

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

W.C.C. File No.: 1104105

Kelly McPherson, ... Claimant/Appellant,

v.

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

RECORD ON APPEAL

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DECISION AND ORDER
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1104105

KELLY MCPHERSON,
Claimant,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT,
Employer/Self-Insurer.

HEARING:

Hearing held in St. George, South Carolina on
April 9, 2015.

APPEARANCES:

Matthew O. Riddle, Esquire on behalf of the
Employer/Self-Insurer.

Fred W. Riesen, Jr., Esquire on behalf of the
Employee/Claimant.

PURPOSE OF HEARING:

To determine if the Employer/Self-insurer is
entitled to pay compensation to the claimant
as set forth on the Form 21.

DECISION AND ORDER BY:

Melody L. James, Commissioner.

DATE FILED:

September 11, 2015

STIPULATIONS

At the call of the case, the parties stipulated as follows:

1. That both the Claimant and the Defendants were subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. That jurisdiction and sufficiency of the notice of the hearing were admitted.
3. That venue for this hearing was proper in Charleston County, South Carolina, pursuant to stipulation by the parties.

APA SUBMISSIONS

The following APA submissions were submitted on behalf of the Employee/Claimant:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>No. Pages</u>
1.	MRI cervical spine	2/17/11	1
2.	MRI cervical and lumbar spine	4/06/11	2-3
3.	Dr. James Keffer	6/08/11 - 3/12/12	4-28
4.	Dr. Stephen Rawe	6/30/11	29-30
5.	Dr. Vibhooti Dave	6/21/12 - 2/15/13	31-39
6.	Dr. Paul Gause	3/12/15	40-42

The following Exhibits were submitted on behalf of the Employee/Claimant:

Exhibits on behalf of Employee/Claimant:

A. Claimant's Memorandum on AWW	April 19, 2011
B. Joan Hynes v CCSD Order	
C. Henson v BCSB	
D. Letter from Holly Foged	March 26, 2015

The following APA submissions were submitted on behalf of the Employer/Self-Insurer:

<u>APA</u>	<u>Name of Provider</u>	<u>Date of Report</u>	<u>No. Pages</u>
1.	Spine Institute of Arizona	06/21/12 - 01/21/15	1 - 62

The following Exhibits were submitted on behalf of the Employer/Self-Insurer:

Exhibits on behalf of Employer/Self-Insurer:

A. Claimant's Deposition	08/02/2011
B. Deposition of Dr. Paul R. Gause	04/30/2015

CLAIMANT BIOGRAPHICAL

DATE OF BIRTH: 7/21/1971

SEX: Female

MARITAL STATUS: Married

EDUCATION: Master's Degree

WORK HISTORY: The Claimant has worked primarily as an elementary school math teacher, and continues to do so. She has also owned a coffee shop, and had a summer job as a deck hand for a ferry boat company.

STATEMENT OF THE CASE

The above case came on to be heard before the undersigned Commissioner in St. George, South Carolina, on April 9, 2015 pursuant to notice timely and properly given to all parties of record. The Self-Insured Employer filed a Form 21 on January 27, 2015, asserting the Claimant had reached maximum medical improvement, and requesting a determination of the Claimant's permanent disability. The Claimant filed a Form 22 Answer to Request for Hearing on February 19, 2015. The Claimant asserted that she was in need of additional medical care and treatment, and requested a determination of permanent partial disability pursuant to S.C. Code Ann. section 42-9-30.

The Employer asserted that the Claimant's disability compensation should be limited to scheduled disability less than 50% of the back, pursuant to S.C. Code Ann. Section 42-9-30. The Employer requested a credit for prior workers' compensation benefits the Claimant received for an injury in Michigan involving her head and neck. The Employer asserted that the Claimant's future medical treatment relative to her admitted neck and low back injuries should be limited to that recommended by the authorized treating physician, Dr. Paul Gause. Finally, the Employer asserted that the Claimant's average weekly wage and compensation rate as calculated on the Form 20 submitted by the Employer were correct pursuant to S.C. Code Ann. Section 42-1-40.

The Claimant asserted that she should receive a PPD award in excess of 50% of the back. The Claimant further asserted that her AWW should be determined by dividing her total annual wages by 38 weeks instead of 52 weeks, because she only worked during the school year. The Claimant also requested ongoing causally related medical treatment. On her pre-hearing brief, the Claimant asserted she was owed past temporary total disability benefits for work she allegedly missed during the summer while recovering from surgery. However, the Claimant's attorney indicated at the hearing that the Claimant was no longer seeking past TTD.

During the pre-hearing conference, the Employer requested that the record be left open for the submission of Dr. Gause's deposition transcript following the hearing. Without objection from the Claimant, the undersigned Commissioner agreed to leave the record open for this purpose. The Employer submitted Dr. Gause's deposition transcript on May 7, 2015, completing the record.

EVIDENCE OF THE CASE

The Claimant is 44 years old. She began working as a middle school and 9th grade math teacher for the Employer in August, 2009. On February 3, 2011, the Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students. (Hrg. Tr. p. 28-29).

The Claimant received initial examination and treatment with Dr. James Aymond and Dr. Todd Joye. She underwent a cervical MRI on February 17, 2011, a lumbar MRI on April 6, 2011, and a repeat cervical MRI on April 6, 2011. (Clm. APA p. 1-3). She was later referred to Dr. J. Reilly Keffer at Charleston Neurosurgical Associates. Additionally, Dr. Stephen Rawe provided a surgical consultation on June 30, 2011. Based upon the MRI results, Dr. Rawe stated that the Claimant likely would not benefit from surgical intervention. He recommended continuing conservative treatment as directed by Dr. Keffer. (Clm. APA p. 30). The Claimant continued to receive conservative treatment from Dr. Keffer until September 15, 2011. She did not miss any time from work during this period of treatment with Dr. Keffer. (Clm. APA p. 4-26).

Thereafter, the Claimant moved to Arizona, and began treating with doctors there. She continues to work full time as a middle school math teacher in Arizona. She received an initial consultation with Dr. Vibhooti Dave on June 21, 2012. Dr. Dave provided conservative treatment, to include injections and a TENS unit. (Def. APA p. 1-9).

The Claimant saw Dr. Paul Gause for a surgical consultation on May 14, 2013. Dr. Gause recommended updated imaging studies of the cervical and lumbar spine. Upon review of the MRI results, Dr. Gause recommended continuing conservative treatment of the lumbar spine. With regard to the cervical spine, Dr. Gause recommended a C5-6 anterior cervical discectomy and fusion. (Def. APA p. 10-16). The Claimant underwent this procedure on July 16, 2013. (Def. APA p. 20-23). She did not miss any time from work, because the surgery occurred during the summer when she was not teaching. She continued to receive her regular paychecks. (Hrg. Tr. p. 63).

The Claimant returned to Dr. Gause on December 13, 2013, and reported that her neck was "doing well." She stated that she was having minimal radicular symptoms in her arms, and that she continued to work as a full time teacher. Dr. Gause stated that "overall, she is happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." (Def. APA p. 24). Dr. Gause performed a physical examination of the Claimant's cervical spine. He found that there were no paraspinal muscle spasms, and the Claimant had minimal bilateral trapezial tenderness. He stated that the Claimant's range of motion was "nearly full without significant pain." He concluded that the Claimant demonstrated full motor strength in the upper extremities, with normal sensation and reflexes. (Def. APA p. 25).

Dr. Gause further concluded that the Claimant had reached maximum medical improvement with regard to her cervical spine. He assigned a 7% medical impairment rating based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended continued physical therapy and consideration of acupuncture with regard to the Claimant's lumbar spine. The Claimant continued to work at modified duty and did not miss any time from work as a result of her cervical spine surgery and subsequent recovery. (Def. APA p. 26-27).

On April 4, 2014, the Claimant returned for follow up with Dr. Gause. She reported that her neck continued to do "quite well." Dr. Gause stated that the Claimant had "occasional mild numbness in the arm at night, but this is fairly minimal for her." (Def. APA p. 28). The Claimant reported increasing back and left leg symptoms. Dr. Gause concluded that the Claimant would benefit from lumbar spine surgery, as conservative treatment had failed. Dr. Gause recommended a lumbar arthrodesis at L5-S1. He

determined that a combined anterior/posterior decompression and fusion would be beneficial, due to the Claimant's relatively young age. (Def. APA p. 30). The Claimant underwent these procedures on June 2, 2014 and June 4, 2014, without complication. (Def. APA p. 35-42). The Claimant did not miss any time from work as a result of these surgeries, as they occurred during the summer when she was not working as a teacher.

The Claimant returned to work without restrictions pursuant to Dr. Gause's report dated August 22, 2014. (Def. APA p. 43). Upon her return to Dr. Gause on September 19, 2014, the Claimant reported that she was "doing quite well." The Claimant told Dr. Gause that she had some "mild residual low back pain with pain in the left buttock and occasionally left lateral thigh." (Def. APA p. 44). The Claimant was continuing to do well as of her next visit with Dr. Gause on October 17, 2014, although she did report some soreness from physical therapy and her exercise program. She continued to work full duty, with limitations on lifting. (Def. APA p. 48). Dr. Gause recommended that the Claimant continue with physical therapy, and instructed her to return in one month. (Def. APA p. 51).

On December 9, 2014, the Claimant reported to Dr. Gause that she had some muscular tenderness over the right side of her low back, but that "her pre-operative symptoms have completely resolved. She does not note any significant leg pain or weakness. She is walking one mile per day for exercise without difficulty. She has done well overall since surgery." (Def. APA p. 52).

Dr. Gause determined the Claimant reached maximum medical improvement for her lumbar spine on January 23, 2015. On that date, he stated that the Claimant continued to do "quite well." The Claimant reported no significant radicular pain in her leg. Dr. Gause stated that the Claimant's "back pain is mild at this point. She is working as a

teacher with normal duties. She is taking no pain medications.” (Def. APA p. 57). Dr. Gause performed a physical examination of the Claimant’s lumbar spine, which revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, “some increased pain” with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited mild tenderness to palpation over the SI joint. (Def. APA p. 58). Dr. Gause concluded that the Claimant reached maximum medical improvement with 7% medical impairment of the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended two years of supportive care, to include four office visits a year, physical therapy, medications, and three injections per year. He stated that the claimant would be reevaluated after two years. (Def. APA p. 62).

Dr. Gause completed a work status report on March 16, 2015. He assigned permanent restrictions of no lifting more than 40 pounds, no sitting/standing/walking for more than 60 minutes at a time without a few minutes change in position/activity, and no bending/twisting/stooping of the back more than 10 times per hour. (Clm. APA p. 42). On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant’s attorney. The questionnaire indicated that, according to the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment, the Claimant would qualify for DRE Category IV impairment ratings of 25-28% of the cervical spine and 20-23% of the lumbar spine, as a result of one level fusions at both areas of the spine. (Clm. APA p. 40).

Dr. Keffer prepared a supplemental report on March 30, 2015, in which he indicated that the Claimant’s attorney had asked him to comment on the Claimant’s

impairment rating. Dr. Keffer assigned 25% impairment relative to the Claimant's cervical spine, and 25% impairment relative to the lumbar spine. He did not examine the Claimant in his office before assigning these impairment ratings, although he spoke with her on the phone and reviewed Dr. Gause's narrative reports. (Cln. APA p. 27-28).

The Claimant was the only witness to testify at the hearing. She testified that her back injury limited her ability to sit or stand for more than 30 minutes at a time. She walks about three quarters of a mile before school each day. She stated a mile would be about the longest distance that she could walk at any one time, whereas before the injury she could walk three or four miles at a time. She wears a pedometer that indicates she walks an aggregate of about two miles each day. The Claimant testified that she avoids lifting anything from the floor that weighs more than ten pounds. She also stated that she experiences pain whenever she bends at the waist. She asserted that she can squat down to help students at their desks and return to an upright position a few times an hour. She avoids climbing, crawling, pushing, and pulling, as she experiences pain with those activities. However, she admitted that she is able to push a dust mop. (Hrg. Tr. p. 41-46).

The Claimant further testified that she was able to bike before the accident, but is now unable to ride more than one to two minutes on a stationary bike. She asserted that she is limited in her ability to perform household chores such as washing dishes, sweeping the floor, cleaning bathrooms, and doing laundry. She stated that she uses a vacuum cleaner very rarely, if at all. She also stated that before her injury she did a lot of gardening, which she asserted she is unable to do now. (Hrg. Tr. p. 46-51).

With regard to her neck, the Claimant testified that her pain was mostly gone. She stated that she does not have full range of motion. She experiences numbness in her pinky and ring fingers on her left hand. She testified that she worked with jewelry before the injury, but is now unable to do so because it causes pain in her neck. The Claimant admitted that she is able to driver herself to and from work every day. She is also able to drive as necessary to pick up and drop off her kids for school and other activities. However, she asserted that she does not drive herself more than 30 minutes at a time. She also testified that her injury has negatively impacted sexual relations with her husband, and her ability to perform activities with her children. (Hrg. Tr. p. 52-54; p. 73-74).

The Claimant testified that she was pleased with the treatment she received from Dr. Gause, and would like to continuing seeing him. She disagreed with Dr. Gause's opinion as to her work restrictions, stating that there is "no way" she could lift 40 pounds. She admitted that she did not discuss with Dr. Gause all the difficulties she referenced in her hearing testimony. (Hrg. Tr. p. 55-58).

On cross examination, the Claimant testified that she experiences some soreness in her neck after grading papers that typically goes away after a couple of days. She admitted she is not currently taking any prescription pain medication, and testified that she takes Motrin once or twice per week. (Hrg. Tr. p. 61-64). The Claimant confirmed that she sustained a prior injury to her head and neck in 1992 while working as a deck hand in Michigan. She admitted that she underwent a procedure in which the treating physician "burned" nerves in her neck. The doctor recommended that she avoid lifting more than 10 pounds. She testified that she could not remember the amount of her settlement relative to

that case, contrary to her earlier sworn deposition testimony that the settlement was "more than \$100,000." (Hrg. Tr. p. 25-28; 65-68; Clm. 8/2/11 Dep. p. 17).

The Claimant admitted that, while working for the Employer, she was paid \$40,403.01 for 52 weeks during 2010. She received a paycheck every two weeks, including during the summer when she was not working. She admitted that her income in 2011 was substantially the same as 2010. She further testified that her earnings in prior teaching jobs in Michigan were substantially similar. Her current salary in Arizona is also comparable to her pay when she was working for the Employer. She testified that she did not think she had ever earned more than \$50,000 in one year as a teacher, but could not remember for sure. The Claimant admitted that she is not paid by the hour, and that she is a salaried employee. (Hrg. Tr. 68-73).

Dr. Gause testified in a deposition on April 30, 2015. Dr. Gause confirmed that his earlier 7% impairment ratings are correct, and an accurate reflection of the claimant's impairment, pursuant to the 6th Edition of the AMA Guides. (Dr. Gause Depo. Tr. p. 16-18, 26-27). He testified that these ratings result in a combined value of 14% total impairment relative to the spine. (Id. p. 27). Dr. Gause confirmed that he has little experience with the 5th Edition. He has used the 6th Edition exclusively the entire time he has been in practice. (Id. p. 16). Dr. Gause testified that the claimant had good results from surgeries at levels C5-6 and L5-S1. He confirmed that, no matter how well a patient recovers after these procedures, the 5th Edition requires a DRE Category IV impairment rating, while the more recent 6th Edition has no such requirement for a specific classification as a result of surgery. (Id. p. 31-33). Dr. Gause further testified that, due to his inexperience with the 5th Edition, he could not comment on the claimant's exact impairment within the

DRE Category IV ranges set forth in the questionnaire he completed for the Claimant's attorney. (Id. p. 33-34, Clm. APA p. 40-41). Asked to assume her impairment would be on the low end of the Category IV ranges, Dr. Gause confirmed that the combined value of a 25% rating to the cervical spine and a 20% rating to the lumbar spine would be 40%, pursuant to the combined values table in the 5th Edition. (Dr. Gause Depo. p. 34-35). He also confirmed that the impairment ratings assigned by Dr. Keffer of 25% to the cervical spine and 25% to the lumbar spine would result in a combined value of 44% total impairment. (Id. p. 39). Finally, Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the claimant's job as a school teacher. (Clm. APA pg. 42). He confirmed that he did not recommend a special ergonomic chair, nor did he recommend that the claimant sit on an exercise ball in class. Dr. Gause did not have any independent recollection of specific problems or difficulty that the claimant has had in her personal life or activities of daily living resulting from her injuries, other than limited walking and prolonged standing. He stated that most of his discussions with the claimant were related to her work, and confirmed there were no other specific complaints indicated in his notes. (Dr. Gause Depo. p. 36-37, 40-41).

Based upon the stipulations of the parties, the testimony and evidence received and produced at the hearing, as well as my personal observation of the witnesses, the undersigned Commissioner finds the following facts based upon the preponderance of the evidence:

FINDINGS OF FACT

IT IS FOUND AS A FACT THAT:

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act;
2. The Claimant is 44 years old, and began working as a math teacher for the Employer in August, 2009;
3. The Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students on February 3, 2011;
4. The Claimant received an initial course of conservative medical treatment, primarily under Dr. J. Reilly Keffer. Thereafter, the Claimant moved to Arizona, and began treating with Dr. Vibhooti Dave and Dr. Paul Gause;
5. Dr. Gause performed a C5-6 fusion on July 16, 2013;
6. Following her cervical fusion, the Claimant reported to Dr. Gause that she was "doing well," and that she was "happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." Upon physical examination the Claimant did not have any paraspinal muscle spasms, and had minimal bi-lateral trapezial tenderness. The Claimant's range of motion was "nearly full without significant pain." The Claimant demonstrated full motor strength in the upper extremities with normal sensation and reflexes;

7. Dr. Gause indicated the Claimant had reached maximum medical improvement relative to her cervical spine on December 13, 2013. He assigned 7% medical impairment relative to the cervical spine based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;

8. Dr. Gause performed a lumbar fusion of L5-S1 on June 2, 2014 and June 4, 2014;

9. Following her lumbar spine surgery, Dr. Gause commented that the Claimant was doing "quite well." He stated that the Claimant's "back pain is mild at this time. She is working as a teacher with normal duties. She is taking no pain medications;"

10. Dr. Gause's physical examination of the Claimant following her surgery revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited mild tenderness to palpation over the SI joint;

11. Dr. Gause concluded that the Claimant reached maximum medical improvement on January 23, 2015. He assigned 7% medical impairment to the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;

12. Dr. Gause recommended 2 years of supportive care, to include 4 office visits a year, physical therapy, medications and 3 injections per year. He stated that the Claimant would be re-evaluated after 2 years;

13. In a work status report completed on March 16, 2015, Dr. Gause assigned permanent restrictions of no lifting more than 40lbs, no sitting/standing/walking for more than 60 minutes at time without a few minutes change in positions/activity and no bending/twisting/stooping of the back more than 10 times per hour. Dr. Gause confirmed in deposition testimony that these restrictions were not based upon any discussion with the Claimant's attorney, and were assigned based only on examination and discussion with the Claimant;

14. On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney, indicating that, under the 5th edition of the AMA Guides, the Claimant would qualify for DRE Category IV impairment ratings of 25- 28% of the cervical spine and 20-23% of the lumbar spine. Dr. Gause testified in deposition on April 30, 2015 that the Claimant's level of impairment remained the same at that time;

15. Dr. Keffer prepared a supplemental medical report on March 30, 2015, in which he concluded that the Claimant sustained 25% impairment of the cervical spine and 25% impairment of the lumbar spine. With regard to the cervical spine, Dr. Keffer opined that the Claimant's condition falls under DRE Category IV pursuant to Table 15-5 on page 392 of the 5th edition of the AMA Guides. In further explanation of his rating to the lumbar spine, Dr. Keffer opined the Claimant qualified for a rating under DRE Category V of the 5th Edition AMA Guides, based upon the residual symptoms the Claimant was reporting, and the fact that she actually underwent two procedures to accomplish the fusion at L5-S1. Dr. Keffer did not exam the Claimant in his office before assigning these impairment ratings, although he spoke with her on the phone and reviewed Dr. Gause's narrative reports;

16. Dr. Gause testified that his impairment ratings of 7% to the cervical spine and 7% to the lumbar spine were accurate according to the 6th edition of the AMA Guides, and that the combined values of these ratings is 14% total medical impairment relative to the spine;

17. Dr. Gause confirmed that, no matter how well a patient recovers following cervical and lumbar fusions, the 5th edition requires DRE category IV impairment ratings, while the 6th edition has no such requirement for a specific classification as a result of surgery;

18. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. However, he confirmed that he reviewed Dr. Keffer's report, and responded affirmatively to the question "Would you generally defer to somebody that uses the 5th Edition with regards their opinions on the 5th Edition?" Dr. Gause further testified that he did not have any major disagreement with Dr. Keffer's report;

19. Assuming the Claimant would receive impairment ratings on the low end of the category IV ranges, Dr. Gause testified that the combined value of these impairment ratings would be 40% relative to the spine as a whole;

20. Dr. Gause testified that the combined value of Dr. Keffer's impairment ratings would be 44%;

21. Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the Claimant's job as a school teacher;

22. The Claimant continues to work full time as a middle school math teacher, with an annual income that is substantially similar to her income while working for the Employer;

23. The Claimant testified that she continues to experience pain and discomfort in her neck and low back with any physical activity;

24. The Claimant testified to difficulty relative to riding a bike, performing household chores, gardening, having sex with her husband, and playing with her children. None of these issues are referenced in Dr. Gause's narrative reports, but he testified that the Claimant was always compliant in her medical treatment, and that, "to his knowledge," the Claimant had not exaggerated her pain complaints. He further testified that he did not have any reason to believe the Claimant was exaggerating her complaints regarding difficulty with activities in her personal life, although he acknowledge that most of their discussions were related to the Claimant's work activities;

25. The Claimant is able to drive, although she testified that she does not drive for more than 30 minutes at a time. Dr. Gause has not assigned a driving restriction;

26. The Claimant walks every day before school, and is able to walk up to one mile at a time. The Claimant admitted that her pedometer indicates she walks an aggregate of about 2 miles per day;

27. The Claimant admitted she does not use prescription medication. She takes Motrin once or twice per week;

28. The Claimant reached maximum medical improvement on January 23, 2015;

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

30. The Claimant sustained a work-related injury to her head and neck in Michigan in 1992. She admitted the treating physician recommended a 10-pound lifting restriction. The Claimant admitted in a prior deposition that she received compensation in excess of \$100,000.00 pursuant to a settlement of the prior claim, although she testified at the hearing she could not remember whether the settlement was more than \$100,000.00. The Claimant admitted that she underwent a procedure relative to her 1992 injury in which the treating physician "burned" nerves in her neck. No evidence was submitted to establish whether the treating physician assigned an impairment rating, the amount of the Claimant's wages for the prior job, or what portion of the settlement funds were paid relative to the neck injury as opposed to the head injury;

31. The Claimant worked as a teacher for 38 weeks in 2010, the four quarters preceding the quarter in which her admitted injury occurred;

32. The Employer paid the Claimant \$40,403.01 during 2010. She received a pay check every two weeks throughout the year, including during the summer when she was not working;

33. The Claimant's annual earnings as a teacher are substantially the same from one year to the next. She continues to earn an annual salary that is substantially the same as her earnings while working for the Employer;

34. The correct average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01, based upon the Claimant's total earnings of \$40,403.01 during 2010, divided by 52 weeks;

Based upon the above Statement of the Case, Evidence of the Case, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident. In this case, the Claimant sustained admitted injuries by accident to her neck and low back.
2. S.C. Code Ann. § 42-9-30(21) sets forth scheduled disability compensation for an injury to the back. Pursuant to this statute, where the claimant's loss of use of the back is forty-nine percent or less, permanent partial disability compensation is calculated based upon a percentage of 300 weeks.
3. The extent of an injured workers' disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341. In this case, the totality of the evidence including the medical records and the testimony of Dr. Gause and the Claimant, support the conclusion that the Claimant has sustained 45% permanent partial disability of the back, which totals 135 weeks of compensation.

4. 67 S.C. Code Ann. Regs. 1605(E) provides that the insurance carrier shall receive a discount for lump sum payment of a permanent disability award greater than ten weeks, unless the Commission orders otherwise. Here, the total PPD award of 135 weeks shall be reduced to 131.5304 pursuant to the current 2% per annum Net Present Value Table used by the Commission.

5. S.C. Code Ann. § 42-1-40 sets forth requirements for determining the Claimant's average weekly wage. Pursuant to this statute, the average weekly wage "must be determined by taking the Claimant's total wages for the four quarters preceding the quarter in which the accident occurred, and dividing by 52 or by the actual number of weeks for which wages were paid, whichever is less." The statute further states "[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.*" Finally, the statute states "[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."

6. The Claimant in the present case was paid during the summer months, even though her contract was for 38 weeks. The language of Section 42-1-40 requires that, for an employee working during the period of 52 weeks prior to injury, the wages should be divided by 52 or by the actual number of weeks for which wages were paid. The actual number of weeks she was paid was 52 weeks. However, this is solely the method of payment, and her pay was actually for the 38 weeks she worked or earned.

7. Each year, the Claimant's employment does not actually produce 52 weeks of continuous work history; her work was performed and earned over a period less than 52 weeks prior to injury. She is employed and contracted for each school session. She does have more than a year's history of work, but if the second method were to be used, the divisor would be 38 weeks. Thus, both methods would yield the same result, a 38 week divisor.

8. Therefore, the Employer paid the Claimant \$40,403.01 during 2010, for her work as a teacher during the 38-week school year. The Claimant did not work during the summer months, but she received a paycheck every two weeks throughout the year. Although the Claimant worked as a teacher for only 38 weeks in 2010, dividing her annual earnings by the "number of weeks and parts thereof during which the employee earned wages," i.e. the 38-week school year, would result in an average weekly wage that is *not* "fair and just to both parties." By her own admission, the Claimant's annual earnings as a teacher are substantially the same from one year to the next. Using a 38-week divisor would artificially increase the Claimant's wages by over 35%. This unfair result is an "exceptional reason" that justifies using an alternative method to calculate the Claimant's average weekly wage. Therefore, the Employer submitted an accurate Form 20 showing an average weekly wage of \$776.98, which is based upon the Claimant's total wages of \$40,403.01 divided by 52 weeks. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury.

9. The "ultimate objective" of the Act's average weekly wage statute is to fairly reflect the injured worker's probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). If the average weekly wage is increased in this case as the Claimant requests, it would overinflate the Claimant's possible future earnings. Specifically, if the Claimant's average weekly wage were \$1,063.24 as she asserts, her annual earnings would be \$55,288.48, representing an increase of about 37% over her actual annual earnings. As a result, the Claimant would be earning more while out of work on disability than she would while actually working. Such an inequitable result would be a windfall for the Claimant, and would unduly burden the Employer.

10. In Bennett, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500, the maximum income he was permitted to earn without penalty while drawing social security payments. To determine the average weekly wage in that case, the Commission divided the Claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The South Carolina Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms

of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99.

11. In this case, the Claimant proposes an AWW that would increase her earnings by over 35%. Such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings. On the other hand, the average weekly wage set forth on the Form 20 is accurate and provides a fair reflection of the Claimant's probable future earning loss. For these reasons, the Form 20 is correct, and the Claimant's average weekly wage should not be increased.

