

DECISION AND ORDER
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1104105

KELLY MCPHERSON,
Claimant/Appellant,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT,
Employer,

CHARLESTON COUNTY SCHOOL DISTRICT,
Carrier,

Defendants/Respondents.

Appellate Panel Review
Columbia, South Carolina
on December 14, 2015

Appellate Panel Decision & Order filed

on February 23rd, 2016

AFFIRMED

Fred W. Riesen, Jr., Esquire, on behalf of the Claimant/Appellant

Matthew O. Riddle, on behalf of the Defendants/Respondents.

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SC Court of Appeals

This matter was heard before the Appellate Panel of the South Carolina Workers' Compensation Commission on December 14, 2015, pursuant to a Form 30 timely filed by the Appellant on September 25, 2015. This matter was originally heard before the Single Commissioner in St. George, South Carolina on April 9, 2015, and this was an appeal from that Order filed on September 11, 2015.

The Hearing Commissioner made the following Findings of Fact, Conclusions of Law, and Order following an evidentiary hearing:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act;
2. The Claimant is 44 years old, and began working as a math teacher for the Employer in August, 2009;
3. The Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students on February 3, 2011;
4. The Claimant received an initial course of conservative medical treatment, primarily under Dr. J. Reilly Keffer. Thereafter, the Claimant moved to Arizona, and began treating with Dr. Vibhooti Dave and Dr. Paul Gause;
5. Dr. Gause performed a C5-6 fusion on July 16, 2013;
6. Following her cervical fusion, the Claimant reported to Dr. Gause that she was "doing well," and that she was "happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." Upon physical examination the Claimant did not have any paraspinal muscle spasms, and had minimal bi-lateral trapezial tenderness. The Claimant's range of motion was "nearly full without significant pain." The Claimant demonstrated full motor strength in the upper extremities with normal sensation and reflexes;

7. Dr. Gause indicated the Claimant had reached maximum medical improvement relative to her cervical spine on December 13, 2013. He assigned 7% medical impairment relative to the cervical spine based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;
8. Dr. Gause performed a lumbar fusion of L5-S1 on June 2, 2014 and June 4, 2014;
9. Following her lumbar spine surgery, Dr. Gause commented that the Claimant was doing "quite well." He stated that the Claimant's "back pain is mild at this time. She is working as a teacher with normal duties. She is taking no pain medications;"
10. Dr. Gause's physical examination of the Claimant following her surgery revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited mild tenderness to palpation over the SI joint;
11. Dr. Gause concluded that the Claimant reached maximum medical improvement on January 23, 2015. He assigned 7% medical impairment to the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;
12. Dr. Gause recommended 2 years of supportive care, to include 4 office visits a year, physical therapy, medications and 3 injections per year. He stated that the Claimant would be re-evaluated after 2 years;
13. In a work status report completed on March 16, 2015, Dr. Gause assigned permanent restrictions of no lifting more than 40lbs, no sitting/standing/walking for more than 60 minutes at time without a few minutes change in positions/activity and no bending/twisting/stooping of the back more than 10 times per hour. Dr. Gause confirmed in deposition testimony that these restrictions were not based upon any discussion with the Claimant's attorney, and were assigned based only on examination and discussion with the Claimant;

14. On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney, indicating that, under the 5th edition of the AMA Guides, the Claimant would qualify for DRE Category IV impairment ratings of 25- 28% of the cervical spine and 20-23% of the lumbar spine. Dr. Gause testified in deposition on April 30, 2015 that the Claimant's level of impairment remained the same at that time;
15. Dr. Keffer prepared a supplemental medical report on March 30, 2015, in which he concluded that the Claimant sustained 25% impairment of the cervical spine and 25% impairment of the lumbar spine. With regard to the cervical spine, Dr. Keffer opined that the Claimant's condition falls under DRE Category IV pursuant to Table 15-5 on page 392 of the 5th edition of the AMA Guides. In further explanation of his rating to the lumbar spine, Dr. Keffer opined the Claimant qualified for a rating under DRE Category V of the 5th Edition AMA Guides, based upon the residual symptoms the Claimant was reporting, and the fact that she actually underwent two procedures to accomplish the fusion at L5-S1. Dr. Keffer did not examine the Claimant in his office before assigning these impairment ratings, although he spoke with her on the phone and reviewed Dr. Gause's narrative reports;
16. Dr. Gause testified that his impairment ratings of 7% to the cervical spine and 7% to the lumbar spine were accurate according to the 6th edition of the AMA Guides, and that the combined values of these ratings is 14% total medical impairment relative to the spine;
17. Dr. Gause confirmed that, no matter how well a patient recovers following cervical and lumbar fusions, the 5th edition requires DRE category IV impairment ratings, while the 6th edition has no such requirement for a specific classification as a result of surgery;
18. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. However, he confirmed that he reviewed Dr. Keffer's report, and responded affirmatively to the question "Would you generally defer to somebody that uses the 5th Edition with regards their opinions on the 5th Edition?" Dr. Gause further testified that he did not have any major disagreement with Dr. Keffer's report;

19. Assuming the Claimant would receive impairment ratings on the low end of the category IV ranges, Dr. Gause testified that the combined value of these impairment ratings would be 40% relative to the spine as a whole;
20. Dr. Gause testified that the combined value of Dr. Keffer's impairment ratings would be 44%;
21. Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the Claimant's job as a school teacher;
22. The Claimant continues to work full time as a middle school math teacher, with an annual income that is substantially similar to her income while working for the Employer;
23. The Claimant testified that she continues to experience pain and discomfort in her neck and low back with any physical activity;
24. The Claimant testified to difficulty relative to riding a bike, performing household chores, gardening, having sex with her husband, and playing with her children. None of these issues are referenced in Dr. Gause's narrative reports, but he testified that the Claimant was always compliant in her medical treatment, and that, "to his knowledge," the Claimant had not exaggerated her pain complaints. He further testified that he did not have any reason to believe the Claimant was exaggerating her complaints regarding difficulty with activities in her personal life, although he acknowledge that most of their discussions were related to the Claimant's work activities;
25. The Claimant is able to drive, although she testified that she does not drive for more than 30 minutes at a time. Dr. Gause has not assigned a driving restriction;
26. The Claimant walks every day before school, and is able to walk up to one mile at a time. The Claimant admitted that her pedometer indicates she walks an aggregate of about 2 miles per day;
27. The Claimant admitted she does not use prescription medication. She takes Motrin once or twice per week;

28. The Claimant reached maximum medical improvement on January 23, 2015;
29. The Claimant has sustained 45% permanent partial disability of the back, as a result of her admitted neck and low back injuries;
30. The Claimant sustained a work-related injury to her head and neck in Michigan in 1992. She admitted the treating physician recommended a 10-pound lifting restriction. The Claimant admitted in a prior deposition that she received compensation in excess of \$100,000.00 pursuant to a settlement of the prior claim, although she testified at the hearing she could not remember whether the settlement was more than \$100,000.00. The Claimant admitted that she underwent a procedure relative to her 1992 injury in which the treating physician "burned" nerves in her neck. No evidence was submitted to establish whether the treating physician assigned an impairment rating, the amount of the Claimant's wages for the prior job, or what portion of the settlement funds were paid relative to the neck injury as opposed to the head injury;
31. The Claimant worked as a teacher for 38 weeks in 2010, the four quarters preceding the quarter in which her admitted injury occurred;
32. The Employer paid the Claimant \$40,403.01 during 2010. She received a pay check every two weeks throughout the year, including during the summer when she was not working;
33. The Claimant's annual earnings as a teacher are substantially the same from one year to the next. She continues to earn an annual salary that is substantially the same as her earnings while working for the Employer;
34. The correct average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01, based upon the Claimant's total earnings of \$40,403.01 during 2010, divided by 52 weeks;

Based upon the above Statement of the Case, Evidence of the Case, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident. In this case, the Claimant sustained admitted injuries by accident to her neck and low back.
2. S.C. Code Ann. § 42-9-30(21) sets forth scheduled disability compensation for an injury to the back. Pursuant to this statute, where the claimant's loss of use of the back is forty-nine percent or less, permanent partial disability compensation is calculated based upon a percentage of 300 weeks.
3. The extent of an injured workers' disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341. In this case, the totality of the evidence including the medical records and the testimony of Dr. Gause and the Claimant, support the conclusion that the Claimant has sustained 45% permanent partial disability of the back, which totals 135 weeks of compensation.
4. 67 S.C. Code Ann. Regs. 1605(E) provides that the insurance carrier shall receive a discount for lump sum payment of a permanent disability award greater than ten weeks, unless the Commission orders otherwise. Here, the total PPD award of 135 weeks shall be reduced to 131.5304 pursuant to the current 2% per annum Net Present Value Table used by the Commission.
5. S.C. Code Ann. § 42-1-40 sets forth requirements for determining the Claimant's average weekly wage. Pursuant to this statute, the average weekly wage "must be determined by taking the Claimant's total wages for the four quarters preceding the quarter in which the accident occurred, and dividing by 52 or by the actual number of weeks for which

wages were paid, whichever is less." The statute further states "[w]hen the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, *as long as results fair and just to both parties will be obtained.*" Finally, the statute states "[w]hen 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."

