APPELLATE PANEL DECISION AND ORDER
OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO. 1402080

John Faubert,

Employee,

Claimant/Respondent,

vs.

University of S.C. Apprentice Students,

Employer,

State Accident Fund,

Carrier,

Defendants/Appellants.

HEARING:	Held in Columbia, South Carolina on July 20, 2015.
APPEARANCES:	Attorney for Claimant/Respondent: Zandra L. Johnson of The Law Firm of Zandra L. Johnson, LLC Attorney for Defendants/Appellants: Peter V. Leventis, IV of McKay, Cauthen, Settana & Stubley, P.A.
COURT REPORTER:	Gigi Davis
PURPOSE OF HEARING:	To determine whether there were any errors of the Hearing Commissioner in her Decision and Order filed March 19, 2015.
DECISION AND ORDER ISSUED:	November 3rd, 2015

STATEMENT OF THE CASE

This matter comes before the Appellate Panel by way of Defendants/Appellants' ("Appellants") appeal of the Hearing Commissioner's Decision and Order finding that the Claimant/Respondent ("Respondent") was entitled to combine wages from both his internship and his work at McDonald's and further awarding him temporary total disability benefits at the combined wages rate for any and all weeks during which he was either unable to attend classes and other activities in connection with his internship or work for McDonald's.

On appeal, the Appellants contend that the Hearing Commissioner erred in finding Smith v. Barnwell Co., 384 S.C. 520, 682 S.E.2d 828 (Ct. App. 2009) inapplicable. Specifically, the Appellants argue that Smith v. Barnwell dictates that the Respondent's average weekly wage be limited solely to the average weekly wage assigned to "students of high schools, state technical schools, and state-supported colleges and universities while engaged in work study..." by S.C. Code Ann. § 42-7-65. Pointing to the language utilized in the statute itself and citing legislative intent, the Respondent replies, that the Appellants' reliance on Smith v. Barnwell is misplaced and further that S.C. Code Ann. § 42-7-65 does not prohibit the increasing of a student intern's average weekly wage by combining wages from the student intern's regular employment. The Respondent points out that the legislature, in S.C. Code Ann. § 42-7-65, specifically informs, by express identification, that the average weekly wage of certain employees "may not be increased as a basis for any computation of benefits for [other employment]" and students nor interns were included among those identified.

EVIDENCE OF THE CASE

The Respondent was the only witness to testify at the hearing before the Hearing Commissioner. The Respondent testified that he was a third year student at University of South Carolina pursuing a Masters in Social Work and expected to graduate May 2015. He possesses a Bachelor's degree in Human

Service, which he obtained from Southern Wesleyan University two years prior as well as an Associate's degree in Human Services from Georgia Tech.

On January 29, 2014, the Respondent was walking along a causeway at Marshall I. Pickens Hospital to complete hours for his internship as required by University of South Carolina when his right foot got caught on one of the slate stone pavers causing him to fall, hitting the right side of his body first. As a result of the fall, the Respondent suffered injuries to his neck, shoulder and right arm.

For several years prior to his fall on January 29, 2014, the Respondent had been being followed by Dr. Robert LeBlond, a pain management doctor at Upstate Medical Rehabilitation, for his pre-existing medical conditions. His pre-existing medical conditions include a 2007 diagnosis of multiple sclerosis (MS) which required prescriptions for MS Contin in addition to Nexium for Barrett's Esophagus and medications prescribed by his pain management doctor which had increased or changed over time due to extensive back issues that existed prior to the fall.

As a result of the injuries he sustained in the fall, the Respondent had been written out of work by both his pain management doctor (who was treating him for MS prior to the fall) and the physician authorized by the Appellant Carrier. At the time of the Respondent's fall, the Respondent was attending school and completing hours for his internship and working as an Assistant Manager for McDonald's. The Respondent testified that he last worked at McDonald's right after the fall and on his last day, he was sent home because of being in apparent, or obvious, distress.

