THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

W.C.C. File No.: 1104105
Appellate Case No. 2016-000597

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

v.

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

INITIAL REPLY BRIEF

Trip Riesen (S.C. Bar #: 71084)
Fred W. Riesen, Jr. (S.C. Bar #: 4731)
Riesen Law Firm, LLP
3660 W. Montage Ave.
North Charleston, SC 29418
843-760-2450 (p)
843-767-3282 (f)
tripriesen@gmail.com

Attorneys for Appellant

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The commission said ruling for Ms. McPherson would give her more money if she was out on disability than if she was working. (Panel Or.p.51). This statement is not true. McPherson's benefits are not her average weekly wage multiplied by 52 weeks. The claimed windfall that dwarfs her earnings is totally artificial.

The commission said the North and South Carolina average weekly wage statutes are "substantially similar" and "nearly identical." Id. at 25, ¶¶28 & 29. They are not. North Carolina does not require dividing by the number of weeks of work unless exceptional reasons exist. South Carolina has precisely that requirement.

These mistakes were not accidents. The commission tailored its decision this way because it perceived McPherson as seeking an unfair benefit.

The commission's perception is an illusion. Instead of preventing an imaginary windfall, the commission's math dilutes McPherson's earning capacity and her benefits. This dilution in benefits is not immediately apparent, but is quickly recognizable through the use of examples and is manifestly sensible when one considers that the Workers' Compensation Act compensates injured workers through weekly benefits based on weekly earning capacity. Other cases have explained this same dilution analysis. See Lynch v. U.S.D. No. 480, 850 P.2d 271, 275 (Kan. Ct. App. 1993); Powell v. Indus. Comm'n, 451 P.2d 37, 42 (Ariz. 1969). Those explanations are correct. The commission's analysis, which

it raised on its own, led the commission away from the controlling statute and authorities, and ultimately to a decision controlled by errors of law.

A. The commission's math dilutes McPherson's earning capacity and benefits. Weekly benefits are tied to weekly wages; not annual wages. The commission would have the exception swallow the rule.

Let's assume there is a teacher whose salary is $38,000 per year; $1,000 for every week of work. Suppose this teacher gets injured on the job and must miss six weeks of school. This costs the teacher $6,000 in wages.

The commission's average weekly wage will reduce this teacher's award significantly and without justification. Missing work would entitle this teacher to temporary total disability benefits. See Lee v. Bondex, Inc., 406 S.C. 97, 102, 749 S.E.2d 155, 157 (Ct. App. 2013) (explaining TTD and a claimant's burden of proof). The controlling statute, section 42-9-10, contemplates this teacher receiving 66 2/3% of her lost earnings (total compensation rate), but the commission's math (dividing $38,000 by 52 instead of 38) yields an average weekly wage of $730—an artificial figure $170 lower than reality. The compensation rate, two-thirds of this fictional wage is even lower. Instead of receiving 66 2/3% of each $1,000 she loses every week, this teacher gets only 49%. Instead of getting $667 per week—a figure that is still significantly less than her lost salary—the teacher gets $487 —a windfall for the School District.

Now, change the hypothetical so the teacher misses the whole school year, forfeiting her entire salary. The percentages are the same. Instead of getting benefits based on 66 2/3% of her lost earnings (roughly $25,333), the

teacher gets only 49% (about $18,500). As McPherson's initial brief correctly explained, this hypothetical teacher loses 25% in benefits, for no reason.

The commission's math gives the false impression of being sound because unlike the hypothetical examples, McPherson is entitled to an award that will last for more than 38 weeks before it runs out. McPherson did not lose a finger or a toe or get a 20% impairment rating to the arm—all of those would result in awards shorter than 38 weeks under section 42-9-30. McPherson's award lasts longer because her injury is serious: She has a 45% permanent impairment rating to her back. The legislature presumed this permanent injury impairs McPherson's earning capacity over her lifetime by an amount equal to 66 2/3% of her average weekly wages, paid for 135 weeks. The Workers' Compensation Act gives injured workers weekly benefits based on their weekly earning capacity. The Act does not determine a worker's annual wages or use 52 weeks of cumulative benefits as a fairness bracket. The commission has bought a false comparison, mistakenly using a 12-month calendar to judge the fairness of an award designed to account for a lifetime of disability.

