TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL v

STATEMENT OF THE CASE 1

FACTUAL BACKGROUND 3

STANDARD OF REVIEW 5

ARGUMENTS

I. The Commission properly determined Claimant's average weekly wage 6

II. The Commission properly awarded Respondents credit for the overpayment of Temporary Total Disability, and Claimant failed to preserve this issue for appeal 14

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Ayoub v. Select Comfort Corp.,
No. 0526870, 2007 S.C. Wrk. Comp. LEXIS 904 (Oct. 16, 2007),
aff'd, 2008 S.C. Wrk Comp. LEXIS 377 (S.C. W.C.C. May 16, 2008) 18

Bailey v. Lyman Printing & Finishing Co.,
245 S.C. 13, 138 S.E.2d 410 (1964) 20

Bennett v. Gary Smith Builders,
271 S.C. 94, 245 S.E.2d 129 (1978) 9

Brittle v. Raybestos-Manhattan, Inc.,
241 S.C. 255, 127 S.E.2d 884 (1962) 14, 15, 19

Brunson v. American Koyo Bearings,
367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005) 14

Case v. Hermitage Cotton Mills,
236 S.C. 515, 115 S.E.2d 57 (1960) 13

Colonna v. Marlboro Park Hosp.,
404 S.C. 537, 745 S.E. 2d 128 (Ct. App. 2013) 14

Emerson Elec. Co. v. South Carolina Dept. of Rev.,
395 S.C. 481, 719 S.E.2d 650 (2011) 5

Fields v. Shoney's of Hardeeville,
Nos. 0322719 & 0030955, 2006 S.C. Wrk. Comp. LEXIS 191
(S.C. W.C.C. June 27, 2006) 18, 19

Foreman v. Jackson Minit Markets, Inc.,
265 S.C. 164, 217 S.E.2d 214 (1975) 9

Forrest v. A.S. Price Mech.,
373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007) 9-10, 13, 20

Freeman v. J.L.H. Invest., LP,
414 S.C. 362, 778 S.E.2d 902 (2015) 7

Hutson v. South Carolina State Ports Auth.,
399 S.C. 381, 732 S.E.2d 500 (2012) 13

In the Matter of the Care and Treatment of McCracken,
346 S.C. 87, 551 S.E.2d 235 (2001) 8

Lark v. Bi-Lo, Inc.,
276 S.C. 130, 276 S.E.2d 304 (1981) 5

Lowe v. Am-Can Transp. Servs., Inc.,
283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984) 12

McPherson v. Express Teller Services, Inc.,
No. 0719102, 2013 S.C. Wrk. Comp. LEXIS 170,
(S.C. W.C.C. Nov. 4, 2013) 18, 19

Mizell v. Raybestos-Manhattan, Inc.,
281 S.C. 430, 315 S.E.2d 123 (1984) 13

Pack v. South Carolina Dept. of Transp.,
381 S.C. 526, 6773 S.E.2d 461 (Ct. App. 2009) 6, 12

Philip Elecs. N. Am. v. Wright,
348 Md. 209, 703 A.2d 150 (Md. 1997) 19, 20

Pilgrim v. Eaton,
391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010) 7

Pope v. Heritage Comm., Inc., 395
S.C. 404, 717 S.E.2d 765 (Ct. App 2011) 15, 17

Pugh v. Piedmont Mech.,
396 S.C. 31, 719 S.E.2d 676 (Ct. App. 2011) 11

Roberts v. McNair Law Firm,
366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005) 8

Robinson v. Estate of Harris,
389 S.C. 360, 698 S.E.2d 801 (2010) 17, 20

Rogers v. Kunja Knitting Mills, Inc.,
312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994) 6

Sanders v. MeadWestvaco Corp.,
371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006) 16

Sellers v. Pinedale Res. Ctr,
350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002) 8, 9, 10, 13

Sharpe v. Case Prod., Inc.,
336 S.C. 154, 519 S.E.2d 102 (1999) 6

Smith v. Pearson,
210 S.C. 524, 43 S.E.2d 479 (1947) 15, 17

State v. Hill,
314 S.C. 330, 444 S.E.2d 255 (1994) 16

Stephenson v. Rice Servs, Inc.,
323 S.C. 113, 473 S.E.2d 699 (1996) 9

Swilling v. Pride Masonry of Gaffney,
401 S.C. 178, 736 S.E.2d 672 (Ct. App. 2012) 10, 11, 12

United States v. Blood,
806 F.2d 1218 (4th Cir. 1986) 15, 17

Williams v. Drywall,
402 S.C. 173, 739 S.E.2d 892 (Ct. App. 2013) 6, 12

W.R. Grace & Co. v. Swedo,
439 Md. 441, 96 A.3d 210 (Md. 2014) 20

STATUTES, REGULATIONS & COURT RULES

S.C. Code Ann. § 1-23-380(5) (Supp. 2016) 5

S.C. Code Ann. § 42-1-40 .... *passim*

S.C. Code Ann. § 42-9-210 .... 1, 3, 15, 16, 21

S.C. Code Ann. § 42-17-50 .... 12, 14

S.C. Code Reg. § 67-1603(C)(3)(b)(iii) 3, 16, 21

Rule 208(b)(1)(C), SCACR 12

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION PROPERLY DETERMINED CLAIMANT'S AVERAGE WEEKLY WAGE?

