THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The South Carolina
Workers' Compensation Commission

Avery B. Wilkerson, Jr., Commissioner
T. Scott Beck, Commissioner
Aisha Taylor, Commissioner

WCC File No. 1104105

Kelly McPherson,

Appellant,

v.

Charleston County School District,

Respondent,

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

The use of a 38-week divisor in the average weekly wage calculation would unfairly and artificially increase the Claimant's earnings. This increase of over 35% would be a windfall to the Claimant and an unfair penalty to the School District. The Commission properly determined that exceptional reasons existed to calculate the Claimant's average weekly wage using another method.

STATEMENT OF THE CASE

The Claimant/Appellant Kelly McPherson ("Claimant") filed a Form 50 with the South Carolina Workers' Compensation Commission ("Commission") on April 19, 2011 alleging that she sustained a compensable injury by accident to her lower back, both legs, and neck on February 3, 2011. (Form 50.) The Employer, Charleston County School District ("School District"), filed a Form 21 ("Employer's Request for Hearing") requesting a determination if compensation was due as the Claimant had reached maximum medical improvement on January 23, 2015. (Form 21.) The Claimant answered the request for a hearing and confirmed that she had reached maximum medical improvement. (Form 22.)

In the Form 20 ("Statement of Earnings of Injured Employee"), the School District reported the Claimant's earnings for the four completed quarters immediately prior to her injury. (Form 20.) The total wages paid equaled $40,403.01. (Id.) The form noted that 52 weeks were paid to the employee during the four quarters immediately preceding the quarter in which the

injury occurred, and thus the average weekly wage was $776.98 and the compensation rate was $518.01. (Id.)

In the Claimant's pre-hearing brief, she claimed that her average weekly wage was $1,063.24 and that her compensation rate was $704.92. (Claimant's Form 58.) The School District's pre-hearing brief noted the same average weekly wage and compensation rate as is in the Form 20. (Employer's Form 58.)

This case was originally heard before Commissioner Melody L. James ("Single Commissioner") on April 9, 2015. (Single Commissioner Order, p. 1.) Prior to the hearing, both parties submitted memoranda of law supporting their positions on the calculation of the Claimant's average weekly wage. (See Self-Insured Employer's Memorandum of Law Re: Average Weekly Wage; Claimant's Memorandum in Support of Calculating Average Weekly Wage for a School Teacher Based on the Number of Weeks for Which Wages Were Paid.) At the hearing before the Single Commissioner, the parties presented their positions on the contested average weekly wage and compensation rate. (Single Commissioner Hr'g Tr., p. 4, line 1 – p. 7, line 3 & p. 12, line 13 – p. 20, line 12.)

On September 11, 2015, the Single Commissioner found that "the Claimant has sustained a 45% permanent partial disability of the back, as a result of her admitted neck and low back injuries." (Single Commissioner Order, p. 19, ¶ 29.) The Single Commissioner also found that "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." (Single Commissioner Order, p. 19, ¶ 34; see also, pp. 21-30, ¶¶ 5-23.)

On September 25, 2015, the Claimant timely filed a Form 30 Request for Commission Review of the Single Commissioner's Decision and Order and asserted, among other errors, that

the Single Commissioner erred in calculating the average weekly wage. (Form 30 and attachment.) The parties submitted briefs to the Commission, and on December 14, 2015, an Appellate Panel of the Commission heard the matter. (Appellant's Br., dated November 11, 2015; Respondent's Appellate Br. (Employer/Self-Insured), dated November 25, 2015; Appellate Panel Order, p. 1.)

On February 23, 2016, by unanimous vote, the Appellate Panel affirmed the Single Commissioner's Decision and Order, making its own findings of fact and conclusions of law. (Appellate Panel Order, pp. 18-64.) The Appellate Panel found "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." (Appellate Panel Order, p. 47, ¶ 36; see also, pp. 47-48, ¶¶ 31-42 & pp. 49-61, ¶¶ 7-32.)

On March 18, 2016, the Claimant served and filed her notice of appeal. This appeal follows.

STATEMENT OF FACTS

The facts of this appeal are best set forth by the Commission in its findings of fact. The Commission found as follows:

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

. . .

