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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Appellate Panel, Workers' Compensation Commission

Opinion No. 2015-UP-339 (S.C. Ct. App. filed July 8, 2015)
Appellate Case No. 2015-002397

LeAndra Lewis, ... Petitioner,

v.

L.B. Dynasty Inc., d/b/a
Boom Boom Room Studio 54, and
the S.C. Uninsured Employer's Fund, ... Defendants,

Of whom

The S.C. Uninsured Employer's Fund
is the ..... Respondent.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Is the Workers' Compensation Commission's calculation of LeAndra Lewis's "compensation rate" clearly erroneous when the commission misstates key facts and principles, and when nothing supports the award of $75/week?

STATEMENT OF THE CASE

These proceedings follow a remand from this Court. *Lewis v. L.B. Dynasty*, 411 S.C. 637, 770 S.E.2d 393 (2015). The Court may recall the facts from its 2015 decision.

In July of 2008, LeAndra Lewis was shot while working as a topless dancer. (App.p.164). She suffered extensive injuries, (App.pp.205-206), and she filed a claim for workers' compensation benefits that December. (App.p.164). Ms. Lewis was 19 years old when she was shot. (App.p.258, lines 5-6). Her claim has been pending for nearly 8 years.

L.B. Dynasty—the club's owner—never appeared in this litigation. The Uninsured Employers' Fund began defending the case after the commission could not determine whether the club was subject to the Workers' Compensation Act. (App.pp.338-340). The Fund answered Ms. Lewis's claim with a general denial. (App.pp.165-167).

A single commissioner denied the claim, holding Ms. Lewis failed to prove she was an employee rather than an independent contractor. (App.pp.150-152). That finding barred compensation as a practical matter, but the order continued and held if Ms. Lewis *had* been an employee, her "compensation rate" would be $75 per week. (App.pp.152-153).

The single commissioner gave three reasons for this latter conclusion. First, he explained there was "no evidence whatsoever" of Ms. Lewis's earnings. (App.p.152). Then, he said the "only evidence" of Ms. Lewis's earnings was her own "self-serving" testimony. *Id.* Finally, he held Ms. Lewis was "bound" by the wages she earned from L.B. Dynasty.

(App.pp.152-153). Ms. Lewis said she worked full-time, dancing at clubs throughout the Carolinas, but the single commissioner viewed Ms. Lewis's failure to file "Form 20s" from other clubs as fatal. *Id.*

A Form 20 assists an employer in calculating an injured worker's "compensation rate." Seventy-five dollars is one of the lower rates, but it is not the lowest.[1]

The single commissioner did not offer any math showing how he reached the $75 figure. He also never shared Ms. Lewis's average weekly wage, a figure used to compute the compensation rate. The decision's two critical features were its view that Ms. Lewis wanted to include earnings from other clubs and its finding that she did not prove those earnings.

Ms. Lewis appealed and an appellate panel affirmed. The panel's order has no material differences from the single commissioner's order. Compare (App.pp.148-154) with (App.pp.157-162). Ms. Lewis appealed to the Court of Appeals. (App.pp.215-216).

In 2012, the Court of Appeals affirmed in a split decision. (App.pp.68-77). The majority reasoned Ms. Lewis was an independent contractor. *Id.* The dissenting judge believed she was an employee. *Id.* Nobody reached Ms. Lewis's argument about the commission's computation of her earnings. Ms. Lewis had briefed the issue, (App.pp.115-118), but the compensability ruling controlled the outcome. (App.p.74, section III).

In 2015, this Court reversed the Court of Appeals and held Ms. Lewis was an employee. (App.pp.19-27). This Court remanded the earnings issue to the Court of Appeals. (App.p.26, Conclusion). Ms. Lewis had suggested this. (App.p.47, III).

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[1]Forms are accessible at www.wcc.sc.gov/welcomeandoverview/forms/Pages/default.aspx. A blank Form 20 is attached to this brief as **Tab 1**.

The Court of Appeals did not conduct oral argument or request briefs on remand. It presumably relied on the briefs filed in 2010 and 2011, though the Fund only filed an initial brief; it did not file a final brief. (App.p.75 n.4) referencing (App.pp.120-29).

In July of 2015, the Court of Appeals issued its decision affirming the commission's compensate rate. (App.p.2). This was roughly two months after this Court's remand.