II. WHETHER THE COMMISSION PROPERLY AWARDED RESPONDENTS CREDIT FOR THE OVERPAYMENT OF TEMPORARY TOTAL DISABILITY, AND CLAIMANT FAILED TO PRESERVE THIS ISSUE FOR APPEAL?

STATEMENT OF THE CASE

This matter was initiated by a Form 20 and Form 21 filed by Respondents Fraenkische USA LP ("Employer") and Maryland Casualty Company c/o Zurich North America requesting that Claimant Michelle Davis' average weekly wage and corresponding compensation rate be corrected. Respondents sought a reduction of Claimant's average weekly wage, calculated under the standard statutory method and based on her pre-accident earnings. Further, Respondents sought, pursuant to S.C. Code Ann. § 42-9-210, a credit for the overpayment of temporary compensation paid under the incorrectly calculated compensation rate. (Form 21 & Form 20, mailed October 15, 2015). Claimant acknowledged that Respondents "miscalculated AWW," but argued that her average weekly wage should be based on her post-accident earnings and, in addition, denied that Respondents were entitled to a credit for the overpayment of temporary compensation benefits. (Cl's Form 58, dated Dec. 29, 2015) (Hrg. Tr. p. 5, line 1 – p. 9, line 19).

The parties were heard by Hearing Commissioner Susan Barden on January 8, 2016. In an Order dated March 1, 2016, the Hearing Commissioner found that exceptional reasons existed to calculate Claimant's average weekly wage based on post-accident earnings, resulting in an average weekly wage of $711.23 with a corresponding compensation rate of $474.39. The Hearing Commissioner also found that it would be unfair to award Respondents a credit for the overpayment of temporary disability benefits from the date of the accident because the error on the Employer's initial Form 20 was the Employer's fault, Respondents had not provided a "satisfactory explanation," for its

error, and because Claimant "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." However, the Hearing Commissioner awarded Respondents a credit calculated on the difference between the amount previously paid, $704.92 per week, and the amount ordered, $474.39 per week, from the date of filing of the Amended Form 20, October 15, 2015, to be deducted from any final permanency award. (Decision and Order of the South Carolina Workers' Compensation Commission, dated March 1, 2016) ("Hearing Commissioner Decision").

Respondents timely appealed to the Full Commission. (Form 30, dated March 14, 2016). An Appellate Panel of the Full Commission heard the parties on June 20, 2016, and issued its Decision on August 16, 2016. The Full Commission reversed the Hearing Commissioner, finding exceptional circumstances did *not* exist and that "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," based on Claimant's pre-injury wages. This resulted in an average weekly wage of $487.56 with a corresponding compensation rate of $325.05. In addition, the Appellate Panel held that Respondents were entitled to a credit based on the difference between the paid compensation rate of $704.92 per week and the ordered rate or $325.05 per week (amounting to a credit of $379.87 per week) from October 15, 2015 to the date weekly payments in the amount of $325.05 began. The Appellate Panel also reversed the Hearing Commissioner's finding that Claimant believed the increased amount was due to a short term or long term disability payment because, "Claimant testified at the hearing

that she never pursued, claimed, or received short-term disability benefits." Finally, the Appellate Panel reversed the Hearing Commissioner's conclusion that Respondents "failed to provide a 'satisfactory explanation' regarding the miscalculation of Claimant's average weekly wage and compensation rate. [Respondents'] entitlement to credit for the overpayment of benefits is not based in equity or fairness" but, instead, arises from S.C. Code Ann. § 42-9-210 and S.C. Code Reg. § 67-1603. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed Aug. 16, 2016) ("Commission Decision").

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

Claimant began working for Employer as a temporary employee approximately three months before being hired as a permanent employee on August 22, 2011. (Hrg. Tr. p. 11, line 20 – p. 13, line 13). Claimant was injured on October 21, 2011, (Hrg. Tr. p. 14, lines 4-5), approximately nine weeks after her permanent hire date. At the time of her injury, she was earning $12.48 per hour which, with overtime, results in an average weekly wage of approximately $487 per week. (Hrg. Tr. p. 28, line 18 – p. 29, line 3).

Claimant testified that, when she was out on workers' compensation disability, she was receiving checks in the amount of $704.92, approximately $217 more than she had earned while working. While she first stated that she had applied for short-term disability benefits, (Hrg. Tr. p. 28, line 18 – p. 29, line 14), she later clarified as follows:

> Q: Short term disability benefits would be those that are offered through your employer when you have a disability and they are not related to workers' comp at all ... And then separate from that, there's the notion of the workers' comp insurance company paying you when you are out of work because of a work

accident.

A: I wasn't receiving any money from anybody but workman's comp.

Q: Okay. And did you ever pursue or claim short-term disability benefits through your employer?

A: No.

. . . .

Q: So, explain to me when you begin receiving checks in the amount of over $700 a week, did that seem unusual to you where you had only not even earned $500 a week before your accident?

A: It did .... It did seem a little excessive to me, but with the questions I would ask here and there, I knew I was getting paid a percentage of what I was making .... I just assumed it was right.