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 x $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[.]**

(Appellate Panel Order, pp. 42-48 (emphasis added).)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of the Commission's decisions and establishes the "substantial evidence rule" as the standard for reviewing the Commission's factual findings. S.C. Code Ann. § 1-23-380 (Supp. 2015); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). An appellate court can reverse or modify the Commission's decision only if the Claimant'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." Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); see § 1-23-380(5)(d),(e).

"The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001). "Where there is a conflict in the evidence, . . . the findings of fact of the Commission are conclusive." Id. at 492-93, 541 S.E.2d at 528. "[W]hether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007) (*citing* Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006)).

South Carolina courts have consistently applied the substantial evidence standard of review to affirm the Commission's findings regarding whether a claimant is entitled to a deviation from the first four statutory methods of calculating one's average weekly wage. See, e.g., Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 186, 736 S.E.2d 672, 676 (Ct. App. 2012); Forrest v. A.S. Pride Mechanical, 373 S.C. 303, 311, 644 S.E.2d 784, 788 (Ct. App.

2007); Roberts v. McNair Law Firm, 366 S.C. 50, 54, 619 S.E.2d 453, 456 (Ct. App. 2005); Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 192, 564 S.E.2d 694, 699 (Ct. App. 2002).

ARGUMENTS AND CITATION OF AUTHORITY

I. The Commission correctly calculated the Claimant's average weekly wage when it divided her salary for the last four quarters by fifty-two.

a. Dividing the Claimant's total earnings by 52 weeks produces an average weekly wage and compensation rate that is fair and just to the parties and accurately approximates the Claimant's earnings were it not for the injury.

The Commission determined the Claimant's average weekly wage after careful consideration of the law and proper application of the law to the facts of this particular case. Its decision is founded on and supported by a sound interpretation of the requirements set forth in the South Carolina Workers' Compensation Act ("the Act") and by substantial evidence in the record. Accordingly, its order must be affirmed.

Computation of the average weekly wage is controlled by S.C. Code Ann. § 42-1-40 (Supp. 2015). The statute, as it pertains to this case, provides:

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . .
>
> [Method 1] "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or
>
> [Method 2] by the actual number of weeks for which wages were paid, whichever is less.
>
> [Method 3] When 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. . . .
>
> [Method 5] When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. . . .

§ 42-1-40.[1]

The Commission correctly determined that exceptional reasons required the use of the fifth statutory method and calculating the Claimant's average weekly wage by dividing her total earnings during 2010 by 52 weeks. (Appellate Panel Order, pp. 47-48, ¶¶ 31-42; pp. 57-58, ¶ 26.) The Claimant was a salaried employee paid $40,403.01 over 52 weeks during 2010. She did not work during the summer months. (Id., p. 47, ¶ 32; Single Commissioner Hr'g Tr. p. 63, lines 12-24.) Nevertheless, using a 38-week divisor, either under the second or the third statutory method, to calculate the average weekly wage artificially inflated the Claimant's actual annual earnings. (Appellate Panel Order, p. 47, ¶ 39.) A 38-week divisor resulted in an average weekly wage of $1,063.24. Instead of accurately reflecting the Claimant's actual earnings, this average weekly wage reflected annual earnings of $55,288.48 (52 x $1,063.24 = $55,288.48). Therefore, under this calculation, the Claimant had 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 earned in any given year as a teacher**. (Id., p. 48, ¶ 40.) This 35% increase would be a windfall to the Claimant and would unfairly punish the School District. (Id., p. 48, ¶ 41.)

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[1] The Claimant asserts "the act bases McPherson's benefits on her *actual* weekly wages." (Appellant Br. p. 9 (emphasis in original).) Respectfully, the Claimant is incorrect. The Act does not compensate one on her "actual" weekly wages but instead on her "**average** weekly wage." § 42-1-40 (emphasis added); see also S.C. Code Ann. § 42-9-30 (Supp. 2015) (emphasis added).

