. 176, 712 S.E.2d 416 (2011) ("However, if the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used."). In order to avoid the application of the plain language in Section 42-1-40, Claimant attempts to create

contradictions in the statute where none exist. Claimant correctly notes that Section 42-1-40 defines "average weekly wages" as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury..." This section goes to provide for various ways in which to calculate this amount depending on the duration and nature of employment. In this case, the formula dictated by the statute is the formula relied upon by the Commission in this case to arrive at the $1,007.32 average weekly wage.

Furthermore, Claimant raises the novel suggestion that the only way to reconcile the perceived "contradictions" in the statute is to outright ignore the mandatory calculation method directed by the General Assembly and "treat the reference to the previous four quarters reported to the Department of Employment and Workforce as a means of authenticating the payroll records." In essence, Claimant argues that the plain language of that statute should be ignored in favor of a calculation method that, in this particular instance, benefits Claimant in some respect. This contradicts the core principles of statutory construction. Berkeley County School Dist. v. South Carolina Dept. of Revenue, 383 S.C. 334, 679 S.E.2d 913 (2009) ("The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."); SCANA Corp. v. South Carolina Dept. of Revenue, 384 S.C. 388, 683 S.E.2d 468 (2009) ("Where a statute's language is plain and unambiguous, and conveys a clear and definite meaning ... the court has no right to impose another meaning.").

Finally, Section 42-1-40 does provide for alternative methods of calculating average weekly wages. Under this section:

> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages

> may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Claimant argues that it is patently unfair for her where, as she alleges occurred here, she was injured in a quarter in which her earnings were higher than the year before. Other than the difference in the final calculation of her average weekly wage, the record is devoid of any facts upon which the Commission could have found "exceptional reasons" for deviating from the statutory calculation method. As noted by this court, "[t]he specific goal of section 42-1-40 is for the commission to calculate an average weekly wage that is ***fair to both the worker and the employer***." Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010)(emphasis added). Claimant argues that the Commission's ruling results in a "windfall" for Employer. Likewise, it would not be fair to Employer to pay a higher compensation rate where, as here, there is no evidence in the record upon which to based Claimant's desired calculation and no evidence in the record to justify the higher figure as an estimation of future earnings potential. Claimant had not received any raise or promotion immediately prior to her injury and Claimant has not cited to any fact in evidence that would support a finding of "exceptional reasons."

Under the established precedent of this court, the Commission must apply the statutory method unless specific conditions are met.

> The Workers' Compensation Act defines "average weekly wage" for the purposes of computing compensation and sets forth a primary method of calculation and four alternative methods. The primary method for calculating the average weekly wage is to take "the total wages paid for the last four quarters divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." "The [Appellate Panel] ***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."

Pugh v. Piedmont Mechanical, 396 S.C. 31, 37-38, 719 S.E.2d 676, 680 (Ct. App. 2011) (internal citations omitted) (emphasis added). In this case, none of the conditions justifying deviation from

the "primary method for calculating the average weekly wage" are present. Consequently, the method used by the Commission in this case was only method available to it.

As set forth above, the Commission based its determination of average weekly wage on a Form 20 submitted in this case that was calculated using the formula expressly set forth in the Workers' Compensation Act. There is no credible evidence in the record to support the finding that Claimant argues should have reached by the Commission. Moreover, the applicable statute is plain in its meaning and the intent of the General Assembly is clear from the unambiguous language in the statute. There is no evidence in the record upon which the Commission could have justified application of any alternative methods of calculation. For these reasons, the findings and conclusions of the Commission with respect to Claimant's average weekly wage and corresponding compensation rate should be affirmed.

February 4, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee..... Appellant/Respondent

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier..... Respondents/Appellants

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CERTIFICATE OF COMPLIANCE

The undersigned certified that Respondents' Final Brief complies with Rule 211(b).

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PROOF OF SERVICE

This is to certify that a copy of the foregoing **Respondents' Final Brief** has been served upon the flowing by placing the same in the United States mail, first-class postage pre-paid, addressed as shown below on the 4th day of February, 2013.

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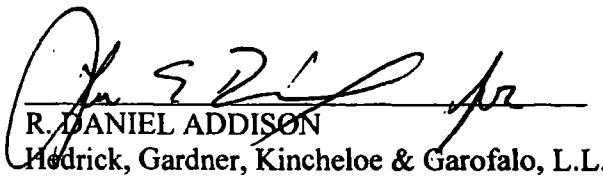

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