(Hrg. Tr. p. 29, line 21 – p. 30, line 22). At oral argument before the Appellate Panel, Claimant's counsel acknowledged that, when Claimant began receiving the checks in the excess amount, they attempted to call the Employer's workers' compensation insurer to try "to straighten it out but it didn't get done," indicating that Claimant knew from the beginning that she was receiving a larger compensation payment than she was entitled to receive. (Full Comm'n Tr. p. 17, lines 6-24).

After conservative treatment, Claimant returned to work and subsequently received various pay increases, only one of which was merit based. Although the testimony went back and forth, it appears that Claimant received a cost of living increase from $12.48 to $13.00 per hour, an increase to $13.35 for moving temporarily from first shift to second shift, and then, in February 2013, a raise to $16.07 per hour with a promotion to set-up operator. (Hrg. Tr. p. 14, line 6 – p. 24, line 14). Claimant worked until July 2013, when she was scheduled for surgery. (Hrg. Tr. p. 27, lines 5-7). Following surgery, she returned to work on light duty at a lower rate of pay until

December 2013. (Hrg. Tr. p. 27, lines 5-20). Claimant no longer works for Employer.

Respondents paid Claimant temporary total disability ("TTD") benefits pursuant to the South Carolina Workers' Compensation Act ("Act") in the amount of $704.92 per week, (Hrg. Tr. p. 28, line 18 – p. 29, line 7), the maximum compensation rate for that time. The payments were based on a mathematical error,[1] which produced an average weekly wage of $1,281.54. (APA p. 1). There is no dispute that Claimant was paid weekly temporary benefits in excess of her compensation rate. (Cl. Form 58) (Hrg. Tr. p. 5, line 1 – p. 9, line 19).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2016). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case."

[1] Although Claimant suggests the finding that the error was simply a mathematical error is not supported, (App. Br. p. 4), Claimant did not appeal that finding of fact. It is not listed in Claimant's issues on appeal nor is it substantively addressed in her opening Brief. Therefore, to the extent Claimant believes the error was based on something other than a mathematical error, that issue is not preserved for appeal. *Emerson Elec. Co. v. South Carolina Dept. of Rev.*, 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief).

Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). The Full Commission is the ultimate fact finder in workers' compensation cases. *Pack v. South Carolina Dept. of Transp.*, 381 S.C. 526, 532, 6773 S.E.2d 461, 464 (Ct. App. 2009). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Prod., Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

ARGUMENT

I. The Commission properly determined Claimant's average weekly wage.

Under Section 42-1-40, "'[a]verage weekly wages' means *the earnings of the injured employee* in the employment in which [she] was working *at the time of the injury* during the period of fifty-two weeks immediately preceding the date of the injury ..." S.C. Code Ann. § 42-1-40 (emphasis added). Section 42-1-40 sets out four alternative methods for calculating average weekly wages. *Williams v. Drywall*, 402 S.C. 173, 179, 739 S.E.2d 892, 896 (Ct. App. 2013). The first, or primary, method is "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 by the actual number of weeks for which wages were paid, whichever is less." The first alternative to the primary method provides that, "[w]hen 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." The second alternative applies, "[w]here, by reason of a shortness of time during which

the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community." And finally, "[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." S.C. Code Ann. § 42-1-40 (emphasis added).

As instructed by Section 42-1-40, where an employee has worked for an employer for less than 52 weeks prior to the compensable accident, which is the case here, the first alternative "*shall* be followed, as long as results fair and just to both parties will be obtained." S.C. Code Ann. § 42-1-40 (emphasis added). The use of the word "shall" in a statute is mandatory, *e.g., Freeman v. J.L.H. Invest., LP*, 414 S.C. 362, 388, 778 S.E.2d 902, 915 (2015) ("[t]he term 'shall' in a statute means that the action is mandatory"), as Claimant apparently acknowledges. (App. Br. p. 10).

This Court has recognized two predicates for employing the first statutory alternative. First, "the calculation must yield a result which is 'fair and just to both parties.'" Second, "it must be 'practicable' to use the first alternative method." *Pilgrim v. Eaton*, 391 S.C. 38, 46, 703 S.E.2d 241, 245 (Ct. App. 2010). Either the Commission must make factual findings concerning "these two predicate conditions," or "it may be clear from the record that both of the two predicate conditions exist." *Id.*

Although Claimant states that this method is not practicable, (App. Br. p. 7), she fails to explain how or why it is impracticable.[2] Clearly, it is not impracticable, as she worked for almost nine weeks prior to her injury, and payment records exist for those nine weeks. (APA p. 5). It is a matter of adding her weekly gross wages for those weeks and dividing them by the correct number of weeks or partial weeks. (Form 20, mailed Oct. 15, 2015). There is nothing impracticable about using this approach.