6. The Claimant in the present case was paid during the summer months, even though her contract was for 38 weeks. The language of Section 42-1-40 requires that, for an employee working during the period of 52 weeks prior to injury, the wages should be divided by 52 or by the actual number of weeks for which wages were paid. The actual number of weeks she was paid was 52 weeks. However, this is solely the method of payment, and her pay was actually for the 38 weeks she worked or earned.
7. Each year, the Claimant's employment does not actually produce 52 weeks of continuous work history; her work was performed and earned over a period less than 52 weeks prior to injury. She is employed and contracted for each school session. She does have more than a year's history of work, but if the second method were to be used, the divisor would be 38 weeks. Thus, both methods would yield the same result, a 38 week divisor.
8. Therefore, the Employer paid the Claimant \$40,403.01 during 2010, for her work as a teacher during the 38-week school year. The Claimant did not work during the summer months, but she received a paycheck every two weeks throughout the year. Although the Claimant worked as a teacher for only 38 weeks in 2010, dividing her annual earnings by the "number of weeks and parts thereof during which the employee earned wages," i.e. the 38-week school year, would result in an average weekly wage that is not "fair and just to both parties." By her own admission, the Claimant's annual earnings as a teacher are substantially the same from one year to the next. Using a 38-week divisor would artificially increase the Claimant's wages by over

35%. This unfair result is an "exceptional reason" that justifies using an alternative method to calculate the Claimant's average weekly wage. Therefore, the Employer submitted an accurate Form 20 showing an average weekly wage of \$776.98, which is based upon the Claimant's total wages of \$40,403.01 divided by 52 weeks. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury.

9. The "ultimate objective" of the Act's average weekly wage statute is to fairly reflect the injured worker's probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). If the average weekly wage is increased in this case as the Claimant requests, it would overinflate the Claimant's possible future earnings. Specifically, if the Claimant's average weekly wage were \$1,063.24 as she asserts, her annual earnings would be \$55,288.48, representing an increase of about 37% over her actual annual earnings. As a result, the Claimant would be earning more while out of work on disability than she would while actually working. Such an inequitable result would be a windfall for the Claimant, and would unduly burden the Employer.
10. In Bennett, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500, the maximum income he was permitted to earn without penalty while drawing social security payments. To determine the average weekly wage in that case, the Commission divided the Claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The South Carolina Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings

about a result fair to the employee and to the employer.”
Bennett, 271 S.C. at 98-99.

11. In this case, the Claimant proposes an AWW that would increase her earnings by over 35%. Such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant’s future earnings. On the other hand, the average weekly wage set forth on the Form 20 is accurate and provides a fair reflection of the Claimant’s probable future earning loss. For these reasons, the Form 20 is correct, and the Claimant’s average weekly wage should not be increased.
12. The Claimant argues that S.C. Code Ann. § 59-21-20 provides the appropriate divisor for the wage calculation. This statute governs mandatory minimum appropriations, and is not applicable to a determination of average weekly wage in the context of a workers’ compensation case.
13. In Conyers v. New Hanover County Schools, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina’s average weekly wage statute, which is substantially similar to South Carolina’s law. 188 N.C.App. 253, 654 S.E.2d 745 (2008). The court held that the claimant’s average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she only worked as a bus driver for 40 weeks during the school year. The claimant had worked for the school district for 12 years. Each year she worked during the school year, and was not employed during the summer. The court cites language in North Carolina’s average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the three methods in the South Carolina law, set forth above. The court concluded that dividing the claimant’s total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant’s wages. Such a result would not be “fair and just” because the Employer would be “unduly burdened,” and the Claimant would receive a “windfall.” The court further stated that “[t]he purpose of our Workers’ Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury.” Therefore, the court concluded that calculating the Claimant’s average weekly wage by dividing her total annual

earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

14. Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). In this case, the applicable provisions of the North Carolina Workers' Compensation Act are nearly identical to South Carolina's statute. As a result, the Court of Appeals of North Carolina's interpretation of that state's statute is very persuasive and directly on point with the present case. As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.
15. The Conyers court also concluded that decisions from other jurisdictions as to average weekly wages for educators and other school employees "are of limited value given the unique nature of the contracts for employment in each case as well as each state's unique workers' compensation statutory scheme." *Id.* at 258. Such decisions from jurisdictions besides North Carolina are similarly inapplicable here. For instance, the Claimant cited Wash. Dist. 50 Sch. v. Ill. Workers' Comp., 917 N.E. 2d 586, 334 Ill. Dc. 760 Ill. App. 2009) and Magnet Cove School Dist. v. Barnett, 97 S.W.3d 909, 81 Ark. App. 11 (Ark. App., 2003). I decline to follow those decisions from Illinois and Arkansas, based upon the sound reasoning set forth in Conyers. Conyers is uniquely applicable to the present case, because of the striking

similarity North Carolina's relevant statutory language bears to the South Carolina Act.

16. The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between "peak" periods and "slack" periods. The court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." To base the claimant's average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant's average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee's average weekly wage where Commission had only considered claimant's wages during peak seasonal period).
17. South Carolina does not have a published appellate case that addresses the exact issue before the Commission regarding the Claimant's average weekly wage. Our Supreme Court addressed a similar issue in Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950). But the facts and circumstances of Breeland are distinguishable from the present case, and therefore Breeland provides little guidance as to the present issue before the Commission.
18. The court in Breeland determined that the employer calculated the correct average weekly wage, based upon the claimant's contracted nine-month work period. The claimant, a school bus driver, was paid by the month, and earned \$75 per month as a school bus driver during the nine-month school year. Unlike the present case, it appears the employer in Breeland agreed that only the nine-month period for which the Claimant was contracted should be considered in determining the average weekly wage. For reasons not stated in the opinion, the employer did not argue that the Claimant's average weekly wage should be determined based upon 52 weeks. The only dispute was whether the period the claimant earned wages was comprised of 39 weeks or 36 weeks. The employer asserted that an average 9-month

period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon a 36-week period, because schools were closed for a total of three weeks during the nine-month school year. The Court concluded that schools being closed for three weeks each year is not an "exceptional reason" that would justify calculating the average weekly wage based upon a period less than the full nine months the Claimant was contracted to work. The court further stated that, according to the claimant's argument, Saturdays and Sundays would also be deducted from the work period, "and the average weekly wage thereby artificially increased."

19. The Claimant argues that Breeland stands for the proposition that one cannot simply revert to the "exceptional circumstances" in an effort to circumvent the unambiguous reading of 42-1-140. Specifically, the Claimant cites the following language from Breeland: "The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, 'Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed.'" But for reasons not set forth in the Breeland court's opinion, the issue of whether the claimant's total wages should have been divided by 52 weeks was not before the court. The court only addressed whether the total wages should have been divided by 39 weeks or 36 weeks. The court determined that exceptional reasons did not exist to justify using the 36-week period the claimant proposed.
20. Furthermore, the parties in Breeland appear to have agreed that only the nine-month period should be considered to calculate the average weekly wage, and the court did not analyze whether the resulting average weekly wage was fair to the parties. Either by virtue of the fact that the claimant perhaps did not work more than one school season, or possibly due to the contractual arrangement that provided for a monthly salary, it does not appear that the Defendants presented this issue to the Court. For these reasons, Breeland is distinguishable from the present case. The court's decision provides little guidance as to the present issue before the

Commission, other than to provide further support for the conclusion that dividing the Claimant's total annual wages by only 38 weeks would "artificially increase" the Claimant's wages. Just as our Supreme Court commented that the deduction of additional weeks in Breeland would produce an "artificially increased" average weekly wage, it would have the same result in the present matter.

21. Similarly, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), cited by the Claimant, is not applicable to the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the single commissioner correctly divided the Claimant's pay by the "actual number of weeks Bazen paid Claimant wages" to determine the compensation rate. Id.
22. Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a period the claimant did not work. The Claimant received her regular pay during the entirety of the 52 weeks in 2010. Her annual earnings as a teacher were substantially similar from one year to the next. Therefore, dividing the Claimant's total annual wages by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.
23. The Claimant further cites Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, neither of which are binding on the Commission. Both cases state that a teacher's average weekly wage should be calculated based upon dividing the claimant's total annual wages by 38 weeks. Neither court addresses whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury.
24. S.C. Code Ann. § 42-9-150 provides that a claimant with a preexisting disability "shall be entitled to compensation only

for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.” In this case, there is insufficient evidence to determine the extent of the Claimant’s previous disability. In 1992, the Claimant received a settlement in Michigan for a work-related head and neck injury that occurred in Michigan. She had a 10-pound weight restriction as a result of this accident. She negotiated to a settlement in excess of \$100,000. However, there is no basis for determining what portion of the settlement funds were paid for the neck injury, and how much for the head injury. Also, the wage information for that period of time is absent from the facts presented. The evidence is simply insufficient to determine the Claimant’s prior disability to her neck. As a result, any finding as to the applicability of section 42-9-150 would be purely speculative and based upon surmise and conjecture. Accordingly, the Employer is not entitled to a credit relative to the Claimant’s previous compensation for a head and neck injury in 1992.

25. S.C. Code Ann. § 42-15-60 states the Claimant is entitled to ongoing causally related medical treatment that, as evidenced by expert medical evidence stated to a reasonable degree of medical certainty, will tend to lessen the Claimant’s period of disability, subject to the limitations set forth below.
26. S.C. Code Ann. section 42-15-60(B)(2) requires that a hearing commissioner’s order set forth medical treatment “with as much specificity as possible.” Pursuant to this requirement, I hereby order that the Claimant is entitled to supportive care as stated on Dr. Gause’s report dated January, 23, 2015, for two years from the date of his report. Such supportive care shall include four office visits a year, physical therapy, medications, and three injections a year, subject to Dr. Gause’s recommendations. After the aforementioned two-year period, the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant’s period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth on Dr. Gause’s January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse

within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90.

27. S.C. Code Ann. Section 42-15-60(C) provides that, "in cases of permanent partial disability, prosthetic devices shall be furnished during the life of the injured employee or for as long as such devices are necessary." Pursuant to this requirement, the Claimant is entitled to causally related maintenance and/or replacement of retained surgical hardware for life, subject to Dr. Gause's recommendations.