The Workers' Compensation Act looks at average weekly earnings during the weeks the person was working and the Act compensates for workplace injuries by paying a finite schedule of weekly benefits that are based on those earnings. With the narrow exception of lifetime benefits cases, see section 42-9-10(C), benefits are for a definite number of weeks even though the injuries and impairments last a lifetime. Moreover, in addition to the limitation on the number of weeks one can receive disability benefits, the total compensation rate is also

capped for the employer ($704.92 for the year 2011)[1] irrespective of the employee's pre-injury earnings. For example, an employee injured in 2011 who previously earned $50,000, $100,000 or even a $1m would have only received a weekly compensation rate of $704.92. The commission's decision takes benefits that are already small and makes them smaller, needlessly cutting benefits that were designed to account for the cumulative effects of disability throughout someone's working life.

This decision was an error of law. The commission's windfall analysis swallows the average weekly wage statute's language requiring division by the number of weeks worked. It applies to anyone with a job that routinely involves less than 52 weeks of continuous work; robbing the average weekly wage statute's "whichever is less" language of all effect unless the injured worker happens to miss work for an unusual or unexpected reason. However, this is not what the statute says. Respectfully, it was an error of law for the commission to marginalize this statutory language and dilute McPherson's already modest benefits.

B. Everyone acknowledges the commission used a statutory argument of its own creation. The glaring problem with this argument is not just that doing so was improper, but that the argument is substantively wrong.

The commission's use of the average weekly wage statute's "exceptional reasons" clause is inconsistent with the School District's Form 20, which stated it was based on McPherson's earnings in the previous four quarters and did not allege an alternative method based on unfairness. The Form 20 has a box to

[1] See South Carolina Workers' Compensation Maximum Compensation Rates:

check off specifically tailored for this reason, which provides: ☐ Report of earning of injured employee based on alternative method because Form 20 results in compensation rate that is not fair and just. (Form 20, ¶ A.1). The use of "exceptional reasons" is also inconsistent with the memo the School District submitted to the single commissioner, which argued McPherson's salary should be divided by 52 because that was the number of weeks she was paid wages. (Memo). The commission's decision went against the School District's argument at the hearing: the School District explained, "we're not even getting into the exceptional reasons section." (James Tr. pp.18, line 23 – p.19, line 2). McPherson would readily concede the School District has consistently argued dividing by 38 weeks gives McPherson a mystical windfall, but there is no question the commission based its decision on statutory reasoning nobody offered.

The School District says this point does not matter because the full commission is the fact finder. That is true, but in Riddle v. Fairforest Finishing Co., the Supreme Court explained full commission review is like an appeal from an inferior court to the court of common pleas. 198 S.C. 419, 424-25, 18 S.E.2d 341, 343 (1942).

However, the commission's reasoning is not sound. The errors of law in this order arose because rather than decide the case based on the arguments the parties presented, the commission went out on its own and relied on foreign authorities that are patently different.

The North Carolina statute is different: It does not require dividing by the number of weeks of work unless exceptional circumstances exist. N.C. Gen. Stat. § 97-2 (2014). South Carolina's statute has exactly that requirement. S.C. Code Ann § 42-1-40 (2015).

The commission said no South Carolina authority controlled on this question, so it looked to a North Carolina case, Conyers v. New Hanover County Schools, that involved a school bus driver. 654 S.E.2d 745 (N.C. Ct. App. 2008). Yet, South Carolina has its own case involving a school bus driver, a case that reaches the opposite result of Conyers, and while it is fair to say that the argument in Breeland v. Colleton County was not over whether to divide by 52 or 38, it is not fair to summarily dismiss Breeland's language explaining that dividing by 39 was "unquestionably" fair to the parties. 216 S.C. 147, 150, 57 S.E.2d 62, 64 (1950). Those words matter. It is also not fair to dismiss without explanation McPherson's argument that the 1996 amendment to the average weekly wage statute—an amendment that specifically added the "actual number of weeks for which wages were paid, whichever is less" language—would have been written differently if the legislature disagreed with Breeland. Compare Act No. 424 §1, 1996 S.C. Acts 2564, 2565 with S.C. Code Ann. § 42-1-40 (1985). And there is no attempt to explain on the merits the commission's prior decisions that followed Breeland and the commission's apparent change of heart.[2]

To this point, none of South Carolina's "exceptional reasons" cases applied on a categorical basis, sweeping in certain occupations wholesale.

