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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/Respondent,

-v-

Marion Builders Group, LLC and
Builders Mutual Insurance Company,

Defendants/Appellants.

PETITION FOR REHEARING

The Appellants, Marion Builders Group, LLC and Builders Mutual Insurance Company, respectfully petition this Court for a rehearing, pursuant to Rule 221(a) and Rule 240 of the South Carolina Appellate Court Rules. The grounds for this Petition are that the Order entered in Appellate Case No. 2013-001611 and filed by this Court on April 15, 2015, overlooked or misapprehended certain points of fact and law applicable to this matter. For the reasons set forth below, the Appellants respectfully request this Court reconsider its opinion and grant this Petition for Rehearing.

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ARGUMENT

1. This Court misapprehended or overlooked the substantial weight of the evidence.

The Appellate Panel's calculation of average weekly wage is based on wage information that is plainly against the substantial weight of the evidence. 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).

There is no evidence the Claimant worked or was expected to work forty (40) hours per week. In fact, the Hearing Commissioner and the Appellate Panel found that the Claimant's boss, Todd Mack, and his crew worked an average of 32-36 hours per week for Marion Builders, and they worked a similar schedule thereafter. (R. p. 22) (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. Mr. 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. (R. p. 19) (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 did not have an hourly income of \$16.67.

Therefore, this Court misapprehended or overlooked the substantial weight of the evidence in affirming the Decision and Order of the Appellate Panel.

2. This Court misapprehended or overlooked the erroneous, arbitrary and capricious nature of the average weekly wage calculation method utilized by the Workers' Compensation Appellate Panel.

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). 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).

The Appellate Panel's Decision and Order, affirmed by this Court, 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."

This math is circular and unsupported by the evidence. The 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**

There is no evidence and no finding that the Claimant's hourly wage was \$16.67. There is no evidence the Claimant would work forty hours per week. Furthermore, the Appellate Panel's calculations do 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 wholly remove the number from the equation. There is no rational basis for the Appellate Panel's calculation, and this Court therefore misapprehended or overlooked the arbitrary, erroneous and capricious nature of the wage calculation in affirming the Appellate Panel's Decision and Order.

3. This Court misapprehended or overlooked a proper balance of equities required in calculating a Claimant's average weekly wage.

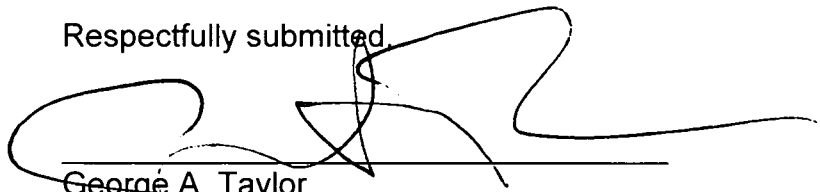
In determining the methodology for calculating average weekly wage, the court must consider whether the calculation yields a result that is "fair and just" to both parties. Pugh v. Piedmont Mechanical, 396 S.C. 31, 39-40, 719 S.E.2d 676, 680-81 (Ct. App. 2011).

The Single Commissioner properly calculated the Claimant's average weekly wage based on the Claimant's total income for 2010 divided by fifty-two weeks. 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. (R. pp. 305 - 306) (Hr. Tr. p. 57, line 22 - p. 58, line 1). 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 rational basis, is unfair and inequitable to the Defendants.

Given the foregoing, Appellants respectfully submit that this Court misapprehended or overlooked the matters set forth above and, therefore, respectfully submit this Petition for Rehearing should be granted.

Respectfully submitted,



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April 30, 2015

Columbia, South Carolina

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PROOF OF SERVICE

I certify that I served the **Petition for Rehearing** on all counsel of record by depositing copies of same in the United States Mail, first-class postage prepaid, on April 30, 2015, addressed as follows:

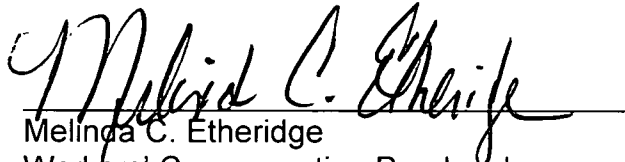
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CALLISON  TIGHE

April 30, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
1220 Senate Street
Columbia, SC 29201

**RE: Kenneth Smith v. Marion Builders Group and
Builders Mutual Insurance Company
Case No. 2013-001611
Our File No. 3399.280**

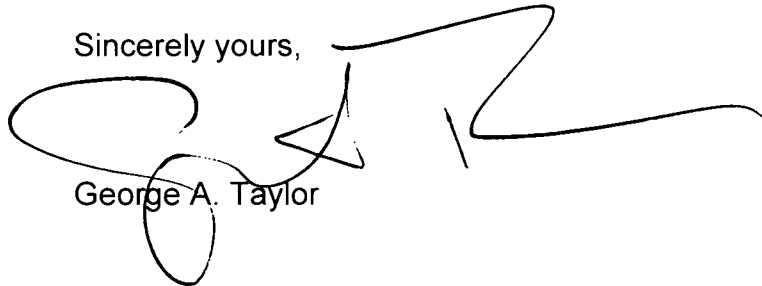
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of a Petition for Rehearing in the above-referenced action, along with this firm's check in the amount of \$25.00 for the filing fee. Please return a clocked-in copy to us in the self-addressed postage paid envelope provided.

By copy of this letter, I am serving same upon the South Carolina Workers' Compensation Commission and all counsel of record.

Thank you for your assistance in this matter.

Sincerely yours,



George A. Taylor

GAT/mce
Enclosures

cc: SC Workers' Compensation Commission (w/enclosures)
Everett Hope Garner, Esquire (w/enclosures)

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