12. The Claimant argues that S.C. Code Ann. § 59-21-20 provides the appropriate divisor for the wage calculation. This statute governs mandatory minimum appropriations, and is not applicable to a determination of average weekly wage in the context of a workers' compensation case.

13. In Conyers v. New Hanover County Schools, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina's average weekly wage statute, which is substantially similar to South Carolina's law. 188 N.C.App. 253, 654 S.E.2d 745 (2008). The court held that the claimant's average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she only worked as a bus driver for 40 weeks during the school year. The claimant had worked for the school district for 12 years. Each year she worked during the school year, and was not employed during the summer. The court cites language in North Carolina's average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the three methods in the

South Carolina law, set forth above. The court concluded that dividing the claimant's total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant's wages. Such a result would not be "fair and just" because the Employer would be "unduly burdened," and the Claimant would receive a "windfall." The court further stated that "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." Therefore, the court concluded that calculating the Claimant's average weekly wage by dividing her total annual earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

14. Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). In this case, the applicable provisions of the North Carolina Workers' Compensation Act are nearly identical to South Carolina's statute. As a result, the Court of Appeals of North Carolina's interpretation of that state's statute is very persuasive and directly on point with the present case. As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. Such a result would be unduly burdensome on the

Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.

15. The Convers court also concluded that decisions from other jurisdictions as to average weekly wages for educators and other school employees "are of limited value given the unique nature of the contracts for employment in each case as well as each state's unique workers' compensation statutory scheme." Id. at 258. Such decisions from jurisdictions besides North Carolina are similarly inapplicable here. For instance, the Claimant cited Wash Dist. 50 Sch. v. Ill. Workers' Comp., 917 N.E. 2d 586, 334 Ill. Dc. 760 Ill. App. 2009) and Magnet Cove School Dist. v. Barnett, 97 S.W.3d 909, 81 Ark. App. 11 (Ark. App., 2003). I decline to follow those decisions from Illinois and Arkansas, based upon the sound reasoning set forth in Convers. Convers is uniquely applicable to the present case, because of the striking similarity North Carolina's relevant statutory language bears to the South Carolina Act.

16. The Convers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between "peak" periods and "slack" periods. The court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." To base the claimant's average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant's average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue

burden on the Employer. See also Brusnon v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee's average weekly wage where Commission had only considered claimant's wages during peak seasonal period).

17. South Carolina does not have a published appellate case that addresses the exact issue before the Commission regarding the Claimant's average weekly wage. Our Supreme Court addressed a similar issue in Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950). But the facts and circumstances of Breeland are distinguishable from the present case, and therefore Breeland provides little guidance as to the present issue before the Commission.

18. The court in Breeland determined that the employer calculated the correct average weekly wage, based upon the claimant's contracted nine-month work period. The claimant, a school bus driver, was paid by the month, and earned \$75 per month as a school bus driver during the nine-month school year. Unlike the present case, it appears the employer in Breeland agreed that only the nine-month period for which the Claimant was contracted should be considered in determining the average weekly wage. For reasons not stated in the opinion, the employer did not argue that the Claimant's average weekly wage should be determined based upon 52 weeks. The only dispute was whether the period the claimant earned wages was comprised of 39 weeks or 36 weeks. The employer asserted that an average 9-month period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon a 36-week period, because schools were closed for a total of three weeks during the nine-month school year. The Court

concluded that schools being closed for three weeks each year is not an "exceptional reason" that would justify calculating the average weekly wage based upon a period less than the full nine months the Claimant was contracted to work. The court further stated that, according to the claimant's argument, Saturdays and Sundays would also be deducted from the work period, "and the average weekly wage thereby artificially increased."

19. The Claimant argues that Breeland stands for the proposition that one cannot simply revert to the "exceptional circumstances" in an effort to circumvent the unambiguous reading of 42-1-140. Specifically, the Claimant cites the following language from Breeden: "The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, 'Where 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.'" But for reasons not set forth in the Breeland court's opinion, the issue of whether the claimant's total wages should have been divided by 52 weeks was not before the court. The court only addressed whether the total wages should have been divided by 39 weeks or 36 weeks. The court determined that exceptional reasons were not determined to justify using the 36-week period the claimant proposed.

20. Furthermore, the parties in Breeland appear to have agreed that only the nine-month period should be considered to calculate the average weekly wage, and the court did not analyze whether the resulting average weekly wage was fair to the parties. Either by virtue of the fact that the claimant perhaps did not work more than one school season, or possibly due to the contractual arrangement that provided for a monthly salary, it

does not appear that the Defendants presented this issue to the Court. For these reasons, Breeland is distinguishable from the present case. The court's decision provides little guidance as to the present issue before the Commission, other than to provide further support for the conclusion that dividing the Claimant's total annual wages by only 38 weeks would "artificially increase" the Claimant's wages. Just as our Supreme Court commented that the deduction of additional weeks in Breeland would produce an "artificially increased" average weekly wage, it would have the same result in the present matter.

21. Similarly, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), cited by the Claimant, is not applicable to the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the single commissioner correctly divided the Claimant's pay by the "actual number of weeks Bazen paid Claimant wages" to determine the compensation rate. Id.

22. Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a period the claimant did not work. The Claimant received her regular pay during the entirety of the 52 weeks in 2010. Her annual earnings as a teacher were substantially similar from one year to the next. Therefore, dividing the Claimant's total annual wages by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.

23. The Claimant further cites Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, neither of which are binding on the Commission. Both cases state that a teacher's average weekly wage should be calculated based upon dividing the claimant's total annual wages by 38 weeks. Neither court addresses whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury.

24. S.C. Code Ann. § 42-9-150 provides that a claimant with a preexisting disability "shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed." In this case, there is insufficient evidence to determine the extent of the Claimant's previous disability. In 1992, the Claimant received a settlement in Michigan for a work-related head and neck injury that occurred in Michigan. She had a 10-pound weight restriction as a result of this accident. She negotiated to a settlement in excess of \$100,000. However, there is no basis for determining what portion of the settlement funds were paid for the neck injury, and how much for the head injury. Also, the wage information for that period of time is absent from the facts presented. The evidence is simply insufficient to determine the Claimant's prior disability to her neck. As a result, any finding as to the applicability of section 42-9-150 would be purely speculative and based upon surmise and conjecture. Accordingly, the Employer is not entitled to a credit relative to the Claimant's previous compensation for a head and neck injury in 1992.

25. S.C. Code Ann. § 42-15-60 states the Claimant is entitled to ongoing causally related medical treatment that, as evidenced by expert medical evidence stated to a reasonable degree of medical certainty, will tend to lessen the Claimant's period of disability, subject to the limitations set forth below.

26. S.C. Code Ann. section 42-15-60(B)(2) requires that a hearing commissioner's order set forth medical treatment "with as much specificity as possible." Pursuant to this requirement, I hereby order that the Claimant is entitled to supportive care as stated on Dr. Gause's report dated January, 23, 2015, for two years from the date of his report. Such supportive care shall include four office visits a year, physical therapy, medications, and three injections a year, subject to Dr. Gause's recommendations. After the aforementioned two-year period, the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth on Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90.

27. S.C. Code Ann. Section 42-15-60(C) provides that, "in cases of permanent partial disability, prosthetic devices shall be furnished during the life of the injured employee or for as long as such devices are necessary." Pursuant to this requirement, the Claimant is entitled to causally related maintenance and/or replacement of retained surgical hardware for life, subject to Dr. Gause's recommendations.

Based upon the above Statement of Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED that the Claimant's average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01; it is further

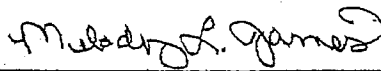
ORDERED that the Employer shall pay to the Claimant 131.5304 weeks of compensation at the rate of \$518.01 per week, for a total of \$68,134.06, representing net present value of 45% permanent partial disability or loss of use to the back, pursuant to the current 2% per annum table currently used by the Commission; it is further

ORDERED that the Employer is not entitled to a credit relative to the Claimant's prior work related injury to her head and neck in Michigan; it is further

ORDERED that the Employer shall provide the Claimant ongoing medical treatment with Dr. Paul Gause for two years from the date of Dr. Gause's January 23, 2015 report. Such treatment is limited to four office visits per year, physical therapy, medications, and three injections per year, as recommended by Dr. Gause. After the aforementioned two-year period the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, casually related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth in Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one years of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90; it is further

ORDERED that the Claimant is entitled to lifetime maintenance and/or replacement of retained surgical hardware that is, more likely than not, causally related to the original accident, subject to Dr. Gause's recommendations/opinion based upon a reasonable degree of medical certainty.

No hearing costs or penalties are assessed in this matter.



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).

September 11, 2015

By: Tamara Morris, Administrative Assistant to Commissioner James

DECISION AND ORDER
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1104105

KELLY MCPHERSON,
Claimant/Appellant,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT,
Employer,

CHARLESTON COUNTY SCHOOL DISTRICT,
Carrier,

Defendants/Respondents.

Appellate Panel Review
Columbia, South Carolina
on December 14, 2015

Appellate Panel Decision & Order filed

on February 23rd, 2016

AFFIRMED

Fred W. Riesen, Jr., Esquire, on behalf of the Claimant/Appellant

Matthew O. Riddle, on behalf of the Defendants/Respondents.

This matter was heard before the Appellate Panel of the South Carolina Workers' Compensation Commission on December 14, 2015, pursuant to a Form 30 timely filed by the Appellant on September 25, 2015. This matter was originally heard before the Single Commissioner in St. George, South Carolina on April 9, 2015, and this was an appeal from that Order filed on September 11, 2015.

The Hearing Commissioner made the following Findings of Fact, Conclusions of Law, and Order following an evidentiary hearing:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act;
2. The Claimant is 44 years old, and began working as a math teacher for the Employer in August, 2009;
3. The Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students on February 3, 2011;
4. The Claimant received an initial course of conservative medical treatment, primarily under Dr. J. Reilly Keffer. Thereafter, the Claimant moved to Arizona, and began treating with Dr. Vibhooti Dave and Dr. Paul Gause;
5. Dr. Gause performed a C5-6 fusion on July 16, 2013;
6. Following her cervical fusion, the Claimant reported to Dr. Gause that she was "doing well," and that she was "happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." Upon physical examination the Claimant did not have any paraspinal muscle spasms, and had minimal bi-lateral trapezial tenderness. The Claimant's range of motion was "nearly full without significant pain." The Claimant demonstrated full motor strength in the upper extremities with normal sensation and reflexes;

7. Dr. Gause indicated the Claimant had reached maximum medical improvement relative to her cervical spine on December 13, 2013. He assigned 7% medical impairment relative to the cervical spine based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;
8. Dr. Gause performed a lumbar fusion of L5-S1 on June 2, 2014 and June 4, 2014;
9. Following her lumbar spine surgery, Dr. Gause commented that the Claimant was doing "quite well." He stated that the Claimant's "back pain is mild at this time. She is working as a teacher with normal duties. She is taking no pain medications;"
10. Dr. Gause's physical examination of the Claimant following her surgery revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited mild tenderness to palpation over the SI joint;
11. Dr. Gause concluded that the Claimant reached maximum medical improvement on January 23, 2015. He assigned 7% medical impairment to the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;
12. Dr. Gause recommended 2 years of supportive care, to include 4 office visits a year, physical therapy, medications and 3 injections per year. He stated that the Claimant would be re-evaluated after 2 years;
13. In a work status report completed on March 16, 2015, Dr. Gause assigned permanent restrictions of no lifting more than 40lbs, no sitting/standing/walking for more than 60 minutes at time without a few minutes change in positions/activity and no bending/twisting/stooping of the back more than 10 times per hour. Dr. Gause confirmed in deposition testimony that these restrictions were not based upon any discussion with the Claimant's attorney, and were assigned based only on examination and discussion with the Claimant;

14. On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney, indicating that, under the 5th edition of the AMA Guides, the Claimant would qualify for DRE Category IV impairment ratings of 25- 28% of the cervical spine and 20-23% of the lumbar spine. Dr. Gause testified in deposition on April 30, 2015 that the Claimant's level of impairment remained the same at that time;
15. Dr. Keffer prepared a supplemental medical report on March 30, 2015, in which he concluded that the Claimant sustained 25% impairment of the cervical spine and 25% impairment of the lumbar spine. With regard to the cervical spine, Dr. Keffer opined that the Claimant's condition falls under DRE Category IV pursuant to Table 15-5 on page 392 of the 5th edition of the AMA Guides. In further explanation of his rating to the lumbar spine, Dr. Keffer opined the Claimant qualified for a rating under DRE Category V of the 5th Edition AMA Guides, based upon the residual symptoms the Claimant was reporting, and the fact that she actually underwent two procedures to accomplish the fusion at L5-S1. Dr. Keffer did not examine the Claimant in his office before assigning these impairment ratings, although he spoke with her on the phone and reviewed Dr. Gause's narrative reports;
16. Dr. Gause testified that his impairment ratings of 7% to the cervical spine and 7% to the lumbar spine were accurate according to the 6th edition of the AMA Guides, and that the combined values of these ratings is 14% total medical impairment relative to the spine;
17. Dr. Gause confirmed that, no matter how well a patient recovers following cervical and lumbar fusions, the 5th edition requires DRE category IV impairment ratings, while the 6th edition has no such requirement for a specific classification as a result of surgery;
18. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. However, he confirmed that he reviewed Dr. Keffer's report, and responded affirmatively to the question "Would you generally defer to somebody that uses the 5th Edition with regards their opinions on the 5th Edition?" Dr. Gause further testified that he did not have any major disagreement with Dr. Keffer's report;

19. Assuming the Claimant would receive impairment ratings on the low end of the category IV ranges, Dr. Gause testified that the combined value of these impairment ratings would be 40% relative to the spine as a whole;
20. Dr. Gause testified that the combined value of Dr. Keffer's impairment ratings would be 44%;
21. Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the Claimant's job as a school teacher;
22. The Claimant continues to work full time as a middle school math teacher, with an annual income that is substantially similar to her income while working for the Employer;
23. The Claimant testified that she continues to experience pain and discomfort in her neck and low back with any physical activity;
24. The Claimant testified to difficulty relative to riding a bike, performing household chores, gardening, having sex with her husband, and playing with her children. None of these issues are referenced in Dr. Gause's narrative reports, but he testified that the Claimant was always compliant in her medical treatment, and that, "to his knowledge," the Claimant had not exaggerated her pain complaints. He further testified that he did not have any reason to believe the Claimant was exaggerating her complaints regarding difficulty with activities in her personal life, although he acknowledge that most of their discussions were related to the Claimant's work activities;
25. The Claimant is able to drive, although she testified that she does not drive for more than 30 minutes at a time. Dr. Gause has not assigned a driving restriction;
26. The Claimant walks every day before school, and is able to walk up to one mile at a time. The Claimant admitted that her pedometer indicates she walks an aggregate of about 2 miles per day;
27. The Claimant admitted she does not use prescription medication. She takes Motrin once or twice per week;

28. The Claimant reached maximum medical improvement on January 23, 2015;
29. The Claimant has sustained 45% permanent partial disability of the back, as a result of her admitted neck and low back injuries;
30. The Claimant sustained a work-related injury to her head and neck in Michigan in 1992. She admitted the treating physician recommended a 10-pound lifting restriction. The Claimant admitted in a prior deposition that she received compensation in excess of \$100,000.00 pursuant to a settlement of the prior claim, although she testified at the hearing she could not remember whether the settlement was more than \$100,000.00. The Claimant admitted that she underwent a procedure relative to her 1992 injury in which the treating physician "burned" nerves in her neck. No evidence was submitted to establish whether the treating physician assigned an impairment rating, the amount of the Claimant's wages for the prior job, or what portion of the settlement funds were paid relative to the neck injury as opposed to the head injury;
31. The Claimant worked as a teacher for 38 weeks in 2010, the four quarters preceding the quarter in which her admitted injury occurred;
32. The Employer paid the Claimant \$40,403.01 during 2010. She received a pay check every two weeks throughout the year, including during the summer when she was not working;
33. The Claimant's annual earnings as a teacher are substantially the same from one year to the next. She continues to earn an annual salary that is substantially the same as her earnings while working for the Employer;
34. The correct average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01, based upon the Claimant's total earnings of \$40,403.01 during 2010, divided by 52 weeks;

Based upon the above Statement of the Case, Evidence of the Case, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident. In this case, the Claimant sustained admitted injuries by accident to her neck and low back.
2. S.C. Code Ann. § 42-9-30(21) sets forth scheduled disability compensation for an injury to the back. Pursuant to this statute, where the claimant's loss of use of the back is forty-nine percent or less, permanent partial disability compensation is calculated based upon a percentage of 300 weeks.
3. The extent of an injured workers' disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341. In this case, the totality of the evidence including the medical records and the testimony of Dr. Gause and the Claimant, support the conclusion that the Claimant has sustained 45% permanent partial disability of the back, which totals 135 weeks of compensation.
4. 67 S.C. Code Ann. Regs. 1605(E) provides that the insurance carrier shall receive a discount for lump sum payment of a permanent disability award greater than ten weeks, unless the Commission orders otherwise. Here, the total PPD award of 135 weeks shall be reduced to 131.5304 pursuant to the current 2% per annum Net Present Value Table used by the Commission.
5. S.C. Code Ann. § 42-1-40 sets forth requirements for determining the Claimant's average weekly wage. Pursuant to this statute, the average weekly wage "must be determined by taking the Claimant's total wages for the four quarters preceding the quarter in which the accident occurred, and dividing by 52 or by the actual number of weeks for which

wages were paid, whichever is less." The statute further states "[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.*" Finally, the statute states "[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."

6. The Claimant in the present case was paid during the summer months, even though her contract was for 38 weeks. The language of Section 42-1-40 requires that, for an employee working during the period of 52 weeks prior to injury, the wages should be divided by 52 or by the actual number of weeks for which wages were paid. The actual number of weeks she was paid was 52 weeks. However, this is solely the method of payment, and her pay was actually for the 38 weeks she worked or earned.
7. Each year, the Claimant's employment does not actually produce 52 weeks of continuous work history; her work was performed and earned over a period less than 52 weeks prior to injury. She is employed and contracted for each school session. She does have more than a year's history of work, but if the second method were to be used, the divisor would be 38 weeks. Thus, both methods would yield the same result, a 38 week divisor.
8. Therefore, the Employer paid the Claimant \$40,403.01 during 2010, for her work as a teacher during the 38-week school year. The Claimant did not work during the summer months, but she received a paycheck every two weeks throughout the year. Although the Claimant worked as a teacher for only 38 weeks in 2010, dividing her annual earnings by the "number of weeks and parts thereof during which the employee earned wages," i.e. the 38-week school year, would result in an average weekly wage that is not "fair and just to both parties." By her own admission, the Claimant's annual earnings as a teacher are substantially the same from one year to the next. Using a 38-week divisor would artificially increase the Claimant's wages by over

35%. This unfair result is an "exceptional reason" that justifies using an alternative method to calculate the Claimant's average weekly wage. Therefore, the Employer submitted an accurate Form 20 showing an average weekly wage of \$776.98, which is based upon the Claimant's total wages of \$40,403.01 divided by 52 weeks. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury.

9. The "ultimate objective" of the Act's average weekly wage statute is to fairly reflect the injured worker's probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). If the average weekly wage is increased in this case as the Claimant requests, it would overinflate the Claimant's possible future earnings. Specifically, if the Claimant's average weekly wage were \$1,063.24 as she asserts, her annual earnings would be \$55,288.48, representing an increase of about 37% over her actual annual earnings. As a result, the Claimant would be earning more while out of work on disability than she would while actually working. Such an inequitable result would be a windfall for the Claimant, and would unduly burden the Employer.
10. In Bennett, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500, the maximum income he was permitted to earn without penalty while drawing social security payments. To determine the average weekly wage in that case, the Commission divided the Claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The South Carolina Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings

about a result fair to the employee and to the employer.”
Bennett, 271 S.C. at 98-99.

11. In this case, the Claimant proposes an AWW that would increase her earnings by over 35%. Such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant’s future earnings. On the other hand, the average weekly wage set forth on the Form 20 is accurate and provides a fair reflection of the Claimant’s probable future earning loss. For these reasons, the Form 20 is correct, and the Claimant’s average weekly wage should not be increased.
12. The Claimant argues that S.C. Code Ann. § 59-21-20 provides the appropriate divisor for the wage calculation. This statute governs mandatory minimum appropriations, and is not applicable to a determination of average weekly wage in the context of a workers’ compensation case.
13. In Conyers v. New Hanover County Schools, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina’s average weekly wage statute, which is substantially similar to South Carolina’s law. 188 N.C.App. 253, 654 S.E.2d 745 (2008). The court held that the claimant’s average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she only worked as a bus driver for 40 weeks during the school year. The claimant had worked for the school district for 12 years. Each year she worked during the school year, and was not employed during the summer. The court cites language in North Carolina’s average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the three methods in the South Carolina law, set forth above. The court concluded that dividing the claimant’s total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant’s wages. Such a result would not be “fair and just” because the Employer would be “unduly burdened,” and the Claimant would receive a “windfall.” The court further stated that “[t]he purpose of our Workers’ Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury.” Therefore, the court concluded that calculating the Claimant’s average weekly wage by dividing her total annual

earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

14. Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). In this case, the applicable provisions of the North Carolina Workers' Compensation Act are nearly identical to South Carolina's statute. As a result, the Court of Appeals of North Carolina's interpretation of that state's statute is very persuasive and directly on point with the present case. As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.
15. The Conyers court also concluded that decisions from other jurisdictions as to average weekly wages for educators and other school employees "are of limited value given the unique nature of the contracts for employment in each case as well as each state's unique workers' compensation statutory scheme." *Id.* at 258. Such decisions from jurisdictions besides North Carolina are similarly inapplicable here. For instance, the Claimant cited Wash. Dist. 50 Sch. v. Ill. Workers' Comp., 917 N.E. 2d 586, 334 Ill. Dc. 760 Ill. App. 2009) and Magnet Cove School Dist. v. Barnett, 97 S.W.3d 909, 81 Ark. App. 11 (Ark. App., 2003). I decline to follow those decisions from Illinois and Arkansas, based upon the sound reasoning set forth in Conyers. Conyers is uniquely applicable to the present case, because of the striking

similarity North Carolina's relevant statutory language bears to the South Carolina Act.

16. The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between "peak" periods and "slack" periods. The court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." To base the claimant's average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant's average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee's average weekly wage where Commission had only considered claimant's wages during peak seasonal period).
17. South Carolina does not have a published appellate case that addresses the exact issue before the Commission regarding the Claimant's average weekly wage. Our Supreme Court addressed a similar issue in Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950). But the facts and circumstances of Breeland are distinguishable from the present case, and therefore Breeland provides little guidance as to the present issue before the Commission.
18. The court in Breeland determined that the employer calculated the correct average weekly wage, based upon the claimant's contracted nine-month work period. The claimant, a school bus driver, was paid by the month, and earned \$75 per month as a school bus driver during the nine-month school year. Unlike the present case, it appears the employer in Breeland agreed that only the nine-month period for which the Claimant was contracted should be considered in determining the average weekly wage. For reasons not stated in the opinion, the employer did not argue that the Claimant's average weekly wage should be determined based upon 52 weeks. The only dispute was whether the period the claimant earned wages was comprised of 39 weeks or 36 weeks. The employer asserted that an average 9-month

period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon a 36-week period, because schools were closed for a total of three weeks during the nine-month school year. The Court concluded that schools being closed for three weeks each year is not an "exceptional reason" that would justify calculating the average weekly wage based upon a period less than the full nine months the Claimant was contracted to work. The court further stated that, according to the claimant's argument, Saturdays and Sundays would also be deducted from the work period, "and the average weekly wage thereby artificially increased."

19. The Claimant argues that Breeland stands for the proposition that one cannot simply revert to the "exceptional circumstances" in an effort to circumvent the unambiguous reading of 42-1-140. Specifically, the Claimant cites the following language from Breeland: "The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, 'Where 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.'" But for reasons not set forth in the Breeland court's opinion, the issue of whether the claimant's total wages should have been divided by 52 weeks was not before the court. The court only addressed whether the total wages should have been divided by 39 weeks or 36 weeks. The court determined that exceptional reasons did not exist to justify using the 36-week period the claimant proposed.
20. Furthermore, the parties in Breeland appear to have agreed that only the nine-month period should be considered to calculate the average weekly wage, and the court did not analyze whether the resulting average weekly wage was fair to the parties. Either by virtue of the fact that the claimant perhaps did not work more than one school season, or possibly due to the contractual arrangement that provided for a monthly salary, it does not appear that the Defendants presented this issue to the Court. For these reasons, Breeland is distinguishable from the present case. The court's decision provides little guidance as to the present issue before the

Commission, other than to provide further support for the conclusion that dividing the Claimant's total annual wages by only 38 weeks would "artificially increase" the Claimant's wages. Just as our Supreme Court commented that the deduction of additional weeks in Breeland would produce an "artificially increased" average weekly wage, it would have the same result in the present matter.

21. Similarly, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), cited by the Claimant, is not applicable to the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the single commissioner correctly divided the Claimant's pay by the "actual number of weeks Bazen paid Claimant wages" to determine the compensation rate. Id.
22. Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a period the claimant did not work. The Claimant received her regular pay during the entirety of the 52 weeks in 2010. Her annual earnings as a teacher were substantially similar from one year to the next. Therefore, dividing the Claimant's total annual wages by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.
23. The Claimant further cites Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, neither of which are binding on the Commission. Both cases state that a teacher's average weekly wage should be calculated based upon dividing the claimant's total annual wages by 38 weeks. Neither court addresses whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury.
24. S.C. Code Ann. § 42-9-150 provides that a claimant with a preexisting disability "shall be entitled to compensation only

for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed." In this case, there is insufficient evidence to determine the extent of the Claimant's previous disability. In 1992, the Claimant received a settlement in Michigan for a work-related head and neck injury that occurred in Michigan. She had a 10-pound weight restriction as a result of this accident. She negotiated to a settlement in excess of \$100,000. However, there is no basis for determining what portion of the settlement funds were paid for the neck injury, and how much for the head injury. Also, the wage information for that period of time is absent from the facts presented. The evidence is simply insufficient to determine the Claimant's prior disability to her neck. As a result, any finding as to the applicability of section 42-9-150 would be purely speculative and based upon surmise and conjecture. Accordingly, the Employer is not entitled to a credit relative to the Claimant's previous compensation for a head and neck injury in 1992.

25. S.C. Code Ann. § 42-15-60 states the Claimant is entitled to ongoing causally related medical treatment that, as evidenced by expert medical evidence stated to a reasonable degree of medical certainty, will tend to lessen the Claimant's period of disability, subject to the limitations set forth below.
26. S.C. Code Ann. section 42-15-60(B)(2) requires that a hearing commissioner's order set forth medical treatment "with as much specificity as possible." Pursuant to this requirement, I hereby order that the Claimant is entitled to supportive care as stated on Dr. Gause's report dated January, 23, 2015, for two years from the date of his report. Such supportive care shall include four office visits a year, physical therapy, medications, and three injections a year, subject to Dr. Gause's recommendations. After the aforementioned two-year period, the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth on Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse

within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90.