The decision of the Court of Appeals was a two-page "substantial evidence" affirmance. (App.pp.2-4). First, the court held its previous decision in *Steele v. Self Serve* was distinguishable. In the time since *Steele*, the relevant administrative regulation had been changed to make a Form 20 mandatory rather than permissive. (App.p.4). Also, the injured worker in *Steele* had submitted tax returns to prove his wages. *Id.* Ms. Lewis did not have any tax returns for the 2 years she worked as a dancer. Instead, she relied on her testimony as well as the testimony of two witnesses.

After distinguishing *Steele*, the Court of Appeals held Ms. Lewis's average weekly wage was a "factual determination supported by the evidence," and that the single commissioner "made no legal errors" in determining Ms. Lewis failed to meet her burden of proof. (App.p.4).

ARGUMENT

There are three reasons this Court should reverse the Court of Appeals and remand this case to the commission.

First, the Court of Appeals committed clear error in holding the commission's findings are supported by the evidence. The commission misstated key facts: The commission said there was "no evidence whatsoever" of Ms. Lewis's earnings except Ms.

Lewis's own testimony, but that "finding"—repeated in both commission orders—ignores the testimony of Ms. Lewis's two (2) witnesses. The commission's "facts" are wrong.

Second, the Form 20 is irrelevant. A Form 20 is completed by an employer—not an employee—and reports the money an employer pays to a claimant. But a dancing club does not pay a dancer anything. Here again, the point is uncontested: Ms. Lewis's only source of income was tips from customers. Also, the law requires multiple Form 20s when a claimant alleges "dual employment," but Ms. Lewis made no such allegation. Instead she asked the commission to vary the standard method of computing her earnings, a variance recognized in the average weekly wage statute. A Form 20 is not germane. Period.

Finally, the only evidence in the record is evidence that supports Ms. Lewis's claim. That is not an exaggeration: The Fund's trial strategy consisted of nothing more than cross-examining Ms. Lewis's witnesses. The Fund did not put up a case of its own. Nothing is wrong with that approach, but the result is that the *only* evidence in the record supports Ms. Lewis. The finding that Ms. Lewis failed to carry her burden of proof is clearly erroneous. This Court should reverse the Court of Appeals and remand the claim to the commission.

A. The commission misstated key facts; ignoring without any stated basis the testimony of Ms. Lewis's two supporting witnesses.

Two witnesses supported Ms. Lewis's case on earnings. A fellow dancer testified about average income and work schedule. (App.p.231, lines 4-21). Ms. Lewis's sister said Ms. Lewis worked five days a week, fifty-two weeks a year. (App.p.313, lines 1-9). This was in addition to Ms. Lewis's own story about her two years of working as an exotic dancer. (App.p.262, line 23 - p.263, line 14); (App.p.289, lines 13-21).

The commission did not discredit these people or label their sworn statements as implausible. Instead, the commission's findings of fact never discussed these witnesses, at all. First, the commission made a specific finding that there was "no evidence whatsoever" of Ms. Lewis's earnings or work schedule. (App.p.152). Then, it found as a fact that the "only evidence" of Ms. Lewis's earnings was her testimony. *Id.*; see also (App.p.161-162) (the appellate panel's order, adopting the single commissioner's order as its own).

The commission *did* cite these witnesses in other parts of its decision, although even then, the commission omitted that Ms. Lewis's sister verified Ms. Lewis's work schedule. (App.pp.145-46). Yet, despite acknowledging these witnesses in the order's prelude, the meat of the commission's decision only described Ms. Lewis's testimony, as if the other witnesses never existed. And there is the decision's awkward pivot from one sentence declaring the absence of "any evidence whatsoever" to an immediate acknowledgment that *some* evidence—Ms. Lewis's testimony—*is* in fact present. The decision also belittles Ms. Lewis's testimony as "self-serving," oddly implying it would be better for Ms. Lewis to sabotage her case with her testimony rather than support it.

A party challenging an administrative agency's decision bears a heavy burden. The Administrative Procedures Act explains a court may not substitute its judgment for an agency's judgment on the weight of the evidence. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Still, the Act empowers the court to reverse an agency's decision in several instances including when the agency's decision is affected by an error of law, clearly erroneous in view of the reliable evidence in the record, arbitrary, or capricious. *Id.* Arbitrary conduct, this Court has explained, includes acts that are not rational and are not done according to reason

or judgment; acts based on will alone. *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992) (citing *Black's Law Dictionary*). Might does not make right. Administrative decisions must be based on reasons. The reasons must be sensible and follow the law.