Due to some delay on the part of Appellants in sending the Respondent for care, he presented to his primary care physician two days after the fall, at which time he complained of a swollen knee, pain in his right wrist and an increase in his back pain since the fall, and was ultimately x-rayed and told to follow up with his pain management doctor, Dr. LeBlond, who had already been following him for six years or pain related to his MS. Dr. LeBlond increased Respondent's prescription for Hydrocodone (for back pain) from 4 pills per day to 5 pills per day.

Ultimately, the Appellants authorized treatment with Doctors Care (on February 27, 2014) and the Respondent was first seen there February 28, 2014 by Dr. Forrest Pommerenke who diagnosed the Respondent with a back sprain and instructed the Respondent to continue with pain management, ordered a course of physical therapy and instructed Respondent to follow up with him in 1 to 2 weeks. At that time, Dr. Pommerenke indicated that the Respondent "need[ed] rehab in major way". With respect to work, Dr. Pommerenke released the Respondent to "part time, sedentary work at his MSW program" but concluded that the Respondent was "unable to work at all at McDonalds." The Respondent testified that, as an intern at Marshall I. Pickens, the Respondent worked two days (8 to 10 hours) per week during which time he engaged with patients in group therapy, admissions and evaluations. Physically, he engaged in these activities and teaching from a seated and/or standing position. His McDonalds work, however, required working seven to eight hour shifts, involving a lot of standing, completing paperwork and some bending, lifting and climbing.

Respondent returned to Doctors Care on March 14, 2014 as instructed but this time saw Dr. Paul Kellett. At that time, he was having the same difficulties—back pain, pain in both legs, right sided neck pain, right shoulder pain, right wrist pain and a swollen right knee as well as increased lower back pain. Dr. Kellett wrote the Respondent out of work and noted that he was unable to estimate his return to work. He then instructed the Respondent to return for re-evaluation in ten days at which time he would have completed the previously ordered course of physical therapy.

Upon Respondent's return for re-evaluation (March 24, 2014), he was seen by Dr. Pommerenke who instructed the Respondent that he could return to his internship on a limited basis but still could not return to McDonalds. He also referred Respondent to neurological surgery upon his belief that surgery may have been Respondent's best option. Respondent was instructed to return to re-evaluation in three weeks which he did on April 10, 2014 at which time he was seen by Dr. Kellett who indicated that he didn't understand why he was back as it was his understanding that he was referred to a

neurosurgeon. It was noted that the workers compensation carrier had denied the Respondent's referral to neurosurgery. Consequently, Dr. Kellett again indicated that the Respondent was to remain out of work for an indefinite period of time and noted that the Respondent was to be followed by neurosurgery.

As of the date of the hearing before the single Commissioner, Appellants had not authorized Respondent's referral to a neurosurgeon. Nonetheless, the Respondent continued to follow up with Dr. LeBlond, his pain management doctor by whom he was being followed prior to his injury. Since that time and through the date of the Hearing Commissioner's Order, Dr. LeBlond had written the Respondent out of work. Consequently, the Respondent remained out of work with respect to his job at McDonalds through the date of the Hearing Commissioner's Order.

After hearing the able arguments of counsel, reviewing the APA Exhibits and, testimony and the transcript of record, we, the Appellate Panel, **AFFIRM IN ALL RESPECTS,** the Decision and Order of Commissioner Taylor filed in this matter March 19, 2015, thereby adopting in full the following Findings of Fact:

1. Smith v. Barnwell County, 384 S.C. 520, 682 S.E.2d 828 (2009) does not apply to this case as it specifically holds, "[t]he General Assembly did not intend for an inmate to be able to combine wages in determining his average weekly wage." In the present case, the Claimant is a student intern with University of South Carolina, not an inmate. As such, Smith v. Barnwell County, is inapplicable.