Based upon the above Statement of Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED that the Claimant's average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01; it is further

ORDERED that the Employer shall pay to the Claimant 131.5304 weeks of compensation at the rate of \$518.01 per week, for a total of \$68,134.06, representing net present value of 45% permanent partial disability or loss of use to the back, pursuant to the current 2% per annum table currently used by the Commission; it is further

ORDERED that the Employer is not entitled to a credit relative to the Claimant's prior work related injury to her head and neck in Michigan; it is further

ORDERED that the Employer shall provide the Claimant ongoing medical treatment with Dr. Paul Gause for two years from the date of Dr. Gause's January 23, 2015 report. Such treatment is limited to four office visits per year, physical therapy, medications, and three injections per year, as recommended by Dr. Gause. After the aforementioned two-year period the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, casually related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required

to provide specific treatment or modalities other than as set forth in Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90; it is further

ORDERED that the Claimant is entitled to lifetime maintenance and/or replacement of retained surgical hardware that is, more likely than not, causally related to the original accident, subject to Dr. Gause's recommendations/opinion based upon a reasonable degree of medical certainty.

APPEAL TO APPELLATE PANEL

In her appeal to the Appellate Panel, the Claimant respectfully submits the following:

1. Did the hearing commissioner err in finding Ms. McPherson based on the totality of the evidence including the medical records and the testimony of Dr. Gause and the Claimant, support the conclusion that Ms. McPherson has sustained 45% permanent partial disability to her back when a review of the evidence of records, in conjunction with the relevant factual findings established she a) suffers considerable range of motion to her back post-accident, b) her extremely credible testimony of the things she is no longer capable of doing completely supported by her treating physician, Dr. Gause, confirms the facts that she has never exaggerated her complaints?
2. Did the hearing commissioner err in failing to take into consideration Dr. Keffer's report of 50% permanent partial impairment and the complaints Ms. McPherson set forth in discussion with her despite the fact that he has also been the Claimant's treating physician in Charleston prior to her move to Arizona and he reviewed all of the current medicals and surgical notes of Dr. Gause, the Arizona surgeon who defers to Dr. Keffer on his rating, and who preferred the 5th Edition rather than the 6th Edition AMA Guides in Ms. McPherson's case and refused to place Ms. McPherson at the lower end of the ranges he recommended on both the cervical and lumbar spine categories?
3. Did the hearing commissioner fail to take into consideration the credible testimony of Claimant when she individually set forth the various percentages of loss she had in her daily activities outside of work and testified that she has lost 75 to 80% of the loss of use of her back with regards to performing these things she was able to do prior to the injury.

4. Did the hearing commissioner err in failing to take into consideration Claimants testimony on her loss of use despite the fact that her treating physician/surgeon stated unequivocally that Ms. McPherson has always been compliant in everything he asked her to do, has always been truthful and followed his instructions, has never exaggerated anything at all, and he would have no reason to believe her testimony would be exaggerated.
5. Did the hearing commissioner fail to find that Ms. McPherson suffered a greater 50% loss of use of her back which would have increased the multiple of 300 weeks to 500 weeks despite the fact that this was the indication at the hearing the direction she was going to rule and then changed her mind over 5 months later despite Dr. Gause's deposition where he continued to support his earlier reports?
6. Did the hearing commissioner err in calculating the average weekly wage of claimant (school teacher) when she divided Claimant's total wage by 52 weeks rather than 38 weeks which was her contractual period with the school district for which her wages were earned and paid as prescribed by S.C. Code Ann 59-21-20 "Appropriation for Teacher Salaries based on 190 days"?
7. Did the hearing commissioner err by not following the clear and unambiguous language of 42-1-40 as required under *Breeland v. Colleton Schools*, 216 S.C. 147, 57 S.E.2d 63 (1950) which does not allow one to simply revert to "exceptional circumstances" to circumvent applying either of the first two methods of calculating average weekly wage under 42-1-40 which the Commissioner agreed would require utilization of a 38 week divisor?
8. Did the hearing commissioner err when she failed to consider what the employer would actually be paying and what the claimant would be receiving, i.e. total compensation rate, when analyzing what is "fair and just to both parties" and "what most nearly approximates the amount the injured employee would be earning had she not sustained the injury" in concluding a 38 week divisor would result in a windfall for the Claimant and unduly burden the Employer?

EVIDENCE OF THE CASE

The Claimant is 44 years old. She began working as a middle school and 9th grade math teacher for the Employer in August, 2009. On February 3, 2011, the Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students. (Hrg. Tr. p. 28-29). She currently lives in Arizona and continues to work as a middle school math teacher.

The Claimant admitted that, while working for the Employer, she was a salaried employee paid gross earnings of \$40,403.01 for 52 weeks during 2010. She received a paycheck every two weeks, including during the summer when she was not working. She admitted that her gross income in 2011 was substantially the same as 2010. She further testified that her earnings in prior teaching jobs in Michigan were substantially similar. Her current salary in Arizona is also comparable to her pay when she was working for the Employer. She testified that she did not think she had ever earned more than \$50,000.00 in one year as a teacher. (Hrg. Tr. 68-73).

A. Medical Treatment

After her February 3, 2011 injury, the Claimant received initial examination and treatment with several doctors in Charleston before moving to Arizona. She underwent a cervical MRI on February 17, 2011, a lumbar MRI on April 6, 2011, and a repeat cervical MRI on April 6, 2011. (Clm. APA p. 1-3). Dr. Stephen Rawe reviewed the MRI results, and concluded that the Claimant was not a surgical candidate at that time. He recommended continuing conservative treatment as directed by Dr. J. Reilly Keffer. (Clm. APA p. 30). The Claimant continued to receive conservative treatment from Dr. Keffer until September 15, 2011. She did not miss any time from work during this period of treatment with Dr. Keffer. (Clm. APA p. 4-26).

Thereafter, the Claimant moved to Arizona, and began treating with doctors there. She received an initial consultation with Dr. Vibhooti Dave on June 21, 2012. Dr. Dave provided conservative treatment, to include injections and a TENS unit. (Def. APA p. 1-9).

The Claimant saw Dr. Paul Gause for a surgical consultation on May 14, 2013. Upon review of updated MRI results, Dr. Gause recommended continuing conservative

treatment of the lumbar spine. With regard to the cervical spine, Dr. Gause recommended a C5-6 anterior cervical discectomy and fusion. (Def. APA p. 10-16). The Claimant underwent this procedure on July 16, 2013. (Def. APA p. 20-23). She did not miss any time from work, because the surgery occurred during the summer when she was not teaching. She continued to receive her regular paychecks during her recovery from surgery. (Hrg. Tr. p. 63).

Based upon Dr. Gause's narrative reports, the Claimant had an excellent recovery from this procedure. The Claimant returned to Dr. Gause on December 13, 2013, and reported that her neck was "doing well." She stated that she was having minimal radicular symptoms in her arms, and that she continued to work full time as a teacher. Dr. Gause stated that "overall, she is happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." (Def. APA p. 24). Dr. Gause performed a physical examination of the Claimant's cervical spine. He found that there were no paraspinal muscle spasms, and the Claimant had minimal bilateral trapezial tenderness. He stated that the Claimant's range of motion was "nearly full without significant pain." He concluded that the Claimant demonstrated full motor strength in the upper extremities, with normal sensation and reflexes. (Def. APA p. 25).

Dr. Gause further concluded that the Claimant had reached maximum medical improvement with regard to her cervical spine. He assigned a 7% medical impairment rating based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended continued physical therapy and consideration of acupuncture with regard to the Claimant's lumbar spine. The Claimant continued to work at

modified duty, and did not miss any time from work as a result of her cervical spine surgery and subsequent recovery. (Def. APA p. 26-27).

On April 4, 2014, the Claimant returned for follow up with Dr. Gause. She reported that her neck continued to do "quite well." Dr. Gause stated that the Claimant had "occasional mild numbness in the arm at night, but this is fairly minimal for her." (Def. APA p. 28). The Claimant reported increasing back and left leg symptoms. Dr. Gause concluded that the Claimant would benefit from lumbar spine surgery, as conservative treatment had failed. Dr. Gause recommended a lumbar arthrodesis at L5-S1. He determined that a combined anterior/posterior decompression and fusion would be beneficial, due to the Claimant's relatively young age. (Def. APA p. 30). The Claimant underwent these procedures on June 2, 2014 and June 4, 2014, without complication. (Def. APA p. 35-42). The Claimant did not miss any time from work as a result of these surgeries, as they occurred during the summer when she was not working as a teacher. As with her previous surgery, she continued to receive her regular paychecks during her recovery.

Dr. Gause's reports indicate that the Claimant had an excellent recovery from the lumbar procedure. The Claimant returned to work without restrictions pursuant to Dr. Gause's report dated August 22, 2014. (Def. APA p. 43). Upon her return to Dr. Gause on September 19, 2014, the Claimant reported that she was "doing quite well." The Claimant told Dr. Gause that she had some "mild residual low back pain with pain in the left buttock and occasionally left lateral thigh." (Def. APA p. 44). The Claimant was continuing to do well as of her next visit with Dr. Gause on October 17, 2014, although she did report some soreness from physical therapy and her exercise program. She continued to work full duty,

with limitations on lifting. (Def. APA p. 48). Dr. Gause recommended that the Claimant continue with physical therapy, and instructed her to return in one month. (Def. APA p. 51).

On December 9, 2014, the Claimant reported to Dr. Gause that “her pre-operative symptoms [had] completely resolved. She does not note any significant leg pain or weakness. She is walking one mile per day for exercise without difficulty. She has done well overall since surgery.” (Def. APA p. 52).

