THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner

Case No. 2015-002505

John Faubert, Employee.....Respondent,

v.

University of SC Apprentice Students, Employer, and State Accident Fund, Carrier..... Appellants.

INITIAL BRIEF OF RESPONDENT

THE LAW FIRM OF
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WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY CALCULATED CLAIMANT'S AVERAGE WEEKLY WAGE, PURSUANT TO SOUTH CAROLINA CODE SECTION 42-1-40, TO INCLUDE CONSIDERATION BOTH HIS STATUTORILY ASSIGNED WEEKLY WAGE AS AN INTERN ENGAGED IN A WORK STUDY PROGRAM AND HIS EARNINGS FROM HIS CONCURRENT EMPLOYMENT WITH MCDONALD'S.

STATEMENT OF THE CASE

This is an appeal from an Order of the Appellate Panel of the South Carolina Workers' Compensation Commission. By Order issued November 3, 2015, the Appellate Panel affirmed, in all respects and without modification, the Order of the single Commissioner. (Order of Appellate Panel issued November 3, 2015, p. 7). In her Order issued March 20, 2015, the single Commissioner concluded, in part, that the calculation of the Respondent John Faubert's average weekly wage and corresponding compensation rate were controlled by S.C. Code Ann. § 42-1-40 and thus required combining the statutorily assigned average weekly wage for students engaged in work study programs and Respondent's wages from his concurrent employment as an Assistant Manager for McDonalds. (Decision and Order of Commissioner Aisha Taylor issued March 20, 2015, p. 7).

Respondent, John Faubert, suffered a compensable injury January 29, 2014 while participating in activities in connection with a work study program in pursuit of his master's degree at the University of South Carolina. (Claimant's Form 50). At the time of this injury, the Respondent was also employed by McDonald's as an Assistant Manager. (Claimant's Exhibits 5, 6 and 10).

Respondent served his Form 50 Notice of Claim March 24, 2014, seeking temporary total benefits beginning January 29, 2014 through the present and continuing as well as medical examination and treatment for the body parts injured. (Claimant's Form 50). By a Form 50 dated April 14, 2015, Respondent requested a hearing seeking a determination on both of these issues. (Claimant's Form 50/ Request for a Hearing dated April 14, 2015). A hearing was held on these issues before Commissioner Aisha Taylor on

September 23, 2014. It is this hearing which resulted in original finding and conclusion that Mr. Faubert was entitled to include both his statutorily assigned average weekly wage for his position as a work study student and his wages from McDonald's in determining his average weekly wage and compensation rate. (Single Commissioner Decision and Order, p. 7; Appellate Panel Order, p. 7). Appellants served a Form 30 on April 2, 2015, appealing the Order of the single Commissioner and a Notice of Appeal on December 3, 2015, appealing the Order of the Appellate Panel.

ARGUMENT

SOUTH CAROLINA CODE SECTION 42-1-40 DICTATES THAT CLAIMANT'S WAGES FROM HIS REGULAR EMPLOYMENT WITH MCDONALD'S ARE TO BE COMBINED WITH THE STATUTORILY DESIGNATED AVERAGE WEEKLY WAGE OF A STUDENT INTERN WHEN DETERMINING HIS TOTAL AVERAGE WEEKLY WAGE AND CORRESPONDING COMPENSATION RATE.

It is undisputed that at the time of his injury, Respondent was engaged as an intern in a work study program with Appellant Employer, University of South Carolina, and was also working as an Assistant Manager for McDonald's. It is also undisputed that for his engagement as an intern engaged in a work study program, his average weekly wage is "fifty percent of the average weekly wage in the State for the preceding fiscal year." S.C. Code Ann. § 42-7-65. Respondent's engagement in a work study program is consequently considered employment within the meaning of the South Carolina Workers' Compensation Act, such that it was properly determined that he was working two jobs at the time of his injury.

It is well-established that when an employee is working more than one job at a time, that employee's average weekly wage is calculated by combining the wages from each of his multiple jobs. *Boles v. Una Water Dist.*, 291 S.C. 282, 353 S.E.2d 286 (1987); *Foreman*

v. Jackson Minit Markets, Inc., 265 S.C. 164, 217 S.E.2d 214 (1975) (holding that concurrent employment is an exceptional reason for deviation from the general method for calculating the average weekly wage in accordance with S.C. Code Ann. § 42-1-40 and further finding that a proper calculation requires combination of the wages from a claimant's multiple jobs). In calculating Respondent's average weekly wage and corresponding compensation rate, the Appellate Panel properly combined the statutorily assigned average weekly wage for student interns in work study programs and Respondent's average weekly wage for his employment as a manager with McDonald's. (Single Commissioner Order, pp. 6-7).

