

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1402522

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SC Court of Appeals

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

v.

Peoplease Corporation, Employer, and
National Interstate Insurance Company, Carrier Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER APPELLANT'S FIRST ARGUMENT IS PRESERVED FOR APPEAL AND LACKS MERIT?
- II. WHETHER THE COMMISSION CORRECTLY DETERMINED CLAIMANT'S AVERAGE WEEKLY WAGE AND CORRESPONDING COMPENSATION RATE?

STATEMENT OF THE CASE

Appellant Jeffrey S. Tracy ("Claimant") was employed by Peoplease Corporation and working for D&C Trucking when he sustained alleged injuries as a result of an admitted tractor trailer accident on March 14, 2014. (Resp. Form 58, Pre-Hearing Brief, dated Aug. 26, 2014, R. p. 36) ("Resp. 2014 Pre-Hearing Brief"). Claimant filed a Form 50 alleging various injuries and demanding that, if not already filed, the Employer file a Form 20 in order to determine his Average Weekly Wage ("AWW"). (Form 50, dated May 29, 2014 with cover letter dated May 28, 2014, R. pp. 20-21) ("2014 Form 50"). In his request for a hearing, Claimant stated that he was alleging compensable injuries to include: "stomach hernia, mid and low back, right shoulder, left knee and leg with radiating pain, right knee and leg with radiating pain and any other body parts affected." He sought medical treatment for his alleged injuries, as well as temporary total disability from March 14, 2014 to present. (2014 Form 50, R. p. 21).

Respondents filed a Form 20 calculating Claimant's AWW at \$716.80 with a corresponding compensation rate of \$477.89. (Respondents' Form 20, filed under cover of letter dated May 19, 2014, R. p. 24). Respondents also filed a Form 51, denying Claimant's claim for work-related injuries, and referencing their Form 20 regarding Claimant's AWW. (Form 51, dated June 25, 2014, R. p. 28).

The parties filed their Form 58, Pre-Hearing Briefs with the Commission. In his Pre-Hearing Brief, Claimant alleged injury to the same body parts and stated the facts in controversy as: "1) TTD; 2) Compensation Rate." (Claimant's Form 58 Pre-Hearing Brief, dated Aug. 22, 2014, R. pp. 31-33) ("Cl. 2014 Pre-Hearing Brief"). He attached to

his Pre-Hearing Brief both medical files and reports, (R. pp. 152-300), and employment and wage records. (R. pp. 302-454).

In their Pre-Hearing Brief, Respondents noted that “Claimant alleges to have sustained injuries to the back, stomach, right shoulder, left knee, left leg, right leg, and knee relative to his admitted accident in this case. All of those allegations are presently under investigation and the parties are working together to determine which injuries are in fact causally connected to the motor vehicle accident. The parties have agreed prior to the hearing date to hold determination of compensability of injuries in abeyance.” (Resp. 2014 Pre-Hearing Brief, R. p. 36).

The parties were heard by Commissioner Susan S. Barden on September 8, 2014. Commissioner Barden noted that the parties stipulated that the determination of whether “the injuries, if any, suffered from the motor vehicle accident ... would be held in abeyance.” (R. p. 78, lines 18-21). Commissioner Barden determined that the AWW as calculated by Respondents on their Form 20 was proper. (Single Commissioner Decision and Order, filed Oct. 21, 2014, R. p. 6) (“Single Commissioner Decision”).

Claimant timely appealed to the Full Commission, raising four specific issues:

- 1) Did the Single Commissioner err in failing to adopt *Rhodes v. Hersek Express, Inc.*, 480 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 by 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? (Findings of Fact #4 and #5; Conclusion of Law #2).

(Cl. Form 30, dated Oct. 27, 2014, R. pp. 41-42).

The Full Commission heard argument and affirmed the Single Commissioner in all respects. (Appellate Panel Decision and Order of the S.C. Workers' Compensation Commission, filed June 4, 2015, R. pp. 11-19) ("Commission Decision"). The Commission found as a matter of fact, that the AWW as calculated by Respondents was proper, which "is based upon a proper calculation of the actual taxable wages, which does not include the non-taxable per diem that the Claimant received." (Commission Decision, R. p. 17).

