

APPELLATE PANEL DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

W.C.C. FILE NO: 1117221

Michelle Davis

EMPLOYEE,  
CLAIMANT/RESPONDENT,

VS.

Fraenkische USA LP

EMPLOYER,

AND

Maryland Casualty Company c/o Zurich North  
America

CARRIER,  
DEFENDANTS/APPELLANTS.

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Appellate Panel Review held in Columbia, South  
Carolina, on June 20, 2016 per notices timely  
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

August 10<sup>th</sup>, 2016

APPEARANCES: Claimant/Respondent represented by Michael F. Mullinax, Esquire

Defendants/Appellants represented by Mark A. Allison, Esquire

**STATEMENT OF THE CASE**

This matter was originally heard before Commissioner Susan Barden on January 8, 2016 to determine the issues as set forth on Forms 21 and 22, including the determination of Claimant's average weekly wage and compensation rate, as well as Defendants' entitlement to credit for the overpayment of temporary disability benefits.

Following Claimant's admitted work accident, Defendants paid her temporary total disability benefits in the amount of \$704.92 per week, the maximum compensation rate for 2011. The compensation rate paid was based on a mathematical error, which produced an average weekly wage of \$1,281.54. The original calculation of wages was based on Claimant having worked one-half of the weeks she actually worked, resulting in a compensation rate that was twice the amount of her actual pre-accident earnings. The parties agreed that Defendants paid weekly benefits in excess of Claimant's compensation rate; however, the parties disagreed about how to calculate her compensation rate and whether Defendants were entitled to a credit for the overpayment of benefits as a result of the mathematical error.

Defendants filed an amended Form 20 on October 15, 2015 reflecting an average weekly wage and compensation rate based on Claimant's pre-injury earnings. Defendants then filed a Form 21 to address the calculation of Claimant's average weekly wage and compensation rate and to seek credit for the overpayment of temporary compensation. Claimant sought calculation of her average weekly wage based on her post-accident earnings and what she would have earned had she been promoted. Further, Claimant denied Defendants' entitlement to a credit for the overpayment of temporary compensation benefits.

#### **STATEMENT OF EVIDENCE**

Claimant testified at the Single Commissioner hearing that she began working for the Employer as a temporary employee through Phillips Staffing Agency in 2011, approximately three months before being hired as a permanent, full-time assembly line worker on August 22, 2011. (Hrg. Tr. pp. 11-12). Claimant was injured on October 21, 2011, approximately nine weeks after her permanent hire date. (Hrg. Tr. p. 12, ll. 2-8). At the time of her injury, she was earning \$12.48 per hour. (Hrg. Tr. p. 28, ll. 18-24; p. 29, ll. 1-3). Based on her pre-injury

wages, Claimant's average weekly wage was \$487.56 with a corresponding compensation rate of \$325.05.

After conservative treatment, Claimant returned to work and subsequently received various pay increases. (Hrg. Tr. pp. 13-18). She first earned a pay increase to \$13.00 per hour, followed by an increase to \$16.07 per hour. (Hrg. Tr. p. 14, ll. 8-13, p. 15, ll. 2-4, p. 16, ll. 6-9). Claimant no longer works for the Employer.

Claimant testified at the hearing that after her injury, she received temporary total disability checks that were approximately \$217.00 more per week than she had ever earned, even before taxes were deducted. (Hrg. Tr. p. 29, ll. 8-11). Claimant admitted that the weekly checks paying \$704.92 were unusual and "seem[ed] a little excessive." (Hrg. Tr. p. 30, ll. 12-17). However, Claimant did not advise Defendants of the excessive payments.

Claimant first testified that she had applied for short-term disability benefits, but after seeking clarification from her attorney, she confirmed that she was only receiving payments from the workers' compensation carrier. (Hrg. Tr. p. 29, ll. 15-25, p. 30, ll. 1-5). She admitted that she never pursued or claimed short-term disability benefits through her employer. (Hrg. Tr. p. 30, ll. 6-8).

#### **Single Commissioner Decision and Order**

By Decision and Order dated March 1, 2016, the Hearing Commissioner issued a Decision and Order.

#### **FINDINGS OF FACT**

1. I find that Michelle Davis, on October 21, 2011, sustained a compensable injury by accident.
2. I find that the Employer/Carrier calculated and filed a Form 20 on December 13, 2011 showing an AWW of \$1,281.54 and a compensation rate of \$854.40; and that Michelle Davis has been paid at the maximum comp rate, \$704.40 since that time, based upon the Form 20

prepared and filed by the Employer/Carrier. The Carrier continued to file reports with the Commission confirming this rate.

3. I find that after her initial injury, Michelle Davis returned to and was paid an initial pay rate of \$12.48 per hour but received a shift change pay raise to \$13.00 per hour and that she continued to work both overtime and regular hours at her place of employment. It appears that she did receive an additional pay increase, which, according to her testimony, was based upon a shift change, to \$13.35 per hour on or about August 31, 2012.