Dr. Gause determined the Claimant reached maximum medical improvement for her lumbar spine on January 23, 2015. On that date, he stated that the Claimant continued to do “quite well.” The Claimant reported no significant radicular pain in her leg. Dr. Gause stated that the Claimant’s “back pain is mild at this point. She is working as a teacher with normal duties. She is taking no pain medications.” (Def. APA p. 57). Dr. Gause performed a physical examination of the Claimant’s lumbar spine, which revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, “some increased pain” with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited only mild tenderness to palpation over the SI joint. (Def. APA p. 58). Dr. Gause concluded that the Claimant reached maximum medical improvement with 7% medical impairment of the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended two years of supportive care, to include four office visits a year, physical therapy, medications, and three injections per year. He stated that the claimant would be reevaluated after two years. (Def. APA p. 62).

Dr. Gause completed a work status report on March 16, 2015. He assigned permanent restrictions of no lifting more than 40 pounds, no sitting/standing/walking for

more than 60 minutes at a time without a few minutes change in position/activity, and no bending/twisting/stooping of the back more than 10 times per hour. (Clm. APA p. 42). On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney. The questionnaire indicated that, according to the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment, the Claimant would qualify for DRE Category IV impairment ratings of 25-28% of the cervical spine and 20-23% of the lumbar spine, as a result of a one-level fusion at both areas of the spine. (Clm. APA p. 40).

Dr. Keffer prepared a supplemental report on March 30, 2015, in which he indicated that the Claimant's attorney had asked him to comment on the Claimant's impairment rating. Dr. Keffer assigned impairment ratings based upon the 5th edition of the AMA Guides of 25% relative to the Claimant's cervical spine, and 25% relative to the lumbar spine. He did not examine the Claimant before assigning these impairment ratings, and in fact has not seen her since she moved to Arizona in 2011. (Clm. APA p. 27-28).

B. The Claimant's Hearing Testimony

The Claimant was the only witness to testify at the hearing. She admitted she is not currently taking any prescription pain medication, and testified that she takes Motrin once or twice per week. (Hrg. Tr. p. 61-64). The Claimant admitted that she is able to drive herself to and from work every day. She is also able to drive as necessary to pick up and drop off her children for school and other activities. (Hrg. Tr. p. 52-54).

The Claimant also testified at length regarding numerous limitations and problems that do not appear in Dr. Gause's narrative reports, and in some instances directly contradict his reports. Her testimony regarding her physical limitations also conflicted with Dr. Gause's assigned restrictions. The Claimant testified that she was pleased with the

treatment she received from Dr. Gause, and would like to continue seeing him. Nevertheless, she disagreed with Dr. Gause's opinion as to her work restrictions, stating that there is "no way" she could lift 40 pounds. The Claimant testified that she avoids lifting anything from the floor that weighs more than ten pounds (the Claimant had previously received a permanent 10-pound weight lifting restriction as a result of a prior work-related injury). She said that her back injury limited her ability to sit or stand for more than 30 minutes at a time. She also stated that she experiences pain whenever she bends at the waist. She asserted that she can squat down to help students at their desks and return to an upright position a few times an hour. She avoids climbing, crawling, pushing, and pulling, as she experiences pain with those activities. However, she admitted that she is able to push a dust mop. (Hrg. Tr. p. 41-46).

Contrary to Dr. Gause's report stating unequivocally that the Claimant was "walking one mile per day for exercise without difficulty," the Claimant testified that she walked only up to three quarters of a mile before school each day. She stated a mile would be about the longest distance that she could walk at any one time. The Claimant admitted her pedometer shows she walks an aggregate of about two miles each day.

The Claimant further testified regarding her difficulty riding a bike, performing household chores, gardening, playing with her children, and having sex with her husband. (Hrg. Tr. p. 46-51). With regard to her neck, the Claimant admitted that her pain was mostly gone. She testified that she experiences some soreness in her neck after grading papers that typically goes away after a couple of days. She stated that she does not have full range of motion. She experiences numbness in her pinky and ring fingers on her left hand. She testified that she worked with jewelry before the injury, but is now unable to do so. The

Claimant admitted that she did not discuss with Dr. Gause any of these various difficulties referenced in her hearing testimony. (Hrg. Tr. p. 55-58).

The Claimant confirmed that she sustained a prior injury to her head and neck in 1992 while working as a deck hand in Michigan. She admitted that she underwent a procedure in which the treating physician “burned” nerves in her neck. The doctor recommended that she avoid lifting more than 10 pounds. She testified that she could not remember the amount of her settlement in that case, contrary to her earlier sworn deposition testimony that the settlement was “more than \$100,000.” (Hrg. Tr. p. 25-28; 65-68; Clm. 8/2/11 Dep. p. 17).

C. Dr. Gause’s Deposition Testimony

Contrary to the Claimant’s testimony, Dr. Gause testified in a deposition on April 30, 2015 that he was unaware of any problems or difficulty the Claimant had in her daily life as a result of her injuries, other than limited walking and issues with prolonged standing. (Dr. Gause Depo. p. 40-41). He confirmed that his earlier 7% impairment ratings are correct, and an accurate reflection of the Claimant’s impairment, pursuant to the 6th Edition of the AMA Guides. (Dr. Gause Depo. Tr. p. 16-18, 26-27). He testified that these ratings result in a combined value of 14% total impairment relative to the spine. (Id. p. 27).

Dr. Gause further testified that the claimant had good results from surgeries at levels C5-6 and L5-S1. He confirmed that, no matter how well a patient recovers after these procedures, the 5th Edition of the AMA Guides requires a DRE Category IV impairment rating, while the more recent 6th Edition has no such requirement for a specific classification as a result of surgery. (Id. p. 31-33). Dr. Gause confirmed that the regional impairment ratings Dr. Keffer assigned based upon the 5th Edition of 25% to the cervical spine and 25%

to the lumbar spine would result in a combined value of 44% total impairment relative to the spine as a whole, according to the combined values chart set forth in the Guides. (Id. p. 39). Finally, Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the claimant's job as a school teacher. (Cln. APA pg. 42).

STANDARD OF REVIEW

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1983), weigh the evidence as presented at the initial hearing, and if grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

LEGAL ANALYSIS

A. Average Weekly Wage Calculation

i. The "fairness" analysis required by S.C. Code Ann. section 42-1-40

Computation of the average weekly wage is controlled by S.C. Code Ann. section 42-1-40, which provides that the claimant's average weekly wage must be calculated by taking the Claimant's total wages for the four quarters preceding the quarter in which the accident occurred and dividing "by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." The statute further states "[w]hen the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, *as long as results fair and just to both parties will be obtained.*" (Emphasis added). Finally, the statute requires that "[w]hen 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.”

In this case, exceptional circumstances require that the Claimant’s average weekly wage be calculated by dividing her total earnings during 2010 by 52 weeks. The Claimant was a salaried employee paid \$40,403.01 over 52 weeks during 2010. She did not work during the summer months. Nevertheless, using a 38-week divisor to calculate the average weekly wage would artificially inflate the Claimant’s actual annual earnings. A 38-week divisor would result in an average weekly wage of \$1,063.24. Instead of accurately reflecting the Claimant’s actual earnings, this average weekly wage reflects annual earnings of \$55,288.48 ($52 \times \$1,063.24 = \$55,288.48$). Therefore, under this calculation, the Claimant would have the same average weekly wage as an employee with an annual salary of \$55,228.48, over \$15,000.00 more than what the Claimant admitted she actually earns in any given year as a teacher. This 35% increase would be a windfall to the Claimant and would unfairly punish the Employer.

The Claimant testified that her gross annual earnings were about \$40,000.00 every year during the years before, during, and after her injury in this case. It stands to reason that her average weekly wage for workers’ compensation purposes should reflect this trend in her actual earnings. As the South Carolina Supreme Court stated in Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978), the “ultimate objective” of the Act’s average weekly wage statute is to fairly reflect the injured worker’s probable future earning loss. In Bennett, a case that is analogous to the present case, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500,

the maximum income he was permitted to earn without penalty while drawing Social Security payments. To determine the average weekly wage in that case, the Commission divided the claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The Supreme Court reversed the Commission and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99.

Similarly, in this case, the Claimant also works less than 52 weeks but dividing her total earnings by the actual number of weeks worked would artificially increase her average weekly wage. The Claimant proposes an average weekly wage that would reflect an increase in her earnings of over 35%. She admitted that her annual gross income in any given year as a teacher is in the range of \$40,000.00. (Hrg. Tr. 68-73). However, according to the Claimant's calculation, she would have the same average weekly wage as a person who earns \$55,228.48 in a year, which is over \$15,000.00 more than the Claimant's actual earnings in any given year. As in Bennett, such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings.

On the other hand, dividing the Claimant's total earnings by 52 weeks is fair and provides an accurate reflection of the Claimant's probable future earning loss.

Furthermore, although Bennett is analogous to the present case, there is no South Carolina appellate court that directly addresses the proper calculation of a teacher's average weekly wage. As a result, the Single Commissioner appropriately considered a North Carolina decision, Conyers v. New Hanover County Schools, 188 N.C.App. 253, 654 S.E.2d 745 (2008), to inform her interpretation of the Act's average weekly wage statute.

Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spooone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). In this case, the applicable provisions of the North Carolina Workers' Compensation Act are almost identical to South Carolina's statute. As a result of the striking similarity between the applicable statutes, the Court of Appeals of North Carolina's interpretation of that state's law is very persuasive and directly on point with the present case. Therefore, the Single Commissioner's decision was properly informed by the North Carolina decision, and her Order should be affirmed.

In Conyers, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina's average weekly wage statute.

which is substantially similar to South Carolina's law. The court held that the claimant's average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she worked as a bus driver for only 40 weeks during the school year. The claimant in Conyers had worked for the school district for 12 years. Every year, she only worked during the school year, and was not employed during the summer. The court cites language in North Carolina's average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the methods in the South Carolina law, set forth above. The court concluded that dividing the claimant's total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant's wages. Such a result would not be "fair and just" because the Employer would be "unduly burdened," and the Claimant would receive a "windfall." The court further stated that "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." Therefore, the court concluded that calculating the Claimant's average weekly wage by dividing her total annual earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. The average weekly wage that would result from such a calculation would be the same as an employee who earns over \$55,000 a year. To the contrary, the Claimant testified that she earned about \$40,000.00 in the years before and after her injury, and continues to earn a comparable annual salary in her work as a teacher.