Claimant appealed to this Court.¹

STATEMENT OF FACTS

Claimant worked for D&C Trucking for approximately 13 years prior to his accident. (R. p. 82, lines 7-8). A couple of years before his injury, Peoplease began handling payroll and other employment functions for D&C Trucking. At that point, Peoplease became Claimant's employer. (R. p. 82, lines 9-12) (R. p. 95, line 15 – p. 96, line 11).

¹ In the meantime, Claimant has filed another Form 50 Request for Hearing, with the Commission. (Form 50, dated March 5, 2015, R. pp. 68-69) ("2015 Form 50"). In this request for hearing, Claimant again states that he is alleging compensable injuries to include: "stomach hernia, mid and low back, right shoulder, left knee and leg with radiating pain, right knee and leg with radiating pain and any other body parts affected." He sought medical treatment for his alleged injuries, as well as temporary total disability from March 14, 2014 to present. On this Form 50, Claimant alleges that, at the time of the injury, he was making weekly wages of "\$477.89 per Form 20." (2015 Form 50, R. p. 68). Respondents responded with a Form 51 denying all injuries except those to Claimant's right shoulder. (Resp. Form 51, dated March 31, 2015, R. p. 72). These compensability issues are pending before the Commission. It is unclear whether the Commission Decision is immediately appealable, given the 2015 Form 50 and the on-going proceeding at the Commission regarding the merits of this claim. See Rose v. JJS Trucking, LLC, 411 S.C. 366, 368-368, 768 S.E.2d 412, 413 (Ct. App. 2015).

Claimant acknowledged at the hearing that his per diem amounts were not taxed. (R. p. 91, lines 19-20) (R. p. 92, lines 7-8). In fact, Claimant elected to have the per diem taken out of his gross taxable wages so that they would not be subject to income tax. (R. p. 92, line 21 – p. 93, line 1). He testified that he turned in “the per diem every week on a sheet based upon how many days I’m out on the road and how many days – meal allowance I claim while I’m on the road.” (R. p. 90, lines 18-21).

Monica Reese, who serves as Vice-President and General Counsel for Peoplease Corporation, testified that Claimant’s per diem is \$59. (R. p. 98, line 19 – p. 99, line 23) (R. pp. 147-151). As Ms. Reese explained the process, Peoplease receives what is referred to in the industry as a “settlement sheet,” which is created by D&C Trucking based on logs that Claimant turns in to D&C. By way of example, for the period beginning March 2, 2014 and ending March 8, 2014, Claimant drove a total of 3,084.1 miles. (R. p. 306). The total number of miles traveled, 3,084.1 was multiplied by \$0.34 for a total of \$1,048.60.

D&C also advises Peoplease as to how many nights a driver is gone overnight during each pay period. During the period March 2 – March 8, 2014, Claimant was away from home six nights which produces a per diem amount of \$354 ($6 \times \$59 = \354). The per diem amount is subtracted from the \$1,048.60 to produce Claimant’s taxable wages, which were \$694.60 for this period ($\$1,048.60 - \$354 = \694.60). (R. p. 97, line 10 – p. 101, line 22). Then, federal and state taxes (totaling \$131.22 for this period) as well as benefit deductions (totaling \$145.82 for this period) are taken out to produce his net wages, which were \$417.56 for this period. Then, for ease of payment, his per diem and net wages are paid in one check. For this pay period, that amounted to \$771.56 (\$417.56

+ \$354 = \$771.56). (R. p. 101, line 23 – p. 103, line 6) (R. p. 307). In creating the Form 20, Claimant's taxable wages during the 52 weeks prior to his accident were utilized to calculate his AWW. (R. p. 103, lines 7-19) (Form 20, R. p. 24) (R. pp. 145-146). For the week March 2 – March 8, 2014, that amount was \$694.60. (Form 20, R. p. 24) (R. pp. 145-146).

Ms. Reese testified that, although the per diem amount is subtracted out of the per mile rate total, Claimant was making a higher per mile rate in order to account for the per diem, which is calculated into the \$0.34 per mile rate. (R. p. 106, line 20 – p. 107, line 3). As Ms. Reese explained, federal guidelines mandate that "per diem cannot equate to more than what the mileage pay is up to ..." (R. p. 99, lines 2-5) (R. p. 100, lines 4-11). Not only is Claimant's per mile rate higher than it otherwise would have been because it includes the per diem, but Claimant benefits by not having his per diem included in his taxable income. The per diem payment itself is "a reimbursement. It's not a benefit [for] him. It's not just giving him money. It's a reimbursement for meals and incidental expenses. So while he's on the way overnight, he has to eat dinner. It's the same way that when anyone for any other businesses traveling for work, the company reimburses you your hotel, your dinners, and your expenses, and your laundry, and your internet. It's the same idea for Mr. Tracy. That's what per diem is doing." (R. p. 107, lines 6-15).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the

substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. In reviewing an AWW calculation, a reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5); *see also Pilgrim v. Eaton*, 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). The Administrative Procedures Act “mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case.” Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court’s purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