Claimant's real and only arguable objection to using the first alternative is that she believes it is not fair to her. Her sole reason for asserting that this method is unfair to her is that she continued to work following conservative treatment and, at some point, received a merit-based raise.[3] The Commission firmly and correctly rejected Claimant's argument. "Exceptional circumstances do not exist to deviate from this standard." (Commission Decision, p. 6), *citing Roberts v. McNair Law Firm*, 366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005). In *Roberts*, this Court upheld the Commission's finding that, "salary increases subsequent to an injury by accident do not provide exceptional reasons to justify departure from the method of average weekly wage calculation prescribed under section 42-1-40 as such an argument could be made in almost every workers' compensation case." 366 S.C. at 53-54, 619 S.E.2d at 455. Based on substantial evidence, and distinguishing the facts before it from those in *Sellers v. Pinedale Res. Ctr*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), this Court upheld the

---

[2] Arguments that are made only in passing and not supported by case law or record evidence are deemed abandoned on appeal. *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal).

[3] Claimant fails to account, however, for the fact that some of her post-injury wages were lower than her pre-injury wages. Her method would pick and choose those post-injury wages that provide her with the highest possible average weekly wage calculation.

Commission's finding that the claimant's "post-injury increases do not justify deviating from the statutory method of average weekly wage calculation." 366 S.C. at 54, 619 S.E.2d at 456.

In almost every case, the relevant wages are those earned by the claimant at the time of his or her injury. *See, e.g., Foreman v. Jackson Minit Markets, Inc.*, 265 S.C. 164, 168, 217 S.E.2d 214, 216 (1975) (looking at "the employee's earning capacity *at the time of the accident* ...") (emphasis added).[4] The only exception has been where the injured worker was extremely young, *Sellers v. Pinedale Res. Ctr*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), which is not the case here. In *Sellers*, this Court found significant the facts that, at the time of his injury which rendered him a paraplegic, the claimant was a 16-year-old high school student working part-time. The Commission also considered the fact that the claimant had demonstrated both a strong interest in and aptitude for becoming an electrician like his father. 350 S.C. at 191-192, 564 S.E.2d at 699. There is no evidence that Claimant is extremely young and/or had demonstrated a long-standing interest in and aptitude for the Employer's particular work, although she performed her job well.

Furthermore, the exceptional reasons provision has been limited to situations where "unusual circumstances relative to employment ... occur." *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 130 (1978) (exceptional circumstances existed where the employee, already retired, worked only a few months each year in order to not jeopardize his social security payments); *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 309,

---

[4] Claimant's reliance on *Stephenson v. Rice Servs, Inc.*, 323 S.C. 113, 473 S.E.2d 699 (1996), is curious, as *Stephenson* did not involve any issues regarding how to calculate average weekly wages and does not refer to Section 42-1-40 even once.

644 S.E.2d 784, 787 (Ct. App. 2007) (exceptional circumstances existed to include wages earned during the 21 weeks prior to the accident while working for additional employers, based on the claimant's young age and his "interest, aptitude, ability, work ethic, and work history" of working multiple jobs year-round); *Sellers*, 350 S.C. at 191-192, 564 S.E.2d at 699 (at the time of his injury, claimant was 16-year-old high school student working two part-time jobs and had demonstrated both a strong interest in and aptitude for becoming an electrician like his father). No such circumstances exist here. Prior to her injury, Claimant was not working for multiple employers, nor was she working only part of the year for personal reasons. As noted above, Claimant has not demonstrated that she is extremely young and/or has a long-standing interest in and aptitude for the Employer's particular work.

Claimant's reliance on *Swilling v. Pride Masonry of Gaffney*, 401 S.C. 178, 736 S.E.2d 672 (Ct. App. 2012), as a case where "extraordinary conditions" were found is misplaced. Although this Court upheld the Commission's order finding that "exceptional reasons exist[ed] to deviate from the Form 20," 401 S.C. at 186, 736 S.E.2d at 676, the question is not whether extraordinary (or exceptional) reasons exist to deviate from an employer's Form 20 but, rather, whether "exceptional reasons make one of the standard approaches unfair to either the employer or employee." *Forrest*, 373 S.C. at 308, 644 S.E.2d at 787. In addition, it is unclear precisely how the employer in *Swilling* calculated the claimant's average weekly wages on the Form 20 filed in that case. Although the claimant was hired on April 3, 2006 and was injured on June 8, 2006, the employer's calculated average weekly wage was based on earnings spread over 39 weeks (which apparently included the rest of the calendar year). This Court noted that, rather

than report the injury to its workers' compensation carrier, from 2006 until March 2010 the employer allowed the claimant to work light duty when he was able, and paid the claimant a "salary" of "$21 per hour for forty hours per week resulting in an average weekly wage of $840, which was the salary he was earning at the time of the accident." *Swilling*, 401 S.C. at 183, 736 S.E.2d at 674. After March 2010, the employer just stopped paying the claimant anything at all. This Court noted that the employer's motive for continuing to pay the claimant was "questionable and appeared to be an attempt to avoid filing a claim with its insurance carrier." 401 S.C. at 186, 736 S.E.2d at 676. In any event, the $21 per hour for 40 hours per week was "the salary [the claimant] was earning at the time of the accident." 401 S.C. at 183, 736 S.E.2d at 674. The facts of *Swilling* bear no resemblance to the facts presently before this Court.