A decision that ignores testimonial evidence and offers no reason for doing so is a standard example of a decision that is arbitrary. We do not know whether the commission chose not to believe these witnesses or why it chose not to believe them; we are simply left to guess. It does no good to look beyond the commission's order and consider the entire record: In the same way that the commission's order never mentions the witnesses, the Fund has overlooked them in every brief the Fund has filed in this case. (App.pp.12-16); (App.pp.49-58); (App.pp.120-129); (App.pp.168-173).

The Court of Appeals erred in concluding the commission's decision was "supported by the evidence." (App.p.4). This decision rejected evidence without explanation or failed to recognize the evidence's existence. In either scenario, the law requires reversal.

B. The commission misstated key principles. An employer-completed form for "wages" is irrelevant when a worker is paid exclusively in tips and is not claiming "dual employment."

The Court of Appeals emphasized that an injured worker who seeks to add earnings from additional employers is required by regulation to file a Form 20 from those employers. (App.p.4). This followed the commission's reasoning precisely. (App.p.161).

i. The commission should not have placed any weight on the Form 20's absence because Ms. Lewis was paid exclusively by patrons, solely in tips.

Workers' compensation benefits are based on an injured worker's average weekly wage. S.C. Code Ann. § 42-1-40 (2015). A regulation points parties to the Form 20,

converting the average weekly wage to the compensation rate. 8 S.C. Code Ann. Regs. 67-1603 (2012).

The form itself is not lengthy. See **Tab 1**. The regulation (Reg. 67-1603), however, is quite long. A close reading of both resources reveals the Form 20 is filled out by the employer, not the employee. In no instance does the injured worker fill in the blanks.

This matters because neither L.B. Dynasty nor any other club paid Ms. Lewis anything. Ever. The commission's orders admit this. The single commissioner's decision and the appellate panel's decision specifically note Ms. Lewis's earnings were all in tips. (App.p.149, Order ¶8); (App.p.158, Order ¶9).

Ms. Lewis's experience is typical. She is not the first worker in this field to litigate her employment status. Courts routinely observe dancers receive compensation exclusively in the form of tips from patrons. *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 953 (Nev. 2014); *Reich v. Circle C. Investments*, 998 F.2d 324, 326 (5th Cir. 1993); see also *Harrell v. Diamond A Entm't*, 992 F. Supp. 1343, 1349 (M.D. Fla. 1997) ("it seems fairly obvious that [the exotic dancing club] would have no way of knowing how much money each of its dancers . . . took home at the end of a shift."). Nobody filed a Form 20 in this case; not the Fund, and certainly not L.B. Dynasty, who has never done anything. That failure is sensible. They could not have completed the form if they tried.

The regulation explains the proper way for a claimant to raise an issue about the compensation rate is to request a hearing. Reg. 67-1603 C(2) & H. Subsection G explains failing to file a Form 20 may result in the commission choosing the compensation rate based on the evidence at the hearing. A different regulation paints the same picture. Reg. 67-606.

That procedure should have applied here. When this case came for a hearing, the critical issues were employment status and average weekly wage. Ms. Lewis presented evidence on these issues. The absence of Form 20s did not matter and was not a valid obstacle to a decision. The proper course was to hear the evidence and make a ruling. Focusing on Ms. Lewis's failure to bring blank forms to the hearing was not faithful to the regulation. The commission misunderstood the rules as well as the proper procedure.

ii. The commission should not have placed any weight on the Form 20's absence because Ms. Lewis was not claiming dual employment.

The law requires multiple Form 20s when a claimant alleges "dual employment." Reg. 67-1603H. As the Court of Appeals correctly explained, when an employee works multiple jobs, the employee's wages from those jobs may be combined to compute the average weekly wage. (App.p.3) citing *Steele v. Self Serve*, 335 S.C. 323, 326, 516 S.E.2d 674, 676 (Ct. App. 1999). The Court of Appeals also correctly observed that the regulation's language is mandatory. It plainly states that when a claimant "alleges he or she worked for two or more employers when the injury occurred . . . [t]he claimant *shall* obtain a completed Form 20 from each of the other employers and file the Forms 20 with the Claims Department." (Emphasis added).

But Ms. Lewis never argued dual employment to the commission. Her argument focused on the average weekly wage statute, which contains multiple mechanisms for approximating a claimant's future earnings. The statute explains that when it is impractical to use one of the standard methods of calculating the average weekly wage because of the shortness of the time the worker has been employed, the commission is supposed to consider

the average earnings of someone in the same class of employment in the same locality or community. See S.C. Code Ann. § 42-1-40 (2015). Dual employment was not an issue.