27. S.C. Code Ann. Section 42-15-60(C) provides that, "in cases of permanent partial disability, prosthetic devices shall be furnished during the life of the injured employee or for as long as such devices are necessary." Pursuant to this requirement, the Claimant is entitled to causally related maintenance and/or replacement of retained surgical hardware for life, subject to Dr. Gause's recommendations.

Based upon the above Statement of Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED that the Claimant's average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01; it is further

ORDERED that the Employer shall pay to the Claimant 131.5304 weeks of compensation at the rate of \$518.01 per week, for a total of \$68,134.06, representing net present value of 45% permanent partial disability or loss of use to the back, pursuant to the current 2% per annum table currently used by the Commission; it is further

ORDERED that the Employer is not entitled to a credit relative to the Claimant's prior work related injury to her head and neck in Michigan; it is further

ORDERED that the Employer shall provide the Claimant ongoing medical treatment with Dr. Paul Gause for two years from the date of Dr. Gause's January 23, 2015 report. Such treatment is limited to four office visits per year, physical therapy, medications, and three injections per year, as recommended by Dr. Gause. After the aforementioned two-year period the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, casually related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required

to provide specific treatment or modalities other than as set forth in Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one years of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90; it is further

ORDERED that the Claimant is entitled to lifetime maintenance and/or replacement of retained surgical hardware that is, more likely than not, causally related to the original accident, subject to Dr. Gause's recommendations/opinion based upon a reasonable degree of medical certainty.

APPEAL TO APPELLATE PANEL

In her appeal to the Appellate Panel, the Claimant respectfully submits the following:

1. Did the hearing commissioner err in finding Ms. McPherson based on the totality of the evidence including the medical records and the testimony of Dr. Gause and the Claimant, support the conclusion that Ms. McPherson has sustained 45% permanent partial disability to her back when a review of the evidence of records, in conjunction with the relevant factual findings established she a) suffers considerable range of motion to her back post-accident, b) her extremely credible testimony of the things she is no longer capable of doing completely supported by her treating physician, Dr. Gause, confirms the facts that she has never exaggerated her complaints?
2. Did the hearing commissioner err in failing to take into consideration Dr. Keffer's report of 50% permanent partial impairment and the complaints Ms. McPherson set forth in discussion with her despite the fact that he has also been the Claimant's treating physician in Charleston prior to her move to Arizona and he reviewed all of the current medicals and surgical notes of Dr. Gause, the Arizona surgeon who defers to Dr. Keffer on his rating, and who preferred the 5th Edition rather than the 6th Edition AMA Guides in Ms. McPherson's case and refused to place Ms. McPherson at the lower end of the ranges he recommended on both the cervical and lumbar spine categories?
3. Did the hearing commissioner fail to take into consideration the credible testimony of Claimant when she individually set forth the various percentages of loss she had in her daily activities outside of work and testified that she has lost 75 to 80% of the loss of use of her back with regards to performing these things she was able to do prior to the injury.

4. Did the hearing commissioner err in failing to take into consideration Claimants testimony on her loss of use despite the fact that her treating physician/surgeon stated unequivocally that Ms. McPherson has always been compliant in everything he asked her to do, has always been truthful and followed his instructions, has never exaggerated anything at all, and he would have no reason to believe her testimony would be exaggerated.
5. Did the hearing commissioner fail to find that Ms. McPherson suffered a greater 50% loss of use of her back which would have increased the multiple of 300 weeks to 500 weeks despite the fact that this was the indication at the hearing the direction she was going to rule and then changed her mind over 5 months later despite Dr. Gause's deposition where he continued to support his earlier reports?
6. Did the hearing commissioner err in calculating the average weekly wage of claimant (school teacher) when she divided Claimant's total wage by 52 weeks rather than 38 weeks which was her contractual period with the school district for which her wages were earned and paid as prescribed by S.C. Code Ann 59-21-20 "Appropriation for Teacher Salaries based on 190 days"?
7. Did the hearing commissioner err by not following the clear and unambiguous language of 42-1-40 as required under *Breeland v. Colleton Schools*, 216 S.C. 147, 57 S.E.2d 63 (1950) which does not allow one to simply revert to "exceptional circumstances" to circumvent applying either of the first two methods of calculating average weekly wage under 42-1-40 which the Commissioner agreed would require utilization of a 38 week divisor?
8. Did the hearing commissioner err when she failed to consider what the employer would actually be paying and what the claimant would be receiving, i.e. total compensation rate, when analyzing what is "fair and just to both parties" and "what most nearly approximates the amount the injured employee would be earning had she not sustained the injury" in concluding a 38 week divisor would result in a windfall for the Claimant and unduly burden the Employer?

EVIDENCE OF THE CASE

The Claimant is 44 years old. She began working as a middle school and 9th grade math teacher for the Employer in August, 2009. On February 3, 2011, the Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students. (Hrg. Tr. p. 28-29). She currently lives in Arizona and continues to work as a middle school math teacher.

The Claimant admitted that, while working for the Employer, she was a salaried employee paid gross earnings of \$40,403.01 for 52 weeks during 2010. She received a paycheck every two weeks, including during the summer when she was not working. She admitted that her gross income in 2011 was substantially the same as 2010. She further testified that her earnings in prior teaching jobs in Michigan were substantially similar. Her current salary in Arizona is also comparable to her pay when she was working for the Employer. She testified that she did not think she had ever earned more than \$50,000.00 in one year as a teacher. (Hrg. Tr. 68-73).

A. Medical Treatment

After her February 3, 2011 injury, the Claimant received initial examination and treatment with several doctors in Charleston before moving to Arizona. She underwent a cervical MRI on February 17, 2011, a lumbar MRI on April 6, 2011, and a repeat cervical MRI on April 6, 2011. (Clm. APA p. 1-3). Dr. Stephen Rawe reviewed the MRI results, and concluded that the Claimant was not a surgical candidate at that time. He recommended continuing conservative treatment as directed by Dr. J. Reilly Keffer. (Clm. APA p. 30). The Claimant continued to receive conservative treatment from Dr. Keffer until September 15, 2011. She did not miss any time from work during this period of treatment with Dr. Keffer. (Clm. APA p. 4-26).

Thereafter, the Claimant moved to Arizona, and began treating with doctors there. She received an initial consultation with Dr. Vibhooti Dave on June 21, 2012. Dr. Dave provided conservative treatment, to include injections and a TENS unit. (Def. APA p. 1-9).

The Claimant saw Dr. Paul Gause for a surgical consultation on May 14, 2013. Upon review of updated MRI results, Dr. Gause recommended continuing conservative

treatment of the lumbar spine. With regard to the cervical spine, Dr. Gause recommended a C5-6 anterior cervical discectomy and fusion. (Def. APA p. 10-16). The Claimant underwent this procedure on July 16, 2013. (Def. APA p. 20-23). She did not miss any time from work, because the surgery occurred during the summer when she was not teaching. She continued to receive her regular paychecks during her recovery from surgery. (Hrg. Tr. p. 63).

Based upon Dr. Gause's narrative reports, the Claimant had an excellent recovery from this procedure. The Claimant returned to Dr. Gause on December 13, 2013, and reported that her neck was "doing well." She stated that she was having minimal radicular symptoms in her arms, and that she continued to work full time as a teacher. Dr. Gause stated that "overall, she is happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." (Def. APA p. 24). Dr. Gause performed a physical examination of the Claimant's cervical spine. He found that there were no paraspinal muscle spasms, and the Claimant had minimal bilateral trapezial tenderness. He stated that the Claimant's range of motion was "nearly full without significant pain." He concluded that the Claimant demonstrated full motor strength in the upper extremities, with normal sensation and reflexes. (Def. APA p. 25).

Dr. Gause further concluded that the Claimant had reached maximum medical improvement with regard to her cervical spine. He assigned a 7% medical impairment rating based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended continued physical therapy and consideration of acupuncture with regard to the Claimant's lumbar spine. The Claimant continued to work at

modified duty, and did not miss any time from work as a result of her cervical spine surgery and subsequent recovery. (Def. APA p. 26-27).

On April 4, 2014, the Claimant returned for follow up with Dr. Gause. She reported that her neck continued to do "quite well." Dr. Gause stated that the Claimant had "occasional mild numbness in the arm at night, but this is fairly minimal for her." (Def. APA p. 28). The Claimant reported increasing back and left leg symptoms. Dr. Gause concluded that the Claimant would benefit from lumbar spine surgery, as conservative treatment had failed. Dr. Gause recommended a lumbar arthrodesis at L5-S1. He determined that a combined anterior/posterior decompression and fusion would be beneficial, due to the Claimant's relatively young age. (Def. APA p. 30). The Claimant underwent these procedures on June 2, 2014 and June 4, 2014, without complication. (Def. APA p. 35-42). The Claimant did not miss any time from work as a result of these surgeries, as they occurred during the summer when she was not working as a teacher. As with her previous surgery, she continued to receive her regular paychecks during her recovery.

Dr. Gause's reports indicate that the Claimant had an excellent recovery from the lumbar procedure. The Claimant returned to work without restrictions pursuant to Dr. Gause's report dated August 22, 2014. (Def. APA p. 43). Upon her return to Dr. Gause on September 19, 2014, the Claimant reported that she was "doing quite well." The Claimant told Dr. Gause that she had some "mild residual low back pain with pain in the left buttock and occasionally left lateral thigh." (Def. APA p. 44). The Claimant was continuing to do well as of her next visit with Dr. Gause on October 17, 2014, although she did report some soreness from physical therapy and her exercise program. She continued to work full duty,

with limitations on lifting. (Def. APA p. 48). Dr. Gause recommended that the Claimant continue with physical therapy, and instructed her to return in one month. (Def. APA p. 51).

On December 9, 2014, the Claimant reported to Dr. Gause that "her pre-operative symptoms [had] completely resolved. She does not note any significant leg pain or weakness. She is walking one mile per day for exercise without difficulty. She has done well overall since surgery." (Def. APA p. 52).

Dr. Gause determined the Claimant reached maximum medical improvement for her lumbar spine on January 23, 2015. On that date, he stated that the Claimant continued to do "quite well." The Claimant reported no significant radicular pain in her leg. Dr. Gause stated that the Claimant's "back pain is mild at this point. She is working as a teacher with normal duties. She is taking no pain medications." (Def. APA p. 57). Dr. Gause performed a physical examination of the Claimant's lumbar spine, which revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited only mild tenderness to palpation over the SI joint. (Def. APA p. 58). Dr. Gause concluded that the Claimant reached maximum medical improvement with 7% medical impairment of the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended two years of supportive care, to include four office visits a year, physical therapy, medications, and three injections per year. He stated that the claimant would be reevaluated after two years. (Def. APA p. 62).

Dr. Gause completed a work status report on March 16, 2015. He assigned permanent restrictions of no lifting more than 40 pounds, no sitting/standing/walking for

more than 60 minutes at a time without a few minutes change in position/activity, and no bending/twisting/stooping of the back more than 10 times per hour. (Clm. APA p. 42). On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney. The questionnaire indicated that, according to the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment, the Claimant would qualify for DRE Category IV impairment ratings of 25-28% of the cervical spine and 20-23% of the lumbar spine, as a result of a one-level fusion at both areas of the spine. (Clm. APA p. 40).

Dr. Keffer prepared a supplemental report on March 30, 2015, in which he indicated that the Claimant's attorney had asked him to comment on the Claimant's impairment rating. Dr. Keffer assigned impairment ratings based upon the 5th edition of the AMA Guides of 25% relative to the Claimant's cervical spine, and 25% relative to the lumbar spine. He did not examine the Claimant before assigning these impairment ratings, and in fact has not seen her since she moved to Arizona in 2011. (Clm. APA p. 27-28).

B. The Claimant's Hearing Testimony

The Claimant was the only witness to testify at the hearing. She admitted she is not currently taking any prescription pain medication, and testified that she takes Motrin once or twice per week. (Hrg. Tr. p. 61-64). The Claimant admitted that she is able to drive herself to and from work every day. She is also able to drive as necessary to pick up and drop off her children for school and other activities. (Hrg. Tr. p. 52-54).

The Claimant also testified at length regarding numerous limitations and problems that do not appear in Dr. Gause's narrative reports, and in some instances directly contradict his reports. Her testimony regarding her physical limitations also conflicted with Dr. Gause's assigned restrictions. The Claimant testified that she was pleased with the

treatment she received from Dr. Gause, and would like to continue seeing him. Nevertheless, she disagreed with Dr. Gause's opinion as to her work restrictions, stating that there is "no way" she could lift 40 pounds. The Claimant testified that she avoids lifting anything from the floor that weighs more than ten pounds (the Claimant had previously received a permanent 10-pound weight lifting restriction as a result of a prior work-related injury). She said that her back injury limited her ability to sit or stand for more than 30 minutes at a time. She also stated that she experiences pain whenever she bends at the waist. She asserted that she can squat down to help students at their desks and return to an upright position a few times an hour. She avoids climbing, crawling, pushing, and pulling, as she experiences pain with those activities. However, she admitted that she is able to push a dust mop. (Hrg. Tr. p. 41-46).

Contrary to Dr. Gause's report stating unequivocally that the Claimant was "walking one mile per day for exercise without difficulty," the Claimant testified that she walked only up to three quarters of a mile before school each day. She stated a mile would be about the longest distance that she could walk at any one time. The Claimant admitted her pedometer shows she walks an aggregate of about two miles each day.

The Claimant further testified regarding her difficulty riding a bike, performing household chores, gardening, playing with her children, and having sex with her husband. (Hrg. Tr. p. 46-51). With regard to her neck, the Claimant admitted that her pain was mostly gone. She testified that she experiences some soreness in her neck after grading papers that typically goes away after a couple of days. She stated that she does not have full range of motion. She experiences numbness in her pinky and ring fingers on her left hand. She testified that she worked with jewelry before the injury, but is now unable to do so. The

Claimant admitted that she did not discuss with Dr. Gause any of these various difficulties referenced in her hearing testimony. (Hrg. Tr. p. 55-58).

The Claimant confirmed that she sustained a prior injury to her head and neck in 1992 while working as a deck hand in Michigan. She admitted that she underwent a procedure in which the treating physician "burned" nerves in her neck. The doctor recommended that she avoid lifting more than 10 pounds. She testified that she could not remember the amount of her settlement in that case, contrary to her earlier sworn deposition testimony that the settlement was "more than \$100,000." (Hrg. Tr. p. 25-28; 65-68; Clm. 8/2/11 Dep. p. 17).

C. Dr. Gause's Deposition Testimony

Contrary to the Claimant's testimony, Dr. Gause testified in a deposition on April 30, 2015 that he was unaware of any problems or difficulty the Claimant had in her daily life as a result of her injuries, other than limited walking and issues with prolonged standing. (Dr. Gause Depo. p. 40-41). He confirmed that his earlier 7% impairment ratings are correct, and an accurate reflection of the Claimant's impairment, pursuant to the 6th Edition of the AMA Guides. (Dr. Gause Depo. Tr. p. 16-18, 26-27). He testified that these ratings result in a combined value of 14% total impairment relative to the spine. (Id. p. 27).

Dr. Gause further testified that the claimant had good results from surgeries at levels C5-6 and L5-S1. He confirmed that, no matter how well a patient recovers after these procedures, the 5th Edition of the AMA Guides requires a DRE Category IV impairment rating, while the more recent 6th Edition has no such requirement for a specific classification as a result of surgery. (Id. p. 31-33). Dr. Gause confirmed that the regional impairment ratings Dr. Keffer assigned based upon the 5th Edition of 25% to the cervical spine and 25%

to the lumbar spine would result in a combined value of 44% total impairment relative to the spine as a whole, according to the combined values chart set forth in the Guides. (*Id.* p. 39). Finally, Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the claimant's job as a school teacher. (Cln. APA pg. 42).

STANDARD OF REVIEW

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1983), weigh the evidence as presented at the initial hearing, and if grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

LEGAL ANALYSIS

A. Average Weekly Wage Calculation

i. The "fairness" analysis required by S.C. Code Ann. section 42-1-40

Computation of the average weekly wage is controlled by S.C. Code Ann. section 42-1-40, which provides that the claimant's average weekly wage must be calculated by taking the Claimant's total wages for the four quarters preceding the quarter in which the accident occurred and dividing "by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." The statute further states "[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.*" (Emphasis added). Finally, the statute requires that "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such

other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.”

In this case, exceptional circumstances require that the Claimant’s average weekly wage be calculated by dividing her total earnings during 2010 by 52 weeks. The Claimant was a salaried employee paid \$40,403.01 over 52 weeks during 2010. She did not work during the summer months. Nevertheless, using a 38-week divisor to calculate the average weekly wage would artificially inflate the Claimant’s actual annual earnings. A 38-week divisor would result in an average weekly wage of \$1,063.24. Instead of accurately reflecting the Claimant’s actual earnings, this average weekly wage reflects annual earnings of \$55,288.48 ($52 \times \$1,063.24 = \$55,288.48$). Therefore, under this calculation, the Claimant would have the same average weekly wage as an employee with an annual salary of \$55,228.48, over \$15,000.00 more than what the Claimant admitted she actually earns in any given year as a teacher. This 35% increase would be a windfall to the Claimant and would unfairly punish the Employer.

The Claimant testified that her gross annual earnings were about \$40,000.00 every year during the years before, during, and after her injury in this case. It stands to reason that her average weekly wage for workers’ compensation purposes should reflect this trend in her actual earnings. As the South Carolina Supreme Court stated in Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978), the “ultimate objective” of the Act’s average weekly wage statute is to fairly reflect the injured worker’s probable future earning loss. In Bennett, a case that is analogous to the present case, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500,

the maximum income he was permitted to earn without penalty while drawing Social Security payments. To determine the average weekly wage in that case, the Commission divided the claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The Supreme Court reversed the Commission and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99.

Similarly, in this case, the Claimant also works less than 52 weeks but dividing her total earnings by the actual number of weeks worked would artificially increase her average weekly wage. The Claimant proposes an average weekly wage that would reflect an increase in her earnings of over 35%. She admitted that her annual gross income in any given year as a teacher is in the range of \$40,000.00. (Hrg. Tr. 68-73). However, according to the Claimant's calculation, she would have the same average weekly wage as a person who earns \$55,228.48 in a year, which is over \$15,000.00 more than the Claimant's actual earnings in any given year. As in Bennett, such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings.

On the other hand, dividing the Claimant's total earnings by 52 weeks is fair and provides an accurate reflection of the Claimant's probable future earning loss.

Furthermore, although Bennett is analogous to the present case, there is no South Carolina appellate court that directly addresses the proper calculation of a teacher's average weekly wage. As a result, the Single Commissioner appropriately considered a North Carolina decision, Conyers v. New Hanover County Schools, 188 N.C.App. 253, 654 S.E.2d 745 (2008), to inform her interpretation of the Act's average weekly wage statute.

Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spooone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). In this case, the applicable provisions of the North Carolina Workers' Compensation Act are almost identical to South Carolina's statute. As a result of the striking similarity between the applicable statutes, the Court of Appeals of North Carolina's interpretation of that state's law is very persuasive and directly on point with the present case. Therefore, the Single Commissioner's decision was properly informed by the North Carolina decision, and her Order should be affirmed.

In Conyers, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina's average weekly wage statute.

which is substantially similar to South Carolina's law. The court held that the claimant's average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she worked as a bus driver for only 40 weeks during the school year. The claimant in Convers had worked for the school district for 12 years. Every year, she only worked during the school year, and was not employed during the summer. The court cites language in North Carolina's average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the methods in the South Carolina law, set forth above. The court concluded that dividing the claimant's total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant's wages. Such a result would not be "fair and just" because the Employer would be "unduly burdened," and the Claimant would receive a "windfall." The court further stated that "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." Therefore, the court concluded that calculating the Claimant's average weekly wage by dividing her total annual earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

As in Convers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. The average weekly wage that would result from such a calculation would be the same as an employee who earns over \$55,000 a year. To the contrary, the Claimant testified that she earned about \$40,000.00 in the years before and after her injury, and continues to earn a comparable annual salary in her work as a teacher.

Therefore, a 38-week divisor would artificially inflate the Claimant's average weekly wage by over 35%. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.

The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between "peak" periods and "slack" periods. The court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." To base the claimant's average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant's average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also Brusnon v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee's average weekly wage where Commission had only considered claimant's wages during peak seasonal period).

The Claimant asserts that using a 38-week divisor would actually not produce a windfall to the claimant. This Panel disagrees. The Claimant's proposed compensation rate would result in annual payments over 90% of her actual annual gross earnings. On the other hand, the total amount the Claimant would receive in one year of workers' compensation benefits using a 52-week divisor would be exactly two thirds of her pre-injury annual salary of \$40,403.01. This result is precisely what is required by regulation 67-1603 ("Calculating

the Compensation Rate”) and the Commission’s Form 20 (“the general rule for calculating the compensation rate is to multiply average weekly wage by .6667”). The Claimant testified that her typical annual salary as a school teacher is in the range of \$40,000.00. A compensation rate that is 2/3 of this amount is exactly what the Act and regulations require. Accordingly, the Single Commissioner correctly held that the Claimant’s proposed compensation rate would result in a significant windfall for the Claimant, and her order must be affirmed.

The Claimant further argues that her proposed average weekly wage would not be an unfair burden to the Employer because the Employer’s total annual payments for workers’ compensation benefits would be lower than the Claimant’s actual gross earnings. However, this circumstance is of no consequence whatsoever to the fairness analysis required by section 42-1-40. As indicated above, the Act states that the compensation rate is two-thirds of the average weekly wage. In every workers’ compensation case, therefore, a claimant’s compensation rate is two-thirds of her actual gross earnings. As a result, every employer in every workers’ compensation claim pays less to a claimant in disability compensation than it pays in actual gross wages. To the contrary, under the Claimant’s proposed calculation, the Employer would be paying a compensation rate that is 90% of the Claimant’s actual annual earnings. Such a result is directly counter to the Act. It would unfairly punish the Employer because the Employer would be paying at a rate that is higher than that which accurately reflects the Claimant’s actual earnings were it not for the injury.

ii. South Carolina law does not mandate a 38-week divisor in this case

Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950), does not mandate calculating the Claimant’s average weekly wage based upon a 38-week divisor. To the

contrary, this case supports the conclusion that the average weekly wage would be artificially increased by using a 38-week divisor. The legal issue disputed in the present case was not before the court in Breeland. Therefore, the holding in Breeland has no bearing on whether it is just and fair to calculate the average weekly in this case based upon 38 weeks.

The limited facts and circumstances presented in Breeland were much different from the present case. The claimant in Breeland died in an accident arising out of his employment as a school bus driver. The court's written opinion does not include any information about the accident itself, including when it occurred. The opinion states only that the claimant was paid a monthly salary of \$75 during the nine month school year. There is no evidence presented as to how long the Claimant worked as a bus driver before his accident, what the claimant did during the months he was not working for the employer, or what the Claimant's typical annual earnings were. Those facts and circumstances were not relevant to the very narrow disputed issue before the court. Therefore, Breeland provides very little or no guidance to the Commission as to the issue in the present case.

The only issue in dispute in Breeland was whether the Claimant's nine-month work period consisted of 39 or 36 weeks. The employer asserted that an average 9-month period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon 36 weeks (thereby increasing his average weekly wage), because schools were closed for a total of three weeks during the nine-month school year. For reasons not set forth in the opinion, the Court concluded that using the 39-week period, in that particular case, was fair and just. Furthermore, the court determined that a school

being closed for three weeks each year is not an "exceptional reason" that would justify an alternative average weekly wage calculation.

In this case, however, using a 38-week divisor is not fair, and there are exceptional circumstances that warrant using an alternative average weekly wage calculation. Limiting the relevant period for average weekly wage determination in this case to the 38-week school year would artificially increase the Claimant's earnings, would be a windfall to the Claimant, and would unfairly punish the Employer. The fact that the Claimant receives an annual salary for her work as a teacher, the similarity of her annual earnings from year to year, and the large disparity between the Claimant's actual annual earnings every year and the income that is reflected by using a 38-week divisor, are all exceptional circumstances that justify using an alternative method to calculate the average weekly wage.

Furthermore, the Breeland decision actually supports the conclusion that discounting the summer months from the average weekly wage calculation would artificially inflate the Claimant's wages. Just as the court in Breeland commented that the average weekly wage would be "artificially increased" by deducting the three vacation weeks from the Claimant's period of employment, so would the Claimant's average weekly wage be artificially increased in this case by deducting the summer months from consideration. For these reasons, Breeland does not mandate the use of a 38-week divisor to determine the average weekly wage in every case involving a public school employee. Breeland did not create precedent that prevents this Panel from properly considering for guidance the Convers decision out of North Carolina. Breeland is a very fact specific case with little application to the present matter, other than to support the conclusion that discounting the summer months

would artificially increase the average weekly wage. Therefore, this Panel concludes that Breeland does not mandate a 38-week divisor in this case.

Likewise, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), does not mandate a 38-week divisor. Bazen is factually distinguishable from the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the Claimant's pay in that particular case should be divided by the "actual number of weeks Bazen paid Claimant wages" to determine the average weekly wage and compensation rate. Id.

Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a period the claimant did not work. The Claimant received her regular salary during the entirety of the 52 weeks in 2010. Her annual salary as a teacher was substantially similar from one year to the next. In Bazen, dividing the claimant's pay the actual number of weeks he worked produced an accurate approximation of his average weekly wages and reflected his expected annual earnings of \$30,000.00. But in this case, dividing the Claimant's wages by 38 weeks would artificially inflate her earnings, would be a windfall to the Claimant, and would unfairly punish the Employer. Instead, dividing the Claimant's total annual wages in this case by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.

Therefore, the Single Commissioner correctly determined that Bazen does not apply to mandate a similar result in the present case, and her Order should be affirmed.

S.C. Code Ann. section 59-21-20, which governs mandatory minimum appropriations by the state legislature, likewise does not mandate a 38-week divisor. This statute is not applicable to a determination of average weekly wage in the context of a workers' compensation case. Section 59-21-20 provides that the legislature shall make sufficient appropriations to pay salaries of all public school teachers on the basis of 190 days. However, this statute has no bearing on the proper determination of the Claimant's average weekly wage under the South Carolina Workers' Compensation Act. The appropriations statute merely ensures that teachers are paid for the work they perform during the school year. There is no dispute that the claimant worked for 38 weeks during the school year, and that she did not work during the summer months. However, section 59-21-20 does not mandate an average weekly wage calculation that undermines the Act's requirement that the average weekly wage accurately reflect the Claimant's earnings were it not for the injury. Dividing the Claimant's total annual salary by only 38 weeks would artificially inflate her earnings and result in a windfall to the Claimant. The appropriations statute does not mandate such an inequitable result.

S.C. Code Ann. section 9-1-840 also does not support an award that runs counter to the Act's fairness requirement. This statute provides that a public school employee's service "for a regular school year in any district shall be equivalent to one year's service" for retirement purposes. If anything, the presumption that the Claimant's work for 38 weeks is equal to one year for retirement purposes actually supports a 52-week divisor in this case. If the Claimant's actual work during the school year is the equivalent to one year for

retirement purposes, then her earnings for that work are appropriately considered as an annual salary for purposes of calculating the average weekly wage. Accordingly, S.C. Code Ann. section 9-1-840 does not mandate a 38-week divisor.

Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, are not binding on this Panel, and do not mandate the Claimant's proposed average weekly wage. These cases state that the average weekly wage in each case should be calculated based upon dividing the claimant's total annual wages by 38 weeks. However, neither court addresses whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury. Therefore, this Panel declines to follow this non-binding precedent.

iii. Statutory construction and interpretation

This Panel declines to follow the Claimant's statutory construction argument, as it ignores the fairness provisions of S.C. Code Ann. section 42-1-40. The Claimant argues that a 1996 amendment to section 42-1-40 somehow reaffirmed the holding in Breeden and mandates the use of a 38-week divisor to determine average weekly wage in this case. The amendment referenced by the Claimant's attorney had no impact whatsoever on the statute's provisions that permit using an alternative method of calculating the average weekly wage. Dividing the Claimant's total wages by 52 weeks produces a result that is fair and just to the parties, and accurately reflects the Claimant's earnings were it not for the injury. The statutory amendment referenced by the Claimant has no bearing on this result.

The Claimant further asserts that using a 52-week divisor to calculate the average weekly wage in this case would "circumvent the statute." This argument is likewise without

merit. This Panel concludes that dividing the Claimant's wages by the actual number of weeks she worked during the four quarters prior to the date of injury would produce an artificially inflated average weekly wage in this particular case. "Exceptional circumstances" in this case therefore permit using an alternative method that accurately reflects the Claimant's actual earnings. The fact that the "alternative method" that is appropriate in this particular case happens to be the same as the standard 52-week method is of no consequence. This coincidence does not require this Panel to order an inequitable average weekly wage and compensation rate that would create a windfall for the Claimant. Using a 52-week divisor is the best available method for calculating a fair and accurate average weekly wage in this particular case, even though the Claimant worked less than 52 weeks.

Finally, using a 52-week divisor in this case does not render portions of section 42-1-40 moot, contrary to the Claimant's assertion. The Claimant contends that, in view of the Single Commissioner's decision, the legislature could have drafted the statute to include only two methods of calculation, one method based on 52 weeks, and a second method based on exceptional circumstances. This argument is also without merit. In the vast majority of cases, including those where the claimant is employed for less than a year prior to an injury, the average weekly wage can be fairly and accurately calculated by dividing the total earnings by the actual number of weeks worked. For example, considering only the actual number of weeks worked would be appropriate for a claimant who is hired in January and expected to work 12 months a year, but is injured in March after working only three months. In that scenario, dividing the claimant's total earnings by the actual number of weeks worked would present a fair approximation of her expected annual earnings.

To the contrary, the fact that the Claimant in this case typically only works during the school year, and has a substantially similar annual income year after year, presents an "exceptional circumstance," in which a 52-week divisor is appropriate, even though the claimant worked for less than 52 weeks. Contrary to the Claimant's argument, the application of the statute's fairness provisions in these unique circumstances does not render the other provisions of the statute moot. It is simply the correct result for this particular case.

B. Permanent Partial Disability

The Single Commissioner's 45% PPD award is founded on and supported by the great weight of the preponderance of the evidence in the record. A Decision and Order of a Single Commissioner must be affirmed if it is supported by a preponderance of the evidence in the record, and is not based on "surmise, conjecture, or speculation." Linen v. Ruscon Construction Co., 286 S.C. 67, 70, 332 S.E. 2d 211, 212 (1985). Additionally, the Full Commission should give weight to the Single Commissioner's decision, based upon the fact that the Full Commission does not have the opportunity or benefit of observing the witnesses, as does the Single Commissioner. Green v. Raybestos - Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967). Here, the Single Commissioner's disability award is not impacted by surmise or conjecture, but instead is supported by a preponderance of the reliable evidence in the record, and therefore is affirmed.

The extent of an injured worker's disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all

the evidence, including both lay and expert testimony. Id. at 341. In this case, the preponderance of the evidence, including the medical records, the testimony of Dr. Gause, the Claimant's testimony, and the Single Commissioner's observation of the Claimant at the hearing, firmly support the Single Commissioner's conclusion that the Claimant has sustained 45% permanent partial disability of the back.

The claimant is 44 years old. By all accounts, she had an excellent recovery from single-level fusions at C5-6 and L5-S1. She continues to work full time as a school teacher. The claimant is able to drive to and from work, and as needed to take her children to various activities. Dr. Gause's medical narrative reports state that the claimant walks a mile a day before school (although the Claimant disputed the length of her walks in her testimony at the hearing). The claimant testified that, according to her pedometer, she walks on average an additional two miles throughout the course of her normal activities during the day. The claimant does not take any prescription pain medication, and takes Motrin only once or twice a week. The Claimant's testimony at the hearing regarding difficulties in her home life and activities of daily living is unsubstantiated by the medical evidence.

Additionally, the 14% combined impairment rating assigned by the authorized treating physician is accurate and provides a reliable indicator as to the Claimant's actual functional capacity. The fact that this rating is based upon the 6th edition of the AMA Guides (as opposed to the 5th edition) is of no consequence to the validity of this rating in support of the Single Commissioner's disability award. There is no law or regulation in South Carolina that mandates a preferential view of one version of the AMA Guides over the other.

Dr. Gause, the authorized treating physician, confirmed in his sworn deposition testimony that his 14% impairment rating is correct under the 6th Edition of the AMA Guides. He testified that his rating is an accurate reflection of the claimant's actual impairment based upon the subjective history the claimant gave Dr. Gause, and his physical examination of the claimant, which indicated an excellent recovery from surgery and no verifiable radicular symptoms. To the contrary, the 5th Edition of the AMA Guides requires a DRE Category IV impairment rating for any patient who undergoes a fusion surgery, no matter how well a patient recovers after this procedure. Dr. Gause testified that the more recent 6th Edition has no such requirement for a specific classification as a result of a particular surgery. Therefore, Dr. Gause's impairment ratings assigned pursuant to the 6th edition are an accurate and reliable reflection of the Claimant's actual functional ability.

This panel gives less weight to the March 30, 2015 report of Dr. J. Reilly Keffer. Dr. Keffer last saw the claimant on December 15, 2011, over three years before he prepared his report. He never saw the Claimant in person after she underwent the surgeries performed by Dr. Gause. Dr. Keffer did not perform a physical examination of the Claimant before assigning his impairment ratings. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. He confirmed that the combined value of Dr. Keffer's impairment ratings would be 44% relative to the spine as a whole, according to the combined values chart in the 5th edition of the Guides. He further testified that, assuming the Claimant would receive impairment ratings on the low end of the DRE category IV ranges, the combined value of these impairment ratings would be 40% relative to the spine as a whole.

Based upon a review of the foregoing, and by way of a full affirmation of the Findings and Conclusions of the Hearing Commissioner, the undersigned Panel enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

IT IS FOUND AS A FACT THAT:

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act;
2. The Claimant is 44 years old, and began working as a math teacher for the Employer in August, 2009;
3. The Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students on February 3, 2011;
4. The Claimant received an initial course of conservative medical treatment, primarily under Dr. J. Reilly Keffer. Thereafter, the Claimant moved to Arizona, and began treating with Dr. Vibhooti Dave and Dr. Paul Gause;
5. Dr. Gause performed a C5-6 fusion on July 16, 2013;
6. Following her cervical fusion, the Claimant reported to Dr. Gause that she was "doing well," and that she was "happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." Upon physical examination the Claimant did not have any paraspinal muscle spasms, and had minimal bi-lateral trapezial tenderness. The Claimant's range of motion was "nearly full without significant pain." The Claimant demonstrated full motor strength in the upper extremities with normal sensation and reflexes;
7. Dr. Gause indicated the Claimant had reached maximum medical improvement relative to her cervical spine on December 13, 2013. He assigned 7% medical

impairment relative to the cervical spine based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;

8. Dr. Gause performed a lumbar fusion of L5-S1 on June 2, 2014 and June 4, 2014;

9. Following her lumbar spine surgery, Dr. Gause commented that the Claimant was doing "quite well." He stated that the Claimant's "back pain is mild at this time. She is working as a teacher with normal duties. She is taking no pain medications;"

10. Dr. Gause's physical examination of the Claimant following her surgery revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited mild tenderness to palpation over the SI joint;

11. Dr. Gause concluded that the Claimant reached maximum medical improvement on January 23, 2015. He assigned 7% medical impairment to the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment;

12. Dr. Gause recommended 2 years of supportive care, to include 4 office visits a year, physical therapy, medications and 3 injections per year. He stated that the Claimant would be re-evaluated after 2 years;

13. In a work status report completed on March 16, 2015, Dr. Gause assigned permanent restrictions of no lifting more than 40lbs, no sitting/standing/walking for more than 60 minutes at time without a few minutes change in positions/activity and no bending/twisting/stooping of the back more than 10 times per hour. Dr. Gause confirmed in

deposition testimony that these restrictions were not based upon any discussion with the Claimant's attorney, and were assigned based only on examination and discussion with the Claimant;

14. On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney, indicating that, under the 5th edition of the AMA Guides, the Claimant would qualify for DRE Category IV impairment ratings of 25- 28% of the cervical spine and 20-23% of the lumbar spine. Dr. Gause testified in deposition on April 30, 2015 that the Claimant's level of impairment remained the same at that time;

15. Dr. Keffer prepared a supplemental medical report on March 30, 2015, in which he concluded that the Claimant sustained 25% impairment of the cervical spine and 25% impairment of the lumbar spine. Dr. Keffer last examined the Claimant three years before preparing this report. He did not examine the Claimant in his office before assigning these impairment ratings, although he spoke with her on the phone and reviewed Dr. Gause's narrative reports;

16. Dr. Gause testified that his impairment ratings of 7% to the cervical spine and 7% to the lumbar spine were accurate according to the 6th edition of the AMA Guides, and that the combined values of these ratings is 14% total medical impairment relative to the spine as a whole;

17. Dr. Gause confirmed that, no matter how well a patient recovers following cervical and lumbar fusions, the 5th edition requires DRE category IV impairment ratings, while the 6th edition has no such requirement for a specific classification as a result of surgery;

18. Dr. Gause stated that he could not comment on the Claimant's exact impairment within the DRE category IV ranges, due to his inexperience with the 5th edition of the AMA Guides. However, he confirmed that he reviewed Dr. Keffer's report, and responded affirmatively to the question "Would you generally defer to somebody that uses the 5th Edition with regards their opinions on the 5th Edition?" Dr. Gause further testified that he did not have any major disagreement with Dr. Keffer's report;

19. Assuming the Claimant would receive impairment ratings on the low end of the DRE category IV ranges set forth in the 5th edition of the Guides, Dr. Gause testified that the combined value of these impairment ratings would be 40% relative to the spine as a whole;

20. Dr. Gause testified that the combined value of Dr. Keffer's impairment ratings would be 44% relative to the spine as a whole;

21. Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the Claimant's job as a school teacher;

22. The Claimant continues to work full time as a middle school math teacher, with an annual income that is substantially similar to her income while working for the Employer;

23. The Claimant testified that she continues to experience pain and discomfort in her neck and low back with any physical activity;

24. The Claimant testified to difficulty relative to riding a bike, performing household chores, gardening, having sex with her husband, and playing with her

children. None of these issues are referenced in Dr. Gause's narrative reports, although he acknowledge that most of their discussions were related to the Claimant's work activities;

25. The Claimant is able to drive, although she testified that she does not drive for more than 30 minutes at a time. Dr. Gause has not assigned a driving restriction;

26. The Claimant walks every day before school, and is able to walk up to one mile at a time. The Claimant admitted that her pedometer indicates she walks an aggregate of about 2 miles per day;

27. The Claimant admitted she does not use prescription medication. She takes Motrin once or twice per week;

28. The Claimant reached maximum medical improvement on January 23, 2015;

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

30. The Claimant sustained a work-related injury to her head and neck in Michigan in 1992. She admitted the treating physician recommended a 10-pound lifting restriction. The Claimant admitted in a prior deposition that she received compensation in excess of \$100,000.00 pursuant to a settlement of the prior claim, although she testified at the hearing she could not remember whether the settlement was more than \$100,000.00. The Claimant admitted that she underwent a procedure relative to her 1992 injury in which the treating physician "burned" nerves in her neck. No evidence was submitted to establish whether the treating physician assigned an impairment rating, the amount of the Claimant's wages for the prior job, or what portion of the settlement funds were paid relative to the neck injury as opposed to the head injury;

31. The Claimant worked as a teacher for 38 weeks in 2010, the four quarters preceding the quarter in which her admitted injury occurred;

32. The Employer paid the Claimant \$40,403.01 during 2010. She received a pay check every two weeks throughout the year, including during the summer when she was not working;

33. The Claimant's annual earnings as a teacher are substantially the same from one year to the next. She continues to earn an annual salary that is substantially the same as her earnings while working for the Employer;

34. The Claimant admitted that her annual gross income in any given year as a teacher was in the range of \$40,000.00;

35. The Claimant's job as a teacher is comparable to "seasonal" workers whose work fluctuates between "peak" periods and "slack" periods. The school year represents the Claimant's "peak time," while the summer is her "slack time;"

36. The correct average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01, based upon the Claimant's total earnings of \$40,403.01 during 2010, divided by 52 weeks;

37. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury;

38. Dividing the Claimant's total earnings by 38 weeks, the actual number of weeks worked, would result in an average weekly wage that is not fair and just to both parties;

39. The Claimant's average weekly wage would be artificially increased by deducting the summer months from consideration;

40. A 38-week divisor would result in an average weekly wage of \$1,063.24. Instead of accurately reflecting the Claimant's actual earnings, this average weekly wage reflects annual earnings of \$55,288.48 ($52 \times \$1,063.24 = \$55,288.48$). Therefore, under this calculation, the Claimant would have the same average weekly wage as an employee with an annual salary of \$55,228.48, over \$15,000.00 more than the Claimant actually earns in any given year as a teacher.

41. This artificial increase of the Claimant's wages by over 35% resulting from a 38-week divisor would be a windfall for the Claimant and an unfair penalty for the Employer;

42. Using a 38-week divisor would result in annual workers' compensation payments equal to 90% of the Claimant's total gross earnings in 2010;

Based upon the above Statement of the Case, Evidence of the Case, Legal Analysis, and the Findings of Fact, the following Conclusions of Law are made:

CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-160 defines injury by accident. In this case, the Claimant sustained admitted injuries by accident to her neck and low back.

2. S.C. Code Ann. § 42-9-30(21) sets forth scheduled disability compensation for an injury to the back. Pursuant to this statute, where the claimant's loss of use of the back is forty-nine percent or less, permanent partial disability compensation is calculated based upon a percentage of 300 weeks.

3. The extent of an injured worker's disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341.

4. There is no law or regulation in South Carolina that mandates a preferential view of one version of the AMA Guides over the other. Therefore, the fact that the authorized treating physician's impairment rating is based upon the 6th edition of the AMA Guides (as opposed to the 5th edition) is of no consequence to the validity of his rating.

5. Therefore, the totality of the evidence, including the medical records, the testimony of Dr. Gause, and the testimony of the Claimant, support the conclusion that the Claimant has sustained 45% permanent partial disability of the back, which totals 135 weeks of compensation.

6. 67 S.C. Code Ann. Regs. 1605(E) provides that the insurance carrier shall receive a discount for lump sum payment of a permanent disability award greater than ten weeks, unless the Commission orders otherwise. Here, the total PPD award of 135 weeks shall be reduced to 131.5304 pursuant to the current 2% per annum Net Present Value Table used by the Commission.

7. S.C. Code Ann. § 42-1-40 sets forth requirements for determining the Claimant's average weekly wage. Pursuant to this statute, the average weekly wage must be determined by taking the Claimant's total wages for the four quarters preceding the

quarter in which the accident occurred, and dividing "by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." The statute further states "[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.*" (Emphasis added). Finally, the statute states "[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."

8. The Claimant in the present case was paid during the summer months, even though her contract was for 38 weeks. The language of Section 42-1-40 requires that, for an employee working during the period of 52 weeks prior to injury, the wages should be divided by 52 or by the actual number of weeks for which wages were paid. The actual number of weeks she was paid was 52 weeks. However, this is solely the method of payment, and her pay was actually for the 38 weeks she worked or earned.

9. Each year, the Claimant's employment does not actually produce 52 weeks of continuous work history; her work was performed and earned over a period less than 52 weeks prior to injury. She is employed and contracted for each school session. She does have more than a year's history of work, but if the second method were to be used, the divisor would be 38 weeks. Thus, both methods would yield the same result, a 38 week divisor.

10. Therefore, the Employer paid the Claimant \$40,403.01 during 2010, for her work as a teacher during the 38-week school year. The Claimant did not work during the summer months, but she received a paycheck every two weeks throughout the year. Although the Claimant worked as a teacher for only 38 weeks in 2010, dividing her annual earnings by the "number of weeks and parts thereof during which the employee earned wages," i.e. the 38-week school year, would result in an average weekly wage that is *not* "fair and just to both parties." By her own admission, the Claimant's annual earnings as a teacher are substantially the same from one year to the next. Using a 38-week divisor would artificially increase the Claimant's wages by over 35%. This unfair result is an "exceptional reason" that justifies using an alternative method to calculate the Claimant's average weekly wage. Therefore, the Employer submitted an accurate Form 20 showing an average weekly wage of \$776.98, which is based upon the Claimant's total wages of \$40,403.01 divided by 52 weeks. This result is fair to both parties, and most nearly approximates the amount the Claimant would be working but for the injury.

11. The "ultimate objective" of the Act's average weekly wage statute is to fairly reflect the injured worker's probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). If the average weekly wage is increased in this case as the Claimant requests, it would overinflate the Claimant's possible future earnings. Specifically, if the Claimant's average weekly wage were \$1,063.24 as she asserts, her annual earnings would be \$55,288.48, representing an increase of about 37% over her actual annual earnings. As a result, the Claimant would be earning more while out of work on disability than she would while actually working. Such an inequitable result would be a windfall for the Claimant, and would unduly burden the Employer.

12. In Bennett, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500, the maximum income he was permitted to earn without penalty while drawing social security payments. To determine the average weekly wage in that case, the Commission divided the Claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The South Carolina Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99.

13. In this case, the Claimant proposes an AWW that would increase her earnings by over 35%. Such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings. On the other hand, the average weekly wage set forth on the Form 20 is accurate and provides a fair reflection of the Claimant's probable future earning loss. For these reasons, the Form 20 is correct, and the Claimant's average weekly wage should not be increased.

14. The Claimant's assertions that her proposed calculation would not produce a windfall or unfairly burden on the Employer are without merit. 67 S.C. Code

Ann. Reg. 1603 and the Commission's Form 20 Wage Statement provide that a claimant's compensation rate typically represents 2/3 of her actual gross earnings. However, the Claimant's proposed compensation rate in this case would result in annual compensation payments over 90% of her actual annual gross earnings. On the other hand, the total amount the Claimant would receive in one year of workers' compensation benefits using a 52-week divisor would be exactly two thirds of her pre-injury annual gross earnings of \$40,403.01. This result is precisely what is required by the Act and regulations, and it is fair and just to both parties.

15. South Carolina does not have a published appellate case that addresses the exact issue before the Commission regarding the Claimant's average weekly wage. Our Supreme Court addressed a similar issue in Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950). But the facts and circumstances of Breeland are distinguishable from the present case, and therefore Breeland provides little guidance as to the present issue before the Commission.

16. The court in Breeland determined that the employer calculated the correct average weekly wage, based upon the claimant's contracted nine-month work period. The claimant, a school bus driver, was paid by the month, and earned \$75 per month as a school bus driver during the nine-month school year. Unlike the present case, it appears the employer in Breeland agreed that only the nine-month period for which the Claimant was contracted should be considered in determining the average weekly wage. For reasons not stated in the opinion, the employer did not argue that the Claimant's average weekly wage should be determined based upon 52 weeks. The only dispute was whether the period the claimant earned wages was comprised of 39 weeks or 36 weeks. The employer asserted

that an average 9-month period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon a 36-week period, because schools were closed for a total of three weeks during the nine-month school year. The Court concluded that schools being closed for three weeks each year is not an "exceptional reason" that would justify calculating the average weekly wage based upon a period less than the full nine months the Claimant was contracted to work. The court further stated that, according to the claimant's argument, Saturdays and Sundays would also be deducted from the work period, "and the average weekly wage thereby artificially increased."

17. The Claimant argues that Breeland stands for the proposition that one cannot simply revert to the "exceptional circumstances" in an effort to circumvent the unambiguous reading of 42-1-140. Specifically, the Claimant cites the following language from Breeland: "The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, 'Where 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.'" But for reasons not set forth in the Breeland court's opinion, the issue of whether the claimant's total wages should have been divided by 52 weeks was not before the court. The court only addressed whether the total wages should have been divided by 39 weeks or 36 weeks. The Court concluded that, *in that particular case*, using the 39-week period was fair and just, and that exceptional reasons did not exist to justify using the 36-week period the claimant proposed.

18. Furthermore, the parties in Breeland appear to have agreed that only the nine-month period should be considered to calculate the average weekly wage. Either by virtue of the fact that the claimant perhaps did not work more than one school season, or possibly due to the contractual arrangement that provided for a monthly salary, it does not appear that the Defendants raised the issue of a 52-week divisor. For these reasons, Breeland is distinguishable from the present case. The court's decision provides little guidance as to the present issue before the Commission, other than to provide further support for the conclusion that dividing the Claimant's total annual wages by only 38 weeks would "artificially increase" the Claimant's wages. Just as our Supreme Court commented in Breeland that the average weekly wage would be artificially increased by deducting the three vacation weeks from the claimant's period of employment, so would the Claimant's average weekly wage be artificially increased in this case by deducting the summer months from consideration.

19. Similarly, Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), is not applicable to the present case. In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the single commissioner correctly divided the Claimant's pay by the "actual number of weeks Bazen paid Claimant wages" to determine the compensation rate. Id.

20. Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a

period the claimant did not work. The Claimant received her regular pay during the entirety of the 52 weeks in 2010. Her annual earnings as a teacher were substantially similar from one year to the next. Therefore, dividing the Claimant's total annual wages by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury.

21. The Claimant cites Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, for the proposition that the average weekly wage should be calculated based upon 38-week divisor. These decisions are not binding on this Panel. The Claimant also cites prior Commission orders, which are likewise not binding on this Panel. These decisions do not address whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury.

22. The Claimant argues that S.C. Code Ann. § 59-21-20 provides the appropriate divisor for the wage calculation. This statute governs mandatory minimum appropriations, and is not applicable to a determination of average weekly wage in the context of a workers' compensation case.

23. S.C. Code Ann. section 9-1-840 also does not mandate a 38-week divisor. This statute provides that a public school employee's service "for a regular school year in any district shall be equivalent to one year's service" for retirement purposes. If anything, the presumption that the Claimant's work for 38 weeks is equal to one year for retirement purposes actually supports a 52-week divisor in this case. If the Claimant's actual work during the school year is the equivalent to one year for retirement purposes, then

her earnings for that work are appropriately considered as an annual salary for purposes of calculating the average weekly wage.

24. A 1996 amendment to section 42-1-40 had no impact whatsoever on the statute's "fairness" provisions that permit using an alternative method of calculating the average weekly wage. Dividing the Claimant's total wages by 52 weeks produces a result that is fair and just to the parties, and accurately reflects the Claimant's earnings were it not for the injury. The statutory amendment referenced by the Claimant has no bearing on this result.

25. The fact that the "alternative method" that is appropriate in this particular case happens to be the same as the "standard" 52-week method is of no consequence to the result in this case. This coincidence does not require this Panel to order an inequitable average weekly wage and compensation rate that would create a windfall for the Claimant. The Commission has not "circumvented" the requirements of the statute by reaching this conclusion. Using a 52-week divisor is simply the best available method for calculating a fair and accurate average weekly wage in this particular case, even though the Claimant worked less than 52 weeks.

26. Using a 52-week divisor in this case does not render portions of section 42-1-40 moot. In the vast majority of cases, including those where the claimant is employed for less than a year prior to an injury, the average weekly wage can be fairly and accurately calculated by dividing the total earnings by the actual number of weeks worked. For example, considering the actual number of weeks worked would be appropriate for a claimant who is hired in January and expected to work full time, 12 months a year, but is injured in March after working only three months. In that scenario, dividing the claimant's

total earnings by the actual number of weeks worked would present a fair approximation of her expected annual earnings. To the contrary, the fact that the Claimant in this case typically only works during the school year, and receives a substantially similar annual income year after year, presents an “exceptional circumstance” in which a 52-week divisor is appropriate, even though the claimant worked for less than 52 weeks. The application of the statute’s fairness provisions in these unique circumstances does not render the other provisions of the statute moot. It is simply the correct result for this particular case.

27. For the reasons set forth above, there is no South Carolina court decision or statute that mandates a 38-week divisor in this case. Again, the facts and circumstances of Breeland are distinguishable from the present case. Furthermore, Bennett, while analogous to this case, is not directly on point. There is no South Carolina decision that directly addresses the proper calculation of the average weekly wage for a teacher who only works during the school year, and has substantially the same annual income from one year to the next. As a result, it is proper to consider a North Carolina decision, Conyers v. New Hanover County Schools, 188 N.C.App. 253, 654 S.E.2d 745 (2008), to inform this Panel’s interpretation of the Act’s average weekly wage statute in this case. Neither Breeland nor any other South Carolina appellate court decision has created precedent that bars the application of Conyers to the present case.

28. Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v.

Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law).

29. In Conyers, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina's average weekly wage statute, which is substantially similar to South Carolina's law. 188 N.C.App. 253, 654 S.E.2d 745 (2008). The court held that the claimant's average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she only worked as a bus driver for 40 weeks during the school year. The claimant had worked for the school district for 12 years. Each year she worked during the school year, and was not employed during the summer. The court cites language in North Carolina's average weekly wage statute that is almost identical to that of South Carolina. The court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the three methods in the South Carolina law, set forth above. The court concluded that dividing the claimant's total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant's wages. Such a result would not be "fair and just" because the Employer would be "unduly burdened," and the Claimant would receive a "windfall." The court further stated that "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." Therefore, the court concluded that calculating the Claimant's average weekly wage by dividing her total annual earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

30. In this case, the applicable provisions of the North Carolina Workers' Compensation Act are nearly identical to South Carolina's statute. There is no material distinction between the two statutes. As a result, the Court of Appeals of North Carolina's interpretation of that state's statute is very persuasive and directly on point with the present case. As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident.

31. The Conyers court also concluded that decisions from other jurisdictions as to average weekly wages for educators and other school employees "are of limited value given the unique nature of the contracts for employment in each case as well as each state's unique workers' compensation statutory scheme." Id. at 258. Such decisions from jurisdictions besides North Carolina are similarly inapplicable here. For instance, the Claimant cited Wash Dist. 50 Sch. v. Ill. Workers' Comp., 917 N.E. 2d 586, 334 Ill. Dc. 760 Ill. App. 2009) and Magnet Cove School Dist. v. Barnett, 97 S.W.3d 909, 81 Ark. App. 11 (Ark. App., 2003). This panel declines to follow those decisions from Illinois and Arkansas, based upon the sound reasoning set forth in Conyers. Conyers is uniquely applicable to the present case, because of the striking similarity North Carolina's relevant statutory language bears to the South Carolina Act.

