

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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JUN 26 2015

SC Court of Appeals

W.C.C. FILE NO.: 1402522

Jeffrey S. Tracy

EMPLOYEE,
CLAIMANT/APPELLANT

VS.

PeopLease Corporation

EMPLOYER,

AND

National Interstate Insurance Company

CARRIER,
DEFENDANTS/RESPONDENTS,

Appellate Panel Review held in Columbia, South
Carolina, on March 16, 2015 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

June 4th, 2015

APPEARANCES: Claimant/Appellant represented by Tyler A. Bathrick, Esquire

Defendants/Respondents represented by Kelly F. Morrow, Esquire

STATEMENT OF THE CASE

Prior to the Single Commissioner hearing, the parties agreed that the single issue for determination by the Single Commissioner in this matter was a determination of average weekly wage and compensation rate.

The Claimant took the position that his average weekly wage and compensation rate should amount to \$1,014.09 yielding a compensation rate of \$676.09. The Claimant took the position that since his per diem expenses are subtracted from each pay check, out of his gross pay, the weekly deduction for his per diem expenses should be included in his overall wage calculation. The Claimant alleged his average weekly wage should be based on the per mile rate indicated in the personnel file. The Claimant was unable to find any South Carolina case law on this issue. However, he did find a North Carolina case, *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430, (N.C. Ct. App. 2003), that the Claimant alleges addresses this issue. The Claimant also requested an underpayment of benefits for the period of temporary total disability benefits paid to the Claimant under the calculation of wages as submitted by the Defendants.

The Defendants asserted that the proper average weekly wage should be \$716.80 with the corresponding compensation rate of \$477.89. That computation is arrived at without use or inclusion of the per diem amount pursuant to the IRS guidelines for determination of income and use of the per diem. Also, the Defendants took the position that the per diem is not taxable income and therefore cannot constitute wages and cannot be included in the overall figures utilized to configure the average weekly wage and compensation rate. As a result, the Defendants asserted that the average weekly wage and compensation rate as set forth on the Form 20 is proper and there is no underpayment of benefits owed to the Claimant.

At the conclusion of the hearing, Commissioner Barden issued the Decision and Order making the following Findings of Facts and Conclusion of Law:

SINGLE COMMISSIONER FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Findings of Fact

1. Average weekly wage and compensation rate are governed by Section 42-9-260.
2. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
3. The undersigned has evaluated all of the evidence as submitted by the parties and is not persuaded by *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430, (N.C. Ct. App. 2003).
4. I find as a matter of fact that the average weekly wage and compensation rate as set forth by the Defendants on the Form 20 is proper.
5. The Claimant's average weekly wage is \$716.80 with the corresponding compensation rate of \$477.89. This is based upon a proper calculation of the actual taxable wages, which does not include the non-taxable per diem that the Claimant received.

Conclusions of Law

It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. Average weekly wage and compensation rate is governed by Section 42-9-260.
2. The Claimant's average weekly wage is \$716.80 with a corresponding compensation rate of \$477.89 as based on the wages submitted by the Defendants and set forth on the Form 20.

Following the Decision and Order, Claimant filed a Form 30 and asserted several exceptions to the Decision and Order. According to the Claimant's Appellant's brief, these exceptions were consolidated as follows:

1. Did the Single Commissioner err in failing to adopt *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430 (N.C. Ct. App. 2003), or provide an explanation for not adopting Rhodes, when South Carolina Courts have not addressed the present issue and South Carolina relies on North Carolina precedent in workers' compensation cases? (Finding of Fact #3).
2. Did the Single Commissioner err by failing to adopt the average weekly wage and compensation rate as agreed to be the employer and employee in the employment application? (Findings of Fact #4 and #5; Conclusion of Law #2).
3. Did the Single Commissioner err in calculating claimant's average weekly wage and compensation rate? (Findings of Fact #4 and #5; Conclusion of Law #2).
4. Did the Single Commissioner err in deducting per diem expenses from claimant's gross income when she calculated claimant's average weekly and compensation rate? (Finding of Fact #4 and #5; Conclusion of Law #2).

EVIDENCE OF THE CASE

The Claimant testified that he is 42 years of age and resides in Chester, SC. (Hrg. Trans. p. 8-9). The Claimant has been employed with D&C trucking for 13 years. (Hrg. Trans. p. 9). The Claimant estimated about two years prior to his accident D&C trucking turned their wage information and employment status over to PeopLease. (Hrg. Trans. p. 9). In the conversion from D&C trucking to PeopLease, the Claimant testified he completed employment paperwork that set (noted as Exhibit Number 1 and retained in the Commission file) wherein his rate per mile was set at 34 cents per mile, \$15 per stop and \$50 lay over pay. (Hrg. Trans. p.15). The Claimant also acknowledged he elected to have his insurance deductions taken out on a pre-tax basis. (Hrg. Trans. p. 12). The Claimant testified that he turned in his per diem to the Company every week on a sheet based on how many days he was out on the road and what allowances he

claimed on the road while he was out. (Hrg. Trans. p. 17). The Claimant testified his per diem was \$52 per day and that it was not taxed. (Hrg. Trans. p. 17-18). The Claimant testified that the remaining balance of his wages that were left over minus his per diem was taxed. (Hrg. Trans. p. 19). The Claimant further testified that he elected to have his per diem taken out of his checks so that he would not have to account for his per diem amounts on his personal tax returns. (Hrg. Trans. p. 19-20).

