IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

W.C.C. File No.: 1104105

Kelly McPherson,.....Claimant/Appellant,

v.

Charleston County School District, ...Employer/Carrier/Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the Workers' Compensation Commission incorrectly calculated a school teacher's "average weekly wage" when it divided the teacher's salary by the number of weeks in a calendar year instead of using the number of weeks the teacher *earned wages*, which is required by statute and precedent and is not unfair.

STATEMENT OF THE CASE

Kelly McPherson was employed as a middle school and 9th grade math teacher for the Charleston County School District. (App. Panel Or., p.42, ¶ 2). On February 3, 2011 she suffered injuries to her neck and low back when she was struck during a fight between two students. (Id.p.42, ¶ 3).

The School District accepted McPherson's claim and began providing benefits. (Id.p.42, ¶¶ 3-4). McPherson had neck surgery in July of 2013 and two back surgeries in June of 2014. (Id.pp.42-43, ¶¶ 5-8). Importantly, McPherson chose to have these three surgeries performed during the summer months when she was not working. (Id.p.20). Thus, even though McPherson suffered a significant injury, she missed little to no work.

The School District filed a Form 21 on January 27, 2015 requesting a hearing with the commission to determine two issues: whether McPherson had reached maximum medical improvement and the extent of McPherson's permanent disability. (Hr'g Comm'r Or., p.4). McPherson filed an answer to this hearing request, claiming she needed additional treatment and requesting a determination of her permanent disability to her back. Id. McPherson also argued her average weekly wage should be calculated by taking her total wages

from the last four quarters and dividing by 38-weeks, the number of weeks in the school year, instead of 52-weeks. (Id.p.5).

Commissioner Melody James heard the dispute and on September 11, 2015 awarded McPherson a 45% permanent partial disability for the loss of the use of her back. (Id.p.32). Commissioner James also ordered the School District to continue providing medical treatment as recommended by the authorized treating physician. (Id.p.33).

Commissioner James determined McPherson's average weekly wage should be calculated by taking her total earnings during 2010 and dividing by 52-weeks. This decision was based on the average weekly wage statute's "exceptional reasons" provision. (Hr'g Comm'r Or., pp.21-22, ¶¶5, 8).

Commissioner James' decision is lengthy, see (Id.pp.1-34), but much of it does not relate to the average weekly wage issue. The relevant findings of fact are findings 31 through 34. (Id.p.19). The pertinent conclusions of law are conclusions 5 to 23. (Id.pp.21-30).

Commissioner James concluded McPherson's earnings from the previous 4 quarters were based on 38 weeks of work, but Commissioner James believed an average weekly wage calculated on that basis would "overinflate" McPherson's "future" earnings. (Id.p.22-23, ¶¶ 8-9). Commissioner James saw this as a "windfall" that was not "fair and just" to both parties; thus warranting use of the average weekly wage statute's "exceptional reasons" provision. Id. Commissioner James also held McPherson's work was similar to "seasonal" work. (Id.p.26, ¶ 16).

In reaching this decision, Commissioner James distinguished the two appellate decisions McPherson argued were at least persuasive, if not binding. (Id.pp.27-29, ¶¶ 17-22). Commissioner James instead relied on a North Carolina case, noting what she found to be a "striking similarity" between the South Carolina and North Carolina statutes. (Id.pp.24-27, ¶¶ 13-16).

McPherson filed a timely request for review by the commission's appellate panel. The panel heard oral arguments on December 14, 2015 and issued an order on February 23, 2016 fully affirming Commissioner James' decision.

As was true with Commissioner James' decision, the appellate panel's order is quite lengthy. It includes a "legal analysis" section devoted almost exclusively to the average weekly wage issue, (App. Panel Or., pp.26-39), and it also includes multiple findings of fact and conclusions of law reiterating this analysis. The relevant factual findings are findings 34 to 42. (Id.pp.47-48). The relevant legal conclusions are numbers 7 through 32. (Id.pp.49-61).

The panel's end result and reasoning do not differ from Commissioner James' analysis. Though the panel found the average weekly wage statute's principal sections required dividing McPherson's earnings as a teacher by 38 weeks, the panel believed this would punish the School District, inflate McPherson's wages, and produce a "windfall" where McPherson's annual benefits would be over 90% of her pre-injury salary. (Id.pp.49-53, ¶¶ 7-14).

