THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION,
APPELLATE PANEL OF SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION AND COMMISSIONER SUSAN S. BARDEN

Case No.: 2015-001376

Jeffrey S. Tracy.....Employee, Appellant,

v.

PeopLease Corporation.....Employer

AND

National Interstate Insurance Company.....Carrier, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE/FACTS

Appellant, Jeffrey Tracy, is a thirteen year employee of D&C Trucking. During those thirteen years, Mr. Tracy worked as a long haul truck driver. Two years prior to Mr. Tracy's date of injury, D&C Trucking turned their wage and employment information over to Peoplease. (R. p. 82, lines 7-18). In the conversion from D&C Trucking to Peoplease, Mr. Tracy completed employment paperwork wherein his rate of pay was set at thirty-four cents (34¢) per mile, fifteen dollars ($15.00) per stop, and fifty dollars ($50.00) per layover. (R. p. 85, lines 7-13).

Each pay period Mr. Tracy would report his miles traveled, stops, layovers, and expenses to Peoplease. Peoplease would then take the miles traveled and multiply them by the agreed rate per mile, thirty four cents (34¢). After that, Peoplease would subtract Mr. Tracy's layover pay and stop pay from the mileage pay. This leftover figure was taxed. Then, Peoplease added Mr. Tracy's stop pay, layover pay and travel expenses back into Mr. Tracy's paycheck, tax fee. Ultimately, Mr. Tracy received one paycheck from Peoplease that consisted of: a) layover pay, stop pay, and travel expenses, paid to Mr. Tracy tax free; and b) miles driven pay with his layover pay and stop pay subtracted (R. p. 92, lines 7-23).

An example might be helpful. During the pay period of May 9, 2014 through May 15, 2014 Mr. Tracy drove 3,125.5 miles. As a result, he grossed $1,071.86 based on the number of miles he drove (3,152.5 miles multiplied by thirty four cents (34¢) per mile equals $1,071.86).

During the period of May 9, 2014 through May 15, 2014 Mr. Tracy reported $295.00 in layover and stop pay. Peoplease subtracted the $295.00 (layover and stop pay) from $1,071.86 (Mr. Tracy's mileage pay) to arrive at $776.86, which was taxed. The overnight pay, stop pay, and any other travel reimbursements owed to Mr. Tracy were then added back into the $776.86 figure, tax free. The resultant total paycheck is $1,337.75. (R. pp. 304-305).

So, for the period of May 9, 2014 through May 15, 2014 Mr. Tracy's weekly pay was calculated as follows: (R. pp. 304-305).

- 3,152.5 miles driven.
- 3,152.5 miles driven multiplied by thirty-four cents (34¢) equals $1,071.86. (Claimant alleges this figure should constitute average weekly wage and compensation rate).
- Overnight pay and stop pay ($295.00) is then subtracted from $1,071.86 figure to come up with a figure of $776.85, which is taxed. (Defendants allege this figure should constitute average weekly wage and compensation rate).
- $295.00 in overnight pay and stop pay and $265.89 in travel expenses are then added back into the $776.85 figure, tax free, for a total check to Mr. Tracy in the amount of $1,337.73.

Mr. Tracy alleges his average weekly wage and compensation rate should be based on the miles he drove multiplied by thirty four cents (34¢) as this method: a) most nearly approximates what Mr. Tracy would have been making prior to the injury; b) is fair to the employer and employee; c) was agreed to by the employer and employee when D&C Trucking turned their wage information and employment information over to Peoplease; and d) is supported by South Carolina Law. The defendants allege they should be able to calculate Mr. Tracy's average weekly wage by subtracting his overnight pay and stop pay from Mr. Tracy's miles driven pay.

Mr. Tracy testified that it was his understanding that his rate of pay was based on the number of miles he was driving. (R. p. 92, lines 14-18).

A hearing on claimant's Form 50 and defendant's Form 51 was held before Commissioner Susan S. Barden on September 8, 2014. On October 21, 2014 Commissioner Barden filed an Order finding: a) The average weekly wage and compensation rate as set out by the Defendants is proper; b) The Single Commissioner was not persuaded by North Carolina Case Law; and c) Claimant's average weekly wage is $716.80 with a corresponding compensation rate of $477.89. (R. p. 6).

Claimant timely filed a Form 30 Request For Commission Review. (R. p. 40). On March 16, 2015 both parties attended an Appellate Panel Review Hearing. On June 4, 2015 The Full Commission fully affirmed the Single Commissioner's Order. (R. p. 19).

Claimant now appeals alleging: a) The Full Commission did not provide a factual and/or legal basis for their award; and b) The Full Commission failed to apply the appropriate legal authority when it calculated Claimant's average weekly wage and compensation rate.

STANDARD OF REVIEW

An appellate court may reverse a Commission decision when that decision is affected by an error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007). "Review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law." Id. at 201.

ARGUMENTS

I. THE FULL COMMISSION FAILED TO PROVIDE A LEGAL BASIS FOR THEIR DECISION.

Not only must findings of fact be made upon the essential factual issues, but they must also be sufficiently definite and detailed to enable the appellate court to properly determine

whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (SC 1970).

Where the decision of the commission fails to comply with the foregoing requirements, it will ordinarily be reversed and the cause remanded to the commission, where the evidence is in conflict, in order that such detailed and specific finding of may be made as will enable the appellate court to properly review the factual and legal basis for the award. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (SC 1962).