Monica Reese testified on behalf of the Defendants. Ms. Reese testified that she is the Vice President and General Counsel for PeopLease Corporation and has worked in that capacity for 9 years handling all litigation including workers compensation matters across the U.S. for PeopLease. (Hrg. Trans. p. 22). Ms. Reese testified that PeopLease works as a professional employer meaning they are co-employers with their clients as to their payroll. (Hrg. Trans. p. 22). PeopLease processes payroll, remits taxes, provides W-2's, provides workers compensation insurance and assists in HR Benefits to their clients. (Hrg. Trans. p. 22-23). They share that same arrangement with D&C Trucking whom the Claimant works for. (Hrg. Trans. p. 23).

Ms. Reese testified that they receive information from D&C Trucking that Mr. Tracy would report as his actual mileage and per diem information from his logs. They then calculate the number of miles as provided from each of the logs remitted and then multiply by the stated rate per mile and arrive at their totals. (Hrg. Trans. p. 24). They take the total amount of payments to driver and then remove the per diem from that figure as non-taxable income (which is a maximum of \$59 per day for truck drivers). (Hrg. Trans. p. 25). You then take the load pay and according to the IRS you can't pay more in per diem than you would pay on the actual gross wages, the mileage pay and make sure that the tax implications are not offset incorrectly. (Hrg. Trans. p. 27) (Defendants APA #11)

Ms. Reese testified when the proper per diem deductions are taken out of the Claimant's wages and then you take out any other deductions that arrive at the proper taxable wages that are his listed W-2 wages reported to the government. (Hrg. Trans. p. 28-29). She testified that those wages are then used to determine average weekly wage and compensation rate. The per diem figures are added back into the Claimant's paycheck for actual payment to the Claimant for ease of payment but they are not included in the configuration for average weekly wage and compensation rate as they are not taxable wages to the Claimant and this explains why they look like they are taken out and then later added back in to his pay information. (Hrg. Trans. p. 29). Ms. Reese testified that this single check payment system is customary in the trucking industry, but only the W-2 reportable wages are used to calculate the aww/cr. (Hrg. Trans. p. 30). Ms. Reese went on to testify that there are variations of this pay system depending on how any given trucking company elected to handle their pay. She testified that the specific election affects how they look at each individual when determining what taxable wages can be utilized in determining average weekly wage and compensation rate and that Mr. Tracy's wages were configured on D&C Trucking's specific set up and Mr. Tracy's individual elections. (Hrg. Trans. p. 33).

FULL COMMISSION FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

1. Average weekly wage and compensation rate are governed by Section 42-9-260 and Section 42-1-40.
2. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
3. We have evaluated all of the evidence as submitted by the parties and are not persuaded by *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430, (N.C. Ct. App. 2003).

4. Based on the substantial evidence, the testimony of the representatives of the Defendants, and the Claimant's testimony, we find as a matter of fact that the average weekly wage and compensation rate as set forth by the Defendants on the Form 20 is proper.
5. Based on the substantial evidence, the testimony of the representatives of the Defendants, and the Claimant's testimony, we find the Claimant's average weekly wage is \$716.80 with the corresponding compensation rate of \$477.89. This is based upon a proper calculation of the actual taxable wages, which does not include the non-taxable per diem that the Claimant received.
6. Based on the substantial evidence, the testimony of the representatives of the Defendants, and the Claimant's testimony, we find the Decision and Order of the Single Commissioner is affirmed in its entirety.

Conclusions of Law:

It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. Pursuant to S.C. Code Ann. § 42-15-10 and § 42-17-20, jurisdiction and venue are proper.
2. Pursuant to South Carolina Workers' Compensation Commission Rules and Regulations, Rule 67-210(B) and Rule 67-213(C), the parties were properly served with Notice of the Hearing.
3. The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (S.C. Ct. App. 1984).

4. The Full Commission is not necessarily bound by the Single Commissioner's findings of fact, and is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commission. *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (S.C. 1967). See also *Muir v. C.R. Bard, Inc.*
5. Workers' Compensation awards may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) ; *Sharpe v. Case Produce Co.*, 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct.App.1997) rev'd on other grounds.
6. Average weekly wage and compensation rate is governed by Section 42-9-260 and Section 42-1-40.
7. Based on the substantial evidence, the testimony of the representatives of the Defendants, and the Claimant's testimony, we find the Claimant's average weekly wage is \$716.80 with a corresponding compensation rate of \$477.89 as based on the wages submitted by the Defendants and set forth on the Form 20.
8. Based on the substantial evidence, the testimony of the representatives of the Defendants, and the Claimant's testimony, we find the Decision and Order of the Single Commissioner is affirmed in its entirety.

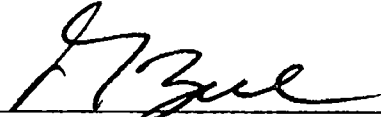
ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the substantial evidence supports a finding that the Decision and Order of the Single Commissioner is **AFFIRMED IN ITS ENTIRETY.**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Claimant's average weekly wage is \$716.80 with a corresponding compensation rate of \$477.89.

IT IS SO ORDERED.

WE CONCUR:



Commissioner Scott T. Beck
For the Appellate Panel



Commissioner R. Michael Campbell, II



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on June 4, 2015