The first alternative has been found to be unfair to one party or the other where using only the wages earned in period immediately *preceding* the injury resulted in an artificially high or low average weekly wage. For example, in *Pugh v. Piedmont Mech.*, 396 S.C. 31, 39-40, 719 S.E.2d 676, 681 (Ct. App. 2011), the claimant suffered two consecutive workplace injuries. The issue before the Court was the average weekly wage for the second injury. This Court held that an average weekly wage calculation based solely on the 17 weeks the claimant worked after the first workplace injury, when he was earning lower wages due to work restrictions, was unfair to the claimant. Prior to the first workplace injury, the claimant had worked for nearly 30 years for the same employer and had been earning significantly more at the time of his first injury than he was earning at the time of his second workplace injury.[5]

[5] Claimant cites *Pugh* as a case where "extraordinary conditions" were found, (App. Br.

Claimant's argument appears to be, in part, that the Hearing Commissioner's Decision was supported by substantial evidence and, therefore, should be adopted by this Court. (*See* App. Br. pp. 9, 10). What Claimant fails to recognize is that the Hearing Commissioner Decision is not before this Court, as it was overturned by the Commission. The "Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact." *Pack*, 381 S.C. at 532, 6773 S.E.2d at 464; *see also Lowe v. Am-Can Transp. Servs., Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984) ("the Commission may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the hearing commissioner"); S.C. Code Ann. § 42-17-50.[6]

In prior cases, this Court has upheld the Commission's decision as to whether exceptional circumstances exist under the substantial evidence standard. *See Williams*, 402 S.C. at 181, 739 S.E.2d at 896 (upholding Commission "decision not to deviate from the primary method of calculation as provided in section 42-1-40" based on substantial evidence in the record); *Swilling*, 401 S.C. at 186, 736 S.E.2d at 676 (finding substantial evidence supported the Commission's findings, including its finding that exceptional

---

p. 7); however, this Court merely held that the record alone did not "establish the calculation provided a fair and just result," and remanded to the Commission to reconsider and clarify the method of calculating average weekly wage. 396 S.C. at 40, 719 S.E.2d at 681.

[6] In her Statement of the Case, Claimant hints that there may have been something improper in the way the Commission Decision was drafted. (App. Br. p. 3). To the extent this is her intent, the statement is a violation of Rule 208(b)(1)(C), SCACR (the "statement shall not contain contested matters"). Furthermore, there was nothing improper in the way the Commission Decision was prepared. The Appellate Panel's Request for Proposed Decision and Order clearly advised that, "[t]his document is not a Decision and Order. It is a request for a proposed order. The Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order." Thus, the Appellate Panel retained the right and ability to revise the proposed order in any way it saw fit. (Request for Proposed Decision and Order, emailed July 8, 2016).

reasons existed); *see also Forrest*, 373 S.C. at 309, 644 S.E.2d at 787 (the Commission has broad discretion in determining whether exceptional circumstances exist). Because the decision in this case to not deviate from the standard statutory method of calculating average weekly wages is supported by substantial evidence, this Court should affirm the Commission.

At the end of the day, Claimant cannot point to any cases other than *Sellers* where the claimant's actual or potential post-injury wages were considered in calculating average weekly wages. Determining an average weekly wage that is fair to both parties does not mean awarding an injured claimant with the highest possible compensation rate under any theory, as Claimant urges the Court to do here.[7] In fact, South Carolina cases setting forth the purposes of the Act's remedial provisions speak in terms of sustaining, but not providing a windfall to an injured claimant. For example, in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960), the Supreme Court explained that, because workers' compensation "may in some instances and may not in others be sufficient ... to enable the injured employee to live without being a burden to others. To say that the purpose of such legislation is to prevent his becoming a public charge is perhaps to overstate the case, for as matters now stand its aim is to aid in, rather than to insure, the accomplishment of that end." *See also Mizell v. Raybestos-Manhattan, Inc.*, 281 S.C. 430, 433, 315 S.E.2d 123, 125 (1984) (noting that "the purpose of workers' compensation [is] to provide *sustenance* to injured workers and their families")

[7] An y suggestion that her average weekly wage should be even higher based on a potential but yet unrealized further promotion is speculative and cannot serve as the basis of an award. *Hutson v. South Carolina State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012) (workers' compensation awards "may not rest upon surmise, conjecture, or speculation").

(emphasis added).

In this case, the Commission properly found that exceptional circumstances do not exist and followed the standard statutory method of calculating Claimant's average weekly wage to be $487.56 with a corresponding compensation rate of $325.05. This Court should affirm.

II. The Commission properly awarded Respondents credit for the overpayment of Temporary Total Disability, and Claimant failed to preserve this issue for appeal.

First, this issue is not preserved for appeal. It is axiomatic that, in order to be preserved for appellate review, a party has to raise an issue to the Commission pursuant to Section 42-17-50. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165-166, 623 S.E.2d 870, 872 (Ct. App. 2005) ("[o]nly issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal"); *see also Colonna v. Marlboro Park Hosp.*, 404 S.C. 537, 548, 745 S.E. 2d 128, 134 (Ct. App. 2013) (unappealed rulings become the law of the case and cannot be reconsidered by an appellate court).