Therefore, a 38-week divisor would artificially inflate the Claimant's average weekly wage by over 35%. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.

The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between "peak" periods and "slack" periods. The court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." To base the claimant's average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant's average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also Brusnon v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee's average weekly wage where Commission had only considered claimant's wages during peak seasonal period).

The Claimant asserts that using a 38-week divisor would actually not produce a windfall to the claimant. This Panel disagrees. The Claimant's proposed compensation rate would result in annual payments over 90% of her actual annual gross earnings. On the other hand, the total amount the Claimant would receive in one year of workers' compensation benefits using a 52-week divisor would be exactly two thirds of her pre-injury annual salary of \$40,403.01. This result is precisely what is required by regulation 67-1603 ("Calculating

the Compensation Rate”) and the Commission’s Form 20 (“the general rule for calculating the compensation rate is to multiply average weekly wage by .6667”). The Claimant testified that her typical annual salary as a school teacher is in the range of \$40,000.00. A compensation rate that is 2/3 of this amount is exactly what the Act and regulations require. Accordingly, the Single Commissioner correctly held that the Claimant’s proposed compensation rate would result in a significant windfall for the Claimant, and her order must be affirmed.

The Claimant further argues that her proposed average weekly wage would not be an unfair burden to the Employer because the Employer’s total annual payments for workers’ compensation benefits would be lower than the Claimant’s actual gross earnings. However, this circumstance is of no consequence whatsoever to the fairness analysis required by section 42-1-40. As indicated above, the Act states that the compensation rate is two-thirds of the average weekly wage. In every workers’ compensation case, therefore, a claimant’s compensation rate is two-thirds of her actual gross earnings. As a result, every employer in every workers’ compensation claim pays less to a claimant in disability compensation than it pays in actual gross wages. To the contrary, under the Claimant’s proposed calculation, the Employer would be paying a compensation rate that is 90% of the Claimant’s actual annual earnings. Such a result is directly counter to the Act. It would unfairly punish the Employer because the Employer would be paying at a rate that is higher than that which accurately reflects the Claimant’s actual earnings were it not for the injury.

ii. South Carolina law does not mandate a 38-week divisor in this case

Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950), does not mandate calculating the Claimant’s average weekly wage based upon a 38-week divisor. To the

contrary, this case supports the conclusion that the average weekly wage would be artificially increased by using a 38-week divisor. The legal issue disputed in the present case was not before the court in Breeland. Therefore, the holding in Breeland has no bearing on whether it is just and fair to calculate the average weekly in this case based upon 38 weeks.

The limited facts and circumstances presented in Breeland were much different from the present case. The claimant in Breeland died in an accident arising out of his employment as a school bus driver. The court's written opinion does not include any information about the accident itself, including when it occurred. The opinion states only that the claimant was paid a monthly salary of \$75 during the nine month school year. There is no evidence presented as to how long the Claimant worked as a bus driver before his accident, what the claimant did during the months he was not working for the employer, or what the Claimant's typical annual earnings were. Those facts and circumstances were not relevant to the very narrow disputed issue before the court. Therefore, Breeland provides very little or no guidance to the Commission as to the issue in the present case.

The only issue in dispute in Breeland was whether the Claimant's nine-month work period consisted of 39 or 36 weeks. The employer asserted that an average 9-month period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon 36 weeks (thereby increasing his average weekly wage), because schools were closed for a total of three weeks during the nine-month school year. For reasons not set forth in the opinion, the Court concluded that using the 39-week period, in that particular case, was fair and just. Furthermore, the court determined that a school

being closed for three weeks each year is not an “exceptional reason” that would justify an alternative average weekly wage calculation.

In this case, however, using a 38-week divisor is not fair, and there are exceptional circumstances that warrant using an alternative average weekly wage calculation. Limiting the relevant period for average weekly wage determination in this case to the 38-week school year would artificially increase the Claimant’s earnings, would be a windfall to the Claimant, and would unfairly punish the Employer. The fact that the Claimant receives an annual salary for her work as a teacher, the similarity of her annual earnings from year to year, and the large disparity between the Claimant’s actual annual earnings every year and the income that is reflected by using a 38-week divisor, are all exceptional circumstances that justify using an alternative method to calculate the average weekly wage.

Furthermore, the Breeland decision actually supports the conclusion that discounting the summer months from the average weekly wage calculation would artificially inflate the Claimant’s wages. Just as the court in Breeland commented that the average weekly wage would be “artificially increased” by deducting the three vacation weeks from the Claimant’s period of employment, so would the Claimant’s average weekly wage be artificially increased in this case by deducting the summer months from consideration. For these reasons, Breeland does not mandate the use of a 38-week divisor to determine the average weekly wage in every case involving a public school employee. Breeland did not create precedent that prevents this Panel from properly considering for guidance the Conyers decision out of North Carolina. Breeland is a very fact specific case with little application to the present matter, other than to support the conclusion that discounting the summer months

would artificially increase the average weekly wage. Therefore, this Panel concludes that Breeland does not mandate a 38-week divisor in this case.

Likewise, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), does not mandate a 38-week divisor. Bazen is factually distinguishable from the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the Claimant's pay in that particular case should be divided by the "actual number of weeks Bazen paid Claimant wages" to determine the average weekly wage and compensation rate. Id.

Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a period the claimant did not work. The Claimant received her regular salary during the entirety of the 52 weeks in 2010. Her annual salary as a teacher was substantially similar from one year to the next. In Bazen, dividing the claimant's pay the actual number of weeks he worked produced an accurate approximation of his average weekly wages and reflected his expected annual earnings of \$30,000.00. But in this case, dividing the Claimant's wages by 38 weeks would artificially inflate her earnings, would be a windfall to the Claimant, and would unfairly punish the Employer. Instead, dividing the Claimant's total annual wages in this case by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.

Therefore, the Single Commissioner correctly determined that Bazen does not apply to mandate a similar result in the present case, and her Order should be affirmed.

S.C. Code Ann. section 59-21-20, which governs mandatory minimum appropriations by the state legislature, likewise does not mandate a 38-week divisor. This statute is not applicable to a determination of average weekly wage in the context of a workers' compensation case. Section 59-21-20 provides that the legislature shall make sufficient appropriations to pay salaries of all public school teachers on the basis of 190 days. However, this statute has no bearing on the proper determination of the Claimant's average weekly wage under the South Carolina Workers' Compensation Act. The appropriations statute merely ensures that teachers are paid for the work they perform during the school year. There is no dispute that the claimant worked for 38 weeks during the school year, and that she did not work during the summer months. However, section 59-21-20 does not mandate an average weekly wage calculation that undermines the Act's requirement that the average weekly wage accurately reflect the Claimant's earnings were it not for the injury. Dividing the Claimant's total annual salary by only 38 weeks would artificially inflate her earnings and result in a windfall to the Claimant. The appropriations statute does not mandate such an inequitable result.

S.C. Code Ann. section 9-1-840 also does not support an award that runs counter to the Act's fairness requirement. This statute provides that a public school employee's service "for a regular school year in any district shall be equivalent to one year's service" for retirement purposes. If anything, the presumption that the Claimant's work for 38 weeks is equal to one year for retirement purposes actually supports a 52-week divisor in this case. If the Claimant's actual work during the school year is the equivalent to one year for

retirement purposes, then her earnings for that work are appropriately considered as an annual salary for purposes of calculating the average weekly wage. Accordingly, S.C. Code Ann. section 9-1-840 does not mandate a 38-week divisor.

Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, are not binding on this Panel, and do not mandate the Claimant's proposed average weekly wage. These cases state that the average weekly wage in each case should be calculated based upon dividing the claimant's total annual wages by 38 weeks. However, neither court addresses whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury. Therefore, this Panel declines to follow this non-binding precedent.

iii. Statutory construction and interpretation

This Panel declines to follow the Claimant's statutory construction argument, as it ignores the fairness provisions of S.C. Code Ann. section 42-1-40. The Claimant argues that a 1996 amendment to section 42-1-40 somehow reaffirmed the holding in Breeden and mandates the use of a 38-week divisor to determine average weekly wage in this case. The amendment referenced by the Claimant's attorney had no impact whatsoever on the statute's provisions that permit using an alternative method of calculating the average weekly wage. Dividing the Claimant's total wages by 52 weeks produces a result that is fair and just to the parties, and accurately reflects the Claimant's earnings were it not for the injury. The statutory amendment referenced by the Claimant has no bearing on this result.

The Claimant further asserts that using a 52-week divisor to calculate the average weekly wage in this case would "circumvent the statute." This argument is likewise without

merit. This Panel concludes that dividing the Claimant's wages by the actual number of weeks she worked during the four quarters prior to the date of injury would produce an artificially inflated average weekly wage in this particular case. "Exceptional circumstances" in this case therefore permit using an alternative method that accurately reflects the Claimant's actual earnings. The fact that the "alternative method" that is appropriate in this particular case happens to be the same as the standard 52-week method is of no consequence. This coincidence does not require this Panel to order an inequitable average weekly wage and compensation rate that would create a windfall for the Claimant. Using a 52-week divisor is the best available method for calculating a fair and accurate average weekly wage in this particular case, even though the Claimant worked less than 52 weeks.