4. I find however, that on February 15, 2013, as she continued to work after her injury, she received a promotion and a pay raise to \$16.07 per hour and that she worked both regular and overtime hours at that rate of pay until July 1, 2013 when she left employment for her second surgery.

5. I find that as set forth above in § 42-1-40 that exceptional reasons exist in the case before me to find that the average weekly wage for the Claimant should reflect the sum of \$16.07 per hour times 40 hours per week as is set forth on APA Exhibit B, page 3, so that her average weekly wage would be \$711.23 and her compensation rate would be \$474.39. Based upon her work habits and work history, it would be unfair to her to resort to her initial rate of compensation as her work history demonstrates conclusively and factually that this is the amount which would most nearly approximate the amount which she would be earning at this time, were it not for her injury.

6. I further find that it is unfair to the Claimant to award a credit to the Carrier/Employer from the date of the accident as the Defendant Carrier/Employer unilaterally had control of the completion and filing of the Form 20 immediately after Claimant's injury, and have continuously, without any objection, paid Claimant based on that calculation, up until the filing of the revised Form 21 in this case on October 16, 2015. Claimant testified that she was under the impression that the compensation that she was receiving was based on not only what she should get from workers' compensation benefits, but also, she believed that she had a short or long term disability policy that would be added to what she received for her injury and therefore, based upon this belief, she did not question the amount, as this calculation had been determined by the Employer and paid from the beginning. The Defendants contend that Claimant would receive a "windfall" in the event the Commission fails to grant a credit back to the date of the accident. The Claimant argues that the insurance carrier had the sole responsibility under the Act, for the authorization, calculation, and payment of compensation, and that the erroneous payment made by the Defendant was not due to or caused by any action on the part of the Claimant. See Brittle v. Raybestos-Manhattan, 241 S.C. 255, 127 S.C.2d. 884 (1962). Claimant also contends that it would constitute a hardship to her as she has not reached MMI, and the compensation under the Act is her sole income. S.C. Code Ann. § 42-9-210 gives the Commission discretion on whether to deduct payments the Carrier/Employer made for temporary disability benefits before the Claimant reached MMI. Claimant has not reached MMI at this time. After careful consideration of the facts of this case, and the relevant case law as set forth in the briefs of the Claimant and that of the Defendant on the issue, I conclude and find as a fact that the Carrier, without satisfactory explanation, calculated incorrectly the average weekly wage and compensation due to the Claimant and paid that for a period of over three years

without taking any action to correct same.

7. I find that pursuant to the provisions of S.C. Code Ann. § 42-9-210, that it would be unfair and unjust to award a credit for the overpayment of temporary total disability benefits from the time of the accident, but that the Employer/Carrier will be entitled to be deducted from any final permanency award granted to the Claimant to be calculated from the date of filing of the Amended Form 20, to wit: October 15, 2015.

#### CONCLUSIONS OF LAW

1. S.C. Code § 42-1-40 defines "average weekly wages."
2. S.C. Code § 42-1-100 defines "compensation."
3. S.C. Code § 42-9-210 defines "deduction from compensation payments made by Employer when note due and payable."
4. Reg. 67-603 defines "calculating the compensation rate."

#### ORDER

1. Michelle Davis, Employee/Claimant, sustained a compensable injury by accident on October 21, 2011, while in the employment of Fraenkische USA, LP and is entitled to workers' compensation benefits to be provided by Employer/Carrier, pursuant to Title 42 in this Order. Claimant's average weekly wage is calculated to be paid at the rate of \$16.07 per hour and the average weekly wage therefore is \$711.23 per week, with a corresponding compensation rate of \$474.39. [See Claimant's APA, Exb B, page 3].

2. The Employer/Carrier is entitled to a credit from October 15, 2015, the date of the filing of the Amended Form 20 in this case, which amounts to the difference between the compensation rate now being paid of \$704.92 and the compensation rate which I find to be proper, \$474.39, which would result in a credit of \$230.53 per week. This credit shall be computed and deducted from any final permanent award to which Claimant is found to be entitled. See for example, Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 127 S.E.2d 884 (1962) where Carrier was denied credit for overpayment citing Lawson's Workman's Compensation Law, Volume 2, page 24, Section 57.47

3. The Claimant shall be paid the compensation rate of \$474.39 beginning with the first payment due after the date of this Order.

4. No hearing costs are assessed.

Within the statutory period, Defendants/Appellants filed an Application for Review setting forth the reasons for appeal, copies of which were furnished to all interested parties prior

to oral arguments which took place before the Appellate Panel on June 20, 2016.

### **STANDARD OF REVIEW**

Under S.C. Code Ann. § 42-17-50, an Appellate Panel is empowered to review an appealed award, weigh the evidence as presented at the initial hearing, and, if good grounds are shown, make its own factual findings and legal conclusions consistent with or inconsistent with the Hearing Commissioner.