The Claimant testified that her gross annual earnings were about $40,000.00 every year during the years before, during, and after her injury. (Id., p. 47, ¶ 34.) The Claimant admitted that, after her injury, her total income in 2011 was substantially the same as 2010. She testified that her earnings in prior teaching jobs in Michigan were also substantially similar. Finally, her current salary in Arizona was comparable to her pay when she was working for the School District. (Id., p. 47, ¶ 33.) She did not believe she had ever earned more than $50,000.00 in a year while working as a teacher. (Single Commissioner Hr'g Tr. p. 68, line 15 – p. 70, line 11.) The Claimant's 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, the "ultimate objective" of the Act's average weekly wage statute is to reflect fairly the "claimant's probable future earning loss." 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). In Bennett, which is analogous to the present case, the claimant was 62 years old and drawing Social Security benefits. 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 benefits. Id. at 96, 245 S.E.2d at 130. To determine the average weekly wage, the Commission used the third statutory method and divided the claimant's pay by the actual number of weeks he worked, which more than tripled his typical earnings for the year. Id. at 97-98, 245 S.E.2d at 131. The Supreme Court reversed the Commission and held that the Commission and the lower court erred in refusing to apply the "exceptional reasons" section of § 42-1-40, i.e., the fifth statutory method. Id. The Court concluded "[i]t 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." Id. at 98-99, 245 S.E.2d at 131.

In this case, the Claimant worked less than 52 weeks and dividing her total earnings by the actual number of weeks worked would artificially increase her average weekly wage by a substantial amount. The Claimant proposed 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 was in the range of $40,000.00. (See Single Commissioner Hr'g Tr. p. 68, line 15 – p. 70, line 11.) According to the Claimant's calculation, however, 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 School District and would not be an accurate or fair approximation of the Claimant's future earnings. See id. at 98-99, 245 S.E.2d at 131. On the other hand, dividing the Claimant's total earnings by 52 weeks was fair and provided an accurate reflection of the Claimant's probable future earning loss. (Appellate Panel Order, p. 47, ¶ 37.)

The Commission correctly concluded that, although Bennett is analogous to the present case, there was no South Carolina appellate court that directly addressed the proper calculation of a teacher's average weekly wage. (Appellate Panel Order, p. 53, ¶ 15.) As such, the Commission 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 its interpretation of the Act's average weekly wage statute.

Because South Carolina workers' compensation law is fashioned after North Carolina's law, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the 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, 434, 424 S.E.2d 489, 490 (1992) (same); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74,77 (Ct. App. 1996) (noting "[d]ecisions 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 because the South Carolina statute was fashioned after that of North Carolina"). The North Carolina Workers' Compensation Act's section regarding average weekly wage (N.C.G.S.A. § 97-2(5) (Supp. 2015)) is substantially similar to South Carolina's average weekly wage statute, § 42-1-40. 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 persuasive and directly on point with the present case. The Commission's decision properly considered the Conyers decision, and the order should be affirmed.

In Conyers, the Court of Appeals of North Carolina addressed the exact same issue as in this case, that is, what method should be used to calculate a public school employee's "average weekly wage." 188 N.C. App. at 254, 654 S.E.2d at 747. Even though the claimant, a school bus driver, only worked 10 months out of the year and was only paid during those 10 months, the North Carolina court concluded that the first statutory method could not be used as the claimant was employed for fewer than 52 weeks in the year preceding the accident, even though she had been employed as a bus driver by the schools for over 12 years. Id. at 258, 654 S.E.2d at 750. The North Carolina court concluded that use of the third statutory method would "not be fair and just as Defendant would be unduly burdened while Plaintiff would receive a windfall." Id. at 259, 654 S.E.2d at 750. "The 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." Id.; see also, Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 102, 580 S.C.2d 100, 104 (2003) (noting South

Carolina's "Act has two purposes: 1) to compensate for loss of injured employee's earning capacity; 2) to indemnify for physical ailments in a class of cases legislatively specified").[2] The North Carolina court concluded that use of the fifth statutory method should be used. Conyers, 188 N.C. App. at 259, 654 S.E.2d at 750.

The Conyers court 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. Id. at 261, 654 S.E.2d at 751. The North Carolina court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." Id. at 260, 654 S.E.2d at 751. 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, 654 S.E.2d at 750-51.

The same reasoning applies in the present case. (Appellate Panel Order, p. 47, ¶ 35.) The Claimant worked only during the school year and was not required (and chose not) to work during the summer. (Single Commissioner Hr'g Tr. p. 63, lines 12-16.) 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 School District. See also Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 113, 542 S.E.2d 732, 735 (Ct. App. 2001) (remanding to the Commission for recalculation of a seasonal employee's average weekly wage where the Commission had only considered the claimant's wages during the peak seasonal period).