ARGUMENTS

I. Appellant’s first argument is not preserved for appeal and lacks merit.

Appellant’s first argument, that the Commission Decision is not “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,” (App. Br. pp. 3-4), is not preserved for appeal. The Commission affirmed the Single Commissioner Decision. Appellant did not raise this issue on his Form 30, (Cl. Form 30, R. pp. 41-42), appeal of the Single Commissioner

Decision, which the Commission “affirmed in its entirety.” (Commission Decision, R. pp. 17-18).²

It is axiomatic that issues not raised on a Form 30 notice of appeal are not preserved for further appellate review. *See, e.g., Creech v. Ducane Co.*, 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) (“only issues within the application for review are preserved for the full commission”); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (only those issues within the scope of the appellant’s exception to the full commission and its notice to the respondent are preserved for appeal to the commission), *citing Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940) (holding that “all findings of fact and law by the hearing commissioner became and are the law of th[e] case, except only those within the scope of the exception of defendant and the notice given to the parties by the commission”).

However, even if this Court considers the substance of Claimant’s argument, it is without merit. The Commission Decision is sufficiently detailed for purposes of appellate review. Neither of the cases relied on by Claimant, *Hill v. Jones*, 255 S.C. 219, 178 S.E.2d 142 (1970) and *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 127 S.E.2d 288 (1962), requires that the Commission address in detail every argument raised by a party. Instead, the Commission must make sufficiently detailed findings on all the facts necessary to its resolution of the issues before it. *Drake*, 241 S.C. at 127, 127 S.E.2d at 294 (remanding because the Commission decision included a finding of when the claimant first knew of her occupational disease, but failed to find when, by the exercise of reasonable diligence, she could have discovered she had a compensable

² While Claimant raised the issue that the Single Commissioner did not provide an explanation for not adopting *Rhodes*, he did not raise any of the other issues discussed in his first argument. (Form 30, R. pp. 41-42).

condition). Here, the Commission found that the AWW as calculated by Respondents was proper, which “is based upon a proper calculation of the actual taxable wages, which does not include the non-taxable per diem that the Claimant received.” (Commission Decision, R. p. 17). There is no necessary factual finding missing from the Commission Decision, which this Court should affirm.

Furthermore, the Commission properly declined to adopt the holding in Rhodes in this case, as is discussed in more detail below. The Commission is not required to explain in detail why it does not find case law from other states persuasive authority. Claimant has cited no case that requires such explanation because there is none.

This Court should hold that the Commission Decision is sufficiently definite and detailed.

II. The Commission correctly determined Claimant’s average weekly wage and corresponding compensation rate.

Despite Claimant’s arguments to the contrary, the Commission correctly determined his AWW based on his taxable wages and excluding amounts for non-taxable per diem. It is uncontested that Claimant’s per diem amounts covered his meals and other expenses when on the road overnight. (R. p. 119, lines 3-6). It is also uncontested that his per mile rate was higher than it otherwise would have been precisely to cover the per diem amounts. (R. p. 106, line 20 – p. 107, line 3).

Claimant argues that the Commission erred by not adopting the North Carolina Court of Appeals’ holding in Rhodes v. Hersek Express, Inc., 2003 N.C. App. LEXIS 1094 (N.C. Ct. App. 2003). While Claimant is correct that North Carolina workers’ compensation precedent is given weight in some instances, that does not mean that either the Commission or this Court is bound by or should adopt the reasoning and conclusion

of the North Carolina intermediate court's decision in Rhodes. See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 543, 689 S.E.2d 615, 619 (2010) (explaining that "although South Carolina courts frequently look to North Carolina's rulings since our workers' compensation code is very similar, there is no requirement that we abide by North Carolina's determination for our own law, particularly since it was decided by an intermediate appellate court"). Even Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995), relied on by Claimant for this point, declined to apply North Carolina's dependency definition. 320 S.C. at 217, 464 S.E.2d at 112. Instead, our courts may look to other jurisdictions, not just North Carolina, when there is no South Carolina precedent on point. Bass v. Isochem, 365 S.C. 454, 477, 617 S.E.2d 369, 381 (Ct. App. 2005) ("[w]hen there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority").