Like Commissioner James' decision, the appellate panel analogized McPherson to a "seasonal" worker, distinguished the relevant South Carolina cases, and relied heavily on North Carolina law. (Id.pp.29-36). The panel also

dismissed as non-binding a prior decision of its own as well as other orders that followed McPherson's reasoning. (Id.p.56, ¶ 21).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard of review. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-134, 276 S.E.3d 304, 306 (1981). Under the APA, this Court can reverse or modify the commission's decision if McPherson's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2015).

ARGUMENT

The commission's decision is controlled by an error of law.

First, it is contrary to the average weekly wage statute's instruction that a worker's earnings be divided by "52 or the number of weeks for which wages were paid, whichever is less." The statute plainly envisions steady employment with wages being paid for less than 52 weeks of work. This means what it says.

Second, the analysis does not differ if one concludes a school teacher's job is "employment" that "extended over a period of less than 52 weeks." Teachers are paid based on 190 days of work – 38 weeks of working Monday to Friday – and the average weekly wage statute ties disability benefits to the wages earned *when the injured worker is working*. Disability benefits are paid for a period of weeks; in McPherson's case, for 135 weeks, because she has lost 45% of the use of her back. It is imminently fair to exclude unpaid vacation from

the math: McPherson's weekly benefits should be based on her weekly wages; not her weekly wages after they have been watered down with her unpaid time off. McPherson's disability will last a lifetime, but her benefits will not. The commission may not dilute McPherson's limited award by artificially inflating the term of her employment.

Finally, the commission improperly considered arguments and reasoning that were not raised by either of the parties, and it erred in looking to North Carolina, which has a different statute, instead of following the South Carolina cases that control. McPherson's analysis is faithful to the statute and to precedent. It is also fair, which is why the Court should reverse.

A. The commission's decision is contrary to the average weekly statute's instruction that an injured worker's earnings be divided by "52 or the number of weeks for which wages were paid, *whichever is less.*"

The relevant statute is section 42-1-40 of the Code (2015). It gives four alternative methods for computing the average weekly wage.

The primary method requires taking the total wages paid for the last four quarters and dividing by "52 or *the actual number of weeks for which wages were paid, whichever is less.*" *Id.* (emphasis added). As this Court explained in *Pilgrim v. Eaton*, the commission "must" use this method unless the employment extended for less than 52 weeks before the injury or unless "exceptional reasons" make this method unfair. 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010).

The central feature of the commission's decision was its view of fairness, but any analysis of average weekly wage must begin with the statute's language, and the statute's chief method plainly contemplates someone having a multi-year

job where the "number of weeks for which wages were paid" during the previous 4 quarters is *less* than 52. This makes sense: the statute computes a worker's average "weekly" wage, not a worker's average "annual" wage. It cannot be extraordinary that someone like a teacher regularly earns wages for less than 52 weeks a year—the statute explicitly recognizes this sort of situation.

This is the first error in the commission's decision. The commission recognized McPherson was paid wages based on 38 weeks of work, (App. Panel Or., p.50, ¶¶ 8-9), but it reasoned in conclusion of law number 26 that McPherson's situation was "unique." (Id.pp.57-58, ¶26). This means *every* teacher's job is "unique." Furthermore, it means any person who regularly works less than 52 weeks per year has a similarly idiosyncratic schedule. The Commission's logic applies to a 46, 48, or a 50-week worker with equal force.

The shortcoming of the commission's analysis is evident: if working less than 52 weeks is what makes the situation extraordinary, the average weekly wage statute's, "whichever is less" clause has almost no practical effect. It applies only in the limited circumstance when someone has worked the same job for more than a year, the job regularly requires 52 weeks of work, but for some reason, the injured worker *does not* work 52 continuous weeks before getting injured. If this seems extremely narrow, that is because it is. It applies only to someone like the worker in *Bazen v. Badger R. Bazen Co.*, who unexpectedly took a one-month unpaid vacation to Israel. See 388 S.C. 58, 66, 693 S.E.2d 436, 440 (Ct. App. 2010). But the statute is not written that narrowly. Instead, the statute's language is straightforward.

The commission recognized this shortcoming and tried to account for it by saying it would use the number of weeks worked for someone whose job begins in January and who is injured in March. (App. Panel Or, pp.57-58, ¶26). This reasoning collapses under the gentlest scrutiny because that scenario fits neatly within the statute's second method, when "the employment, prior to the injury, extended over a period of less than 52 weeks." Again, if regularly earning wages for less than 52 weeks of work is what qualifies a job as "extraordinary," the "whichever is less" clause is oddly fashioned and out of place.