The Hearing Commissioner awarded Respondents a credit based on "the difference between the compensation rate now being paid of $704.92 and the compensation rate" that the Hearing Commissioner found to be proper. (Hearing Commissioner Decision, p. 10). Respondents argued that they are entitled to a credit for the entire time they paid the excessive compensation rate, and that they are entitled to a credit as a matter of statute and case law and not as a matter of equity or discretion. (Form 30). However, neither party contested the Hearing Commissioner's rejection of Claimant's argument that the credit should be based on weeks instead of dollars paid.

Although Claimant discussed *Brittle v. Raybestos-Manhattan, Inc.*, 241 S.C. 255, 127 S.E.2d 884 (1962), in her brief to the Appellate Panel, (Claimant's/Respondent's Brief, dated June 3, 2016, p. 8), she did not file a Form 30 appealing the basis or method of calculating the credit due to Respondents.

In fact, at oral argument before the Appellate Panel, Claimant's counsel referenced *Brittle* and then conceded, "*but I didn't appeal that ruling* by Commissioner Barden where she gave them credit. So that's not necessarily before you .... They get credit. If I had my way it would be credit for the weeks and not the amount of money but the Commissioner didn't rule that way *and I did not appeal it so*." (Full Comm'n Tr. p. 20, line 20 – p. 21, line 9) (emphasis added). Parties are bound by concessions made by their counsel. *See, e.g.*, *Pope v. Heritage Comm., Inc.*, 395 S.C. 404, 430-431, 717 S.E.2d 765, 779 (Ct. App 2011); *Smith v. Pearson*, 210 S.C. 524, 530-531, 43 S.E.2d 479, 481-482 (1947) (finding party was bound by its counsel's prior statement); *see also United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) ("statements by an attorney concerning a matter within his employment may be admissible against the retaining client").

Out of an abundance of caution, however, Respondents address the substance of Claimant's arguments regarding the credit issue. Section 42-9-210 provides, in pertinent part, that "[a]ny payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation." S.C. Code Ann. § 42-9-210. "The word 'may' ordinarily 'signifies permission and generally means the action spoken of is optional or

discretionary.'" *State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994). The deductions are applied by shortening the period during which compensation must be paid. S.C. Code Ann. § 42-9-210.

In addition, Regulation 67-1603(C)(3) addresses the payment of temporary compensation based on an incorrect compensation rate. When the corrected compensation rate is less than previously reported on the Form 15 and paid to a claimant, and the claimant does not agree to the reduction, the employer shall continue paying the compensation rate reported on the Form 15 and request a reduction in compensation by filing a Form 21. S.C. Code Reg. § 67-1603(C)(3)(b)(iii). That is what Respondents did here.

Claimant's main argument appears to be based on "fault" – who is responsible for the overpayment. However, "[c]redit for overpayment of temporary total benefits is governed by section 42-9-210 (1985) of the South Carolina Code." *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 294, 638 S.E.2d 66, 72 (Ct. App. 2006). As the Commission found, the credit is based on the statute and not "in equity or fairness." (Commission Decision, p. 8).

Even if fairness entered into the analysis, the Commission determined Claimant's compensation rate to be $325.05 as opposed to $704.92, a difference of $379.87 per week. Claimant would receive an unjust windfall if Respondents are not provided credit for the full amount they overpaid as compensation benefits. Claimant was aware but did not alert her Employer that she was receiving temporary disability benefits in excess of the gross amount she earned prior to the injury. Claimant's counsel acknowledged that they were aware of the excessive payments, called the carrier but, when they did not get

through, did nothing further.[8] "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Robinson v. Estate of Harris*, 389 S.C. 360, 371, 698 S.E.2d 801, 807 (2010). It would be unjust to allow Claimant to receive a significant windfall due to an incorrect compensation rate based on a mathematical error, an error that Claimant was aware of but failed to address. In addition, such an outcome would provide Claimant with benefits not contemplated in the Act.

There is no dispute that Claimant was paid weekly benefits the amount of $704.92 per week based on Respondents' inadvertent miscalculation of her average weekly wage. The Commission found Claimant's compensation rate to be $325.05. Until the Commission rendered its Decision, Respondent overpaid Claimant $379.87 for each week of temporary benefits paid. The Commission held that $379.87 for each week starting on October 15, 2015 (until the correct amount began to be paid) be deducted from any permanent benefit awarded to Claimant. Particularly given both the Claimant's and her counsel's silence in the face of their admissions that they knew the payments were unusually high, (Hrg. Tr. p. 29, line 4 – p. 30, line 20) (Full Comm'n Tr. p. 17, lines 6-24),[9] Respondents believe the credit should reach back to include all of the excess TTD

[8] As noted above, parties are bound by concessions made by their counsel. *See, e.g.*, *Pope*, 395 S.C. at 430-431, 717 S.E.2d at 779; *Smith*, 210 S.C. at 530-531, 43 S.E.2d at 481-482 (finding party was bound by its counsel's prior statement); *see also United States v. Blood*, 806 F.2d at 1221 ("statements by an attorney concerning a matter within his employment may be admissible against the retaining client").

[9] The Commission specifically rejected Claimant's assertions that she "was under the impression that what she was receiving was correct," and that "she had been led to believe that she was entitled to workers' compensation and short or long term disability," (App. Br. pp. 9-10), instead finding that, "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.'" (Commission Decision, pp. 7-

payments made to Claimant.