Furthermore, Rhodes is both legally and factually distinguishable from the case at hand. First, in Rhodes, the Claimant had only worked for the employer for several weeks prior to his work-place accident. Rhodes v. Hersek Express, Inc., 2002 NC Wrk. Comp. LEXIS 955, *3 (N.C. Wrk. Comp. Comm'n Feb. 28, 2002). Thus, the North Carolina Workers' Compensation Commission was applying the "exceptional reasons" method of calculating the claimant's AWW, where the "general method '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.'" 2003 N.C. App. LEXIS 1094 at *14, quoting N.C. Gen. Stat. § 97-2(5).

However, under South Carolina law, the Commission must use the first alternative under Section 42-1-40 “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.” Pilgrim, 391 S.C. at 44-45, 703 S.E.2d at 244. If the Commission applies the “exceptional reasons” alternative, it must first make “factual findings that explain the ‘exceptional reasons’” that make applying the other sections unfair. Id. at 47, 703 S.E.2d at 245; *see also Swilling v. Pride Masonry of Gaffney*, 401 S.C. 178, 186, 736 S.E.2d 672, 676 (Ct. App. 2012) (Commission must specifically find that necessary conditions exist to deviate from the primary method of calculating AWW). Here, Claimant worked for D&C Trucking for 13 years, and for Peoplease for several years prior to his accident. Claimant did not argue to the Commission that application of the first alternative under Section 42-1-40 would be unfair or that exceptional circumstances exist in this case,³ and the Commission did not reference or make any findings that would support application of the exceptional reasons alternative for calculating AWW. Thus, because Rhodes was decided under the “exceptional reasons” provisions of the N.C. workers’ compensation statute and this case was not, Rhodes simply does not apply here.

In addition, in Rhodes, the claimant was paid \$600 per trip to California. Cash per diem amounts of between \$28 and \$32 were advanced to cover his expenses and meals, and the N.C. Workers’ Compensation Commission found that those amounts were “deducted from the \$600.00 per trip that plaintiff earned as **wages**.” Rhodes, 2002 NC

³ In fact, although Claimant quoted both the first and fourth alternative provisions of Section 42-1-40 in his Brief to the Commission, he never argued that the fourth provision should apply in this case. (Brief of Jeffrey Tracy, Appellant, to the Full Workers’ Compensation Commission, dated Dec. 22, 2014, R. pp. 55-56) (“Cl. Brief to the Commission”) (R. pp. 115-130; 140-141).

Wrk. Comp. LEXIS 955, *3 (emphasis added). Here, in contrast, the Commission made no finding that the \$0.43 per mile rate constituted Claimant's wages.

Finally, in Rhodes, the evidence submitted by the employer did not substantiate the amounts "allegedly deducted from [the claimant's] wages and paid in cash; therefore, the records are not indicative of the wages actually paid to plaintiff." Rhodes, 2003 N.C. App. LEXIS 1094 at *14. Here, in contrast, evidence in the record clearly demonstrates the per diem amounts deducted from Claimant's taxable wages for each of the 52 weeks prior to his accident. (R. pp. 304-449). Thus, the Commission correctly declined to apply the reasoning or conclusion in Rhodes, a result which this Court should affirm.

Instead, as this Court explained in Stephen v. Avins Constr. Co., "the statutory language, 'earnings of the injured employee,' means the actual sum paid to the employee as his wages, not the totality of payments including reimbursements." 324 S.C. 334, 347, 478 S.E.2d 74, 81 (Ct. App. 1996). Reimbursements, like per diem, that cover expenses incurred by the employee when traveling out of town overnight for business and that are not incurred when the claimant is not working out of town, are properly excluded from the calculation of AWW.⁴ They simply are not wages.

Claimant raises various policy rationales, alleging that "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." (App. Br. p. 7). Claimant reaches back to the early days of the Act, citing cases from the 1930s and 1940s regarding the purposes of the Act. (App. Br. p. 7).

⁴ Claimant's counsel conceded before the Full Commission that the per diem was a reimbursement. (R. p. 120, line 21 – p. 121, line 1).