The commission's decision was driven by its view of fairness, and the mistakes in that analysis are discussed in the next section. The point is that the statute's chief method of calculating average weekly wage explicitly envisions a worker, like a teacher, who works a multi-year job that involves being paid for less than 52 weeks of work. The commission should have followed the statute.

B. The analysis does not differ if one concludes a school teacher's job is "employment" that "extended for a period of less than 52 weeks." If the issue is fairness, the commission's math unfairly dilutes McPherson's benefits by inflating the school year and watering down her wages with her unpaid time off.

The second method of calculating average weekly wage applies when the employment prior to the injury extended over a period of less than 52 weeks.

There may be an interesting debate about whether someone who has worked consecutive years as a teacher has "employment, prior to the injury" that extends for less than 52 weeks. The commission did not decide this issue. We know the school year has 190 days and that teachers are paid for 190 days of work. S.C. Code Ann. §§ 59-1-425(A) (Supp. 2015) and 59-21-20 (2004).

But as far as the correctness of the commission's decision is concerned, the debate is immaterial. Fairness comes in through either the "exceptional circumstances" clause or the "employment for less than 52 weeks" clause.

The plain error in the commission's fairness calculation is apparent when one considers what would have happened if McPherson had any of her three surgeries during the school year instead of the summer. Suppose McPherson would have to miss six weeks of school. Then, she would have returned to work.

The commission's math dilutes her benefits in a way that is obviously incorrect. McPherson's benefits should be based on missing six weeks of work, but that will not happen if average weekly wage requires dividing her salary by 52. Dividing by 52 pays benefits as though McPherson is missing 4.4 weeks of work and 1.6 weeks of vacation. McPherson gets less money, for no reason.

Now suppose McPherson is not so fortunate. Suppose she has to miss the entire school year, but *only* the school year, before she is released by a doctor to work. McPherson would lose her salary if she missed the school year, but the commission's math would give her roughly 25% less benefits; again because the commission is dividing by 52 instead of the 38 weeks McPherson was supposed to work and missed. In fact, as long as McPherson's award is for less than 38 weeks, the commission's analysis is plainly erroneous. Unless the award goes beyond 38 weeks, the case for unfairness is not even lucid.

This is not a point of timing: it illustrates that timing is irrelevant. The commission has employed a false analogy: yes, it looks like McPherson does "better" in the short run, but the statute is computing an average *weekly* wage,

not an average *annual* wage. The distinction is not trivial; the Workers' Compensation Act compensates people for permanent injuries by providing a schedule of weekly benefits. These benefits expire; the only exceptions are workers who are left with paraplegia, quadriplegia, or physical brain damage. See S.C. Code Ann. § 42-9-10(C) (2015). McPherson is entitled to 135 weeks of benefits because she has suffered a 45% loss of the use of her back. See S.C. Code Ann. § 42-9-30(21) (2015). The Act bases those 135 weeks of benefits on her earnings during the weeks she worked as a teacher. Rather than a fictional weekly wage, the act bases McPherson's benefits on her *actual* weekly wage. It does this via dividing her salary by the number of weeks she worked.

No South Carolina case holds to the contrary. The panel held McPherson's case was analogous to *Bennett v. Gary Smith Builders*. (App. Panel Or., p.27). Yet, the claimant in *Bennett* was a 62-year old carpenter who, for nine years preceding his injury, would work each year and stop once he earned $2,500. This was the maximum he could earn without suffering a penalty because he was drawing Social Security benefits at the same time. 271 S.C. 94, 96, 245 S.E.2d 129, 130 (1978). He was, in a sense, gaming the system.