The Commission has repeatedly held that an employer is entitled to credit for the overpayment of temporary disability benefits based on an incorrect compensation rate. *See McPherson v. Express Teller Services, Inc.*, No. 0719102, 2013 S.C. Wrk. Comp. LEXIS 170, *1-3, 13-15 (S.C. W.C.C. Nov. 4, 2013) (finding the employer/carrier was entitled to credit for overpayment of TTD "paid to claimant as a result of the incorrect compensation rate"); *Ayoub v. Select Comfort Corp.*, No. 0526870, 2007 S.C. Wrk. Comp. LEXIS 904, *47 (Oct. 16, 2007) (awarding employer/carrier credit for overpayment of TTD paid at an erroneous compensation rate), *aff'd*, 2008 S.C. Wrk Comp. LEXIS 377 (S.C. W.C.C. May 16, 2008); *Fields v. Shoney's of Hardeeville*, Nos. 0322719 & 0030955, 2006 S.C. Wrk. Comp. LEXIS 191, **3, 24-28 (S.C. W.C.C. June 27, 2006) (awarding credit for substantial overpayment of TTD based on "an inadvertent miscalculation of the Claimant's Form 20"). In *McPherson*, an Appellate Panel held that the credit to which the employer/carrier were entitled for the overpayment of temporary benefits was to be determined in the form of dollars paid, and not based on a number of weeks paid. The Commission held that, to deny the employer/carrier for excess payments already made in the form of temporary disability benefits, merely based on an erroneous compensation rate, would be unfair to the Respondents and contrary to the Act. 2013 S.C. Wrk. Comp. LEXIS 170 at **14-15. In *Fields*, the Commission affirmed that the award of a credit to the employer against the claimant's permanent disability award was appropriate under the Act, as it merely "shorten[ed] the period during which compensation must be paid." 2006 S.C. Wrk. Comp. LEXIS 191 at *27.

---

8).

Thus, even if an equity standard applied to this issue, which Respondents do not concede, Respondents assert that the mathematical error made in calculating Claimant's average weekly wage should not prohibit a credit for the overpayment of compensation where such errors are not uncommon. *See McPherson,* 2013 S.C. Wrk. Comp. LEXIS 170, **1-3, 13-15; *Fields,* 2006 S.C. Wrk. Comp. LEXIS 191. The mathematical error doubled Claimant's average weekly wage and grossly inflated her compensation rate, which Claimant noticed but did not question.

Claimant cites *Brittle* in support of her argument that Respondents are not entitled to credit for overpayment. However, *Brittle* does not address the overpayment of temporary disability benefits based on an incorrect compensation rate. Rather, that case addresses payments an employer made to the claimant voluntarily and gratuitously, and which were not "made in contemplation of the legal obligation of the employer to pay compensation to a disabled employee." 241 S.C. at 257-258, 127 S.E.2d at 885.[10] The rule and quote from Larson's that Claimant relies on applies to cases where the payment was made voluntarily and not in contemplation of the legal obligation to pay disability benefits, and says nothing about the credit that should apply where compensation payments were made in excess of the correct compensation rate.

In her argument that the credit should be based solely on the weeks during which she was overpaid, and not on the amount, Claimant relies on *Philip Elecs. N. Am. v. Wright*, 348 Md. 209, 703 A.2d 150 (Md. 1997). However, for a number of reasons, *Philip Elecs.* is not applicable here. First, *Philip Elecs.* is a Maryland case, and South

[10] In fact, the payments made voluntarily by the employer in *Brittle* were less than the compensation rate based on the claimant's average weekly wages as calculated by the Commission. 241 S.C. at 258, 127 S.E.2d at 885.

Carolina has no history or obligation to follow the rulings of Maryland's highest Court. Second, *Philip Elecs.* is based on a statute that was substantively different from South Carolina's Act. *See* 348 Md. at 218-219, 703 A.2d at 154-155 (setting forth the provisions in the Maryland statute that have no counterpart in our Act). Third, *Philip Elecs.* has been superseded by statute, as noted in *W.R. Grace & Co. v. Swedo*, 439 Md. 441, 457, 96 A.3d 210, 219-220 (Md. 2014) (explaining that the Maryland Legislature passed a statute abrogating the Court's prior rulings "that crediting is to be done on the basis of weeks paid"). Thus, *Philip Elecs.* is not applicable and is no longer good law, even in Maryland.

Claimant also incorrectly suggests that laches should apply here. First, "the doctrines of estoppel and laches do not preclude the Commission from adjusting the average weekly wage prior to the administrative body's final determination." *Forrest*, 373 S.C. at 307, 644 S.E.2d at 786. Second, Claimant cannot meet her burden of proving the elements of laches. The party "seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Robinson*, 389 S.C. at 372, 698 S.E.2d at 807. "Delay alone in the assertion of a right does not constitute laches. It must be shown in addition that such delay has resulted in material prejudice to the defendant." *Bailey v. Lyman Printing & Finishing Co.*, 245 S.C. 13, 22, 138 S.E.2d 410, 414 (1964). Even if Claimant could establish the first two elements, which Respondents do not concede, she cannot prove she has been materially prejudiced. Claimant has not and cannot show how she was prejudiced by receiving amounts in excess of what she was entitled to be paid as disability compensation. As Commissioner Melody L. James on the Appellate Panel queried, "if I get something that is not due to me

how am I prejudiced for having to pay it back?" (Full Comm'n Tr. p. 17, lines 6-8). On the other hand, Respondents are significantly prejudiced by paying Claimant benefits to which she was not entitled.