Ms. Lewis argued the statute to the commission. She submitted a memorandum of law to the single commissioner, quoting this part of the statute verbatim. (App.pp.183).[2] Her brief to the appellate panel offered the same argument. (App.p.211). Both briefs explain that this is why Ms. Lewis brought a fellow dancer to testify at her hearing. Though Ms. Lewis had only worked a few times at the club where she was injured, she sought to establish her average weekly wage based on the earnings of someone else who worked in this community. This witness testified about earnings and work schedule. (App.p.231, lines 4-21).

The commission's decision completely ignored this, as did the Court of Appeals.

C. Nothing supports an award of $75/week. The only evidence in the record supports Ms. Lewis's claim. The Fund did not put up a case.

This case was entirely about witness testimony. Four people testified; the investigating officer, Ms. Lewis, a fellow dancer, and Ms. Lewis's sister. See (App.pp.ii-iii) (Index, listing the witnesses). The single commissioner's summary of the Fund's position dealt only with Ms. Lewis's employment status. (App.pp.144-45). The Fund's argument on average weekly wage appears in a post-trial brief. (App.pp.172-73).

The Fund did not put up a case, call any witnesses, or attack anyone's credibility. Again, the only evidence in the record is evidence Ms. Lewis offered.

If the only evidence in the record supports Ms. Lewis's claim, it necessarily follows that Ms. Lewis has carried her burden of proof unless this evidence is somehow discredited.

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[1]The brief quotes the statute correctly but cites the wrong statute number.

The commission's decision is even more odd when one subjects the award's actual dollar amount to meaningful scrutiny. As stated previously, the single commissioner did not offer any math showing how he reached the $75 figure. If, as Ms. Lewis's rehearing petition to the Court of Appeals described,(App.pp.9-10), her compensation rate was truly limited to her earnings from L.B. Dynasty, Ms. Lewis earned $357 the night she was shot. (App.p.279, lines 18-21). Dividing that by the number of weeks worked (1) and following the Form 20 yields a compensation rate of $238. This vastly exceeds $75.

It is surely a rare circumstance when there is in fact no evidence supporting the commission's decision, but this has happened before, as precedent illustrates. *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 310, 454 S.E.12d 320, 322 (1995). Ms. Lewis's case is one of those rare instances. When the claimant is the only one presenting evidence, it is hardly surprising that the balance of evidence leans the claimant's way.

CONCLUSION

The Court of Appeals erred in affirming. The commission's decision misstates key facts and does not consider all of the relevant testimony.

Rather than answer these arguments, the Court of Appeals ignored them. Ms. Lewis does not seek anything more than a fair award, and as requested in the brief she filed over 5 years ago, (App.p.119), on a claim that began over 8 years ago, (App.p.164), this case should be remanded for the commission to render an accurate calculation of the average weekly wage and compensation rate.

Respectfully submitted,

August 23, 2016

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Tab

1

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

WCC File #: _____
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: _____ Employer's Name: _____

Address: _____ Address: _____

City: _____ State: _____ Zip: _____ City: _____ State: _____ Zip: _____

Home Phone: _____ Work Phone: _____ Insurance Carrier: _____

Preparer's Name: _____ Preparer's Phone #: _____

Date of Injury: _____
month day year

A. Total Wages Paid

1. Check Applicable Method:
   - ☐ Report of earnings of injured employee based on four completed quarters.
   - ☐ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
   - ☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
   - ☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st	_____	$ _____
2nd	_____	$ _____
3rd	_____	$ _____
4th	_____	$ _____

Total Paid 2. $ _____

3. List total value of other allowances of any character made in lieu of wages during four quarters above. 3. $ _____
4. Add lines 2 and 3. **TOTAL WAGES PAID:** 4. $ _____
5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred. 5. _____

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).
   AVERAGE WEEKLY WAGE: 6. $ _____

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate. 7. $ _____
8. The compensation rate is as follows (choose one):
   - ☐ When average weekly wage (line 6) is less than $75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
   - ☐ When the estimated compensation rate (line 7) is less than $75.00 and average weekly wage (line 6) is more than $75.00, the compensation rate is $75.00. Enter $75.00 on line 8.
   - ☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
   - ☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8. _____
   - ☐ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. $ _____

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803)737-5723.

THE STATE OF SOUTH CAROLINA
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APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

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Of whom

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is the ..... Respondent.

PROOF OF SERVICE

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

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August 24, 2016 Erin Bridges