2. S.C. Code Ann. § 42-7-65 does not prohibit the Claimant, a student intern, from combining wages for purposes of calculating his average weekly wage. Section 42-7-65 states in part, "[t]he wages provided in items (2), (3), (4) and (5) of this section may not be increased as a basis for any computation of benefits because of employment other than as a volunteer. This part of the statute refers to voluntary fireman, volunteer rescue squads, volunteer deputy sheriffs, and volunteer state constables. The statute goes on to address student interns in the final paragraph; however, there is no provision restricting the

combining of a student intern's wages. The Act is silent as to a specific prohibition on combining wages for a student intern. As such, I find S.C. Code § 42-1-40 and Steele v. Self-Serve, Inc., 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999) apply to this claim and Claimant is allowed to combine his wages from both his internship and his work at McDonald's.

3. Respondent's average weekly wage as a student, per the Form 20 prepared and submitted by

Appellant Employer, set forth an average weekly wage of $371.86 with a corresponding compensation rate of $250.73.

4. Respondent's concurrent employer, McDonald's prepared and submitted a Form 20 which set forth an average weekly wage of $378.93 with a corresponding compensation rate of $252.63.

5. Respondent's combined average weekly wage, taking into account both his employment as a

student and his concurrent employment with McDonald's is $750.79, yielding a compensation rate of $500.55.

6. Respondent is entitled to back payment of temporary total disability benefits for the period March 6, 2014 through March 24, 2014, the period during which he was written out of and unable to both complete work in connection with his internship with University of South Carolina and unable to work for McDonald's.

7. Although Respondent was able, at one point, to return to complete work in connection with his internship, he was never released and/or able to return to work at McDonald's as a result of this injury. Consequently, we find that Respondent is entitled to back payment of temporary partial disability payment for the period beginning March 25, 2014 through the date of the Hearing Commissioner's Order and continuing for those weeks that he was not able to return to work at McDonald's to be paid in a lump sum.

8. Respondent has not yet reached maximum medical improvement.

9. Respondent's current medical condition is worse than his pre-existing condition and he is entitled to additional causally-related medical treatment to include a neurosurgical evaluation as well as prescription medications, which have increased since the work injury. This finding is based on the evidence as a whole, including the referral to a neurosurgeon from Doctor's Care, the authorized provider, as well as the credible testimony of the Respondent concerning his pre-existing condition.

CONCLUSIONS OF LAW

Having thoroughly reviewed the testimony before the Hearing Commissioner, the documentary evidence filed pursuant to the Administrative Procedures Act, the position of the parties as well as the relevant statutes and case law, we conclude, in affirmation of the Hearing Commissioner, that the following Code sections are applicable:

1. Section 42-1-40 defines "average weekly wages";
2. Section 42-1-120 defines "disability";
3. Section 42-7-65 designates "average weekly wage...for certain categories of employees";
4. Section 42-9-35 governs "evidence of preexisting injury or condition"'
5. Section 42-9-350 governs "payment of compensation of employee working for several employers at time of injury"; and
6. Section 42-15-60 governs "medical".

ORDER

IT IS THEREFORE ORDERED that the Order of the Hearing Commissioner is **AFFIRMED IN FULL** as follows:

IT IS ORDERED that the Hearing Commissioner's Order requiring Appellants to pay to the Respondent, in a lump sum, temporary total disability benefits at the rate of $500.55 per week for any and

all weeks during which he was either unable to attend classes and other activities in connection with his internship with University of South Carolina or work for McDonald's is AFFIRMED.

IT IS FURTHER ORDERED that the Hearing Commissioner's Order requiring Appellants to direct Claimant's medical treatment in accordance with the mandates of S.C. Code Ann. § 42-15-60 is AFFIRMED.

IT IS FURTHER ORDERED that the Hearing Commissioner's Order requiring Appellants to resume temporary total disability and/or temporary partial disability for any weeks during which the Respondent continues to be written out of work by any authorized treating physician is AFFIRMED.

IT IS FURTHER ORDERED that the Hearing Commissioner's Order that no hearing costs are assessed in this matter is AFFIRMED.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By: _____

T. Scott Beck, Commissioner, Chair

Date: Nov. 3, 2015

WE CONCUR:

_____

Melody L. James, Commissioner

_____

Gene McCaskill, Commissioner

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 November 3, 2015