Claimant points to testimony where she equivocated about whether she applied for and/or believed she was receiving short term disability in addition to workers' compensation benefits, going so far as to assert "she had been led to believe" that she was entitled to both workers' compensation benefits and short or long term disability. (App. Br. p. 10-11). However, it is unclear who, if anyone, "led" her to this erroneous conclusion. In addition, the Commission clearly rejected and vacated the Hearing Commissioner's finding that Claimant somehow believed she was receiving short term disability benefits, noting that Claimant testified at the hearing that she never pursued, claimed, or received short-term disability benefits. (Commission Decision, pp. 7-8). Instead, once short term disability was explained to her, she denied ever applying for short term disability and specifically testified that the only compensation she received was from "workman's comp." (Hrg. Tr. p. 29, line 12 – p. 30, line 11).[11] Because the Commission's finding is supported by substantial evidence in the form of Claimant's own testimony, this Court must uphold that finding.

In the end, the Commission properly awarded Respondents credit based on their overpayment of temporary benefits based on Section 42-9-210 and Reg. 67-1603. The only adjustment that should be made at this point would be to extend the credit beyond October 15, 2015 to the date Respondents began paying the excessive compensation amount.

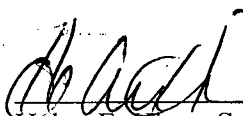
---

[11] In order to support her argument, Claimant cites only select, isolated portions of testimony which are misleading at best.

CONCLUSION

For the reasons stated herein, this Court should affirm the average weekly wage and corresponding compensation rate found by the Commission. In addition, this Court should affirm the Commission's grant to Respondents of a credit based on the difference between the inflated compensation rate that was paid to Claimant and the correct compensation rate, adjusting the credit to extend back to cover all of the compensation payments made to Claimant at the excessive rate.

MCANGUS GOUDELOCK & COURIE, LLC



Helen F. Hiser, S.C. Bar No.: 76124
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Mark A. Allison, S.C. Bar No.: 70331
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Respondents Fraenkische USA LP and Maryland Casualty Company c/o Zurich North America

October 13, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 18 2016
SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1117221

Michelle Davis, Employee, Claimant, ... Appellant,

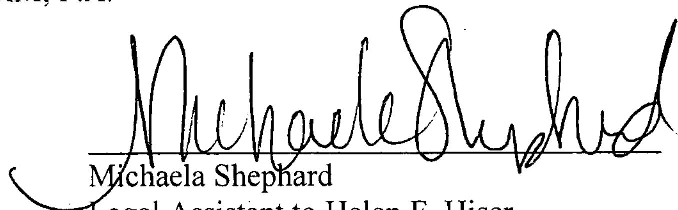
v.

Fraenkische USA LP, Employer,
and Maryland Casualty Company
c/o Zurich North America, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that on the 13th day of October 2016, I served the **Initial Brief of Respondents** and Respondents' **Designation of Matter to be Included in the Record on Appeal** on Michelle Davis by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record:

Michael F. Mullinax, Esq.
MULLINAX LAW FIRM, P.A.
P.O. Box 2665
Anderson, SC 29622



Michaela Shephard
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
Attorneys for Respondents Fraenkische USA LP and Maryland Casualty Company c/o Zurich North America

Reply To
Helen F. Hiser
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

October 13, 2016

RECEIVED
OCT 18 2016
SC Court of Appeals

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Michelle Davis v. Fraenkische USA LP and Maryland Casualty Company c/o Zurich North America
Date of Accident: October 21, 2011
WCC File No.: 1117221
Our File No.: 20216.15027
Claim No.: 2800077386-001
Appeal No.: 2016-001788

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of the Initial Brief of Respondents;
2. original and one copy of the Designation of Matter to be Included in the Record on Appeal; and
3. original and one copy of Respondents' Proof of Service concerning items one and two.

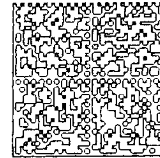
Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

Very truly yours,

Helen F. Hiser

Enclosures

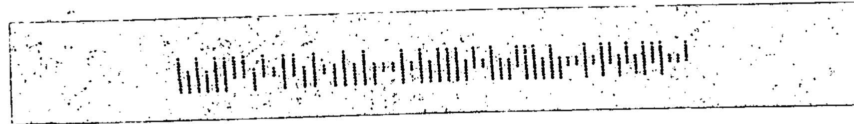
cc: Michael F. Mullinax, Esq.



UNITED STATES POSTAGE
PITNEY BOWES
02 1P $ 003.25⁰
0000841307 OCT 13 2016
MAILED FROM ZIP CODE 29464

mgc | INSURANCE DEFENSE

POST OFFICE BOX 2980
CHARLESTON, SC 29465



RECEIVED
OCT 18 2016
SC Court of Appeals

20216.15027/HFH/mls
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211