In the present case, The Full Commission found: a) We have evaluated all the evidence as submitted by the parties and are not persuaded by Rhodes v. Hersek Express, Inc; and b) Based on the substantial evidence, the testimony of the representative of the Defendants, and the Claimant's testimony, we find the Claimant's average weekly wage in $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.

The Full Commission's Order is not sufficiently definite and detailed to allow the appellate panel to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. First, the Full Commission did not indicate why the they were not persuaded by Rhodes v. Hersek Express, Inc.. Second, the Full Commission did not indicate how or why they believe the method they adopted most nearly approximates what Mr. Tracy would have been making prior to the injury and why they believe this method is fair to the employer and employee. Third, the Full Commission misconstrued Claimant's argument. Claimant does not wish for non-taxable per diem to be included in the wage calculation. Claimant simply wants the wage calculation to be based on the number of

miles he drove multiplied by the agreed upon rate per mile. Finally, as the Full Commission misconstrues Claimant's argument, the Full Commission neither indicates why claimant's average weekly wage is not based on the number of miles driven multiplied by the agreed upon rate per mile nor does it provide any legal explanation for its conclusion. The Full Commission never even ruled on Claimant's argument.

As the Full Commission's Order is not sufficiently definite and detailed to allow the appellate panel to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings, claimant respectfully requests the Full Commission Order be reversed and remanded to the Industrial Commission so that specific findings of fact may be made that will enable the appellate court to properly review the factual and legal basis for the Industrial Commission's award.

II. THE FULL COMMISSION FAILED TO FOLLOW APPROPRIATE LEGAL AUTHORITY WHEN CALCULATING CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE

Section 42-1-40 of the South Carolina Code addresses the calculation of average weekly wage and compensation rate. It states, "Average weekly wage means 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 proceeding the date of the injury...." It goes on to state:

> 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. Whenever allowance of any character made to an employee in lieu of wages are a specified part of a wage contract they are deemed a part of his earnings. S.C. Code Ann. § 42-1-40.

The objective of wage calculation for purposes of workers' compensation is to arrive at a fair approximation of claimant's probably future earning capacity. Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 736 S.E. 2d 672 (Ct. App. 2012).

Claimant does not want per diem expenses, or anything that might be construed as per diem expenses, included in his average weekly wage or compensation rate. Instead, Claimant requests that his average weekly wage and compensation rate be based on the number of miles driven per week multiplied by thirty four cents (34¢) per mile. Claimant simply does not want his stop pay and overnight pay/per diem subtracted from his base rate of pay.

Neither Claimant nor Defendants has been able to find any South Carolina case law directly on point. However, North Carolina has already addressed this issue. In Rhodes v. Hersek Express, Inc., Op. No. COA02-816 (N.C. Ct. App. filed June 3, 2013), a long haul truck driver was paid $600.00 per trip. Per diem in the amount ranging between $28 and $32 per day was then subtracted from the $600.00 per trip amount. The per diem was not taxed and not reported on Plaintiff Rhode's W2 Form. The North Carolina Court of Appeals found, "...calculation plaintiff's average weekly wages using his base salary of $600.00 per trip most nearly approximated the amount he would have earned." Id.

The North Carolina Statute defining average weekly wage is nearly identical to South Carolina's. North Carolina General Statute Section 97-2 states, ""Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately proceeding the date of the injury...." It goes on to state, "But where 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 the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5).

As South Carolina adopted large portions of North Carolina's Workers' Compensation legislation, South Carolina relies on North Carolina precedent in Workers' Compensation cases. Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952); Adams v. Texfi Indu., 320 S.C. 213, 464 S.E.2d 109 (1995).

There is strong public policy behind adopting Rhodes v. Hersek Express, Inc. Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939); Phillips v. Dixie Stores, Inc., 186 SC 374, 195 S.E. 2d 646 (1938).

Before this injury, Mr. Tracy was making over a thousand dollars per week. The Full Commission has ordered the Defendants to compensate Mr. Tracy at $477.89 per week; roughly one half of what he was making and living off prior to the injury. A compensation rate of one half of what Mr. Tracy was making before the injury is neither fair to Mr. Tracy nor does it nearly approximate what Mr. Tracy would be making but for the injury. Additionally, allowing Employers to use creative book-keeping in order to reduce an employee's average weekly wage

and compensation rate will result in injured employees and their dependents becoming charges on society.

Claimant respectfully requests the Court of Appeals follow the appropriate legal authority, reverse the Full Commission, and calculate Mr. Tracy's average weekly wage using his base salary (thirty four cents per mile multiplied by the number of miles driven per week) as this figure is fair to both parties and most nearly approximates the amount Claimant would have earning if not for the injury. In the alternative, Claimant respectfully requests the Court of Appeals adopt Rhodes v. Hersek Express, Inc., and remand this case to the Industrial Commission for a new hearing or new Order.

CONCLUSION

For the reasons stated, this Court should either: a) Reverse the judgment of the Full Commission; b) Adopt Rhodes v. Hersek Express, Inc., and remand to the Workers' Compensation Commission for a new hearing or new Order; or c) Remand to the Full Commission so that specific findings of fact may be made that will enable the appellate court to properly review the factual and legal basis for the Workers' Compensation Commission's award.

Respectfully submitted,

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This 26 day of January, 2016

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CERTIFICATE OF COUNSEL

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

This 26 day of January, 2016.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served a copy of the Final Brief of Appellant upon the South Carolina Court of Appeals and Counsel for Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed at their address of record, namely:

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