[2] The Legislature created the workers' compensation system, for good or ill, to serve "a social function by providing the injured employee with sufficient income and medical care to keep him from destitution . . . . [they] are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." Wigfall, 354 S.C. at 116, 580 S.E.2d at 108 (citing Gary A. Scarzafava and Frank Herrera, Jr., *Workplace Safety—The Prophylactic and Compensatory Rights of the Employee*, 13 St. Mary's L.J. 911, 944 (1982)).

In noting that the fifth statutory method neither required nor prohibited a specific mathematical formula, the Conyers court concluded that the "average weekly wage should be calculated by dividing the wages earned in the 52-week period prior to [the claimant's] accident by 52, the number of weeks in the year. This calculation yields average weekly wages of $338.63, which most nearly approximates the amount Plaintiff would be earning were it not for her injury." Conyers, 188 N.C. App. at 261, 654 S.E.2d at 751. As in Conyers, the Commission correctly determined that the use of the third statutory method would result in an average weekly wage that was not fair and just to both parties. (Appellate Panel Order, p. 47, ¶ 38.) The Commission properly determined the fifth statutory method should be used and, as in Conyers, divided the Claimant's prior yearly wages by 52. (Appellate Panel Order, p. 47, ¶ 36.) The Commission's findings of fact are supported by substantial evidence and its conclusions of law are not effected by an error. See Hopper, 373 S.C. at 479, 646 S.E.2d at 165; Shealy, 341 S.C. at 454, 535 S.E.2d at 442. For these reasons, its order should be affirmed.

b. The Commission correctly determined that the "exceptional reasons" portion of the average weekly wage statute applied to the facts of this case.

Use of the first two methods of § 42-1-40 are not mandatory, as argued by the Claimant. (Appellant's Br., pp. 5-7.) If so, there would be no reason for the fifth method, which allows such other method to be used when for exceptional reasons any of the first four methods "would be unfair, either to the employer or employee." § 42-1-40. The Commission found that the Claimant's earnings were substantially the same year after year and continued to be the same, in the range of $40,000 per year. (Appellate Panel Order, p. 47, ¶¶ 33-34.) Like the claimant in Bennett, the Claimant chose to only work during a portion of any given year. As a teacher who did not work during the summer, either in summer school or another job, the Claimant's employment was

seasonal with the school year representing her "peak time" and the summer representing her "slack time." (Id., p. 47, ¶ 35.)

The Commission found that dividing the Claimant's total earnings for the last four quarters by 38 weeks, the actual number of weeks worked, would result in an average weekly wage that was not fair to both parties. (Id., p. 47, ¶ 38.) This method would artificially increase the claimant's average weekly wage and provide an average weekly wage of someone making $55,228.48 a year, which is $15,000 more than she actually earned. (Id., pp. 47-48, ¶¶ 39-40.) Such an increase was a windfall to the Claimant and an unfair penalty to the School District. (Id., p. 48, ¶ 41.) Further, use of a 38-week divisor resulted in compensation payments equal to 90% of the Claimant's yearly earning, instead of the "sixty-six and two-thirds percent" required by the statute. (Id., p. 48, ¶ 42.) § 42-9-30(21).

The average weekly wage statute was drafted with the "elasticity or flexibility" to achieve "the ultimate objective of reflecting **fairly** a claimant's **probable future earning loss**." Bennett, 271 S.C. at 98, 245 S.E.2d at 131 (emphasis added). The Commission correctly considered all five methods of § 42-1-40 and determined, after making the appropriate factual findings, that exceptional reasons supported dividing the Claimant's yearly salary by 52 to obtain her average weekly wage.[3] This application of the facts to § 42-1-40 is supported by substantial evidence and should be affirmed. See Hopper, 373 S.C. at 479, 646 S.E.2d at 165; Shealy, 341 S.C. at 454, 535 S.E.2d at 442.

[3] The fact that the Claimant's employment history and earnings were not out of the ordinary does not prevent the Commission's determination that exceptional reasons supported a finding that the use of the first four statutory methods was unfair. The windfall to the Claimant and the unfair penalty to the School District, which result from using the method proposed by the Claimant, when combined with the Claimant's work history of not working in the summers when employed as a teacher, support the Commission's finding that exceptional reasons existed to use another method to calculate her average weekly wage.