However, none of those cases stand for the proposition that a claimant's AWW calculation should be inflated in order to ensure he is economically self-sufficient. In fact, in Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960), the Supreme Court explained that, because workers' "compensation is based not upon need but upon wages, it may in some instances and may not in others be sufficient ... to enable the injured employee to live without being a burden to others. To say that the purpose of such legislation is to prevent his becoming a public charge is perhaps to overstate the case, for as matters now stand its aim is to aid in, rather than to insure, the accomplishment of that end." Furthermore, our Supreme Court has clarified that there "appears to be an inadvertent confusion with the rule that the compensation law will be construed liberally in order to effect its beneficent purpose. [citations omitted] However, our rule which is applicable to the findings of facts is that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is up on him. He cannot prevail by the resolution of doubts." Cross v. Concrete Materials, 236 S.C. 440, 445-446, 114 S.E.2d 828, 831 (1960).

In addition, the "creative book-keeping" was an election made by Claimant himself in order to reduce his taxable income. (R. p. 92, line 21 - p. 93, line 1). Here, as the Supreme Court of New Hampshire found in Appeal of MacDonald, 879 A.2d 1156 (N.H. 2005), Claimant "is seeking to capitalize on a contradiction." In MacDonald, the claimant sought to exclude expenses and "per diem payments for tax purposes by not reporting them as income, yet include them as wages for the purpose of calculating his workers' compensation award." 879 A.2d at 1160. The same is true here. Claimant purposefully had his per diem excluded from his taxable wages so that he would not have

to pay income tax on them, but now wants those same amounts included in order to bump up his AWW. The New Hampshire Supreme Court rejected the claimant's position and affirmed the N.H. Compensation Appeals Board determination that his per diem should not be included in the calculation of his AWW. MacDonald, 879 A.2d at 1160. This Court should do likewise. In addition, there is absolutely no proof or even evidence in this record that accurately calculating Claimant's wages based on his taxable income will result in him becoming a "charge on society." Instead, Claimant consciously chose one position with regard to his taxable income, and now attempts to take the polar opposite position when it comes to calculating his AWW. As Commissioner Beck correctly characterized it, Claimant is trying to have his cake and eat it too. (R. p. 140, lines 3-4).

Other states' treatment of per diem reimbursements is consistent with the Commission Decision in this case. For example, in United Airlines, Inc. v. Illinois Workers' Comp. Comm'n, 887 N.E.2d 888 (Ill. Ct. App. 2008), the court held that, "[g]enerally, amounts paid as reimbursement for travel expenses are not part of a claimant's earnings for the purpose of calculating her average weekly wage. The rationale behind this rule is that such payments merely reimburse the claimant for employment-related expenses that she would not otherwise incur, and, therefore, the claimant will not suffer any economic loss if she fails to receive such reimbursements once the employment ceases." 887 N.E.2d at 891-892. Because the claimant in that case testified that she used part of those per diem amounts for meals, they were excluded from the calculation of her AWW. Here, Claimant testified that he turned in his per diem each week "based upon how many days I'm out on the road and how many days – meal allowance I claim while I'm on the road." (R. p. 90, lines 18-21). Thus, he never even

alleged, and certainly did not testify, that he did not use his per diem for food and other travel expenses. Ms. Reese confirmed. (R. p. 107, lines 6-15) (per diem covers meals and incidental expenses while Claimant is on the road overnight).

In Moorehead v. Industrial Comm'n, 495 P.2d 866 (Ariz. Ct. App. 1972), the court rejected arguments that amounts paid to an injured employee “representing a travel allowance” and which the employee excluded from taxable wages for income tax purposes, should be included in the calculation of AWW. The court first noted that “not every payment made to the employee by the employer constitutes ‘wages’” for purposes of calculating the compensation rate,” 495 P.2d at 868, explaining that, “[w]ages’ do not include amounts paid to the employee to reimburse him for employment-related expenditures of a nature which would not be incurred but for his employment. Such payments are simply not intended as compensation for services rendered. Before any part of such allowances or reimbursements can be considered as a part of the employee’s ‘wages’ there should be some showing that the payments are more than sufficient to reimburse the employee for the work-related expense so that in effect the excess can be considered as extra compensation to the workman for his services performed.” 495 P.2d at 869. There has been no such showing here; in fact, as noted above, Claimant has not even alleged that he did not spend all of his per diem on food, lodging and/or other related travel expenses.