32. The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between

“peak” periods and “slack” periods. The court determined that the school year represented the claimant’s “peak time,” while the summer was her “slack time.” To base the claimant’s average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. Id. at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant’s average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee’s average weekly wage where Commission had only considered claimant’s wages during peak seasonal period);

33. S.C. Code Ann. § 42-9-150 provides that a claimant with a preexisting disability “shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.” In this case, there is insufficient evidence to determine the extent of the Claimant’s previous disability. In 1992, the Claimant received a settlement in Michigan for a work-related head and neck injury that occurred in Michigan. She had a 10-pound weight restriction as a result of this accident. She negotiated to a settlement in excess of \$100,000. However, there is no basis for determining what portion of the settlement funds were paid for the neck injury, and how much for the head injury. Also, the wage information for that period of time is absent from the facts presented. The evidence is simply insufficient to determine the Claimant’s prior disability to her neck. As a result, any finding as to the applicability of section 42-9-150 would be purely speculative and based upon surmise and

conjecture. Accordingly, the Employer is not entitled to a credit relative to the Claimant's previous compensation for a head and neck injury in 1992.

34. S.C. Code Ann. § 42-15-60 states the Claimant is entitled to ongoing causally related medical treatment that, as evidenced by expert medical evidence stated to a reasonable degree of medical certainty, will tend to lessen the Claimant's period of disability, subject to the limitations set forth below.

35. S.C. Code Ann. section 42-15-60(B)(2) requires that a hearing commissioner's order set forth medical treatment "with as much specificity as possible." Pursuant to this requirement, I hereby order that the Claimant is entitled to supportive care as stated on Dr. Gause's report dated January, 23, 2015, for two years from the date of his report. Such supportive care shall include four office visits a year, physical therapy, medications, and three injections a year, subject to Dr. Gause's recommendations. After the aforementioned two-year period, the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth on Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90.

36. S.C. Code Ann. Section 42-15-60(C) provides that, "in cases of permanent partial disability, prosthetic devices shall be furnished during the life of the

injured employee or for as long as such devices are necessary." Pursuant to this requirement, the Claimant is entitled to causally related maintenance and/or replacement of retained surgical hardware for life, subject to Dr. Gause's recommendations.

Based upon the above Statement of Case, Evidence of the Case, Legal Analysis, Findings of Fact, and Conclusions of Law, the following Order is made:

ORDER

Based on the foregoing, it is hereby:

ORDERED that the Claimant's average weekly wage is \$776.98, with a corresponding compensation rate of \$518.01; it is further

ORDERED that the Employer shall pay to the Claimant 131.5304 weeks of compensation at the rate of \$518.01 per week, for a total of \$68,134.06, representing net present value of 45% permanent partial disability or loss of use to the back, pursuant to the current 2% per annum table currently used by the Commission; it is further

ORDERED that the Employer is not entitled to a credit relative to the Claimant's prior work related injury to her head and neck in Michigan; it is further

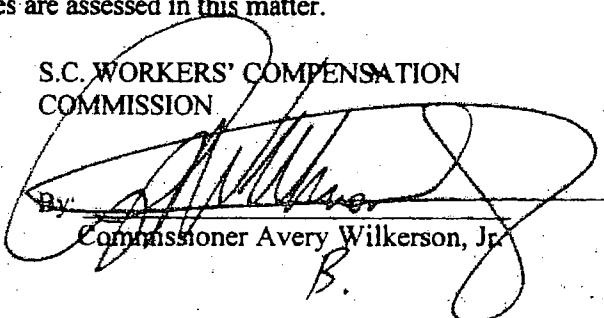
ORDERED that the Employer shall provide the Claimant ongoing medical treatment with Dr. Paul Gause for two years from the date of Dr. Gause's January 23, 2015 report. Such treatment is limited to four office visits per year, physical therapy, medications, and three injections per year, as recommended by Dr. Gause. After the aforementioned two-year period the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable

degree of medical certainty. But in no instance shall the Employer be required to provide specific treatment or modalities other than as set forth in Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition for the worse within one years of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90; it is further

ORDERED that the Claimant is entitled to lifetime maintenance and/or replacement of retained surgical hardware that is, more likely than not, causally related to the original accident, subject to Dr. Gause's recommendations/opinion based upon a reasonable degree of medical certainty.

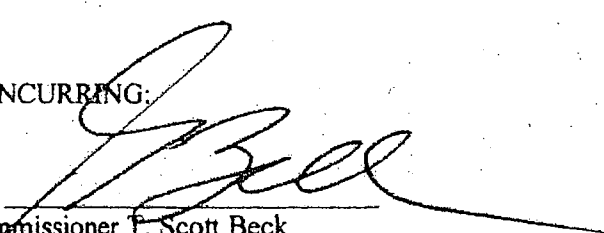
No hearing costs or penalties are assessed in this matter.

S.C. WORKERS' COMPENSATION
COMMISSION

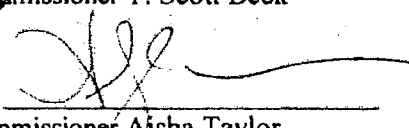
By: 

Commissioner Avery Wilkerson, Jr.

CONCURRING:

By: 

Commissioner P. Scott Beck

By: 

Commissioner Aisha Taylor

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 February 23, 2016

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 #: **07-11-050485**
Carrier Code #: **1656**
Employer FEIN #: **67-680222**

Claimant's Name: Kelly McPherson SSN: ██████████ Employer's Name: Charleston County School District
Address: ████████████████████ Address: 3999 Bridge View Drive
City: ██████████ State: SC Zip: 29403 City: Charleston State: SC Zip: 29403
Home Phone: (517) 554 - 1510 Work Phone: (843) 887 - 3244 Insurance Carrier: Self Insured c/o Corvel Company
Preparer's Name: Heather Erdmann Preparer's Phone #: (800) 365 - 5998, ext 69901

Date of Injury: 2/3/2011
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: 8/12/09
☐ 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	3/31/10	\$9,444.03
2nd	6/30/10	\$10,802.63
3rd	9/30/10	\$9,319.63
4th	12/31/10	\$10,836.72

Total Paid 2. \$40,403.01

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. \$40,403.01

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 52

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. \$776.98

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. \$518.01

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. \$518.01

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 which states that if 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 REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE WORKERS' COMPENSATION COMMISSION AT (803) 737-5723.

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 which states that if 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 REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE WORKERS' COMPENSATION COMMISSION AT (803) 737-5723.

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5675 www.wcc.sc.gov

WC Case # 1104105

Carrier File # 07-11-050485

Carrier Code #

Employer FEIN

Kelly McPherson
Claimant's Name Social Security Number
Address City State Zip
Home Phone Work Phone

Charleston County School District

Employer's Name

75 Calhoun Street, Charleston, SC 29401

Address City State Zip

Charleston County School District

Insurance Carrier

Matthew O. Riddle

P.O. Box 993, Charleston, SC 29402

(843) 720-5422

Preparer's Name

Address

Phone #

The date of injury reported on the Form 12A is: 2/3/2011

Check appropriate section(s). The employer's representative requests a hearing to:

- I. ☐ **Stop payment of compensation.** Claimant has reached maximum medical improvement and Claimant continues to receive temporary compensation payments. The employer's representative requests a hearing pursuant to § 42-9-260(D) to stop payment of temporary compensation. A hearing requested pursuant to this section must be held within sixty days of the date of the request.

Claimant reached maximum medical improvement on _____ (copy of medical report must be attached).

Compensation payments are current as of _____ and shall continue until otherwise ordered or until Form 17 is signed by the claimant.

A Form 17 was offered and refused on _____.

- II. ☐ **Address suspension, termination, or reduction of temporary disability payments for any cause.**

☐ a. At any time pursuant to § 42-9-260(E).

☐ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.

The basis for the termination/suspension is: _____

- III. ☒ **Determine if compensation is due pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:**

CLAIMANT REACHED MAXIMUM MEDICAL IMPROVEMENT.

Claimant reached maximum medical improvement on 1/23/2015 (copy of medical report must be attached).

- IV. ☐ **Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.**

- V. ☐ **Determine amount of compensation for claims involving a fatality. (Dependency investigation must be attached).**

☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.

☐ b. Amount of compensation of death of employee due to accident pursuant to § 42-9-290.

- VI. ☐ **Mediation**

☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.

☐ b. Mediation is required pursuant to Reg. 67-1801.

☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Failure to respond pursuant to Reg. 67-208 B in writing or by submission of a Form 22 may result in ordered mediation pursuant to Reg. 67-1801 B.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Fred W. Riesen, Jr., Esquire
address P. O. Box 40997, N. Charleston, SC 29423-0997 on the 27th day of January, 2015.
by ☒ first class postage ☐ certified mail ☐ personal service. A \$25.00 filing fee and updated Form 18 is required.

Preparer's Signature

Attorney for Employer/Carrier
Title

MRiddle@ycrlaw.com
Email

January 27, 2015
Date

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or jud@wcc.sc.gov or mediation@wcc.sc.gov.
Refer to Regulations 67-211, 67-504, 67-506; and 67-510.

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737.5675 www.wcc.sc.gov



WCC File #: **1104105**
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Kelly McPherson SSN: [REDACTED] Employer's Name: Charleston County School District
Address: [REDACTED] Address: 75 Calhoun Street
City: [REDACTED] State: SC Zip: 29401 City: Charleston State: SC Zip: 29401
Home Phone: () - Work Phone: () - Insurance Carrier: Charleston County School District
Preparer's Name: Fred W. Riesen, Jr. Law Firm: Riesen Law Firm, LLP Preparer's Phone #: (843) 760 - 2450

Date of Injury or Illness: _____

Complete each information blank. Clearly specify when contention are admitted in part and denied in part. The Claimant's answer to the claim respectfully shows:

I. ☐ Stop payment of compensation.

It is admitted/denied the Claimant has reached maximum medical improvement and continues to receive temporary compensation payments.
It is admitted/denied the Claimant's temporary total payments are current.
It is admitted/denied the Claimant's temporary total payments have been properly stopped as of ____ (m/d/yyyy) pursuant to Reg. 67-505.

I. ☐ Address suspension, termination, or reduction of temporary disability payments for any cause.

- ☐ a. At any time pursuant to § 42-9-260(E).
- ☐ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.
- ☐ c. Temporary total compensation was suspended, terminated, or reduced without proper order of the Commission.
- ☐ d. Additional compensation and penalties are requested pursuant to Reg. 67-510.

The basis for additional compensation and penalty is _____

I. ☒ Determine if compensation is due pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:

Claimant reached MMI but is not getting temporary total

Claimant reached maximum medical improvement on 1/23/15 (m/d/yyyy) (copy of medical report must be attached).

It is admitted/denied the Claimant has reached maximum medical improvement.

Claimant has/ has not returned to work. Claimant has/has not returned to light duty.

- ☐ a. Permanency is premature at this time.
- ☒ b. Claimant is in need of additional medical care and treatment
- ☒ c. Claimant is entitled to permanent partial disability pursuant to 42-9-30.
- ☐ d. Claimant is entitled to wage loss pursuant to 42-9-20.
- ☐ e. Claimant is entitled to total and permanent disability pursuant to 42-9-10 or 42-9-30(21) and Reg. 67-1802.

☐ Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.

It is admitted/denied that the Employer/Carrier is due a credit for overpayment.

☐ Determine amount of compensation for claims involving a fatality.

- ☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.
- ☐ b. Amount of compensation for death of employee due to accident pursuant to § 42-9-290.

☐ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Failure to respond pursuant to Reg. 67-208 B in writing or by submission of a Form 22 may result in ordered mediation pursuant to Reg. 67-1801 B.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to _____ see attached
address _____ on the _____ day of _____ 20____ by ☒ first class postage ☐ certified mail ☐ personal service.

[Signature] Attorney At Law fredriesen@knology.net February 19, 2015
Preparer's Signature Title Email Date

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or judicial@wcc.sc.gov or mediation@wcc.sc.gov
Refer to Regulations 67-211, 67-504, 67-505, 67-506, 67-510; and 67-1801.

SCWCC
FEB 23 2015
JUDICIAL

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715

Columbia, South Carolina 29202-1715

(803) 737-5723

www.wcc.sc.gov



WCC File #:

Carrier File #:

Carrier Code #:

Employer FEIN #:

Claimant's Name: Kelly McPherson SSN: 587-12-3456Employer's Name: Charleston County School DistrictAddress: [REDACTED]Address: 209 The Center at Meeting and HutsoCity: [REDACTED] State: SC Zip: [REDACTED]City: Charleston State: SC Zip: 29416Home Phone: (517) 554 - 1810 Work Phone: () -Insurance Carrier: Charleston County School District CorvelPreparer's Name: Fred W. Riesen, Jr. Law Firm: Riesen Law Firm, L.L.P. Preparer's Phone #: (843) 760 - 2450**Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.****A claim for workers' compensation benefits is made based on the following grounds:****Date of Injury or Illness:** 02/03/11X Injury ☐ Illness ☐ Repetitive Trauma1a. The claimant sustained an injury to lower back, both legs, and neck (Part(s) of Body Injured) on 02/03/11 (Month/Day/Year) in Charleston county, state of South Carolina.1b. Body part(s) affected are: lower back, both legs, and neckBriefly describe how the accident occurred. While breaking up an altercation between two students the Claimant was facing one student when the student ran into her full force.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the Employer on 02/03/11 (Month/Day/Year) in the following manner:Verbally

X 6. Due to injury, the claimant is in need of (check one):

☐ (a) medical examination and treatment for: _____X (b) additional medical examination and treatment for: lower back, both legs, and neck

X 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:

To be determined

X 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):

X (1) General Disability:

X Total

X (2) Specific Disability:

X Total

X (3) Wage Loss

X Partial

X Partial

☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:10a. At the time of the injury, the Claimant was paid weekly wages of \$to be determined, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:

11a. Further grounds or unusual aspects of claim:

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:

Doctor's Care; Orthopaedic Specialists of Charleston11c. To the best of your knowledge, did you have any prior permanent disability? NO

If yes, describe: _____

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

XX 13a. I am filing a claim. I am not requesting a hearing at this time.

☐ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Attorney at Law

Title

fredriesen@knology.net

Email

April 19, 2011

Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.



PRE-HEARING BRIEF
WCC File

No: 1104105

Claimant's Name: Kelly McPherson

Employer's Name: Charleston County School District

Address: [REDACTED]

Address: 75 Calhoun Street

City: [REDACTED] State: SC Zip: 2940

City: Charleston State: SC Zip: 2940

Home Phone: () - Work Phone: () -

Carrier: Charleston County School District

Preparer's Name: Fred W. Riesen, Jr.

Preparer's Phone #: (843) 760-2450

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$704.92 2. AWW: \$1,063.24 Date of Injury: 2/03/11

3. Type of injury and body part(s): Neck and back

4. Facts in controversy: Compensability and disability and need for additional medical treatment; past and ongoing.

All body parts and all remedies available under SC Workers' Compensation Act, including; but not limited to 42-1-40, 42-9-10, 42-9-20, 42-15-60, 42-9-30, 42-9-301, R67-1101, R67-1603, R67-1605 lump sum with Utica Mohawk language where warranted.

5. Legal issues involved: See #4 above

6. Unusual aspects: Claimant requests back TT for the times she was unable to work while undergoing surgery.
Claimant is a school teacher that only receives 38 weeks of pay a year. Claimant's comp rate should be
Calculated based on 38 weeks instead of 52. (Claimant's Exhibit A)

7. Witnesses (designate if expert):* Claimant

8. Exhibits: Pursuant to A.P.A.: See Notice of Witnesses and Written Medical Reports (attached)

9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
Pursuant to A.P.A.: See Notice of Witnesses and Written Medical Reports (attached)

10. Name, address, and specialty, if any, of the treating physician: Dr. Paul Gause and Vibhooti Dave at Spine Institute of Arizona;
Dr. James Keffer

11. Impairment rating(s); body part(s); physician and date of opinion: Dr. Paul Gause on 3/12/15
25 - 28% to the whole person relative to the cervical spine and
20 - 23% to the whole person relative to the lumbar spine.
Dr. James Keffer on 3/30/15
25% to the whole person relative to the cervical spine and
25% to the whole person relative to the lumbar spine

12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to see attached

address on the day of 20 by; ☐ first class postage ☐ certified mail ☐ personal service.

Signature:

Fred W. Olesen

fredriesen@knology.net

Date of hearing:

April 9, 2015

Email:

Time needed for hearing:

45 minutes

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-60 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58

Revised 7/13

58

PRE-HEARING BRIEF

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1104105

Kelly McPherson,	)
	)
Employee,	)
Claimant,	)
	)
vs.	)
	)
Charleston County School District,	)
	)
Employer,	)
	)
and	)
	)
SC School Boards Insurance Trust,	)
	)
Carrier,	)
Defendants.	)

**CLAIMANT'S MEMORANDUM IN
SUPPORT OF CALCULATING
AVERAGE WEEKLY WAGE FOR A
SCHOOL TEACHER BASED
ON THE NUMBER OF WEEKS FOR
FOR WHICH WAGES WERE PAID**

FACTS/PROCEDURAL HISTORY

The Claimant seeks medical treatment and also permanent partial disability benefits. The Claimant contends that her average weekly wage should be calculated by taking her total wages and dividing by thirty-eight weeks, because she is a public school teacher whose income is earned during a thirty-eight week period.

The Carrier takes the position that the Claimant's average weekly wage should be divided by fifty-two weeks. The parties agree that Claimant's total wages are \$40,403.01.

LAW/ANALYSIS

The Workers' Compensation Act defines average weekly wage as "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 injury..."

S.C. Code Ann. § 42-1-40 (Supp. 2009) sets forth four alternative methods for the commission to calculate the average weekly wage. Forrest v. A.S. Price Mech., 373 S.C. 303, 308, 644 S.E.2d 784, 786 (Ct. App. 2007). The primary method of calculation requires that the average weekly wage must be calculated by taking the total wages paid for the last four quarters, divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. S.C. Code Ann. § 42-1-40. The commission must use this method unless "the employment, prior to the injury, extended over a period of less than fifty-two weeks," or unless "for exceptional reasons" it would be unfair to do so. Id.

S.C. Code Ann. § 59-21-20 (Supp. 2010) "Appropriation for teacher salaries based on term of 190 days" specifically provides:

"The General Assembly shall make sufficient appropriation to pay state aid to salaries of all school teachers in the public schools on the basis and for the length of one hundred ninety days in the elementary and secondary schools in the State. (emphasis added)."

As a public school teacher, the Claimant is paid for 190 days or thirty-eight weeks and not fifty-two weeks per the plain reading of 59-21-20 and thirty-eight is clearly "less" than fifty-two per the plain reading of 42-1-40. Accordingly, the commission must use this method of calculation as no "exceptional reason" exists to

use an alternate method.¹

In Breeland v. Colleton County, 216 S.C. 147, 57 S.E. 2d 63 (1950), the South Carolina Supreme Court had occasion to construe Section 7035-2 of the 1942 Code (a prior codification of Section 42-1-40) in a substantially similar context. A review of the relevant facts reveals: (a) a school bus driver, whose period of employment and receipt of wages were also tied to the school year, died as a result of a compensable accident; (b) he received approximately three weeks of holiday vacation during the school year; and (c) his beneficiaries consequently argued the provisions of this statute required that his average weekly wage be based upon a thirty-six week period, rather than the thirty-nine week school term.

Without discussion, the hearing commissioner excluded the holiday period from the driver's average weekly wage calculation, dividing his earnings by thirty-six (36) weeks. This determination was subsequently affirmed by the Full Commission and later by the Circuit Court, which noted that the award was "just and fair" in accordance with the language of Section 7035-2.

On appeal, the bus driver's beneficiaries further maintained that the "exceptional reasons" proviso of Section 7035-2 was controlling. However, in response to this assertion, the Court noted the Commission's "award was not based upon exceptional

¹ Even if the Commission finds an "exceptional reason" exists in this case to look to an alternate method, it is clear that utilization of 38 weeks is a much more "fair and just" than utilizing 52 weeks as it "most nearly approximates what the Claimant was earning were it not for the injury" (42-1-40). By way of example, $\$40,403.01 / 38 = \$1,063.24 \times .667 = \$709.17$ (Total Compensation Rate). $\$709.17 \times 52 \text{ weeks} = \$36,876.84$ which is $\$3,526.17$ less than her salary. Conversely, utilizing the Carrier's 52 week formula: $\$40,403.01 / 52 = \$776.98 \times .667 = \$518.25$ (Total Compensation Rate). $\$518.25 \times 52 = \$26,948.80$ which is $\$13,454.21$ less than her salary. Accordingly, utilization of 38 weeks is certainly more fair and just at approximating what Claimant was earning were it not for the injury.

reasons" and further concluded that nothing in the record would have justified the application of the "exceptional reasons" proviso. Specifically, the Court held:

The error of the commission appears too plainly to require further discussion. There is **no ambiguity** in the statute here applicable. There is no doubt of the meaning of the words, quoting again, "Where 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. . . .**" **Unquestionably, the result is fair and just and the prescribed method should have been applied in this case.** Breeland, 57 S.E. 2d at 64. (Emphasis added).

Although Carrier may contend this decision compels utilization of a fifty-two week denominator when calculating a school employee's average weekly wage, the Supreme Court actually determined: (a) the Commission was statutorily required to compute the deceased employee's average weekly wage based upon the earnings he received during the thirty-nine weeks which comprised the school term; (b) the Commission was not empowered to artificially increase or decrease the employment period by either adding to or deducting from the school term/contract period; and (c) the mere fact that an individual's employment was tied to the standard public school term did not, in and of itself, authorize resort to the "exceptional reasons" proviso.

The current viability of the Breeland construction is further validated by the 1996 amendment of Section 42-1-40, which inserted the following sentence:

"Average weekly wage" **must** be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Employment Security Commission's Employer Contribution Reports **divided by fifty-two or by**

the actual number of weeks for which wages were paid, whichever is less. (Emphasis added).

Where, as here, the Legislature "adopt[s] . . . an amendment to a statute, . . . [it] is presumed to have intended to make some change in existing law." Glover v. United States, 337 S.C. 307, 523 S.E. 2d 763, 765 (1999); Kennedy v. South Carolina Retirement System, 345 S.C. 339, 549 S.E. 2d 243, 253 (2001); See also, Vernon v. Harleysville Mut. Cas. Co., 224 S.C. 152, 135 S.E. 2d 841, 844 (1964); Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E. 2d 766, 775 (1999). Similarly, "there is a basic presumption that the . . . [L]egislature has knowledge of previous legislation as well as judicial decisions construing that legislation when later statutes are enacted concerning related subjects." Whitner v. State, 328 S.C. 1, 492 S.E. 2d 777, 779 (1997); Russo v. Nationwide Insurance Company, 334 S.C. 455, 513 S.E. 2d 127, 129 (Ct. App. 1999) ("We presume the . . . [L]egislature's awareness of our decision when passing . . . amendment" to previously construed statute).

It is equally certain that in applying an amendment of this nature, the adjudicating tribunal "must presume . . . [the Legislature] intended by its action to accomplish something and not to do a futile thing." State ex. rel. McCloud v. Montgomery, 244 S.C. 308, 136 S.E. 2d 778, 782 (1964); South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 354 S.C. 585, 582 S.E. 2d 410, 413 (2003).

Significantly, application of these rules: (a) recognizes the Legislature's awareness of its prior enactment (which primarily focused on a fifty-two week period), as well as the Breeland ruling; (b) presumes the amendatory language ("divided by fifty-

two or by the actual number of weeks for which wages were paid, whichever is less") was inserted "to make some change in existing law"/ "intended. . . to accomplish something"; (c) evinces a Legislative intent to mandate calculation of average weekly wage/compensation rate based upon "the actual number of weeks for which wages were paid. . . ." See also, Hyde v. South Carolina Department of Mental Health, 314 S.C. 207, 442 S.E. 2d 582, 583 (1994); Buist v. Huggins, 367 S.C. 268, 625 S.E. 2d 636, 640 (2006) ("subsequent statutory amendment may be interpreted as clarifying original legislative intent"); and (d) facilitates "arrive[ing]. . . at a fair approximation of the claimant's probable future earning capacity. . . [, t]he objective of wage calculation" in this context. Booth v. Midland Trane Heating & Air Conditioning, 298 S.C. 251, 379 S.E. 2d 730, 732 (Ct. App. 1989).

Hynes v. Charleston County School District (WCC File No.: 0604675) is a case decided in 2011 by the Circuit Court which Reversed the Appellate Panel. Although the law was changed so that appeals now go directly to the South Carolina Court of Appeals, Hynes is a good case for guidance as it involves the exact same issue presented in this case. Ms. Hynes, was a school nurse for the school district who worked 38 weeks a year but elected to receive her payments over a fifty-two week period. The school district in Ms. Hynes' case took the same position that the average weekly wage should be based on fifty-two weeks rather than thirty-eight weeks. Judge Harrington disagreed citing S.C. Code Ann. § 59-21-20 (Supp. 2012) which specifically defines the appropriation of teacher salaries based on a term of 190 days or thirty-eight weeks. She further held that "under either of the first two methods, Ms. Hynes average

weekly wage should have been calculated based on 38 not 52 weeks as 38 is clearly 'less' than 52 weeks per the plain reading of 42-1-40."

Henson v. Berkeley County School Board, 2000-UP-163 (Ct. Appeals 2000) is unpublished and therefore not binding but is being included to provide guidance and to show that the Court still reaffirms Breeland. In Henson an art teacher suffered a compensable work related injury. With respect to Average Weekly Wage calculation the Court held as follows:

"Though Henson's salary was allotted over a 52 week period, she argues the calculation should be based on her total salary divided by the number of weeks in the school year. We agree. The statute clearly states that when the period of employment immediately preceding the injury is less than 52 weeks the earnings for that period are to be divided by the number of weeks in which wages were earned... See Breeland. Therefore we find it was improper for the full commission to base its calculation on a 52 week period"

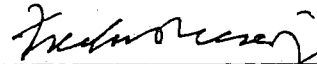
In Bazen v. Badger R. Bazen Company, Inc., 388 S.C. 58, 693 S.E.2c 436 (S.C.App.2010) the Court of Appeals affirmed the single commissioner's average weekly wage calculation. In Bazen, the Commissioner determined that the Claimant earned \$27,500 in 2001 and then divided this number by forty-eight, the actual number of weeks Bazen paid Claimant wages. The employer argued the salary should be divided by fifty-two weeks because he was employed for one year and had taken a one-month vacation. The Court of appeals disagreed and held that the average weekly wage is calculated by the "actual number of weeks for which **wages** were paid." Id. at 66.

CONCLUSION

Based on the foregoing reasons, the Commission should calculate the Claimant's average weekly wage by taking the total wages paid of \$40,403.01 and dividing by thirty-eight weeks for an average weekly wage of \$1,063.24 with a resulting total compensation rate of \$708.86 (max for 2011 is \$704.92).

Respectfully Submitted,

RIESEN LAW FIRM, L.L.P.



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Attorney for Claimant

March 30, 2015
N. Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-10-7739

Joan Beverly Hynes,
Claimant-
Appellant,

vs.

Charleston County School District,
Employer,

Charleston County School District,
Carrier/
Respondent.