[2] See *Jude v. Dillon School District* (App. Panel W.C.C. File #: 0602631)(2009)

McPherson cited these cases on pages 14 and 15 of her principal brief. Dual employment, raises, short-term dual employment, and other scenarios that do not happen every day are properly characterized as "exceptional" precisely because they are unusual. The principal South Carolina case the School District relies on is *Bennett v. Gary Smith Builders* (App. Panel Or., p.27), which is clearly distinguishable as *Bennett* involved a worker who was in a sense gaming the system by removing himself from the labor market after about 3 months of work so he could still collect social security benefits without penalty. Public school teachers who work an entire calendar school year are nothing like Mr. Bennett's situation.

Exceptional reasons, by definition, are abnormal, atypical, extraordinary, and do not happen every day. The mere fact that a teacher's work schedule is tied to the school year is not by itself exceptional. Many teachers are unquestionably exceptional themselves, but their work schedules are not.

CONCLUSION

The average weekly wage statute's clear and unambiguous language envisions steady employment with wages being paid for less than 52 weeks of work and required the commission to divide McPherson's earnings by the 38 weeks she worked unless there was an "exceptional reason" this procedure was unfair. "Exceptional reasons" do not include being employed as a public school teacher: Hundreds of people have the same job. The commission's decision improperly dilutes their earning capacity by watering down their weekly wages with their unpaid time off.

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.

Respectfully Submitted,

Trip Riesen
Fred W. Riesen, Jr
3660 W. Montage Ave.
North Charleston, SC 29418
843-760-2450 (p)

Attorneys for Appellant

North Charleston, SC
September 19, 2016

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel for the Respondent with a copy of the *Initial Reply Brief* by mailing the same by United States Mail with first class postage prepaid to the following address:

Catherine H. Chase, Esquire
Young Clement Rivers
P.O. Box 993
Charleston, SC 29402

Trip Riesen
Riesen Law Firm, LLP
3660 W. Montage Ave.
North Charleston, SC 29418
843-760-2450 (p)
843-767-3282 (f)
tripriesen@gmail.com
Attorney for Appellant

North Charleston, SC
September 19, 2016

RIESEN LAW FIRM, L.L.P.

FRED W. RIESEN, JR
GARY ALAN LING, PC +
PHILIP A. BERLINSKY
FRED "TRIP" W. RIESEN, III (SC, CA)
G. RUTLEDGE DURANT

A REGISTERED LIMITED LIABILITY PARTNERSHIP

MAILING ADDRESS
Post Office Box 40997
Charleston, South Carolina 29243-0997

STREET ADDRESS
3660 West Montague Avenue
N. Charleston, South Carolina 29418

TELEPHONE
(843) 760-2450
FACSIMILE
(843) 767-3282

+South Carolina Certified Mediator

JOHN D. BRADLEY, III (1946-1998)

E. PAUL GIBSON, *Of Counsel*

September 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Kelly McPherson v. Charleston County School District
WCC File No.: 1104105
Case Tracking No.: 2016-000597

Dear Ms. Kitchings:

Enclosed please find an original and one copy of the **Initial Reply Brief of Appellant,** and **Proof of Service**.

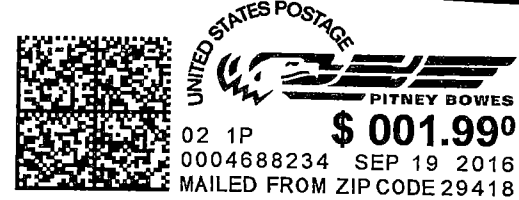
Please return the additional filed copy in the enclosed, self-addressed, stamped envelope.

With kind regards, I remain

Sincerely,

Trip Riesen

cc w/encl: Catherine H. Chase



RIESEN LAW FIRM, L.L.P.
TR
ATTORNEYS AT LAW
POST OFFICE BOX 40997
CHARLESTON, SC 29423-0997

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201