Based upon its review of all the evidence in the record in this case, the Panel hereby reverses the Order of the Hearing Commissioner in full. Accordingly, the Panel makes the following Findings of Fact:

### **FINDINGS OF FACT**

1. Defendants calculated and filed a Form 20 on December 13, 2011 reflecting an average weekly wage of \$1,281.54 and a compensation rate of \$854.40. Claimant was paid temporary total disability benefits at the maximum compensation rate of \$704.92 from that time forward. Defendants calculated this rate based on one-half of the number of weeks Claimant had actually worked, mistakenly viewing the biweekly checks as weekly checks. Accordingly, a mathematical error resulted in these calculations.

2. Upon discovering the error, Defendants filed an amended Form 20 on October 15, 2015 reflecting an average weekly wage and compensation rate based on Claimant's properly calculated pre-injury earnings. This Form reflected an average weekly wage of \$487.56 and a corresponding compensation rate of \$325.05.

3. Claimant's average weekly wage and compensation rate are to be calculated using the standard statutory method outlined in S.C. Code Ann. § 42-1-40. Exceptional circumstances do not exist to deviate from this standard. *See Roberts v. McNair*, 366 S.C. 50, 54, 619 S.E.2d 453,

456 (Ct. App. 2005) (holding post-injury pay increases do not justify deviating from the method of average weekly wage calculation prescribed under S.C. Code Ann. § 42-1-40, as such an argument could be made in nearly each and every workers' compensation claim).

4. The Hearing Commissioner erred in finding that exceptional reasons exist to deviate from the standard method of calculation and to use an alternative method of calculation.

5. The Hearing Commissioner erred in calculating Claimant's average weekly wage and compensation rate based on the post-injury wage of \$16.07 per hour based on a 40 hour work week.

6. Based on the standard statutory method of calculating Claimant's pre-injury wages pursuant to S.C. Code Ann. § 42-1-40, Claimant's average weekly wage is \$487.56 with a corresponding compensation rate of \$325.05.

7. The Hearing Commissioner erred in finding that Defendants are only entitled to a credit which amounts to the difference between the compensation rate of \$704.92 and \$474.39, for a total credit of \$230.53 per week.

8. Defendants are entitled to a weekly credit of \$379.87, representing the difference between the paid compensation rate of \$704.92 and the proper compensation rate of \$325.05, for each week an overpayment of benefits was made from the date of the filing of the amended Form 20 on October 15, 2015 to the date weekly payments began in the amount of \$325.05. Pursuant to S.C. Code Ann. § 42-9-210 and Reg. 67-1603, Defendants' credit is to be computed and deducted from any final permanent award to which Claimant is found to be entitled, if any.

9. The Hearing Commissioner erred in finding that Claimant testified that she believed that she had a short term or long term disability policy that would be added to her weekly workers' compensation benefits and that, based upon this belief, she did not question the amount of the

weekly checks. Claimant testified at the hearing that she never pursued, claimed, or received short-term disability benefits. She testified that the only compensation she received was from "workman's comp." Accordingly, the Hearing Commissioner's finding as it references Claimant's belief regarding short term or long term disability policies is vacated.

10. The Hearing Commissioner erred in finding that Defendants failed to provide a "satisfactory explanation" regarding the miscalculation of Claimant's average weekly wage and compensation rate. Defendants' entitlement to credit for the overpayment of benefits is not based in equity or fairness. Accordingly, the Hearing Commissioner's finding is vacated.

### **CONCLUSIONS OF LAW**

1. Pursuant to South Carolina Code Annotated § 42-1-40, Claimant's average weekly wage and compensation rate are to be calculated based on the standard method as set forth in the statute by considering her pre-injury wages. Claimant's average weekly wage is \$487.56 and the corresponding compensation rate is \$325.05. The amended Form 20 filed on October 15, 2015 reflects the proper calculation.

2. Pursuant to *Roberts v. McNair*, 366 S.C. 50, 54, 619 S.E.2d 453, 456 (Ct. App. 2005), Claimant's post-injury pay increases do not justify deviating from the method of average weekly wage calculation prescribed by South Carolina Code Annotated § 42-1-40. Accordingly, no exceptional circumstances exist to justify a deviation from the standard method of calculation.

3. Pursuant to South Carolina Code Annotated § 42-9-210 and Regulation 67-1603, Defendants are entitled to credit for overpayment of temporary disability benefits back to the filing of the amended Form 20 on October 15, 2015. Defendants are entitled to a weekly credit of \$379.87 dating back to October 15, 2015 through the date payments are paid at the proper compensation rate of \$325.05. This credit shall be deducted from a future award of permanency,

if any.

**ORDER**

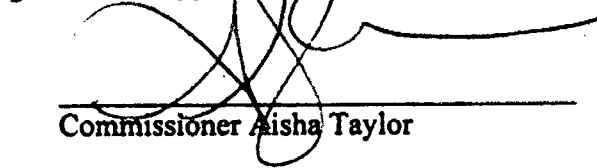
**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the Single Commissioner's Order is **REVERSED IN FULL**.

**IT IS SO ORDERED.**




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Commissioner T. Scott Beck  
For the Appellate Panel

**WE CONCUR:**



\_\_\_\_\_  
Commissioner Aisha Taylor



\_\_\_\_\_  
Commissioner Melody L. James

**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 August 16, 2016***