Finally, using a 52-week divisor in this case does not render portions of section 42-1-40 moot, contrary to the Claimant's assertion. The Claimant contends that, in view of the Single Commissioner's decision, the legislature could have drafted the statute to include only two methods of calculation, one method based on 52 weeks, and a second method based on exceptional circumstances. This argument is also without merit. In the vast majority of cases, including those where the claimant is employed for less than a year prior to an injury, the average weekly wage can be fairly and accurately calculated by dividing the total earnings by the actual number of weeks worked. For example, considering only the actual number of weeks worked would be appropriate for a claimant who is hired in January and expected to work 12 months a year, but is injured in March after working only three months. In that scenario, dividing the claimant's total earnings by the actual number of weeks worked would present a fair approximation of her expected annual earnings.

To the contrary, the fact that the Claimant in this case typically only works during the school year, and has a substantially similar annual income year after year, presents an "exceptional circumstance," in which a 52-week divisor is appropriate, even though the claimant worked for less than 52 weeks. Contrary to the Claimant's argument, the application of the statute's fairness provisions in these unique circumstances does not render the other provisions of the statute moot. It is simply the correct result for this particular case.

B. Permanent Partial Disability

The Single Commissioner's 45% PPD award is founded on and supported by the great weight of the preponderance of the evidence in the record. A Decision and Order of a Single Commissioner must be affirmed if it is supported by a preponderance of the evidence in the record, and is not based on "surmise, conjecture, or speculation." Linen v. Ruscon Construction Co., 286 S.C. 67, 70, 332 S.E. 2d 211, 212 (1985). Additionally, the Full Commission should give weight to the Single Commissioner's decision, based upon the fact that the Full Commission does not have the opportunity or benefit of observing the witnesses, as does the Single Commissioner. Green v. Raybestos - Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967). Here, the Single Commissioner's disability award is not impacted by surmise or conjecture, but instead is supported by a preponderance of the reliable evidence in the record, and therefore is affirmed.

The extent of an injured worker's disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all

the evidence, including both lay and expert testimony. *Id.* at 341. In this case, the preponderance of the evidence, including the medical records, the testimony of Dr. Gause, the Claimant's testimony, and the Single Commissioner's observation of the Claimant at the hearing, firmly support the Single Commissioner's conclusion that the Claimant has sustained 45% permanent partial disability of the back.

The claimant is 44 years old. By all accounts, she had an excellent recovery from single-level fusions at C5-6 and L5-S1. She continues to work full time as a school teacher. The claimant is able to drive to and from work, and as needed to take her children to various activities. Dr. Gause's medical narrative reports state that the claimant walks a mile a day before school (although the Claimant disputed the length of her walks in her testimony at the hearing). The claimant testified that, according to her pedometer, she walks on average an additional two miles throughout the course of her normal activities during the day. The claimant does not take any prescription pain medication, and takes Motrin only once or twice a week. The Claimant's testimony at the hearing regarding difficulties in her home life and activities of daily living is unsubstantiated by the medical evidence.

Additionally, the 14% combined impairment rating assigned by the authorized treating physician is accurate and provides a reliable indicator as to the Claimant's actual functional capacity. The fact that this rating is based upon the 6th edition of the AMA Guides (as opposed to the 5th edition) is of no consequence to the validity of this rating in support of the Single Commissioner's disability award. There is no law or regulation in South Carolina that mandates a preferential view of one version of the AMA Guides over the other.

Dr. Gause, the authorized treating physician, confirmed in his sworn deposition testimony that his 14% impairment rating is correct under the 6th Edition of the AMA Guides. He testified that his rating is an accurate reflection of the claimant's actual impairment based upon the subjective history the claimant gave Dr. Gause, and his physical examination of the claimant, which indicated an excellent recovery from surgery and no verifiable radicular symptoms. To the contrary, the 5th Edition of the AMA Guides requires a DRE Category IV impairment rating for any patient who undergoes a fusion surgery, no matter how well a patient recovers after this procedure. Dr. Gause testified that the more recent 6th Edition has no such requirement for a specific classification as a result of a particular surgery. Therefore, Dr. Gause's impairment ratings assigned pursuant to the 6th edition are an accurate and reliable reflection of the Claimant's actual functional ability.

This panel gives less weight to the March 30, 2015 report of Dr. J. Reilly Keffer. Dr. Keffer last saw the claimant on December 15, 2011, over three years before he prepared his report. He never saw the Claimant in person after she underwent the surgeries performed by Dr. Gause. Dr. Keffer did not perform a physical examination of the Claimant before assigning his impairment ratings. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. He confirmed that the combined value of Dr. Keffer's impairment ratings would be 44% relative to the spine as a whole, according to the combined values chart in the 5th edition of the Guides. He further testified that, assuming the Claimant would receive impairment ratings on the low end of the DRE category IV ranges, the combined value of these impairment ratings would be 40% relative to the spine as a whole.

Based upon a review of the foregoing, and by way of a full affirmation of the Findings and Conclusions of the Hearing Commissioner, the undersigned Panel enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

IT IS FOUND AS A FACT THAT:

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act;
2. The Claimant is 44 years old, and began working as a math teacher for the Employer in August, 2009;
3. The Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students on February 3, 2011;
4. The Claimant received an initial course of conservative medical treatment, primarily under Dr. J. Reilly Keffer. Thereafter, the Claimant moved to Arizona, and began treating with Dr. Vibhooti Dave and Dr. Paul Gause;
5. Dr. Gause performed a C5-6 fusion on July 16, 2013;
6. Following her cervical fusion, the Claimant reported to Dr. Gause that she was "doing well," and that she was "happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." Upon physical examination the Claimant did not have any paraspinal muscle spasms, and had minimal bi-lateral trapezial tenderness. The Claimant's range of motion was "nearly full without significant pain." The Claimant demonstrated full motor strength in the upper extremities with normal sensation and reflexes;
7. Dr. Gause indicated the Claimant had reached maximum medical improvement relative to her cervical spine on December 13, 2013. He assigned 7% medical

impairment relative to the cervical spine based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;

8. Dr. Gause performed a lumbar fusion of L5-S1 on June 2, 2014 and June 4, 2014;

9. Following her lumbar spine surgery, Dr. Gause commented that the Claimant was doing "quite well." He stated that the Claimant's "back pain is mild at this time. She is working as a teacher with normal duties. She is taking no pain medications;"

10. Dr. Gause's physical examination of the Claimant following her surgery revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited mild tenderness to palpation over the SI joint;

11. Dr. Gause concluded that the Claimant reached maximum medical improvement on January 23, 2015. He assigned 7% medical impairment to the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;

12. Dr. Gause recommended 2 years of supportive care, to include 4 office visits a year, physical therapy, medications and 3 injections per year. He stated that the Claimant would be re-evaluated after 2 years;

13. In a work status report completed on March 16, 2015, Dr. Gause assigned permanent restrictions of no lifting more than 40lbs, no sitting/standing/walking for more than 60 minutes at time without a few minutes change in positions/activity and no bending/twisting/stooping of the back more than 10 times per hour. Dr. Gause confirmed in

deposition testimony that these restrictions were not based upon any discussion with the Claimant's attorney, and were assigned based only on examination and discussion with the Claimant;

14. On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney, indicating that, under the 5th edition of the AMA Guides, the Claimant would qualify for DRE Category IV impairment ratings of 25- 28% of the cervical spine and 20-23% of the lumbar spine. Dr. Gause testified in deposition on April 30, 2015 that the Claimant's level of impairment remained the same at that time;

15. Dr. Keffer prepared a supplemental medical report on March 30, 2015, in which he concluded that the Claimant sustained 25% impairment of the cervical spine and 25% impairment of the lumbar spine. Dr. Keffer last examined the Claimant three years before preparing this report. He did not examine the Claimant in his office before assigning these impairment ratings, although he spoke with her on the phone and reviewed Dr. Gause's narrative reports;

16. Dr. Gause testified that his impairment ratings of 7% to the cervical spine and 7% to the lumbar spine were accurate according to the 6th edition of the AMA Guides, and that the combined values of these ratings is 14% total medical impairment relative to the spine as a whole;

17. Dr. Gause confirmed that, no matter how well a patient recovers following cervical and lumbar fusions, the 5th edition requires DRE category IV impairment ratings, while the 6th edition has no such requirement for a specific classification as a result of surgery;

18. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. However, he confirmed that he reviewed Dr. Keffer's report, and responded affirmatively to the question "Would you generally defer to somebody that uses the 5th Edition with regards their opinions on the 5th Edition?" Dr. Gause further testified that he did not have any major disagreement with Dr. Keffer's report;

19. Assuming the Claimant would receive impairment ratings on the low end of the DRE category IV ranges set forth in the 5th edition of the Guides, Dr. Gause testified that the combined value of these impairment ratings would be 40% relative to the spine as a whole;

20. Dr. Gause testified that the combined value of Dr. Keffer's impairment ratings would be 44% relative to the spine as a whole;

21. Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the Claimant's job as a school teacher;

22. The Claimant continues to work full time as a middle school math teacher, with an annual income that is substantially similar to her income while working for the Employer;

23. The Claimant testified that she continues to experience pain and discomfort in her neck and low back with any physical activity;

24. The Claimant testified to difficulty relative to riding a bike, performing household chores, gardening, having sex with her husband, and playing with her

children. None of these issues are referenced in Dr. Gause's narrative reports, although he acknowledge that most of their discussions were related to the Claimant's work activities;

25. The Claimant is able to drive, although she testified that she does not drive for more than 30 minutes at a time. Dr. Gause has not assigned a driving restriction;

26. The Claimant walks every day before school, and is able to walk up to one mile at a time. The Claimant admitted that her pedometer indicates she walks an aggregate of about 2 miles per day;

27. The Claimant admitted she does not use prescription medication. She takes Motrin once or twice per week;

28. The Claimant reached maximum medical improvement on January 23, 2015;

29. The Claimant has sustained 45% permanent partial disability of the back, as a result of her admitted neck and low back injuries;