Appellants, relying on *Smith v. Barnwell County*, 384 S.C. 520, 682 S.E.2d 828 (2009), unconvincingly contend that S.C. Code Ann. § 42-7-65 prohibits the Respondent from including his wages earned from McDonalds in the calculation of his average weekly wage. In doing so, however, Appellants ignore the plain language of the very statute sought to be interpreted in *Smith v. Barnwell County*. Appellants' contention requires that one's consideration be limited to an isolated portion of S.C. Code Ann. § 42-7-65, which portion is reproduced in Appellants' brief. A careful review and reading of the **entire** applicable statute, however, instructs or points out the fallacy in Appellants' position.

Section 42-7-65 begins "[n]otwithstanding the provisions of Section 42-1-40, or the purpose of this title and while serving in this capacity, the total average weekly wage of the following categories of employees is the following...." Immediately thereafter appears five (5) indented and enumerated subparagraphs identifying certain categories of employees, neither of which includes student interns. After the five (5) indented and enumerated subparagraphs, the statute provides, without any indention, expressly as

follows: "The wages provided in items (2), (3), (4) and (5) of this section may not be increased as a basis for any computation of benefits because of employment other than as a volunteer. Persons in the categories provided by items (2), (3), (3), and (5) must be notified of the limitation on average weekly wages prescribed in this section by the authority responsible for obtaining coverage under this title." *Id.*

After a few blank lines, the statute defines "volunteer firemen", "rescue squad members" and "volunteer deputy sheriff[s]" in a un-indented paragraph of several lines. Thereafter are a few blank lines and finally, the last paragraph of the statute which addresses student interns. It is then and only then, in this un-indented paragraph of several lines that the legislature assigns an average weekly wage for "students of high schools, state technical schools, and state-supported colleges and universities while engaged in work study, marketing education, or apprentice programs on the premises of private companies or while engaged in the Tech Prep or other structured school-to-work programs on the premises of a sponsoring employer [to be] fifty percent of the average weekly wage in the State for the preceding fiscal year." *Id.*

Consideration of the statute's own formatting and the placement of modifying language used in Section 42-7-65 evidence the clear intent of the legislature. In "modifying" or "designating" the average weekly wage for certain categories of employees, the legislature referred to "the total average weekly wage" when addressing those employees enumerated and identified in subparagraphs (1), (2), (3), (4) and (5). S.C. Code Ann. § 42-7-65. Additionally, the legislature intentionally informed—as to specific categories of employees identified by number—that their total average weekly wage "may

not be increased as a basis for any computation of benefits because of employment other than as a volunteer." *Id.*

A careful reading of the statute informs the reader that no such limitations have been placed on those categories of employees referenced in the final paragraph. First, the legislature elects to refer to the wage as the "average weekly wage" rather than the "total average weekly wage" as it did for those employees identified in the enumerated subparagraphs. Additionally and even more telling is the legislature's election to not include the language it used for those employees included in the enumerated subparagraphs. As indicated, the legislature specifically identified those employees and expressly indicated that their total average weekly wage was not to be increased on account of other employment. There was no such effort taken on the part of the legislature for those employees appearing in the final paragraph—a clear indication that no such limitation was being imposed. It appears that it was the intent of the legislature to provide workers' compensation coverage where none previously existed to the benefit of those employees—not to limit it to those persons.

Appellants' reliance on *Smith v. Barnwell, supra,* is sorely misplaced. In that case, the Supreme Court, reversing the circuit court and thereby affirming the single Commissioner, held that an inmate could not combine wages to determine his average weekly wage. *Id.* In arriving at that conclusion, the court resorted to a review of the legislative history and noted that the average weekly wage of prisoners was originally addressed in S.C. Code Ann. § 42-1-40, which contained the "exceptional reasons" provision. *Id.* at 523-524, 830. The Court interpreted the legislature's removal of "prisoners" from S.C. Code Ann. § 42-1-40 and placement of them in S.C. Code Ann. §

42-1-40 to limit their total average weekly wage to $40 per week. The Court, however, did not give any consideration to the fact that the prisoners were moved to a statutory section where the legislature dealt with other specific categories of employees. It is to be logically assumed that removal of prisoners from Section 42-1-40 and inclusion of them in Section 42-7-65 was nothing more than housekeeping and organizational.

Simply put, the portion of Section 42-7-65 addressing student interns does not prohibit the increasing of a student intern's average weekly wage by combining wages from the student intern's regular employment as it does for other identified categories of employees. As such, S.C. Code Ann. § 42-1-40, *Foreman*, *supra*, and *Boles*, *supra*, are applicable and dictate that the Order of the Appellate Panel be affirmed in all respects, allowing the combination of the Claimant's wages from his regular employment with that provided him on account of his student intern status.

CONCLUSION

At the time he sustained his injury, the Respondent was both pursuing his master's degree and working as an Assistant Manager at McDonald's. As such, his average weekly wage was properly calculated by combining the wages from his regular employment with those wages provided him as an intern under S.C. Code Ann. § 42-7-65. Such a result is demanded by the clear intent of the state legislature as expressed in both S.C. Code Ann. § 42-1-40 and S.C. Code Ann. § 42-7-65. Consequently, the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission should be AFFIRMED in all respects and without modification.

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Respectfully Submitted,

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