ORDER
(WCC FILE NO. 0604673)

FILED
2011 APR 19 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter was brought before this Court on appeal from the South Carolina Workers' Compensation Commission. A review of the record reflects that the Hearing Commissioner issued an Order filed March 16, 2010, after an evidentiary hearing was held finding, in pertinent part, that the Claimant/Appellant (hereinafter referred to as "Claimant") had sustained 50% loss of use to her right arm, that the compensation rate was \$439.96 based upon an average weekly wage calculated over a period of 52 weeks prior to the accident, and that the Appellant did not prove a causal connection between current complaints involving her left knee and the work-related accident. He also found that MMI had been reached on September 27, 2008, with regard to the right arm. The Claimant appealed that Order to the Appellate Panel of the South Carolina Workers' Compensation Commission by Form 30 filed timely on March 19, 2010.

The Appellate Panel issued an Order filed September 2, 2010, which affirmed the findings of the Single Commissioner, except that it found that the Claimant had sustained an

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injury to her left knee as a result of the injury by accident but that a causal connection between her current complaints and her work-related injury to the knee was not proven by the substantial evidence in the record.

The Claimant timely filed this appeal to the Circuit Court alleging numerous errors of law in the Full Commission decision. Oral argument was presented on March 24, 2011.

The Claimant's issues on appeal were as follows:

1. Did the Hearing Commissioner err in finding as a matter of law that Claimant's average weekly wage is \$659.90 with a corresponding compensation rate of \$439.96, the error being that the Claimant's average weekly wage is \$903.02 with a resulting compensation rate of \$602.04? Claimant is a school nurse and works thirty-eight weeks per year and not fifty-two weeks so the correct method of determining her average weekly wage and compensation rate would be to take her last four quarters worked before the injury, which is \$34,314.92, and divide it by thirty-eight weeks, resulting in an average weekly wage of \$903.02 with a compensation rate of \$602.04. Under Section 42-1-40, earnings are to be divided by the number of weeks in which those earnings were distributed. Breeland v. Colleton County, 216 S.C. 147, 57 S.E. 2d 63 (1950); Henson v. Berkeley County School Board, 2000 UP 168 filed March 6, 2000. The Court of Appeals reaffirmed and cited the Breeland case and, while unpublished and therefore not binding, is certainly persuasive in understanding the Court's interpretation on this exact issue. Statute 59-21-20 of our legislature has unequivocally stated that the appropriation for teachers' salaries is to be one hundred ninety days in elementary and secondary schools in our state.

2. Did the Hearing Commissioner err in finding that Claimant's knee injury was not a result of her work-related accident of March 27, 2006, the error being that the greater weight of the evidence supports a finding that Claimant's knee was injured?

3. Did the Hearing Commissioner err in finding that Claimant's knee injury was not causally connected with the Claimant's current problems with the left knee, the error being that the greater weight of the evidence supports a finding that Claimant's knee injury was causally connected to her work-related accident?

4. Did the Hearing Commissioner err in finding that the left knee is denied based on the medical evidence in the record, the error being that the greater weight of the medical evidence in the record supports a finding that the left knee was injured in Claimant's work-related accident? The medical evidence supports a finding that the injury aggravated a previous asymptomatic arthritic condition in Claimant's left knee.

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5. Did the Hearing Commissioner err in finding that the only medical report which connected any injury to the left knee was generated on April 3, 2006, when it was noted that she had a "small effusion on her knee with bruising," the error being that the greater weight of the medical evidence supports a finding that the left knee injury was connected to the work-related accident? All of the medical evidence supports a finding that the injury aggravated a previous asymptomatic arthritic condition in Claimant's left knee. Dr. Jan-Eric Esway, in his note of April 3, 2006, states "on secondary survey from her injury, she has been experiencing left knee pain... At this point, I would concentrate on her shoulder and not address this. In the future, if she continues to have pain, then I would consider obtaining x-rays of her knee." On September 27, 2008, Dr. Robert Elvington stated, "I think her best option is a knee replacement." Dr. Dowse Rustin, Defendant's IME doctor, in his report of October 20, 2009, stated "Dr. Esway's note of 4/3/06, 11 days after the injury, mentioned that she has been experiencing left knee pain, does have a small effusion with good range of motion, stable knee but with ecchymosis and bruising over the anteromedial aspect of the knee. There was some crepitus at that time consistent with arthritis. It would certainly not be unreasonable for her to have preexisting arthritis with a contusion aggravating her symptoms at this point of now being symptomatic intermittently." On November 1, 2009, Dr. Esway responded that the Claimant would more than likely need a knee replacement for control of pain and function in the future as a result of her job injury of March 27, 2006, which has accelerated or exacerbated a previously asymptomatic condition of arthritis in her knee.

6. Did the Commission err in Finding of Fact number 11 that "I also noted this report did not appear to have been sent to the Defendants, as was the other separate report prepared on the same day for the left arm injury," the error being that there was no testimony or evidence whatsoever to support such a comment.

7. Did the Hearing Commissioner err in finding that Claimant's further medical care would not reduce the Claimant's level of disability, the error being that the greater weight of the evidence supports a finding that future medical care pursuant to Dodge v. Bruccolli, Clark, Layman, Inc., would tend to lessen the Claimant's disability? On November 1, 2009, the authorized physician, Dr. Esway, responded that the Claimant would need ongoing medical visits and modalities of pain control treatment such as injections, pain medications, physical therapy, and diagnostic testing as well as likely pain control techniques necessary to maintain the Claimant's current level of function and prevent her disability for worsening. Dr. Robert Elvington, in his note of September 27, 2006, in addition to recommending knee injections, continued her on Celebrex and discussed injections. Claimant's testimony was that she had to take Mobic (substitute for Celebrex) and Ibuprofen or Naproxen Sodium for her left knee in addition to injections.

STATEMENT OF THE CASE

The Claimant sustained an admitted injury to her left upper extremity on March 27, 2006. The Claimant is a registered nurse and had been employed for approximately ten years as a school nurse for the Charleston County School District. At the time of the injury, she was 70 years old. Her date of birth is February 3, 1936. The Claimant testified at the hearing that she completed a Form 12A by hand and that another Form 12A was completed by the claims adjuster. Both of these documents were completed on the same day.

The Claimant was initially seen at Doctor's Care and then evaluated by Dr. Esway with Orthopaedic Specialists of Charleston on March 27, 2006. Her chief complaint at that time was left humerus fracture. On April 3, 2006, Dr. Esway saw the Claimant again for her left arm but stated, "Of note, on secondary survey of her injury, she has been experiencing left knee pain. She does have a small effusion of her knee. Range of motion is good. The knee is stable. She mainly has some ecchymosis with bruising over the anteromedial aspect of her knee. With range of motion of her knee, she initially has some crepitation consistent with arthritis. At this point, I would concentrate on her shoulder and not address this. In the future, if she continues to have pain, I would consider obtaining x-rays of the left knee." Dr. Esway continued to follow the Claimant for her left arm fracture until leaving the practice and the State of South Carolina in July, 2006. Dr. Esway stated in a telephone deposition taken in December, 2009, that he had not seen the Claimant since July, 2006. At no time did he ever recommend x-rays or make any mention of left knee pain after that single visit.

The Claimant then saw Dr. Elvington on September 27, 2010. He released the Appellant at MMI for the left upper extremity and, in a separate report, diagnosed her left knee pain as degenerative arthritis. No mention was made of this work-related accident or any

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connection between the accident and degenerative arthritis in the left knee. The Appellant had no medical treatment for her left knee until December 15, 2008, when she returned to Orthopaedic Specialists of Charleston. She reported that it was not the result of a work-related accident and the onset was noted to be "insidious." The Claimant was, at that time, assessed with moderate to severe medial and patella femoral compartment degenerative arthritis to the left knee. The Claimant also testified at the hearing that she worked 190 days and was paid over a 12-month period, although she was off during the summer and Christmas holidays and spring break.

STANDARD OF REVIEW

The Administrative Procedures Act governs appellate review of the Workers' Compensation Commission decisions, and accordingly, the Appellate Court will not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. Therrell v. Jerry's, Inc., 370 S.C. 22, 633 S.E.2d 893 (S.C. 2006). Findings of the Appellate Panel of the Workers' Compensation Commission are presumed correct and will be set aside by a reviewing court only if unsupported by substantial evidence. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (S.C. Ct. App. 2008).

Pursuant to the Administrative Procedures Act, the Appellate Court's scope of review in a workers' compensation proceeding is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Hall v. United Rental, Inc., 371 S.C. 69, 636 S.E.2d 876 (S.C. Ct. App. 2006).

The Appellate Panel is the ultimate fact-finder in workers' compensation cases and is not bound by the Single Commissioner's findings of fact. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the

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weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). After hearing arguments of counsel and reviewing the submitted documents, this Court finds as follows:

1. Average Weekly Wage

Claimant contends that the Commission erred when calculating her average weekly wage by choosing the wrong method of calculation pursuant to S.C. code Ann. § 42-1-40 (Supp. 2010). Section 42-1-40 provides in relevant part:

“Average weekly wage’ must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce’s Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. (emphasis added)

When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained...” (emphasis added)

S.C. code Ann. § 42-1-40 (Supp. 2010). The Commission chose to calculate Claimant’s average weekly wage by using the first paragraph above. In doing so, they divided Claimant’s Total Wages Paid of \$34,314.92 by 52 weeks giving an average weekly wage of \$659.90 with a resulting compensation rate of \$439.96 ($\$659.90 \times .6667$).

Claimant asserts that the second paragraph above should have applied because her “employment” extended over a period of less than 52 weeks. Alternatively, if applying the first paragraph, the calculation should have been based on “the actual number of weeks for which wages were paid.” As a school nurse, Ms. Hynes testified she only worked for 38 not 52 weeks and that her employment was for 38 weeks not for a year. She worked only during the calendar

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school year and did not work summers. Further, S.C. Code Ann. § 59-21-20 (Supp. 2010)

"Appropriation for teacher salaries based on term of 190 days" specifically provides:

"The General Assembly shall make sufficient appropriation to pay state aid to salaries of all school teachers in the public schools on the basis and for the length of one hundred ninety days in the elementary and secondary schools in the State. (emphasis added).

It is Claimant's position that "employment" as defined by statute is for 190 days or 38 weeks. Accordingly, she was not employed as a teacher for 52 weeks. Thus, under either of the first two methods, Ms. Hynes average weekly wage should have been calculated based on 38 not 52 weeks as 38 is clearly "less" than 52 weeks per the plain reading of 42-1-40. This Court agrees and respectfully REVERSES the Commission's finding as to the average weekly wage based on 52 weeks. Claimant's average weekly wage based on a 38 week period is \$903.02 with a resulting compensation rate of \$602.04.

2. Claimant's Ongoing Knee Problems

There is substantial evidence in the record supporting the finding of the Workers' Compensation Commission that the Appellant's ongoing problems with her left knee are not causally related to this work-related accident of March 27, 2006. While there may have been some conflicting medical evidence presented, the determination of weight and credit to be afforded expert testimony and evidence is clearly within the discretion of the fact-finding body and beyond the purview of this Court.

3. Further Medical Treatment

There is substantial evidence in the record to support the Workers' Compensation Commission's decision that further medical treatment would not lessen the Claimant's disability.

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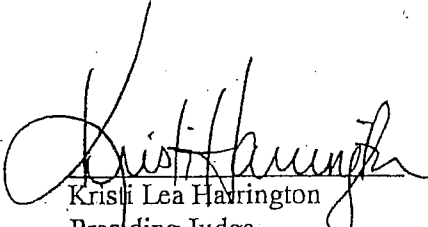
CONCLUSION

Based on the foregoing analysis, the Commission's average weekly wage calculation based on a 52-week period is **REVERSED**.

The Commission's decision to deny Claimant's claim for benefits for injuries to the left knee is **AFFIRMED**

The Commission's finding that further medical treatment would not lessen Claimant's disability is **AFFIRMED**. As to paragraph 6 in Claimant's appeal, it was noted that this issue was not raised in the Form 30 before the Appellate Panel and is therefore not properly before this Court.

IT IS SO ORDERED.


Kristi Lea Harrington
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

Dated: 4-18-11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Debra B. Henson,

Appellant,

v.

Berkeley County School Board,

Respondent.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2000-UP-163
Heard December 7, 1999 - Filed March 6, 2000

REVERSED AND REMANDED

Harriet McBryde Johnson, of Charleston, for appellant.

Terri Morrill Lynch, of Sinkler & Boyd, of Charleston, for
respondent.

PER CURIAM: In this workers' compensation action, Debra Henson appeals from the circuit court's order affirming the Workers' Compensation Commission's denial of benefits. We reverse and remand for further factual findings.

FACTS

Henson began her employment as an art teacher with the Berkeley County School District in 1978. During the 1985-1986 school year while working at College Park Middle School, Henson developed symptoms including clogged sinuses, a recurring sore throat, coughing, sneezing and laryngitis. In October, 1985, she sought treatment from Dr. Dantzler, a board-certified specialist in allergy and immunology.

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Henson was diagnosed with perennial allergic rhinitis and conjunctivitis with vasomotor instability. However, the underlying cause of Henson=s symptoms was unknown at that time. Dr. Dantzler noted possible precipitating factors including weather changes, animal exposure, spicy food, cigarette smoke, dust and odors. He suggested Henson Aavoid what she could.@

Henson testified she successfully treated her symptoms with the periodic use of antihistamines. In May 1986, Henson transferred to Stratford High School where her daily contact with a variety of artistic media, including a pottery kiln, increased. Henson, in retrospect, came to associate the heavy fumes produced by the kiln with her adverse reactions.

Henson testified that her symptoms worsened during the 1987-88 school year. She attributes the deterioration to the use of ceramics in the adjoining classroom and increased use of the kiln. Henson suffered a nasal discharge causing her doctor to prescribe antibiotics and later allergy injections.

In March 1988, Henson had a sinus inflammation accompanied by headaches and difficulty breathing. She testified this was Athe stick that broke the camel=s back.@ Dr. Dantzler took her out of work for two weeks. Henson never returned to work. She contends this proved to be the onset of her disability.

On May 5, 1988, Henson filed her First Report of Injury. She subsequently filed a Form 50 pro se on January 29, 1989. On April 5, 1989, Henson=s counsel withdrew her hearing request on the basis that the claim was not yet ripe for adjudication. She asked that the Form 50 be accepted as a claim for purposes of satisfying the statute of limitations. Henson claimed entitlement to workers= compensation benefits for vasomotor rhinitis caused by exposure to irritants in her employment as an art teacher resulting in an occupational disease or alternatively, an injury by accident.

Henson attempted to return to the art classroom environment, but testified that her symptoms became aggravated with each attempt. In 1990, Dr. Charles Banov concluded Henson=s underlying rhinitis was aggravated by her work environment but without permanent residua that would render her incapable of seeking gainful employment. However, in 1993 Dr. Dantzler concluded Henson was disabled by her condition not only from her previous employment but from all work continuously since 1988.

A hearing was held before the single commissioner on September 30, 1996. In his order, the single commissioner found Henson proved the elements of occupational disease but failed to prove her alternative theory of injury by accident. However, the single commissioner denied coverage because he determined that Henson=s claim was

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untimely and she generally failed to prove her entitlement to benefits. The single commissioner further found that even though Berkeley County School Board (the school board) was not given timely notice of the injury, no prejudice resulted from the delay. Both parties appealed to the full commission. The commission affirmed the single commissioner in every respect but two. The commission found the school board was prejudiced by the lack of timely notice and that vasomotor rhinitis did not meet the qualifications of occupational disease. Henson appealed to the circuit court. The circuit court affirmed the commission in all respects. This appeal followed.

SCOPE OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions of the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). We may not substitute our judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse if the decision is affected by an error of law. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

DISCUSSION

Henson appeals asserting the commission erred in determining that: (1) her claim was untimely; (2) notice of injury was delayed and prejudice resulted from the delay; (3) vasomotor rhinitis does not constitute an occupational disease; (4) Henson failed to prove her alternative theory of injury by accident; and (5) the calculation of the compensation rate. In the alternative, Henson alleges the commission failed to make specific factual findings to enable proper appellate review. We agree the commission erred by failing to set forth a specific factual basis for its findings and conclusions.

I.

As noted, the commission's order incorporates by reference the findings of fact and conclusions of law of the single commissioner with two exceptions. The commission departed from the single commissioner's order by finding as fact that the school board was prejudiced by Henson's failure to give timely notice and, secondly, finding as fact and concluding as law that vasomotor rhinitis does not meet the qualifications of an occupational disease as contemplated within the meaning of Mohasco Corp. v. Rising, 289 S.C. 130, 345 S.E.2d 249 (Ct. App. 1986), rev'd on other grounds, 292 S.C. 489, 357 S.E.2d 456 (1987).

In Mohasco, our Court, construing the term "occupational disease" as that term is defined by section 42-11-10, recognized that a claimant must establish the following elements in order to recover benefits for an occupational disease:

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1. A disease;
2. The disease must arise out of and in the course of the claimant=s employment;
3. The disease must be due to hazards in excess of those hazards that are ordinarily incident to employment;
4. The disease must be peculiar to the occupation in which the claimant was engaged;
5. The hazard causing the disease must be one recognized as peculiar to a particular trade, process, occupation, or employment; and
6. The disease must directly result from the claimant=s continuous exposure to the normal working conditions of the particular trade, process, occupation, or employment.

Mohasco, 289 S.C. at 135, 345 S.E.2d at 252. The full commission failed to address in what regard Henson=s medical condition does not constitute an occupational disease.

In Brayboy v. Clark Heating Co., 306 S.C. 56, 409 S.E.2d 767 (1991)(quoting Able Communications, Inc. v. South Carolina Pub. Serv. Comm=n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986)) our supreme court stated:

The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970). Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact. Aristizabal v. Woodside Division of Dan River, 268 S.C. 366, 234 S.E.2d 21 (1977). No particular format is required. Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977).

Brayboy, 306 S.C. at 58-59, 409 S.E.2d at 768. The commission summarily stated in its order that AFinding of Fact No. 5 and Conclusion of Law No. 3 are reversed to find that vasomotor rhinitis does not meet the qualifications of occupational disease as contemplated within the meaning of Mohasco Corp. vs. Rising.@¹ The commission did not state the facts upon which it relied nor did it

¹ The single commissioner stated in Finding of Fact No. 5 that A[t]he claimant suffers from Avasomotor rhinitis@, [sic] which constitutes an occupational disease.@ In Conclusion of Law No. 3, the single commissioner, citing Mohasco, stated:

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set forth which factors under Mohasco were not satisfied. We find the commission erred in failing to set forth a specific factual basis for its determination that vasomotor rhinitis, in this particular context, does not constitute an occupational disease.

Henson also raises the argument that the commission erred in failing to apply the proper legal standard in determining she failed to prove her alternative theory of injury by accident. The single commissioner concluded A[u]nder ' 42-1-160, the Claimant failed to meet her burden of proving that she sustained an injury by accident arising out of and in the course of her employment in September 1996 [sic].@ Again, without a specific factual basis to support this conclusion, we are unable to review in what manner the commission determined Henson=s claim failed to meet the requirements of ' 42-1-160.

Further, we find the commission erred in not setting forth a specific factual basis to support its finding that notice was untimely, resulting in prejudice to the school board. Specifically, the single commissioner found as fact that A[t]here was no reasonable excuse on behalf of the Claimant to fail to give notice to the Employer that she suffered from the condition of vasomotor rhinitis or what conditions may have triggered it in 1986. . . .@ The commission upheld this finding but disagreed with the single commissioner on the resulting prejudice and found Athat the Defendant=s [sic] were prejudiced by lack of timely notice.@ However, neither the single commissioner nor the full commission set forth a factual basis to support these findings. See Gray v. Laurens Mill, 231 S.C. 488, 99 S.E.2d 36 (1957) (supreme court remanded case to commission for further findings where no finding regarding Areasonable excuse@ was made, nor any finding supporting the conclusion as to Alack of prejudice@).

We also find the commission erred in failing to set forth a specific factual basis to support its finding that Henson=s claim is barred by her failure to

AI find that the Claimant suffered a disease which arose out of and in the course of her employment; that the disease was a result of hazards in excess of those ordinarily incident to the employment; that the disease was peculiar to the occupation in which the claimant was engaged; that the hazard causing the disease is recognized as peculiar to a particular trade, process, or employment; and that the disease was directly a result of the claimant=s continuous exposure to the normal working conditions of the trade, process, occupation or employment.@

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timely file under S.C. Code Ann. ' 42-15-40. The single commissioner determined, and the full commission agreed, that Henson failed to timely file a claim under section 42-15-40 where the record clearly establishes a diagnosis of vasomotor rhinitis in October 1985. . . .@ This conclusion lacks a specific factual basis to enable a reviewing court to determine how the commission related a diagnosis of vasomotor rhinitis, @ to Henson=s claim based on alternative theories of an occupational disease or an injury by accident.

Despite the argument by the school board that the evidence in the record, recited by the single commissioner and relied upon by the commission, provides a substantial evidentiary basis for the findings and conclusion of the commission, it would only be speculation on our part as to what evidence the commission relied upon in making its decision. From the order before us, it is impossible to determine the basis for the commission's findings.

II.

Henson further argues the commission miscalculated the average weekly wage and compensation rate. Under our Workers= Compensation Act, Aaverage weekly wages@ have been defined as:

[E]arnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury. . . . When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, so long as results fair and just to both parties will be obtained.

S.C. Code Ann. ' 42-1-40 (Supp. 1998) (emphasis added). Henson first contends the fifty-two week period at issue should run from March 1988, the date Henson alleges Aa injury@ occurred from the onset of disability. The commission based its calculation on the fifty-two week period immediately prior to September 1986. The correct period on which to base this calculation depends on the commission=s determination upon remand whether Henson suffers from an occupational disease or injury by accident at all; if either, as supported by specific facts. If the commission finds an injury by accident or occupational disease, then the fifty-two week period will be based on the commission=s determination of Aa the date of the injury,@ supported by specific facts.

Henson also contends the commission erred in basing its calculation on a full fifty-two week period, where Henson, as a teacher, only worked approximately thirty-

HENSON v. BERKELEY COUNTY SCHOOL BOARD

eight weeks a year. Though Henson=s salary was allotted over a fifty-two week period, she argues the calculation should be based on her total salary divided by the number of weeks in the school year. We agree. The statute clearly states that when the period of employment immediately preceding the injury is less than fifty-two weeks, the earnings for that period are to be divided by the number of weeks in which wages were earned. Henson=s period of employment was a school year. The earnings for that period of employment were distributed over a calendar year. Under the statute, those earnings are to be divided by the number of weeks in which earned, i.e, the number of weeks in the school year, not the number of weeks in which those earnings were distributed. See Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950). Therefore, we find it was improper for the full commission to base its calculation on a fifty-two week period.

Accordingly, we reverse the circuit court=s affirmance of the commission=s calculation of the compensation rate based on a full fifty-two week period, and remand for the circuit court to remand to the full commission to make specific factual findings on the issues of: whether Henson suffered an injury by accident; whether vasomotor rhinitis constitutes an occupational disease; whether notice was untimely, and if so, whether it prejudiced the school board, and whether it was reasonably excused; and the proper fifty-two week period to be used in calculating the compensation rate.

REVERSED AND REMANDED.

CURETON, HUFF and HOWARD, JJ., concur.

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P. O. Box 1715
Columbia, SC 29202-1715
(803) 737-5739 www.wcc.sc.gov

PRE-HEARING BRIEF
WCC File No.: 1104105

Claimant's Name: Kelly McPherson

Employer's Name: Charleston County School District

Address: 2011 Highway 17 North, # 2200N
Mt. Pleasant, SC 29466
and
8614 W. Corrine
Peoria, AZ 85381

Address: 75 Calhoun Street
Charleston, SC 29401

Home Phone: _____ Work Phone: _____

Carrier: Charleston County School District

Preparer's Name: Matthew O. Riddle

Preparer's Phone # (843) 720-5422

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Comp. Rate: \$ 518.01 2. AWW: \$ 776.98 Date of Injury: 2/3/2011
3. Type of injury and body part(s) The Claimant sustained admitted injuries to her neck/back while breaking up a fight between two students.
4. Facts in controversy: Whether the Claimant has reached maximum medical improvement; whether and to what extent the Claimant is entitled to permanent disability benefits; whether the Claimant is entitled to ongoing medical treatment; correct average weekly wage and compensation rate.
5. Legal issues involved: See #4 above. Employer/Carrier asserts average weekly wage is correct pursuant to SC Code Ann. Section 42-1-40.
6. Unusual aspects: The Claimant had a prior workers' compensation claim in Michigan involving her neck in 1992. The Claimant received a settlement in that case in excess of \$100,000. The Claimant moved to Arizona in 2012, and currently still lives there.
7. Witnesses (designate if expert)* The Claimant; a representative of the Employer may testify.
8. Exhibits: None; the Employer may submit the Claimant's deposition transcript for impeachment purposes.
9. Medical evidence: (indicate report pursuant to R.67-612; deposition or appearance):
 1. Spine Institute of Arizona; 06/21/12-01/21/15; 62 pages.
10. Name, address, and specialty, if any, of the treating physician: Dr. Paul Gause, Spine Institute of Arizona, 9735 N. 90th Place, Scottsdale, Arizona 85258
11. Impairment rating(s); body part(s); physician and date of opinion: Dr. Gause assigned 7% impairment on 01/23/15.
12. I am amending my Form 50/51 in the following manner: No amendments

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1801.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Fred W. Riesen, Jr., Esquire

Address P. O. Box 40997, N. Charleston, SC 29423-0997 on the 25th day of March 2015

By ☒ first class postage ☐ certified mail ☐ personal service.

Signature: _____

Email: MRiddle@vcrlaw.com

Date of hearing: 4/9/2015

Time needed for hearing: 1 hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-15; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58

58

PRE-HEARING BRIEF

Rev. 7/13

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1104105

Kelly McPherson,)
)
 Claimant,)
)
 vs.)
)
 Charleston County School District,)
)
 Self-Insured Employer,)
)
 Defendants.)

**SELF-INSURED EMPLOYER'S
MEMORANDUM OF LAW RE:
AVERAGE WEEKLY WAGE**

The Self-Insured Employer in this case denies the Claimant's request for an increased average weekly wage (AWW). The Employer accurately calculated the established AWW of \$776.98 based upon \$40,403.01 paid over 52 weeks, according to the explicit instructions on the Form 20, and pursuant to the requirements of S.C. Code Ann. Section 42-1-40. The Claimant's arguments in favor of an increased AWW are directly contrary to the plain language of the South Carolina Workers' Compensation Act. Furthermore, an increased AWW would result in an inequitable windfall to the Claimant, unfairly penalize the Employer, and would not accurately approximate the Claimant's probable future earning loss. Finally, the Claimant relies on precedent that is not binding on this Commission, and is inapplicable to the facts of the present case. Therefore, the established AWW of \$776.98 is correct, and should not be increased.

A. The Employer correctly calculated the AWW according to the plain language of S.C. Code Ann. section 42-1-140.

The parties agree that the Claimant, a school teacher, earned a salary of \$40,403.01 during 2010. The Employer paid this salary over the course of the entire calendar year, and therefore calculated the AWW according to 52 weeks paid. However, the Claimant requests that the AWW be calculated according to the number of weeks in the school year, instead of the 52

weeks for which she was actually paid. The Claimant's request is directly contrary to the plain language of the Act. S.C. Code Ann. section 42-1-40 states in no uncertain terms that the AWW must be calculated based upon the "actual number of weeks for which wages were paid." In this case, the Employer paid the Claimant a total salary \$40,403.01, over the course of 52 weeks. The Claimant was not paid hourly, she was paid a salary. She did not account for her time by "clocking" in and out. She was paid an annual salary, and continued to receive her pay during the summer months when she was not working. To reach the established average weekly wage of \$776.98, the Employer divided the total salary by 52, the "actual number of weeks for which wages were paid." Therefore, the established AWW of \$776.98 is accurate, fully in accordance with the plain language of the law, and should not be increased.