In Grimes v. GAB Bus. Servs., Inc., 988 S.W.2d 636 (Mo. Ct. App. 1999), the court overturned the Missouri Industrial Commission’s inclusion of per diem expenses as part of the claimant’s “wages” for purposes of calculating his AWW. There, like here, the claimant acknowledged that his per diem was used to cover expenses for room and

board while working away from home. 988 S.W.2d at 640-641. The court reasoned that, “[t]he fact that Employer did not withhold federal taxes on the per diem payment further suggests that no real economic gain was contemplated.” Id. at 641 n.3.⁵

The reasoning of the Ohio Supreme Court in McDulin v. Industrial Comm’n of Ohio, 732 N.E.2d 367 (Ohio 2000), is instructive. There, the claimant sought to include amounts listed on his federal income tax as “miscellaneous income” in the calculation of his AWW. Those amounts included reimbursements for lodging, meals, and tool and trucking expenses. The Ohio Supreme Court distinguished “wages” and “earnings” from “income” and held that they are not synonymous. Wages are “earned as compensation for labor” and “constitute ‘monetary remuneration by an employer ... for labor or services.’ [citation omitted] ‘Income,’ on the other hand, represents ‘a gain or recurrent benefit that is [usually] measured in money and for a given period of time’ Income is a much broader term than ‘earnings’ or ‘wages,’ and cannot, therefore, be used interchangeably.” 732 N.E.2d at 369. In McDulin, the claimant did not present evidence that the reimbursements for lodging and meals, etc. represented “gainful remuneration rather than simple reimbursement for expenses incurred by claimant” and, therefore, those amounts were excluded from the calculation of his AWW. 732 N.E.2d at 370. This Court should follow the reasoning in Stephen v. Avins, MacDonald, United Airlines, Moorehead, Grimes, and McDulin, and hold that Claimant’s per diem are not part of his wages for purposes of calculating his AWW.

⁵ As the Maine Supreme Court explained in Hackett v. Western Express, Inc., “[a]lthough federal law does not control how we define average weekly wage, [citation omitted] the Internal Revenue Code and regulations regarding exclusion of certain expenses from income are not inconsistent with the exclusion of special expenses from average weekly wage ...” 21 A.3d 1019, 1021 n.3 (Me. 2011).

Despite Claimant's attempt to make a meaningful distinction between per diem that is added on top of a worker's wages and this case, where the per diem is calculated into his per mile rate and then deducted for tax purposes based on the number of overnights per pay period, the distinction carries no legal significance. (R. p. 120, line 16 – p. 121, line 15 (Claimant's Counsel conceding that, if the per diem reimbursement was "on top of mileage I'd agree with you, I wouldn't be here")) (R. p. 124, lines 3-5 (Commissioner Beck saying, "I think we're playing some semantics here," and Claimant's Counsel agreeing, "Absolutely")). There is no question that Claimant used his per diem to cover meals and other expenses while on the road overnight. It is also uncontested that, if Claimant was not on the road overnight, he would not incur the expenses covered by his per diem. (R. p. 123, lines 19-25).

Here, Ms. Reese explained that the per mile rate was specifically calculated in order to cover the per diem. (R. p. 106, line 20 – p. 107, line 3). (R. p. 99, lines 2-5) (R. p. 100, lines 4-11). In other words, because the employer cannot pay a higher per diem rate than the mileage pay worked out to be, the per mile rate was augmented to cover the per diem, which provided a tax benefit to Claimant. Thus, Claimant is not disadvantaged in any way by the fact that his per diem is backed out of his per mile rate.

Respondents note that the "example" that appears on pages 1-2 of Appellant's Brief constitutes impermissible argument and characterization of contested facts in his Statement of the Case in violation of Rule 208(b)(1)(C), SCACR. Furthermore, Claimant's discussion of this pay period is problematic on many levels. To begin with, he purports to rely on an example from the pay period May 9, 2014 through May 15, 2014; however, Claimant's accident occurred on March 14, 2014 so that any pay records

after that date would be irrelevant. Claimant references his APAs, pages 148-149, R. pp. 304-305, however, so it appears that he intends to reference the pay period March 9, 2014 through March 15, 2014, which is the pay period reflected on those pages of the Record.