The Commission's analysis does not render the "by the actual number of weeks for which wages are paid, whichever is less" portion of § 42-1-40, the second statutory method, moot as argued by the Claimant. While the Commission provided the example of a worker employed in January, intending to work 52 weeks, but was injured after 12 weeks as a circumstance to use the second statutory method, this is actually a circumstance to apply the third statutory method. A better example for the second statutory method is an employee who intends to work 52 weeks in a year but misses more than seven consecutive calendar days at one or more times although not in the same week, such as, a worker who takes unpaid leave for more than one week. See Beard, Poteat, Lamar, Sumwalt, Bluestein, Sullivan, *The Law of Workers' Compensation Insurance in South Carolina, Sixth Edition*, 2012, Ch. 9, § II.2.b., p. 385. The statute is not so narrow that it only applies to workers who take unexpected month long vacations, such as in Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 66, 692 S.E.2d 436, 440 (Ct. App. 2010), as argued by the Claimant. (Appellant's Br., p. 6.) Many reasons exist for a worker to take unpaid leave, such as unpaid maternity, paternity, or sick leave. None of these reasons are present in this case. This one misstatement in the Conclusion of Law, ¶ 26, does not prejudice the Claimant and is not a reason to reverse. See Shealy, 341 S.C. at 454, 535 S.E.2d at 442. This one statement has no effect on the various findings of fact which are supported by substantial evidence and does not affect the other conclusions of law which support the use of the fifth statutory method. For the reasons discussed *supra* and *infra*, the Commission's order should be affirmed.

c. The Commission's calculation does not unfairly dilute the Claimant's benefits.

As discussed above, the Commission did not unfairly dilute the Claimant's average benefits as alleged by the Claimant. (Appellant's Br., pp. 7-11.)[4] The Claimant incorrectly argues that the fairness analysis only applies under the third and fifth methods. While correct that the words "fair" and "unfair" only appear in these two sections of § 42-1-40, the fairness analysis of the fifth method should be applied to **all** applications of the first four methods to determine if the fifth method is required. This is evident from the plain language of § 42-1-40, which provides in part 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." § 42-1-40 (emphasis added). "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." Wigfall, 354 S.C. at 110, 580 S.E.2d at 105 (*citing* Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "If a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules

[4] The Claimant's argument that provisions of the South Carolina Code of Laws outside of the Act may create an interesting debate is misplaced. (Appellant's Br,. p. 7.) The Commission correctly concluded that S.C. Code Ann. § 9-1-840 (Supp. 2015) and S.C. Code Ann. § 59-21-20 (Supp. 2015) did not mandate the use of a 38-week divisor. (Appellate Panel Order, pp. 56-57, ¶¶ 22-23.) Section 9-1-840 notes that service for the regular school year shall be equivalent to one year's service for the purpose of determining credit for retirement purposes. Section 59-21-20 confirms that the General Assembly shall make sufficient appropriations to pay all public school teachers for 190 days. S.C. Code Ann. § 59-1-425(A) (Supp. 2015) merely sets the statutory school term at 190 days annually with a minimum of 180 days of instruction. The purpose of the South Carolina School Code, which includes § 59-1-425 and § 59-21-20, is "to provide for a State system of public education and for the establishment, organization, operation, and support of such State system." S.C. Code Ann. § 59-1-20 (Supp. 2015); see also S.C. Code Ann. § 59-1-10 (Supp. 2015). Neither the South Carolina School Code nor the South Carolina Retirement System mandates how to determine the average weekly wage of a public school employee.

of statutory interpretation are not needed and the court has no right to impose another meaning.'" Id. (*citing* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

As in Forrest, the "Commission acted within its broad discretion in determining that exceptional circumstances existed." 373 S.C. at 310, 644 S.E.2d at 787. "Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. Disability reaches into the future, not the past; loss as a result of the injury must be thought of in terms of its impact on probable future earnings." Elliott v. S.C. Dep't of Transp., 362 S.C. 234, 238, 607 S.E.2d 90, 92 (Ct. App. 2004) (citing Bennett, 271 S.C. at 98-99, 245 S.E.2d at 131). The award of 131.5304 weeks at the compensation rate of $518.01 per week reaches into the future to compensate the Claimant based on the loss of her probable future earnings. (Appellate Panel Order, p. 63.)

The Claimant's argument regarding when she had her surgeries is irrelevant because § 42-9-30(21) compensates the Claimant for her overall loss of use of her back. The Claimant sustained an injury to a single scheduled member, her back. As such, she is limited to the scheduled compensation of § 42-9-30(21). See Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960); Wigfall, 354 S.C. at 118, 580 S.E.2d at 109. How much time one may actually lose from work is immaterial when a claimant has an injury confined to a single scheduled member.