B. An increase in the AWW would result in an inequitable windfall for the Claimant, and unfairly penalize the Self-Insured Employer.

An increased AWW would not only be contrary to the plain language of the law, it would also be inequitable. The "ultimate objective" of the Act's AWW statute is to fairly reflect the injured worker's probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). However, if the AWW is increased in this case as the Claimant requests, it would grossly overinflate the Claimant's possible future earnings. Specifically, if the Claimant's AWW were \$1,063.24 as she asserts, her earnings for 52 weeks would be \$55,288.48, representing an increase of about 37% over her actual salary. As a result, the Claimant would be earning more while out of work on disability than she would while actually working. Such an inequitable result would be a windfall for the Claimant, and an unfair penalty to the Employer. Therefore, the established AWW is correct, fair, and should not be increased.

In the Bennett case cited above, the claimant was 62 years old and drawing Social Security. He worked for a short period of time each year until he received \$2500, the maximum

income he was permitted to earn without penalty while drawing social security payments. To determine the AWW in that case, the Commission divided the Claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The South Carolina Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was inequitable, reasoning that

"It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer."

Bennett, 271 S.C. at 98-99.

In this case, the Claimant proposes an AWW that would increase her earnings by almost 40%. Such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings. On the other hand, the AWW set forth on the Form 20 is accurate and provides a fair reflection of the Claimant's probable future earning loss. For these reasons, the established AWW is correct, and should not be increased.

C. The Claimant relies on precedent that is not binding on this Commission and is inapplicable to the facts of the present case.

In support of her position, the Claimant cites Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, neither of which are binding on the Commission. Furthermore, these decisions are erroneous, for the same reasons referenced above. The decisions are contrary to the plain language of the Act, result in an inequitable

windfall to the Claimant, unfairly penalize the Employer, and do not accurately approximate the Claimant's probable future earnings. These cases are entirely inapplicable, have no precedential value, and do not mandate or support a change to the established and accurate AWW.

Furthermore, the Claimant's reliance on Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), is misplaced. Bazen is distinguishable from the present case, and does not apply to support the Claimant's position. The Claimant relies on Bazen for the proposition that vacation time should not be included in the calculation of average weekly wage. But in that case, the claimant was not paid during his one month vacation. The claimant and the employer (the claimant's father) in Bazen entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "*during which time he did not receive compensation.*" Bazen, 388 S.C. at 66 (emphasis added). Therefore, the court determined the single commissioner correctly divided the Claimant's pay by the "actual number of weeks Bazen paid Claimant wages" to determine the compensation rate. Id.

Unlike the claimant in Bazen, the Claimant in this case received compensation during the summer months when she was not working. The Employer correctly divided the Claimant's pay by the actual number of weeks the Employer paid the Claimant wages. The Claimant's annual salary in the present case was \$40,403.01, and she received the entirety of that pay. The Claimant and the Employer in this case, unlike in Bazen, did not have a prior agreement for a higher amount of pay that was later reduced based on the period the claimant did not work. The Claimant received her regular pay during the entirety of the 52 weeks in 2010, even during the summer months. The Employer divided the Claimant's pay by the actual number of weeks she was paid, and therefore, the established AWW is accurate, and should not be increased.

CONCLUSION

The AWW set forth on the Form 20 the Employer completed and filed with the Commission is accurate and should not be increased. The AWW of \$776.98 is based upon the 52 weeks during which the Employer paid the Claimant compensation. Therefore, it is correct and fully in compliance with the plain language of the law. Furthermore, it is fair to both the Claimant and the Employer, because it accurately reflects the Claimant's probable future earning loss. For these reasons, the Employer requests that the Commission find the Claimant's AWW is \$776.98, with a corresponding compensation rate of \$518.01.

Respectfully Submitted,

Matthew O. Riddle, Esq.
Attorney for the Self-Insured Employer

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: **1104105**
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Kelly McPherson SSN: 504 - 04 - 0723 Employer's Name: Charleston Cty School District
Address: 8614 W. Corrine Address: 75 Calhoun Street
City: Peoria State: AZ Zip: 85381 City: Charleston State: SC Zip: 29401
Home Phone: () - Work Phone: () - Insurance Carrier: Charleston Cty School District
Preparer's Name: Fred W. Riesen, Jr. Law Firm: Riesen Law Firm, LLP Preparer's Phone #: (843) 760 - 2450

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 02/03/11

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See attached

SCWCC
SEP 28 2015
JUDICIAL

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to see attached
address see attached on the 20 day of 20 by first class postage certified mail personal service.

Preparer's Signature Fred W. Riesen, Jr. Attorney At Law fredwriesen@gmail.com 09/25/15
Title _____ Email _____ Date _____

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

Attachment to Form 30

Kelly McPherson v Charleston County School District

WCC NO.: 1104105

DOA: 02/03/11

- 1) Did the hearing commissioner err in finding Ms. McPherson based on the totality of the evidence including the medical records and the testimony of Dr. Gause and the Claimant, support the conclusion that Ms. McPherson has sustained 45% permanent partial disability to her back when a review of the evidence of records, in conjunction with the relevant factual findings established she a) suffers considerable range of motion to her back post accident, b) her extremely credible testimony of the things she is no longer capable of doing completely supported by her treating physician, Dr. Gause, confirms the fact that she has never exaggerated her complaints?
- 2) Did the hearing commissioner err in failing to take into consideration Dr. Keffer's report of 50% permanent partial impairment and the complaints Ms. McPherson set forth in discussion with her despite the fact that he has also been the Claimant's treating physician in Charleston prior to her move to Arizona and he reviewed all of the current medicals and surgical notes of Dr. Gause, the Arizona surgeon who defers to Dr. Keffer on his rating, and who preferred the 5th Edition rather than the 6th Edition AMA Guides in Ms. McPherson's case and refused to place Ms. McPherson at the lower end of the ranges he recommended on both the cervical and lumbar spine categories?
- 3) Did the hearing commissioner fail to take into consideration the credible testimony of Claimant when she individually set forth the various percentages of loss she had in her daily activities outside of work and testified that she has lost 75 to 80% of the loss of use of her back with regards to performing these things she was able to do prior to the injury.
- 4) Did the hearing commissioner err in failing to take into consideration Claimants testimony on her loss of use despite the fact that her treating physician/surgeon stated unequivocally that Ms. McPherson has always been compliant in everything he asked her to do, has always been truthful and followed his instructions, has never exaggerated anything at all, and he would have no reason to believe her testimony would be exaggerated.
- 5) Did the hearing commissioner fail to find that Ms. McPherson suffered a greater than 50% loss of use of her back which would have increased the multiple of 300 weeks to 500 weeks despite the fact that this was the indication at the hearing the direction she was going to rule and then changed her mind over 5 months later despite Dr. Gause's deposition where he continued to support his earlier reports?
- 6) Did the hearing commissioner err in calculating the average weekly wage of claimant (school teacher) when she divided Claimant's total wages by 52 weeks rather than 38 weeks which was her contractual period with the school district for which her wages were earned and paid as prescribed by S.C. Code Ann 59-21-20 "Appropriation for Teacher Salaries based on 190 days"?

- 7) Did the hearing commissioner err by not following the clear and unambiguous language of 42-1-40 as required under *Breeland v. Colleton County Schools*, 216 S.C. 147, 57 S.E.2d 63 (1950) which does not allow one to simply revert to "exceptional circumstances" to circumvent applying either of the first two methods of calculating average weekly wage under 42-1-40 which the Commissioner agreed would require utilization of a 38 week divisor.
- 8) Did the hearing commissioner err when she failed to consider what the employer **would actually be paying and what the claimant would be receiving**, i.e. total compensation rate, when analyzing what is "fair and just to both parties" and "what most nearly approximates the amount the injured employee would be earning had she not sustained the injury" in concluding a 38 week divisor would result in a windfall for the Claimant and unduly burden the Employer.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Kelly McPherson,	)	W.C.C. File No.: 1104105
	)	
Employee/Claimant,	)	
	)	
-vs-	)	
	)	
Charleston Cty School District,	)	
	)	
Employer, and	)	BRIEF OF APPELLANT
	)	
Charleston Cty School District,	)	
	)	
Carrier,	)	
	)	
Defendants.	)	
	)	

The Claimant respectfully request that the Appellate Panel of the South Carolina Workers' Compensation Commission (hereinafter referred to as "Full Commission" overturn the Decision and Order of the single Commissioner filed on September 11, 2015.

STATEMENT OF THE CASE

The above case was heard before the single Commissioner in St. George, South Carolina, on April 9, 2015 pursuant to notice timely and properly given to all parties of record. The Self-Insured Employer filed a Form 21 on January 27, 2015, asserting the Claimant had reached maximum medical improvement, and requested a determination of the Claimant's permanent disability. The Claimant filed a Form 22 Answer to Request for Hearing on February 19, 2015. The Claimant asserted that she was in need of additional medical care and treatment, and requested a determination of permanent partial disability pursuant to S.C. Code Ann. section 42-9-30.

The Employer asserted that the Claimant's disability compensation should be limited to scheduled disability less than 50% of the back, pursuant to S.C. Code Ann. Section 42-9-30. The Employer requested a credit for prior workers' compensation benefits the Claimant received for an injury in Michigan involving her head and neck. The Employer asserted that the Claimant's future medical treatment relative to her admitted neck and low back injuries should be limited to that recommended by the authorized treating physician, Dr. Paul Gause. Finally, the Employer asserted that the Claimant's average weekly wage and compensation rate as calculated on the Form 20 submitted by the Employer were correct pursuant to S.C. Code Ann. Section 42-1-40.

The Claimant asserted that she should receive a PPD award in excess of 50% of the back. The Claimant further asserted that her Average Weekly Wage ("AWW") should be determined by dividing her total annual wages by 38 weeks instead of 52 weeks, because she only worked during the school year. The Claimant also requested ongoing causally related medical treatment. In her pre-hearing brief, the Claimant asserted she was owed past temporary total disability benefits for work she missed during the summer while recovering from surgery. However, the Claimant's attorney indicated at the hearing that the Claimant was no longer seeking past TTD.

During the pre-hearing conference, the Employer requested that the record be left open for the submission of Dr. Gause's deposition transcript following the hearing. Without objection from the Claimant, the Commissioner agreed to leave the record open for this purpose. The Employer submitted Dr. Gause's deposition transcript on May 7, 2015, completing the record.

EVIDENCE SUMMARY

On September 11, 2015 Commissioner found that Claimant had sustained a 45% permanent partial disability or loss of use to the back and pursuant to the current 2% per annum table currently weekly the commission was entitled to \$68,134.06. The hearing commissioner also found that Claimants contract with the school district was for 38 weeks and although she only worked for 38 weeks, her paycheck was stretched out over a 52 week period. She decided that the proper method of determining the average weekly wage and compensation rate is by dividing by 52 weeks rather than the 38 weeks for which she was employed and paid. She computed an average weekly wage of \$776.98 with a corresponding compensation rate of \$518.01. The hearing commissioner found there was no credit due relative to Claimant's previous work related injury, which occurred over 20 years prior to this injury.

Regarding medical care, the commissioner found that the Claimant is entitled to supportive care as stated on Dr. Gause's report dated January, 23, 2015, for two years from the date of his report. Such supportive care shall include four office visits a year, physical therapy, medications, and three injections a year, subject to Dr. Gause's recommendations. After the aforementioned two-year period, the Employer shall be required to provide only that medical treatment which Dr. Gause states is, more likely than not, causally related to the original accident, based upon a reasonable degree of medical certainty, and will, more likely than not, tend to lessen the Claimant's period of disability, based upon a reasonable degree of medical certainty. In no instance shall the Employer be required to provide specific treatment or modalities other than as set forth on Dr. Gause's January 23, 2015 report, absent a finding that the Claimant has proven a compensable physical change of condition

for the worse within one year of final payment of compensation, subject to the provisions of S.C. Code Ann. section 42-17-90.

Pursuant to S.C. Code Ann. section 42-15-60(B)(3), the Claimant shall not be entitled to any further medical treatment or modalities if there is a lapse in treatment of the claimant by an authorized physician in excess of one year, unless the Claimant has made reasonable attempts to obtain further treatment or modality from an authorized physician, but through no fault of the Claimant's own, is unable to obtain such treatment or modalities. S.C. Code Ann. Section 42-15-60(C) provides that, "in cases of permanent partial disability, prosthetic devices shall be furnished during the life of the injured employee or for as long as such devices are necessary." Pursuant to this requirement, the Claimant is entitled to causally related maintenance and/or replacement of retained surgical hardware for life, subject to Dr. Gause's recommendations.

STANDARD OF REVIEW

In an Appellant Review, the Full Commission shall, pursuant to South Carolina Code Ann. 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusion of Law consistent or inconsistent with those of the Hearing Commissioner Lowe v. AM-CAN Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

ARGUMENTS

The Claimant respectfully asserts that the greater weight of the evidence in the record and applicable law does not support the single Commissioner's Decision and Order.

I. The hearing Commissioner erred in calculating the average weekly wage of Claimant (school teacher) when she divided Claimant's total wages by 52 weeks, rather than 38 weeks, which was her contractual period with the school district for which her wages were earned and paid as prescribed by S.C. Code Ann 59-21-20 "Appropriation for Teacher Salaries based on 190 days"

Claimant is a public schoolteacher whose contract with the Charleston County School district is for 38 weeks. The school district elects to stretch out or allot payments over a 52-week period. Claimant did not work summers for the school district. The two (2) preceding summers she was unable to work as she was recovering from surgeries performed as a result of her on the job injury.

S.C. Code Ann. § 42-1-40 (Supp. 2009) sets forth four alternative methods for the commission to calculate the average weekly wage. *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 308, 644 S.E.2d 784, 786 (Ct. App. 2007). The primary method of calculation requires that the average weekly wage must be calculated by taking the total wages paid for the last four quarters...divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. S.C. Code Ann. § 42-1-40. The commission must use this method unless "the employment, prior to the injury, extended over a period of less than fifty-two weeks," or unless "for exceptional reasons" it would be unfair to do so. Id.

As the Commissioner correctly held, "the Claimant's contractual period was based upon 38 weeks" and "her work was performed and earned over a period of less

than 52 weeks prior to injury." (Concl. of Law 6 & 7). Thus, her wages are calculated and paid based upon 38 weeks of work, not 52 weeks of work.

To further support this position, S.C. Ann § 59-21-20 (Supp. 2010) specifically provides that the General Assembly shall make sufficient appropriation to pay salaries of all schoolteachers in the public schools on the basis of one hundred and ninety days, which is 38 weeks. Since Claimant's wages were paid based on 38 weeks of work, both contractually and statutorily, and 38 weeks are clearly less than 52 weeks, then under the primary method of 42-1-40, Claimant's average weekly wage should be calculated based on 38 weeks.

Similarly, the second method of calculation under 42-1-40 would yield the same result. The second method provides:

When the employment prior to the injury, extended over a period of **less than fifty-two weeks**, the method of dividing the earnings during that period by the number of weeks and parts thereof **during which the employee earned wages shall be followed**, as long as results fair and just to both parties will be obtained. (emphasis added).

Claimant's earned wages were based on 38 weeks and the results of utilizing a 38 weeks divisor are fair and just to both parties. To determine what is fair and just, one must look to what the Claimant will actually receive and what the employer will actually pay. The only logical way to do so is to calculate the total compensation rate ("TCR"). If we utilize 38 weeks as the divisor in calculating the TCR, Claimant is earning \$36,876.84, which is \$3,526.17 less than her pre-injury salary. On the other hand, if we utilize 52 weeks as the divisor, Claimant is earning \$26,948.80, which is \$13,454.21 less than her salary.

Clearly, use of 38 weeks is fair and just to both parties as Claimant is still earning \$3,526.17 less than her salary prior to the injury and conversely the employer is still paying \$3,526.17 less than they were paying prior to the injury.

It should also be noted that the fourth method of calculation, which will be discussed in more detail below, provides:

"When for exceptional reasons the foregoing would be unfair, to either 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" (emphasis added).

This language tracks fairness language of the second method above and utilization of 38 weeks "most nearly approximates the amount, which Claimant would be earning were it not for the injury."

In *Bazen v. Badger R. Bazen Company, Inc.*, 388 S.C. 58, 693 S.E.2c 436 (S.C. App. 2010) the Court of Appeals affirmed the single commissioner's average weekly wage calculation. In *Bazen*, the Commissioner determined that the Claimant earned \$27,500 in 2001 and then divided this number by forty-eight, the actual number of weeks Bazen paid Claimant wages. The employer argued the salary should be divided by 52 weeks because he was employed for 1 year and had taken a 1-month vacation. The Court of appeals disagreed and held that the average weekly wage is calculated by the "actual number of weeks for which wages were paid." *Id.* at 66.

In our case, the Commissioner correctly acknowledged that utilizing both the first and second methods of calculation in this case would **"yield the same result, a thirty-eight weeks divisor."** (Concl. of Law 7). If 38 weeks were the proper divisor, then conversely 52 weeks would clearly be improper under the first two methods. Despite this

conclusion, the Commissioner calculates the Claimant's average weekly wage using a divisor of 52 weeks by utilizing the fourth method of calculation or "exceptional reasons" alternative. In doing so, she seeks to distinguish *Breeland v. Colleton County*, 216 S.C. 147, 57 S.E. 2d 63 (1950), which is a case involving very similar facts. She also relies on the North Carolina case of *Conyers v. New Hanover County Schools* 654 S.E.2d 745, 188 (N.C. App., 2008). *Conyers*' average weekly wage statute is not identical to South Carolina's statute and *Conyers* did not have the *Breeland* precedence that we have in South Carolina, which is discussed below.

It should be noted that defense counsel specifically stated during the hearing that the second alternative was the correct method:

When the employment prior to the injury extended over a period of less than 52 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 are just and fair to both parties will be obtained. And, Commissioner, I would contend that that is the controlling language here. (Tr. P. 13 Ln 12-20).

Additionally, defense counsel conceded that "exceptional reasons" would not apply and he was not taking that position. (Tr. P. 19 Ln. 1-15). At no time did defense counsel ever raise the issue that resorting to "exceptional reasons" under the fourth method of calculation should apply because he recognized it was not the appropriate method.

In *Breeland*, the South Carolina Supreme Court construed Section 7035-2 of the 1942 Code (a prior codification of Section 42-1-40) in a substantially similar context. A review of the relevant facts reveals: (a) a school bus driver, whose period of employment and receipt of wages were also tied to the school year, died as a result of a compensable accident; (b) he received approximately 3 weeks of holiday vacation during the school year; and (c) his beneficiaries consequently argued the provisions of this statute required

that his average weekly wage be based upon a 36 week period, rather than the 39 week school term.

Without discussion, the hearing commissioner excluded the holiday period from the driver's average weekly wage calculation, dividing his earnings by 36 weeks. This determination was subsequently affirmed by the Full Commission and later by the Circuit Court, which noted that the award was "just and fair" in accordance with the language of Section 7035-2.

On appeal, the bus driver's beneficiaries further maintained that the "exceptional reasons" proviso of Section 7035-2 was controlling. However, in response to this assertion, the Court noted the Commission's award was not based upon "exceptional reasons." Specifically, the Court held:

The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, "Where 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. . . ." Unquestionably, the result is fair and just and the prescribed method should have been applied in this case. *Breeland*, 57 S.E. 2d at 64. (Emphasis added).

Although Carrier may contend this decision compels utilization of a 52 week denominator, the Supreme Court actually determined: (a) the Commission was statutorily required to compute the deceased employee's average weekly wage based upon the earnings he received during the 39 weeks which comprised the school term; (b) the Commission was not empowered to artificially increase or decrease the employment period by either adding to or deducting from the school term/contract period; and

(c) the mere fact that an individual's employment was tied to the standard public school term did not, in and of itself, authorize resort to the "exceptional reasons" proviso.

Additionally, the legislature has recognized that a public school employee's service "for regular school year in any district shall be equivalent to one year's service" for retirement purposes. See, S.C. Code ann. § 9-1-840. So, even though a public schoolteacher is only required to work 38 weeks a year, the legislature has specifically provided a whole year's worth of retirement credit. Clearly, the legislature does not consider same as unfair or a windfall, which is contrary to the rationale behind the Commissioner's decision to divide by 52-weeks rather than 38-weeks.

The current viability of the *Breeland* construction is further validated by the 1996 amendment of Section 42-1-40, which inserted the following sentence:

"Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Employment Security Commission's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. (Emphasis added).

Where, as here, the legislature "adopt[s] . . . an amendment to a statute, . . . [it] is presumed to have intended to make some change to existing law." *Glover v. United States*, 337 S.C. 307, 523 S.E.2d 763m 765 (1999). Significantly, application of these rules of construction: (a) recognizes the legislature's awareness of its prior enactment (which primarily focused on a 52 week period), as well as the *Breeland* ruling; (b) presumes the amendatory language ("divided by 52 or the actual number of weeks for which wages were paid, **whichever is less**;) was inserted "to make some change in existing law" / "intended. . . to accomplish something and (c) evinces the legislative

intent to mandate calculation of average weekly wage/compensation rate based upon "the actual number of weeks for which wages were paid . . ."

Despite *Breeden's* holding that there was no ambiguity in the statute to justify use of the "exceptional circumstances," the commissioner nevertheless chose to use the exceptional circumstances by attempting to distinguish *Breeland*. The Commissioner stated, "For reasons not stated in the *Breeland* opinion, the employer did not argue that the Claimant's average weekly wage should be determined based on 52 weeks. The only dispute was whether the period the Claimant earned wages was comprised of 39 or 36 weeks." (Conclusion of law 18).

This is the precise point Claimant is making. The employer did not argue the average weekly wage should be calculated based on 52 weeks because it recognized 42-1-40 was unambiguously clear that the school bus driver's wages were based on 39 weeks.

The Commissioner further distinguishes *Breeden* by stating, "The parties in *Breeland* appear to have agreed that only the nine-month period should be considered to calculate average weekly wage, and the court did not analyze whether the resulting average weekly wage was fair to the parties." (Conclusion of law 20). This conclusion misinterprets and contradicts the holding in *Breeden*, which clearly states, "Unquestionably, the result is fair and just and the prescribed method should have been applied in this case." *Breeland*, 57 S.E. 2d at 64.

By attempting to distinguish *Breeland*, the Commissioner determined that both the primary and second methods of calculation were not fair and just to the employer and "exceptional reasons" were present. She further found using a 38-week divisor would

artificially increase the Claimant's wages by over thirty-five (35%). As previously noted, the legislature recognizes the payment of a public schoolteacher for a full year's retirement, even though she only works 38 weeks out of the year, is neither unfair nor does it artificially increase her retirement. The same holds true with respect to the AWW in this case.

Utilization of the "exceptional reasons" calculation also requires that the result must "most nearly approximate the amount which the injured employee would be earning were it not for the injury." The only fair and just way to determine the employee's earnings pre-injury is to calculate the total compensation rate as opposed to an *artificial* average weekly wage. The total compensation rate is the true amount that the employee will be "earning" and the employer will be paying as illustrated below:

Pre-Injury Salary (Wages)	Weeks Wages Paid	AWW	Comp. Rate %	Total Comp Rate	Weeks In Year	Post Injury Salary
			.667			
\$40,403.01 ÷	38 =	\$1,063.24 x	.667 =	\$709.17 x	52 =	\$36,876.84
\$40,403.01 ÷	52 =	\$776.98 x	.667 =	\$518.25 x	52 =	\$26,948.80

As one can see, the Claimant would not be receiving a windfall of \$55,288.48 or 35% increase in wages as the Commissioner determined but rather a decrease in her wages, i.e. what she was earning were it not for the injury.

On the other hand, by utilizing the Commissioner's 52 week-divisor, even though the Claimant only worked 38 weeks, the employer will be paying \$26,948.80, which is \$13,454.21 less than Claimant's salary. Comparing the two calculations, \$36,876.84 most nearly approximates the amount, which the injured employee would be earning (\$40,402.96) were it not for the injury.

By arguing "exceptional reasons" apply, the commissioner has basically circumvented the first two methods of calculation, which she acknowledged required use of 38 weeks rather than 52 weeks. She then uses the same formula from the first two methods by applying 52 weeks, which she previously determined would be inappropriate. By utilizing this approach, one can use the fourth method to circumvent the statute when utilization of 52 weeks under the first or second methods would be otherwise inappropriate.

If the Commissioner's construction was the intent of the legislature, it simply could have drafted two methods of calculation at the time they amended the statute in 1996: a) one method based on 52 weeks and b) a second method based on "exceptional reasons" when 52 weeks did not apply. There would be no need to include under the primary method, "actual number of weeks for which wages were paid" or under the second method, "when employment extended less than 52 weeks...the number of weeks and parts thereof during which the employee earned wages shall be followed."

Claimant has also enclosed *Hynes v. CCSD* Case No. 2010-CP-10-7739, a circuit court decision in which Judge Harrington, agreed with Claimant's position that the average weekly wage of a school nurse employed by the same employer in this case, the Charleston County School District, should be calculated based on 38 weeks rather than 52 weeks. The school district made the same argument to both the Appellant Panel and Circuit Court that "it would be unfair to the employer to attribute an average weekly wage based on nine months which would result in a windfall to the Claimant by giving her an average weekly wage higher than that which she was actually earning." Judge Harrington disagreed and held that employment as defined by SC Code Ann 59-21-20 is

190 days or 38 weeks. Additionally, application of either the first or second methods of 42-1-40 would be the appropriate method of application, which therefore would require utilization of 38 weeks, not 52 weeks. The Charleston County School district chose not to appeal the decision and yet they continue to calculate teachers' average weekly wage based on 52 weeks.

The case of *Vanessa Waldo v. Berkeley County School District*, (WC No. 1118280), was discussed during the hearing but not included in the Commissioner's Order. In *Waldo*, Commissioner McCaskill was presented with the exact same issue. Ms. Waldo was a school nurse employed by the Berkeley County School district when she was injured on the job. She did not work summers. The Employer took the position that the average weekly wage should be calculated based off 52 weeks per their Form 20, rather than 38 weeks. Commissioner McCaskill disagreed and held the average weekly wage should be calculated using 38 weeks.

Henson v. Berkeley County School Board, 2000-UP-163 (Ct. Appeals 2000) is unpublished and therefore not binding but is being included to provide guidance and to show that the Court still reaffirms *Breeland*. In *Henson* an art teacher suffered a compensable work related injury. With respect to Average Weekly Wage calculation, the Court held as follows:

"Though Henson's salary was allotted over a 52 week period, she argues the calculation should be based on her total salary divided by the number of weeks in the school year. We agree. The statute clearly states that when the period of employment immediately preceding the injury is less than 52 weeks the earnings for that period are to be divided by the number of weeks in which wages were earned... See *Breeland*. Therefore we find it was improper for the full commission to base its calculation on a 52 week period"

It is clear from the facts in our case that a public schoolteacher who works 9 months out of the year is not the type of "seasonal employment," very short term employment, or dual employment that the legislature and courts sought to include as an "exceptional reason" when drafting and interpreting 42-1-40¹. Every "exceptional reason" case that has been decided is clearly distinguishable and truly appears to be an exceptional reason (see footnote 1).