30. The Claimant sustained a work-related injury to her head and neck in Michigan in 1992. She admitted the treating physician recommended a 10-pound lifting restriction. The Claimant admitted in a prior deposition that she received compensation in excess of \$100,000.00 pursuant to a settlement of the prior claim, although she testified at the hearing she could not remember whether the settlement was more than \$100,000.00. The Claimant admitted that she underwent a procedure relative to her 1992 injury in which the treating physician "burned" nerves in her neck. No evidence was submitted to establish whether the treating physician assigned an impairment rating, the amount of the Claimant's wages for the prior job, or what portion of the settlement funds were paid relative to the neck injury as opposed to the head injury;

31. The Claimant worked as a teacher for 38 weeks in 2010, the four quarters preceding the quarter in which her admitted injury occurred;

32. The Employer paid the Claimant \$40,403.01 during 2010. She received a pay check every two weeks throughout the year, including during the summer when she was not working;

33. The Claimant's annual earnings as a teacher are substantially the same from one year to the next. She continues to earn an annual salary that is substantially the same as her earnings while working for the Employer;

34. The Claimant admitted that her annual gross income in any given year as a teacher was in the range of \$40,000.00;

35. The Claimant's job as a teacher is comparable to "seasonal" workers whose work fluctuates between "peak" periods and "slack" periods. The school year represents the Claimant's "peak time," while the summer is her "slack time;"

36. The correct average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01, based upon the Claimant's total earnings of \$40,403.01 during 2010, divided by 52 weeks;

37. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury;

38. Dividing the Claimant's total earnings by 38 weeks, the actual number of weeks worked, would result in an average weekly wage that is not fair and just to both parties;

39. The Claimant's average weekly wage would be artificially increased by deducting the summer months from consideration;

40. A 38-week divisor would result in an average weekly wage of \$1,063.24. Instead of accurately reflecting the Claimant's actual earnings, this average weekly wage reflects annual earnings of \$55,288.48 ($52 \times \$1,063.24 = \$55,288.48$). Therefore, under this calculation, the Claimant would have the same average weekly wage as an employee with an annual salary of \$55,228.48, over \$15,000.00 more than the Claimant actually earns in any given year as a teacher.

41. This artificial increase of the Claimant's wages by over 35% resulting from a 38-week divisor would be a windfall for the Claimant and an unfair penalty for the Employer;

42. Using a 38-week divisor would result in annual workers' compensation payments equal to 90% of the Claimant's total gross earnings in 2010;

Based upon the above Statement of the Case, Evidence of the Case, Legal Analysis, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident. In this case, the Claimant sustained admitted injuries by accident to her neck and low back.

2. S.C. Code Ann. § 42-9-30(21) sets forth scheduled disability compensation for an injury to the back. Pursuant to this statute, where the claimant's loss of use of the back is forty-nine percent or less, permanent partial disability compensation is calculated based upon a percentage of 300 weeks.

3. The extent of an injured worker's disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341.

4. There is no law or regulation in South Carolina that mandates a preferential view of one version of the AMA Guides over the other. Therefore, the fact that the authorized treating physician's impairment rating is based upon the 6th edition of the AMA Guides (as opposed to the 5th edition) is of no consequence to the validity of his rating.

5. Therefore, the totality of the evidence, including the medical records, the testimony of Dr. Gause, and the testimony of the Claimant, support the conclusion that the Claimant has sustained 45% permanent partial disability of the back, which totals 135 weeks of compensation.

6. 67 S.C. Code Ann. Regs. 1605(E) provides that the insurance carrier shall receive a discount for lump sum payment of a permanent disability award greater than ten weeks, unless the Commission orders otherwise. Here, the total PPD award of 135 weeks shall be reduced to 131.5304 pursuant to the current 2% per annum Net Present Value Table used by the Commission.

7. S.C. Code Ann. § 42-1-40 sets forth requirements for determining the Claimant's average weekly wage. Pursuant to this statute, the average weekly wage must be determined by taking the Claimant's total wages for the four quarters preceding the

quarter in which the accident occurred, and dividing "by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." The statute further states "[w]hen the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, *as long as results fair and just to both parties will be obtained.*" (Emphasis added). Finally, the statute states "[w]hen 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."

8. The Claimant in the present case was paid during the summer months, even though her contract was for 38 weeks. The language of Section 42-1-40 requires that, for an employee working during the period of 52 weeks prior to injury, the wages should be divided by 52 or by the actual number of weeks for which wages were paid. The actual number of weeks she was paid was 52 weeks. However, this is solely the method of payment, and her pay was actually for the 38 weeks she worked or earned.

9. Each year, the Claimant's employment does not actually produce 52 weeks of continuous work history; her work was performed and earned over a period less than 52 weeks prior to injury. She is employed and contracted for each school session. She does have more than a year's history of work, but if the second method were to be used, the divisor would be 38 weeks. Thus, both methods would yield the same result, a 38 week divisor.

10. Therefore, the Employer paid the Claimant \$40,403.01 during 2010, for her work as a teacher during the 38-week school year. The Claimant did not work during the summer months, but she received a paycheck every two weeks throughout the year. Although the Claimant worked as a teacher for only 38 weeks in 2010, dividing her annual earnings by the “number of weeks and parts thereof during which the employee earned wages,” i.e. the 38-week school year, would result in an average weekly wage that is *not* “fair and just to both parties.” By her own admission, the Claimant’s annual earnings as a teacher are substantially the same from one year to the next. Using a 38-week divisor would artificially increase the Claimant’s wages by over 35%. This unfair result is an “exceptional reason” that justifies using an alternative method to calculate the Claimant’s average weekly wage. Therefore, the Employer submitted an accurate Form 20 showing an average weekly wage of \$776.98, which is based upon the Claimant’s total wages of \$40,403.01 divided by 52 weeks. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury.

11. The “ultimate objective” of the Act’s average weekly wage statute is to fairly reflect the injured worker’s probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). If the average weekly wage is increased in this case as the Claimant requests, it would overinflate the Claimant’s possible future earnings. Specifically, if the Claimant’s average weekly wage were \$1,063.24 as she asserts, her annual earnings would be \$55,288.48, representing an increase of about 37% over her actual annual earnings. As a result, the Claimant would be earning more while out of work on disability than she would while actually working. Such an inequitable result would be a windfall for the Claimant, and would unduly burden the Employer.

12. In Bennett, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500, the maximum income he was permitted to earn without penalty while drawing social security payments. To determine the average weekly wage in that case, the Commission divided the Claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The South Carolina Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99.

13. In this case, the Claimant proposes an AWW that would increase her earnings by over 35%. Such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings. On the other hand, the average weekly wage set forth on the Form 20 is accurate and provides a fair reflection of the Claimant's probable future earning loss. For these reasons, the Form 20 is correct, and the Claimant's average weekly wage should not be increased.

14. The Claimant's assertions that her proposed calculation would not produce a windfall or unfairly burden on the Employer are without merit. 67 S.C. Code

Ann. Reg. 1603 and the Commission's Form 20 Wage Statement provide that a claimant's compensation rate typically represents 2/3 of her actual gross earnings. However, the Claimant's proposed compensation rate in this case would result in annual compensation payments over 90% of her actual annual gross earnings. On the other hand, the total amount the Claimant would receive in one year of workers' compensation benefits using a 52-week divisor would be exactly two thirds of her pre-injury annual gross earnings of \$40,403.01. This result is precisely what is required by the Act and regulations, and it is fair and just to both parties.

15. South Carolina does not have a published appellate case that addresses the exact issue before the Commission regarding the Claimant's average weekly wage. Our Supreme Court addressed a similar issue in Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950). But the facts and circumstances of Breeland are distinguishable from the present case, and therefore Breeland provides little guidance as to the present issue before the Commission.

16. The court in Breeland determined that the employer calculated the correct average weekly wage, based upon the claimant's contracted nine-month work period. The claimant, a school bus driver, was paid by the month, and earned \$75 per month as a school bus driver during the nine-month school year. Unlike the present case, it appears the employer in Breeland agreed that only the nine-month period for which the Claimant was contracted should be considered in determining the average weekly wage. For reasons not stated in the opinion, the employer did not argue that the Claimant's average weekly wage should be determined based upon 52 weeks. The only dispute was whether the period the claimant earned wages was comprised of 39 weeks or 36 weeks. The employer asserted

that an average 9-month period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon a 36-week period, because schools were closed for a total of three weeks during the nine-month school year. The Court concluded that schools being closed for three weeks each year is not an "exceptional reason" that would justify calculating the average weekly wage based upon a period less than the full nine months the Claimant was contracted to work. The court further stated that, according to the claimant's argument, Saturdays and Sundays would also be deducted from the work period, "and the average weekly wage thereby artificially increased."

17. The Claimant argues that Breeland stands for the proposition that one cannot simply revert to the "exceptional circumstances" in an effort to circumvent the unambiguous reading of 42-1-140. Specifically, the Claimant cites the following language from Breeland: "The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, 'Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed.'" But for reasons not set forth in the Breeland court's opinion, the issue of whether the claimant's total wages should have been divided by 52 weeks was not before the court. The court only addressed whether the total wages should have been divided by 39 weeks or 36 weeks. The Court concluded that, *in that particular case*, using the 39-week period was fair and just, and that exceptional reasons did not exist to justify using the 36-week period the claimant proposed.