Bennett reversed an award that compensated the claimant, who was permanently and totally disabled, as though he was a full-time employee. The court explained the average weekly wage statute "obviously takes into consideration the fact that unusual circumstances relative to employment may occur." *Id.* at 98, 245 S.E.2d at 131. The court further reasoned "[a]n elasticity or flexibility is permitted with a view toward always achieving the ultimate

objective of reflecting fairly a claimant's probable future earning loss." *Id.* at 98, 245 S.E.2d at 131. Disability caused Mr. Bennett to lose $2,500 per year, and the court explained Bennett's failure to receive anything over that amount was not attributable to his injury, but to his pattern of work. *Id.*

Any comparison to McPherson's case immediately falls apart. The appropriate analogy is *Breeland v. Colleton County*, which reversed an award for a school bus driver where the commission divided the employee's wages by 36 weeks (9 months x 4 weeks/month) in favor of dividing by 39 weeks, which the parties agreed was the length of nine consecutive months on the calendar. The employer did not argue the question presented here—that the salary should be divided by 52 and not 39—but the language the court used is telling. The court wrote "[u]nquestionably, the result is fair and just[.]" 216 S.C. 147, 150, 57 S.E.2d 63, 64 (1950). Then, the Court said "the prescribed method [dividing wages by weeks worked] should have been applied[.]" *Id.*

The principal point of this section is that the commission has mistakenly equated a good system with a perfect system, and the last section of this brief explains in detail why the commission should have followed *Breeland.* There is no "windfall." McPherson is not doing "better" than before her injury. The commission found McPherson lost 45% of the use of her back, and McPherson will live with that disability for the rest of her life. The Workers' Compensation Act contains many things that look like inequities when taken in isolation but are balanced out over time. This Court examined one such instance in *Foreman v. Jackson Minit Markets* when it explained, quoting a treatise, "[t]oday this

employer-carrier may be saddled with a slight extra cost; tomorrow the positions may be reversed[.]" 265 S.C. 164, 169, 217 S.E.2d 214, 216 (1975).

The math compelled by the statute is *not* unfair. Some teachers will get less than 38 weeks of benefits because of an injury, some teachers will get more, some will be permanently and totally disabled, and some teachers will never get injured at all. Yet, even in the case of permanent and total disability, the School District will only have to provide a teacher with 500 weeks of benefits. It is not unfair to follow the statute and compute a teacher's true average weekly wage. It is, in fact, precisely what the statute mandates.

C. The commission improperly considered arguments and reasoning that were not raised by either of the parties, and the commission erred in looking to North Carolina, which has a different statute, rather than following the South Carolina cases that control.

The oddest thing about the commission's decision is that it uses reasoning nobody argued.

The School District's argument was two-fold. First, the School District said the commission should divide by 52 because McPherson received her salary every two weeks, 52 weeks each year. (James Tr.pp.13-15). Second, the School District argued McPherson's job was "employment for less than 52 weeks," and that dividing by 38 would inflate her annual earnings. *Id.*

McPherson argued her salary was based on 38 weeks of work and that the first and second computation methods required dividing by 38. (Id.pp.15-18). After McPherson additionally argued this was not an "exceptional reasons" case, *id.*, the School District *agreed*. See (Id.p.18, line 23 – p.19, line 14).

Commissioner James bought the School District's "inflation" argument, but she used the "exceptional reasons" provision, based her decision on a North Carolina case, and said McPherson had a "seasonal" job. (Hr'g Comm'r Or., pp.22-29, ¶¶8-22). However, nobody argued in favor of exceptional circumstances, and nobody had mentioned anything about North Carolina or seasonal workers. See (James Tr.pp.1-76) (the hearing transcript).

There is more proof of this in the record. After McPherson's counsel argued this error to the panel, (Cl. Panel Br.p.8), the School District candidly responded in its brief that Commissioner James "examined and considered legal cases and arguments that were not presented by either party at the hearing, including the [] case from North Carolina that ultimately formed the basis of her decision." (Sch. Dist. Panel Br., p.20). But the commission should not have considered arguments and reasoning nobody raised. The commission should have decided which party presented the better case and ruled on *that* basis.

This is more than a procedural point. The defect is substantive. Although North Carolina's statute has many similarities to South Carolina's statute, there is an important difference. North Carolina's statute does not have the "or the number of weeks for which wages were paid, whichever is less" clause in the chief average weekly wage method. N.C. Gen. Stat. § 97-2(5). This is crucial. North Carolina's statute requires dividing by 52 unless the injured worker "lost" more than seven consecutive calendar days from work during the relevant period. This is different from South Carolina. Our legislature added the "whichever is less" clause in 1996. Act. No. 424 §1, 1996 S.C. Acts 2564, 2565.

North Carolina also interprets its average weekly wage statute more strictly. South Carolina views "dual employment"—increasing the average weekly wage when someone with two jobs is injured while working at one of them—as an "exceptional reason." *Foreman*, 265 S.C. at 168, 217 S.E.2d at 216. North Carolina disagrees. *Barrett v. All Payment Servs.*, 686 S.E.2d 920, 926 (N.C. Ct. App. 2009).