Tellingly, Claimant's counsel began to discuss the March 9 – March 15, 2014 pay period at the hearing before Commissioner Barden but, before the amounts for that pay period were discussed in any meaningful way, he switched gears and moved to the prior pay period, reflected at his APAs, pages 150-151, R. pp. 306-307. (R. p. 85, line 25 – p. 88, line 2). It is both curious and unclear why Claimant did not rely in his Brief on the pay period discussed at the hearing for his "example."

Although it is unclear what the reimbursement amount of \$265.89 covered,⁶ (R. pp. 304-305), the per diem amount of \$295 was "a reimbursement for meals and incidental expense ... while he's on the way overnight ..." (R. p. 107, lines 8-9). Claimant testified that he turned in "the per diem every week on a sheet based upon how many days I'm out on the road and how many days – meal allowance I claim while I'm on the road." (R. p. 90, lines 18-21). The amount \$295 indicates he was away from home five nights during the pay period March 9, 2014 through March 15, 2014. ($\$295 \div \$59 = 5$) (R. p. 101, lines 8-15 (Claimant's counsel explaining that the easiest way to figure out how many days Claimant was on the road overnight was to divide the per diem amount by 59)). Furthermore, according to the employment contract, Stop Pay was \$15 per stop and Layover Pay was \$50 per layover, which total \$65. So it is clear in Claimant's "example" that the \$295 represented the per diem, which was intended to

⁶ The only testimony in the record concerning reimbursements was from Ms. Reese, who explained that, "if [Claimant] had received reimbursements for receipts that he did turn back in too, those would be re-included into this amount to come up within what the net pay of the check is." (R. p. 102, lines 14-17).

cover Claimant's meals and other expenses while he was on the road overnight, and not Stop Pay and Layover Pay.

In fact, Claimant's characterization of the \$295 as "overnight pay and stop pay" and the \$265.89 as "travel expenses" is incorrect, misleading and not supported by any evidence in the Record. Claimant's employment contract does not contain a line for "overnight pay," only Mileage Pay, Stop Pay and Layover Pay. (R. p. 143). Neither Stop Pay nor Layover Pay is relevant here. Furthermore, in his Brief to the Commission, Claimant correctly referred to the \$295 as per diem, which he now attempts to characterize as "layover pay" or "overnight pay" and "stop pay."

Compare: "Peoplease subtracted the **per diem, \$295.00**, from the grossed mileage, \$1,071.85, and provided Mr. Tracy with a gross wage of \$776.86. The **per diem (\$295)** and any **reimbursements** owed to Mr. Tracy (**265.89**) are then added back in, tax free, and Mr. Tracy was provided a weekly check ..." (Cl. Brief to the Commission, R. p. 53) (emphasis added);

With: "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." (App. Br. p. 2) (Emphasis added).

In his Brief to the Commission, Claimant readily and accurately acknowledged the Layover Pay and Stop Pay each to be \$50 and \$15 respectively. (Cl. Brief to the Commission, R. p. 52). Claimant misleadingly refers to the \$265.89 as "travel expenses" in his Brief, (App. Br. p. 2), when, in fact, they are listed on the pay stub as

“reimbursement,” (R. p. 305), and are clearly not part of the per diem allowed for meals and other expenses when Claimant is on the road overnight. On appeal, he attempts to blur these distinctions apparently in an attempt to characterize his per diem as “pay,” which attempt this Court should reject.

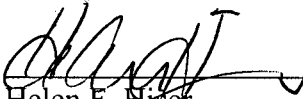
This Court should hold that the Commission properly declined to apply the reasoning or conclusion of the North Carolina Court of Appeals in Rhodes. In addition, this Court should hold that the Commission correctly calculated Claimant’s AWW based on his taxable wages and excluding his per diem.

CONCLUSION

For all the reasons stated herein, Respondents respectfully request that this Court affirm the Commission Decision and dismiss Appellant’s appeal.

Respectfully submitted,
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January 21, 2016


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1402522

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SC Court of Appeals

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

v.

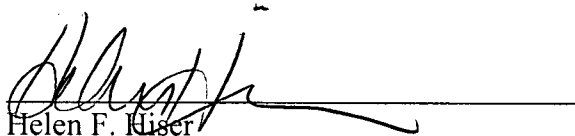
Peoplease Corporation, Employer, and
National Interstate Insurance Company, Carrier Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents Peoplease Corporation and National Interstate Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondents complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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