18. Furthermore, the parties in Breeland appear to have agreed that only the nine-month period should be considered to calculate the average weekly wage. Either by virtue of the fact that the claimant perhaps did not work more than one school season, or possibly due to the contractual arrangement that provided for a monthly salary, it does not appear that the Defendants raised the issue of a 52-week divisor. For these reasons, Breeland is distinguishable from the present case. The court's decision provides little guidance as to the present issue before the Commission, other than to provide further support for the conclusion that dividing the Claimant's total annual wages by only 38 weeks would "artificially increase" the Claimant's wages. Just as our Supreme Court commented in Breeland that the average weekly wage would be artificially increased by deducting the three vacation weeks from the claimant's period of employment, so would the Claimant's average weekly wage be artificially increased in this case by deducting the summer months from consideration.

19. Similarly, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), is not applicable to the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the single commissioner correctly divided the Claimant's pay by the "actual number of weeks Bazen paid Claimant wages" to determine the compensation rate. Id.

20. Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a

period the claimant did not work. The Claimant received her regular pay during the entirety of the 52 weeks in 2010. Her annual earnings as a teacher were substantially similar from one year to the next. Therefore, dividing the Claimant's total annual wages by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.

21. The Claimant cites Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, for the proposition that the average weekly wage should be calculated based upon 38-week divisor. These decisions are not binding on this Panel. The Claimant also cites prior Commission orders, which are likewise not binding on this Panel. These decisions do not address whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury.

22. The Claimant argues that S.C. Code Ann. § 59-21-20 provides the appropriate divisor for the wage calculation. This statute governs mandatory minimum appropriations, and is not applicable to a determination of average weekly wage in the context of a workers' compensation case.

23. S.C. Code Ann. section 9-1-840 also does not mandate a 38-week divisor. This statute provides that a public school employee's service "for a regular school year in any district shall be equivalent to one year's service" for retirement purposes. If anything, the presumption that the Claimant's work for 38 weeks is equal to one year for retirement purposes actually supports a 52-week divisor in this case. If the Claimant's actual work during the school year is the equivalent to one year for retirement purposes, then

her earnings for that work are appropriately considered as an annual salary for purposes of calculating the average weekly wage.

24. A 1996 amendment to section 42-1-40 had no impact whatsoever on the statute's "fairness" provisions that permit using an alternative method of calculating the average weekly wage. Dividing the Claimant's total wages by 52 weeks produces a result that is fair and just to the parties, and accurately reflects the Claimant's earnings were it not for the injury. The statutory amendment referenced by the Claimant has no bearing on this result.

25. The fact that the "alternative method" that is appropriate in this particular case happens to be the same as the "standard" 52-week method is of no consequence to the result in this case. This coincidence does not require this Panel to order an inequitable average weekly wage and compensation rate that would create a windfall for the Claimant. The Commission has not "circumvented" the requirements of the statute by reaching this conclusion. Using a 52-week divisor is simply the best available method for calculating a fair and accurate average weekly wage in this particular case, even though the Claimant worked less than 52 weeks.

26. Using a 52-week divisor in this case does not render portions of section 42-1-40 moot. In the vast majority of cases, including those where the claimant is employed for less than a year prior to an injury, the average weekly wage can be fairly and accurately calculated by dividing the total earnings by the actual number of weeks worked. For example, considering the actual number of weeks worked would be appropriate for a claimant who is hired in January and expected to work full time, 12 months a year, but is injured in March after working only three months. In that scenario, dividing the claimant's

total earnings by the actual number of weeks worked would present a fair approximation of her expected annual earnings. To the contrary, the fact that the Claimant in this case typically only works during the school year, and receives a substantially similar annual income year after year, presents an “exceptional circumstance” in which a 52-week divisor is appropriate, even though the claimant worked for less than 52 weeks. The application of the statute’s fairness provisions in these unique circumstances does not render the other provisions of the statute moot. It is simply the correct result for this particular case.

27. For the reasons set forth above, there is no South Carolina court decision or statute that mandates a 38-week divisor in this case. Again, the facts and circumstances of Breeland are distinguishable from the present case. Furthermore, Bennett, while analogous to this case, is not directly on point. There is no South Carolina decision that directly addresses the proper calculation of the average weekly wage for a teacher who only works during the school year, and has substantially the same annual income from one year to the next. As a result, it is proper to consider a North Carolina decision, Conyers v. New Hanover County Schools, 188 N.C.App. 253, 654 S.E.2d 745 (2008), to inform this Panel’s interpretation of the Act’s average weekly wage statute in this case. Neither Breeland nor any other South Carolina appellate court decision has created precedent that bars the application of Conyers to the present case.

28. Because South Carolina workers’ compensation law is fashioned after North Carolina’s statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers’ Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spooone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v.

Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law).

29. In Conyers, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina's average weekly wage statute, which is substantially similar to South Carolina's law. 188 N.C.App. 253, 654 S.E.2d 745 (2008). The court held that the claimant's average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she only worked as a bus driver for 40 weeks during the school year. The claimant had worked for the school district for 12 years. Each year she worked during the school year, and was not employed during the summer. The court cites language in North Carolina's average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the three methods in the South Carolina law, set forth above. The court concluded that dividing the claimant's total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant's wages. Such a result would not be "fair and just" because the Employer would be "unduly burdened," and the Claimant would receive a "windfall." The court further stated that "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." Therefore, the court concluded that calculating the Claimant's average weekly wage by dividing her total annual earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

30. In this case, the applicable provisions of the North Carolina Workers' Compensation Act are nearly identical to South Carolina's statute. There is no material distinction between the two statutes. As a result, the Court of Appeals of North Carolina's interpretation of that state's statute is very persuasive and directly on point with the present case. As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.

31. The Conyers court also concluded that decisions from other jurisdictions as to average weekly wages for educators and other school employees "are of limited value given the unique nature of the contracts for employment in each case as well as each state's unique workers' compensation statutory scheme." Id. at 258. Such decisions from jurisdictions besides North Carolina are similarly inapplicable here. For instance, the Claimant cited Wash Dist. 50 Sch. v. III. Workers' Comp., 917 N.E. 2d 586, 334 Ill. Dc. 760 Ill. App. 2009) and Magnet Cove School Dist. v. Barnett, 97 S.W.3d 909, 81 Ark. App. 11 (Ark. App., 2003). This panel declines to follow those decisions from Illinois and Arkansas, based upon the sound reasoning set forth in Conyers. Conyers is uniquely applicable to the present case, because of the striking similarity North Carolina's relevant statutory language bears to the South Carolina Act.

32. The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between

“peak” periods and “slack” periods. The court determined that the school year represented the claimant’s “peak time,” while the summer was her “slack time.” To base the claimant’s average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant’s average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also Brusnon v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee’s average weekly wage where Commission had only considered claimant’s wages during peak seasonal period);

33. S.C. Code Ann. § 42-9-150 provides that a claimant with a preexisting disability “shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.” In this case, there is insufficient evidence to determine the extent of the Claimant’s previous disability. In 1992, the Claimant received a settlement in Michigan for a work-related head and neck injury that occurred in Michigan. She had a 10-pound weight restriction as a result of this accident. She negotiated to a settlement in excess of \$100,000. However, there is no basis for determining what portion of the settlement funds were paid for the neck injury, and how much for the head injury. Also, the wage information for that period of time is absent from the facts presented. The evidence is simply insufficient to determine the Claimant’s prior disability to her neck. As a result, any finding as to the applicability of section 42-9-150 would be purely speculative and based upon surmise and

conjecture. Accordingly, the Employer is not entitled to a credit relative to the Claimant's previous compensation for a head and neck injury in 1992.

34. S.C. Code Ann. § 42-15-60 states the Claimant is entitled to ongoing causally related medical treatment that, as evidenced by expert medical evidence stated to a reasonable degree of medical certainty, will tend to lessen the Claimant's period of disability, subject to the limitations set forth below.

35. S.C. Code Ann. section 42-15-60(B)(2) requires that a hearing commissioner's order set forth medical treatment "with as much specificity as possible." Pursuant to this requirement, I hereby order that the Claimant is entitled to supportive care as stated on Dr. Gause's report dated January, 23, 2015, for two years from the date of his report. Such supportive care shall include four office visits a year, physical therapy, medications, and three injections a year, subject to Dr. Gause's recommendations. After the aforementioned two-year period, the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth on Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90.

36. S.C. Code Ann. Section 42-15-60(C) provides that, "in cases of permanent partial disability, prosthetic devices shall be furnished during the life of the

injured employee or for as long as such devices are necessary.” Pursuant to this requirement, the Claimant is entitled to causally related maintenance and/or replacement of retained surgical hardware for life, subject to Dr. Gause’s recommendations.

Based upon the above Statement of Case, Evidence of the Case, Legal Analysis, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED that the Claimant’s average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01; it is further

ORDERED that the Employer shall pay to the Claimant 131.5304 weeks of compensation at the rate of \$518.01 per week, for a total of \$68,134.06, representing net present value of 45% permanent partial disability or loss of use to the back, pursuant to the current 2% per annum table currently used by the Commission; it is further

ORDERED that the Employer is not entitled to a credit relative to the Claimant’s prior work related injury to her head and neck in Michigan; it is further

ORDERED that the Employer shall provide the Claimant ongoing medical treatment with Dr. Paul Gause for two years from the date of Dr. Gause’s January 23, 2015 report. Such treatment is limited to four office visits per year, physical therapy, medications, and three injections per year, as recommended by Dr. Gause. After the aforementioned two-year period the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant’s period of disability, based upon a reasonable

degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth in Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one years of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90; it is further

ORDERED that the Claimant is entitled to lifetime maintenance and/or replacement of retained surgical hardware that is, more likely than not, causally related to the original accident, subject to Dr. Gause's recommendations/opinion based upon a reasonable degree of medical certainty.

No hearing costs or penalties are assessed in this matter.

S.C. WORKERS' COMPENSATION
COMMISSION

By: 

Commissioner Avery Wilkerson, Jr.
B.

CONCURRING:

By: 

Commissioner F. Scott Beck

By: 

Commissioner Aisha Taylor

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 February 23, 2016