The North Carolina decision the commission used does not even involve a teacher. See (App. Panel Or., pp.58-61) (citing *Conyers v. New Hanover Cty. Sch.*, 654 S.E.2d 745 (N.C. Ct. App. 2008)). *Conyers* involved a bus driver—the precise scenario the South Carolina Supreme Court considered in *Breeland*. The commission believed *Breeland* provided "little guidance" because the commission read the decision as meaning only that the result was fair in that particular case. (App. Panel Or,pp.54-55, ¶¶17-18). But *Breeland* plainly explains that Mr. Breeland was a bus driver who died from a compensable accident and that he worked nine months a year. The law in affect at that time entitled his dependents to 350 weeks of benefits. 1942 Code § 7035-41. With the utmost respect for Mr. Breeland, there is nothing unique about his wage calculation or his case. *Breeland* conflicts with *Conyers*, and *Breeland* controls.

Indeed, the commission has previously applied *Breeland* in precisely the same way McPherson believes it must be applied. At the beginning of the panel hearing, McPherson gave the panel a copy of the commission's decision in *Jude v. Dillon School District*. See (Panel Tr.p.5, lines 4-9). Just like the present case, the employer in *Jude* believed it was improper to divide by the number of weeks

for which wages were paid, but *unlike* this case, the employer in *Jude* argued for the "exceptional reasons" section of the statute. (Jude, pp.2-3).

The commission rejected these arguments, (Id.pp.24-25), noting *Breeland*'s observation that the award "was *not* based upon exceptional reasons *and none appears*." 216 S.C. at 150, 57 S.E.2d at 64 (emphasis added). McPherson's commission dismissed *Jude* as "non-binding" and said *Jude* did not discuss whether the result was fair. (App. Panel Or., p.56, ¶21). But of course, *Breeland* discusses fairness, *Breeland* discusses exceptional reasons, and *Jude*'s non-binding nature hardly passes for an explanation why the commission now views *Breeland* as irrelevant when it previously found *Breeland* controlled.

South Carolina's appellate decisions addressing "exceptional reasons" have involved circumstances that fit the label of "exceptional" in a way that is more readily ascertainable than the case of an everyday schoolteacher.

In *Swilling v. Pride Masonry of Gaffney*, for example, this Court affirmed a decision that used the claimant's post-injury wages rather than his pre-injury wages. The claimant worked for only 39 weeks before he was injured, and according to the wages he earned, this averaged 35 hours per week. After his injury, the employer paid the claimant for 40 hours per week, for several years. The commission believed the employer made these payments to avoid filing a claim with its carrier and noted the claimant ceased working only when he was no longer able to work. 401 S.C. 178, 186, 736 S.E.2d 672, 676 (Ct. App. 2012).

Other "exceptional reasons" cases disclose similarly unusual circumstances. It would be unfair to include lower wages when someone has

earned one or more raises during the counting period. Instead, the increased wage is the proper forecast for future earnings. *Elliott v. S.C. Dep't of Transp.*, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004); *Booth v. Midland Trane Heating & Air Conditioning*, 298 S.C. 251, 379 S.E.2d 730 (Ct. App. 1989). An "exceptional reasons" case that favored the employer is *Brunson v. Wal-Mart*, which reversed the commission in a dual-employment case because the claimant, a college student, admitted he did not intend to be dually-employed beyond the Christmas holidays. 344 S.C. 107, 109, 542 S.E.2d 732, 733 (Ct. App. 2001).

"Exceptional" means out of the ordinary, unusual. Every teacher in South Carolina works 38 weeks a year, every teacher. 38 weeks are the norm, not the exception.

The commission should never have reached the exceptional reasons analysis. Nobody argued it. Even if this *had* been argued, it is foreclosed by *Breeland* as well as by a comparison to precedent applying the exceptional reasons analysis. The commission's view is also contrary to *Bazen*, which said average weekly wage must be based on 'the actual number of weeks for which wages were paid[.]'" 388 S.C. at 66, 693 S.E.2d at 440. These cases control.

CONCLUSION

This Court should reverse the Decision and Order of the Appellate Panel and re-calculate McPherson's average weekly wage based on 38 weeks of work, which yields and average weekly wage of $1,063.24.

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Respectfully Submitted,

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