Contrary to the Claimant's assertions, the Commission correctly determined that Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950), did not mandate calculating the Claimant's average weekly wage based upon a 38-week divisor. (Appellate Panel Order, pp. 32-35, 53-55, ¶¶15-18.) The limited facts and circumstances presented in the brief Breeland opinion vary greatly from the present case. The opinion stated that the claimant was paid a monthly salary of $75 during

the nine month school year but provided no information 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. Id.

The sole issue in Breeland was whether the claimant's average weekly wage should have been divided by 39 weeks (which was agreed to be the average of nine calendar months) or 36 weeks, as the hearing commissioner chose. 216 S.C. at 149, 57 S.E.2d at 64. The hearing commissioner quoted the third statutory method for its reasoning, and the Commission affirmed the hearing commissioner without stating its reasoning. Id. The Breeland Court reversed the Commission's use of the 36-week divisor and ordered the 39-week divisor to be used. Id. at 150, 57 S.E.2d at 64. In doing so, the Court noted that "[t]he error of the commission appears too plainly to require further discussion." Id. As such, Breeland is distinguishable and not instructive in the present case, where the Commission correctly determined for the reasons set forth above that the fifth statutory method should be applied and the proper divisor of the Claimant's annual salary was 52 weeks.

If Breeland is instructive in any manner, the decision supports the Commission's 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, the Claimant's average weekly wage be artificially increased in this case by deducting the summer months from consideration. Id. For these reasons, the Commission's order should be affirmed. See Shealy, 341 S.C. at 454, 535 S.E.2d at 442.

d. The Claimant's procedural argument is not properly before the Court, is conclusory, lacks prejudice, and is without merit.

First, the Claimant's procedural argument that the Commission improperly considered arguments not raised by either party (Appellant's Br. pp. 11-15) is not preserved for appeal. The Claimant failed to note this procedural argument in her Form 30 Request for Commission Review (Form 30 and attachment, ¶¶ 6-8), and only referenced in passing in her appellate brief that the School District's counsel did not argue that the fifth method of §42-1-40 should be used. (Br. of Appellant, p. 8.) The Claimant's appellate brief failed to argue this was a procedural error, which is likely why the Commission did not address the argument in its order. (See Appellate Panel Order pp. 1-64.) As such, this alleged procedural error was not "raised to and ruled upon" by the Commission, and this issue was not preserved for this Court's review. See Wilder Corp. v. Wilke, 300 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Transp. Ins. Co. v. Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010).

Second, even if the Court accepts this argument as preserved, this procedural argument fails to cite any case law and is merely conclusory. As such, it is abandoned on appeal. See Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting that Appellants failed to cite any case law for its proposition and only made conclusory arguments thus they abandoned the issue on appeal); see also First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting appellant failed to provide arguments or supporting authority for his assertions and thus had abandoned the issue).

Third, the Appellate Panel is the "ultimate finder of fact." Shealy, 341 S.C. at 455, 535 S.E.2d at 442. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]. It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]." Id. (*citing* Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969) and Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)). While the Single Commissioner applied a method which neither party argued to her, i.e., the fifth statutory method, the School District adopted this reasoning in its brief to the Appellate Panel (Respondent's Appellate Br. (Employer/Self-Insured), pp. 2-3) and argued the same before to the Appellate Panel. (Appellate Panel Hr'g Tr. p. 17, line 19 – p. 25, line 15.) The Appellate Panel, as the ultimate finder of fact, applied the facts of this case to the average weekly wage statute, § 42-1-40. For the reasons set forth in Section I.a., *supra*, these findings are supported by substantial evidence.

Finally, the Claimant has failed to show that her substantial rights were prejudiced by this alleged error. See id. at 454, 535 S.E.2d at 442 (noting the appellate courts can reverse or modify the Commission's decision only if the Claimant'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."); see § 1-23-380(5)(d),(e). Assuming, *arguendo*, that this procedural argument was properly before the Court, for the reasons outlined above, the Commission's order should be affirmed.

CONCLUSION

The Commission's decision and order must be affirmed. The Commission's decision and order is not affected by any error of law, and it is supported by substantial evidence in the record.

Respectfully submitted,

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