Our case is not the equivalent of a "seasonal worker" such as a migratory worker, lifeguard, or snow ski instructor, each of which only works 3-4 months out of the year, and which would justify application of "exceptional reasons". There are ample cases from South Carolina supporting Claimant's average weekly wage position without having to rely on a North Carolina case. As such, reliance on a North Carolina case to justify application of "exceptional reasons" in the instant case is misplaced especially considering our legislature amended our AWW statute in 1996 reaffirming Breeden.

Consequently, application of the formula presented by Section 42-1-40 (through a Breeland analysis or use of the unambiguous amendatory language) requires use of 38 weeks, which yields an AWW of \$1,063.24 and establishes a compensation rate of \$709.17. Based on the foregoing, the Commissioner's order as to utilization of a 52-week divisor to calculate the AWW should be reversed.

¹ Exceptional reasons existed to deviate from primary method of calculating average weekly wage when employer's motive appeared to be an attempt to avoid filing a claim with its insurance carrier and claimant ceased working only when he could no longer physically perform his duties. *Swilling v. Pride Masonry of Gaffney* 401 S.C. 178, 736 S.E.2d 672 (S.C. App. 2012); Earned pay increase qualified as exceptional reason to recalculate average weekly wage. *Elliott v. S.C. Dept. of Transp.* 362 S.C. 234, 607 S.E.2d 90 (S.C. App. 2004); Claimant's dual employment during holiday season was an exceptional reason to deviate from statutory method of calculating average weekly wage. *Brunson v. Wal-Mart Stores, Inc.* 344 S.C. 107, 542 S.E.2d 732 (S.C. App. 2001); Claimant's merit wage increases of over 63% in less than 12 months permitted Claimant to utilize the exceptional reasons method to calculate average weekly wage rather than the primary method argued for by the Employer as the wage increases most nearly approximates what the claimant would be earning but for the injury as well as his probable future earnings capacity. *Booth v. Midland Trane Heating and Air Conditioning* 298 S.C. 251, 379 S.E.2d 730 (S.C. App. 1989)

II. The hearing commissioner erred in finding claimant sustained only a 45% permanent partial disability to her back when a review of the evidence of record, in conjunction with the relevant factual findings establishes a) Dr. Keffer assigned a 25% impairment to Claimant's cervical spine and 25% lumbar impairment for a combined whole person impairment of 50%; b) Dr. Paul Gause deferred to Dr. Keffer's opinion with respect to utilization of the AMA Guidelines 5th Edition; c) Claimant suffers considerable range of motion limitation to her back post accident; d) Claimant provided credible testimony that she no longer is capable of doing the daily activities she enjoyed prior to the injury; and e) Dr. Gause's confirmation that Claimant has never exaggerated her complaints.

The Commissioner erred in finding Claimant suffered only a 45% permanent partial disability to her back when the totality of the evidence involving the medical records and testimony of Dr. Gause and Claimant, along with the report of Dr. Keffer, whom Dr. Gause defers to, establishes that Claimant is extremely credible, she never exaggerated her complaints, and suffers considerable loss of range of motion and loss of use of her back in excess of 50%.

Dr. J. Reilly Keffer with Charleston Neurosurgical Associates was the authorized treating physician in Charleston before Claimant moved to Arizona. He assigned an impairment rating, which was based not only on his prior medical records while treating Claimant but also all of the medical records of Dr. Paul Gause, Claimant's surgeon in Arizona. Since claimant was in Arizona Dr. Keffer was unable to do a physical exam but spoke to her on the phone and went over very carefully her medical history and her current symptoms. Dr. Keffer rated her cervical spine at 25% of the whole person pursuant to DRE Category IV on table 15-5 page 352 due to the fusion surgery. He also rated claimant at 25% to the whole person for the lumbar spine injury. Dr. Keffer noted that she actually had two surgeries to the lumbar spine with an anterior fusion on 6/2/14

and also a posterior fusion on 6/4/14. He additionally noted that despite the fusion at L5-S1, she is still reporting 3-4/10 level lower back pain on average and 5/10 left lower extremity pain occurring intermittently but fairly regularly. Finally, Dr. Keffer determined that given the residual symptoms she is still reporting and also considering the fact that she actually underwent two lumbar surgeries rather than one to accomplish the fusion at L5-S1, he felt it was reasonable under the circumstances to put her in category V and a rating of 25% of the whole person for the lumbar spine. There was no deduction from the 50% total Dr. Keffer assigned (APA #3 page 27-28).

Dr. Paul Gause, the Arizona surgeon noted that the 5th Edition was not used in Arizona. After reviewing the 5th Edition categories which claimant forwarded to him for his opinion, he determined that the cervical spine rating would be a category IV and fall between 25%-28% of the whole person. He noted that pursuant to the 5th edition, Kelly's impairment to the spine for the lumbar injury would fall under category IV which was 20%-23% of the whole person (APA#6 page 40-42). Since South Carolina, unlike Arizona, utilizes the 5th edition, he was of the opinion that the 5th edition should be used rather than the 6th edition (APA#6 page 40-42). Dr. Gause stated in his deposition (page 11) that the 6th edition tables are somewhat subjective, and trying to come up with a particular number can be a little problematic. Additionally in his work status report, he placed Claimant at modified work duty consisting of no lifting greater than 40 pounds, no sitting, standing, walking more than 60 minutes at a time. Claimant was limited to no bending, twisting, stooping of the back more than 10 times/hour (APA #6 pg. 40-42).

Dr. Gause testified in his deposition that impairment ratings he assigned are for these two particular injuries and are irrespective of prior issues (Dep. Page 29). He also

stated, regarding Kelly's neck injury in 1992, that he did not know of any impairment nor would his rating include or encompass any prior rating she might have received (Dep. Pg. 28 lines 1-15). Dr. Gause stated unequivocally that the ratings he assigned on 2/27/2015 were still the same today (depo. page 38, lines 9-14).

Dr. Gause further noted that he had received a copy of Dr. Keffer's report who uses the 5th edition regularly and he noted he would defer to a doctor like Dr. Keffer with regards to their opinion on the 5th edition (dep. Page 38, lines 16-21). Dr. Gause testified in his deposition that he read Dr. Keffer's report and did not see any major changes to which he would disagree (Dep. Page 38-39, lines 22-25 and 1-2). Dr. Gause further testified that Claimant has always been compliant in everything he asked her to do (Dep. Page 39, lines 21-24). He stated unequivocally that she has never exaggerated anything at all (Dep. Page 39, line 25). He went on to say claimant has always been truthful and followed his instructions. Regarding her testimony with difficulties with housework and other limitations he would have no reason to believe she would be exaggerating (Dep. Page 40, lines 5-9).

Despite a person with undeniable credibility as evidenced by Dr. Gause, and who elected to defer her surgeries to the summer months when she was off work, the hearing commissioner completely ignores her testimony relative to her loss of use of her spine and lower extremity and how her activities in her life have been affected.

Claimant testified at the hearing that she had problems with sitting. She stated she can sit for about 30 minutes but has to move quite a bit. The pain will start after about five or six minutes then she has to move. (Hearing Trans. Page 41, lines 9-18). In regards to standing, Claimant testified that she can stand for about 30 minutes. If she stands for a

whole hour her back gets a lot of cramps in it and is very painful. She has to keep moving. She can stand for a little bit and then she has to move in order to shift her weight around (Hrg Trans. Page 41, lines 18-25). In regards to walking, Claimant testified that she walks every morning before school. She walks roughly three-quarters of a mile and then that is it. A mile would be about the longest distance that she can walk at any one given time. Claimant wears a pedometer and tries to walk up to two miles a day but it's not all at the same time. She walks in her classroom or between breaks and between classes she will walk to the bathroom and walk back. Prior to her injury, Claimant testified that she would walk three to four miles at a time without problems. Claimant testified that because of her back injury, the percentage of loss of use regarding walking is about 75% (Hrg. Trans. Page 42, lines 2 - 20).

In regards to lifting, Claimant testified that she doesn't lift too much off the floor. If something falls in the classroom, she usually has a student pick it up but if something was placed on the desk, anything less than 40 pounds, she can slide it off and put it up against her body to hang on to and move it. Just to bend over and pick it up, she can't do that. If she squats down to pick it up and uses her legs, she can pick up like a ten pound back of potatoes, maybe a gallon of milk off the floor. Other than that she doesn't think she could probably do too much more without pain (Hrg. Trans page 43, lines 1-17).

Claimant testified that as to bending forward at the waist, it is very painful if she has to hold it for any certain amount of time. When doing dishes she normally doesn't unload the low rack because it hurts too much because of the repetitive bending. She can deal with the rack on the top pretty much, but as for putting any of the dishes that have to go in the cabinets below the counter, she has the kids put them away. In the classroom

she has to limit the amount of times she bends while she is teaching. Her kids will come to a table that the school has set up for her. They have to do a stamping thing for every class period, and to bend over and stamp for 20 to 30 kids in the class is too much so the school has allowed the kids to come to her. (Hrg. Trans. Page 43, lines 18 – 25 and page 44, lines 1 – 11). Claimant testified that the school has accommodated her since her surgeries. They have allowed a student to push a cart with her computers on it. After her low back surgery, the school allowed her to teach for the first month or two in a anti-gravity lawn chair so she could tip back and lay back and still teach. They have also allowed her to have an exercise ball in her classroom so she can sit at the kids' level and roll back and it stretches her back when it gets sore. She has a big round half table in the front of the room if she needs to work with a bunch of kids or even just a couple of kids that require her to be bend over, she can sit up there and the kids can come to her (Hrg. Trans. Page 44, lines 14 – 25 and page 45, lines 1 – 8).

Regarding stooping, Claimant testified she has to squat to stoop down to work so she is at the kids' level because she can't bend over. It is just hard coming back up to stand up to the standing position but she can do it a few times an hour. As to climbing, Claimant testified that she does not live anywhere there are stairs except maybe one or two and she can get up those. Every morning she has a little incline that she walks over and her husband usually hangs on or gives her a tug to help support her when she goes up because it causes pain (Hrg Trans. Page 45, lines 9 – 25 and page 46, lines 1 – 5).

With respect to crawling, Claimant testified that she doesn't really crawl. There was an exercise that physical therapy had her do for strengthening her core but they had to modify it because when she is in that position her neck hangs and it becomes very

painful. They wanted her to rest her head on her arm so her arm was basically supporting her head. If she is at home and she loses something under the bed then her husband or children will look for it. She doesn't typically get on all fours to try to look (Hrg. Trans page 46, lines 6 - 16). As to pushing and pulling, it all depends on the weight. Claimant testified that she can push her dust mop but doesn't push or pull the computer cart at school, and it only has ten computers in it because it causes pain to try to steer something like that (Hrg. Trans. Page 46, lines 17 - 22).

Claimant testified that when she used to live in South Carolina she would ride bikes regularly with her family. Now if she gets on a stationary bike at home the longest she can ride is one to two minutes. She attempted to ride for two and a half minutes and then she had problems walking for the next three days because her back was really sore from the rocking motion. From a biking standpoint, she testified that she has a 95% loss because she used to be able to do it and now she really can't. From a walking standpoint, Claimant testified that she has about a 75% loss (Hrg. Trans. Page 47, lines 2 - 22).

In regards to chores around the house, Claimant testified that she has suffered probably an 80% loss when it comes to dishes. She used to be able to do the dishes herself but now she has to have help. In regards to managing the floors, she has had to switch from the regular brooms that pull the dirt towards you because it is too much twisting and pulling and it causes her back to hurt. With that type of broom she can only do it for maybe 5 minutes. With a dust mop, because it swivels for you, she can do that for longer. She also testified that she has to do her house in sections. She can't just say "hey I have ten minutes let me go sweep the whole floor," because she needs to take breaks in between. She testified that depending on the type of broom she has lost

probably 75% of her ability to do sweep (Hrg. Trans page 48, lines 8 – 25).

Claimant testified that she does not vacuum now. If she tries to vacuum it hurts. She used to be the only one that vacuumed, but now if she tries to vacuum the motion in her back it gets very tight and it hurts so she has to sit down and rest. She would estimate she has lost about 90% of her ability to vacuum because previously she did it all the time and now it is very very rare (Hrg. Trans. Page 49, lines 1 – 11). Claimant testified that she also is unable to scrub the floors and has her daughter do them. She also testified that her husband and her kids clean the bathrooms. "If I had to clean the bathrooms, cause the sink is at a level where I don't have to bend over, I can sometimes. I'll have the kids clean it first, and then I go in behind them and clean up to make it a little more my quality of cleaning. And then if they haven't cleaned just the inside of the toilet bowl to where I'm like, okay, it needs to get done, I can squirt the stuff in and swirl the brush around. But even that length of time to clean inside to brush, to stand back up is painful" (Hrg. Trans page 49, lines 14 – 25).

With respect to carrying the laundry, Claimant testified that she doesn't carry the laundry. "All of our laundry baskets have wheels on them so if I have to move the basket it moves easier. But my kids and my husband haul all the laundry out to the garage to get washed." Claimant did state that prior to her accident she was a single mother of three kids, age two, four, and six, and she did everything (Hrg. Trans. Page 50, lines 2 – 11). Claimant further testified that prior to the accident she used to enjoy gardening. "We lived on two acres, and so I cut all the grass. I had a very large garden. I had 140 tomato plants and zucchini and pumpkins and stuff. And we owned a house that didn't have any landscaping on it, and we, I put in the beds and planted all the plants, and we planted, I

think, six trees. So I did it. I did it a lot." Since Claimants injury she tried to put some plants around their pool. She had the kids dig the holes but she even had trouble getting the plants out of the pots. She had to rely on her kids to help her and they did most of the work. "I sat down most of the time and said, well, that spot over there looks good. Go dig the hole. So I became more of a supervisor than I did a participant." Claimant testified that she lost about 85% of her being able to garden. (Hrg. Trans page 50, lines 2 – 25 and page 51, lines 1 – 14).

In regards to her neck, Claimant testified that for the most part her pain went away but her pinky and her ring finger on her left hand go to sleep almost every night. Every night she has to wake up and try to move her neck in a position so the fingers aren't numb (Hrg. Trans page 52, lines 3 – 14). Claimant stated that prior to her injury she used to do jewelry with beads but is unable to do that now because it is too much with her head down trying to work. Ever since the injury, Claimant is unable to drive herself more than 30 minutes because it is hard to sit still. Prior to her injury, she used to drive six hours straight to see her grandparents. Claimant testified that she probably does 85% less driving now as a result of her injury. She still drives to work every day but that is less than ten minutes (Hrg. Trans. Page 53, lines 1 – 12).

Claimant testified that her injury has affected her sex life with her husband. She stated her husband gets very frustrated because the frequency is much less than what it was before she got hurt. Her neck or her back always has to be supported so it's more choreographed than it should be. It's not natural. Her husband used to hug her ten, fifteen times a day and now she is lucky if she gets one hug a day because he is afraid to hurt her and he doesn't want to add any undue pain (Hrg. Trans. Page 53, lines 13 – 24).

When asked how her injury has affected her mothering/parenting skills, Claimant stated, "I'm my kids' rock and they'll even say, "you're not the person you used to be." I don't get to play with them the way I used to. We, my kids, are all athletes, and I can't go out and play soccer; I can't go out and throw the ball anymore; I can't go for bike rides. Some times they ask me why I'm such a lame mom. And my husband now, my current husband, will try to fill in, but he's not mom. So it's been very hard, and I don't like making my kids always have to help me or ask for help. I'm a very stubborn person, and I don't like having to ask people for help, and I always have to ask my kids. If I have to go to the grocery store, they have to come. I don't go alone. They haven't had a normal childhood just because they're always taking care of a parent that's injured, and I don't think it's fair to them" (Hrg. Trans. Page 54, lines 1 – 19).

When asked what Claimant thought her overall estimate of loss of her lower back and neck would be, she stated 75 to 80%. She is not the person she used to be. She is not full of energy and can't even wear dresses anymore because she can't wear heels. She has to dress differently and do things differently than what she used to be able to do. (Hrg. Trans page 54, lines 20 – 25 and page 55, lines 1 – 4).

Claimant testified that she continues to see her treating physician, Dr. Paul Gause, and would like to continue seeing him. Dr. Gause has her on modified duty consisting of no bending, twisting, and stooping of her back more than ten times an hour. Claimant stated that if that is cumulative, if you add all those things up ten times in an hour, she would say that's probably accurate. If she had to do those things separately ten times she would be in a lot of pain (Hrg. Trans. Page 55, lines 5 – 25). As to sitting or standing no more than 60 minutes, she states she can't sit very long before she has to change positions. She

is always shifting in her seat. In regards to lifting, carrying, pushing, or pulling more than 40 pounds, Claimant testified that it all depends on where the pounds are located. If the weight is on the floor she is unable to do any of that. She couldn't carry the bags of dirt to put in the ground when they planted plants. If it's something that's at the table length and she can use the rest of her body and just kind of hang on tight with her arms and move it, then that might be reasonable. It really depends on where things are positioned (Hrg. Trans. Page 56, lines 2 – 24).

III. The hearing commissioner erred in failing to take into consideration Dr. Keffer's report of 50% permanent partial impairment and the complaints Ms. McPherson set forth in discussion with her despite the fact he also has been the Claimant's treating physician in Charleston prior to her move to Arizona and he reviewed all of the current medicals and surgical notes of Dr. Gause, the Arizona surgeon who defers to Dr. Keffer on his rating, and who preferred the 5th edition rather than the 6th edition AMA Guides in Ms. McPherson's case and refused to place Ms. McPherson at the lower end of the ranges he recommended on both the cervical and lumbar spine categories.

See #II above.

IV. The hearing commissioner erred in failing to take into consideration the credible testimony of Claimant when she individually set forth the various percentages of loss she had in her daily activities outside of work and testified that she has lost 75% to 80% of the loss of use of her back with regards to performing these things she was able to do prior to the injury.

See #II above.

V. The hearing commissioner erred in failing to take into consideration the Claimants testimony on her loss of use despite the fact that her treating physician/surgeon stated unequivocally that Ms. McPherson has always been compliant in everything he asked her to do, has always been truthful and followed his instructions, has never exaggerated anything at all, and he would have no reason to believe her testimony would be exaggerated.

See #II above.

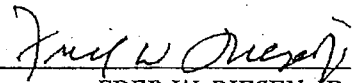
CONCLUSION

For the foregoing reasons, the Appellate Panel should reverse the Order of the Commissioner and make the following findings:

- a) Claimants AWW requires use of a 38-week divisor which yields an AWW of \$1,063.24 with a resulting compensation rate of \$709.17 and;
- b) Claimant is permanently partially disabled with substantially more than 50% loss of use and disability to her spine.

Respectfully Submitted,

RIESEN LAW FIRM, L.L.P.


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November 11, 2015

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0602631

JASON JUDE, EMPLOYEE, CLAIMANT,

v.

DILLON SCHOOL DISTRICT NO. 2, EMPLOYER,

and

SOUTH CAROLINA SCHOOL BOARDS INSURANCE TRUST, CARRIER,
DEFENDANTS.

Hearing: Held on February 23, 2009 in Columbia,
South Carolina.

APPEARANCES: Claimant represented by Andrew N.
Safran, Esquire, Post Office Box 12089,
Columbia, South Carolina 29211.

Defendants represented by Adrienne L.
Turner, Esquire of Barnes, Alford, Stork
& Johnson, L.L.P., Post Office Box 8448,
Columbia, South Carolina 29202-8448.

Purpose of Hearing: Review of the June 26, 2008 Order of the
Honorable George N. Funderburk.

DECISION AND ORDER OF THE APPELLATE PANEL

Filed: _____

STATEMENT OF THE CASE

This is an appeal from the June 26, 2008 Order of the Honorable George N. Funderburk, which determined: (a) Claimant, Jason Jude, sustained a compensable back injury on January 26, 2006 while performing his job duties as a cafeteria worker (transporting several boxes of apples from a walk-in cooler via use of a cart) for Defendant, Dillon School District No. 2; (b) "the credible evidence establishe[d] . . . Mr. Jude did not violate or ignore any directive of supervisory personnel on the date in question, so as to materially deviate from the course/scope of his employment"; (c) Dillon School District No. 2 and its Carrier, South Carolina School Boards Insurance Trust, had failed to establish this injury was the product of Mr. Jude's "wilful intention to injure himself" ("staged" accident); (d) the plain language of S.C. Code Ann. Section 42-1-40 (1976, as amended) compels calculation of Mr. Jude's average weekly wage/compensation rate based upon earnings generated during the 38 week period which comprised the standard school year; and (e) Mr. Jude required further treatment, including surgical intervention recommended by Dr. W. F. (Bill) Edwards, Jr. of Pee Dee Orthopaedic Associates, P.A.

Essentially, Defendants contend Commissioner Funderburk erred in: (a) declining to find Mr. Jude deviated from the course/scope of his employment by either disobeying a

supervisor's instruction/admonition as to the manner in which he was to move the boxes or purposely injured himself; (b) implying the unambiguous language of Section 42-1-40 (requiring total wages paid for the last four quarters immediately preceding the quarter in which the accident occurred be "divided by fifty-two or the actual number of weeks for which wages were paid, whichever is less"); (c) acknowledging the Legislature's consistent recognition that an individual's working during the "regular school year" constitutes full-time employment; and (d) concluding the "exceptional reasons" proviso of Section 42-1-40 was inapplicable to the assessment of Mr. Jude's period of employment.

After thoroughly reviewing all pertinent evidence, in light of the relevant legal authorities, we hereby affirm Commissioner Funderburk's determinations in their entirety based upon the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. In August, 2004, Mr. Jude was hired by Dillon School District No. 2 to serve as a cafeteria worker at East Elementary High School in Dillon, South Carolina. Although he shared certain limited responsibilities with his co-workers, the evidence establishes Mr. Jude was: (a) the only male member of the cafeteria staff; and (b) required to perform the more physically demanding tasks.

2. While his co-workers' (including supervisory personnel) indicated he possessed several positive traits/qualities (no "reason to. . . question his honesty or not trust him"; "never had any reason to question him as far as his honesty or being a. . . trustworthy person"; "always nice"; "always reported to work"), they acknowledged he: (a) was mentally "slow"; (b) had difficulty understanding; and (c) regularly required repeated instruction relative to work assignments.

3. Significantly, Ms. Powers, who had supervised Mr. Jude throughout his employment tenure and currently serves as "a manager" of the cafeteria, confirmed he: (a) "had difficulty picking up on instructions"; (b) would occasionally "look back at you with kind of a blank look on his face. . . [when] given a comment or instruction"; (c) routinely "did not completely get it" (describing his receipt of instruction); (d) "was not the kind of person. . . you could count on. . . understanding. . . a single instruction"; (e) needed someone "to stay behind him" ("you'd repeat yourself, really, as a standard thing for him"); (f) did not follow direction, despite repeated reinforcement, on multiple occasions; (g) encountered these difficulties "because. . . he was slow. . . and. . . [,] in [her] impression. . . had difficulty comprehending"; and (h) could be expected to "not always. . . get. . . it. . . done the way you want it. . . nine

times of out ten", notwithstanding his receipt of repeated instruction.

4. In this regard, Ms. Cummings verified her son had: (a) experienced complications at birth (turning blue when umbilical cord had wrapped around his throat); (b) always exhibited various cognitive problems (relating to concentration, understanding, learning ability, etc.), which became more noticeable once he began attending school; (c) repeated two grades, while being routinely placed in remedial and (at the high school level) vocational classes; and (d) performed poorly throughout his academic career.

5. She further explained: (a) his difficulties (need for repeated instruction, a lack of comprehension which was often symbolized by a "blank look", poor learning capacity, etc.) have persisted, to the extent Mr. Jude is still childlike in many respects; (b) these limitations have necessitated his remaining moderately dependent upon others (particularly family members) in connection with certain activities of daily living (cooking, cleaning, laundry, etc.); (c) he has consistently strived to maintain a "normal" lifestyle, notwithstanding these intellectual shortcomings; (d) she has assisted/accommodated his attempts to do so in various ways (allowing him to occupy a mobile home located next to the family residence, helping him complete job applications and prevailing upon family friends/acquaintances to

offer employment opportunities); and (e) his efforts to find/maintain employment have always been encouraged.

6. When questioned as to Mr. Jude's work history, including a brief tenure as a police officer for the Town of Lakeview, Ms. Cummings candidly advised: (a) the law enforcement job was obtained through a family friend/acquaintance, who "knew Jason"; (b) her son left this employment after he was involved in a motor vehicle accident and it became obvious he was not suited for the job; (c) relatively short-term security jobs were likewise obtained through family friends/acquaintances; and (d) the absence of any prior issues relative to his honesty or willingness to work.

7. Inspection of Mr. Jude's academic record, in light of Ms. McCall's testimony, similarly indicates: (a) testing performed during his eighth grade year was indicative of "a consistent pattern [of] . . . working below grade level"; (b) as a consequence, he was routed into a "trade[/]remedial . . . course curriculum"; (c) his academic performance at even this basic level was poor (generating a 1.87 "[c]umulative G.P.A."); and (d) he was nonetheless allowed to "graduate" after obtaining a "passing" score on his BSAP examination in the Summer of 1998.

8. Interestingly, when cross-examined as to certain aspects of Mr. Jude's performance on this test battery, Ms. McCall admitted/conceded: (a) the "passing" score was generated

on his fifth attempt; (b) this score (787) represented a "significant increase" (107 points) over his previous best; (c) his rather dramatic improvement was "higher than. . . expected", particularly in the context of Mr. Jude's prior academic performance (including consistently unsatisfactory or near failing grades in this subject area); (d) the substantial number of rather pronounced increases by the group of students who took this examination (for either the fourth or fifth time) at Mr. Jude's test site was "unusual"; and (e) the peculiarity of Mr. Jude's particular circumstances. ("Q: And so he has completely bombed math for the year. He has not been able to meet the standard, you can't tell us that he went to any intervening course and yet, miraculously, in the summertime he goes from 680 to 780? A: That is correct.").

9. In the Summer of 2005, Mr. Jude: (a) developed "left leg and low back pain", which were determined to stem from an L5-S1 disc herniation; (b) "underwent surgical intervention by Dr. Rhea for this with good results"; and (c) was unable to work for a period of time.

10. While Defendants implicitly maintain (through submission of medical records stemming from this treatment) that Mr. Jude continued to suffer from this lumbar disc pathology, the relevant evidence unequivocally establishes he: (a) resumed full duty work activities; (b) regularly performed the physically

demanding duties incidental to his job; and (c) did not complain of any lingering/persistent physical problems.

11. During a brief breakfast break on January 26, 2006, Mr. Jude made an apparently unsolicited comment relative to "workmen's comp, long-term, short-term, salary and disability benefits." As confirmed by Ms. Manning, Ms. Gaddy and Ms. Campbell, he: (a) did not address the inquiry to any particular individual; (b) "made the comment once and. . . then. . . [the group] moved on to the next thing"; and (c) did not bring up the subject again.

12. Later that morning, he was asked to retrieve several boxes of apples from a walk-in cooler/refrigerator located in the cafeteria's kitchen area. In response to this directive, Mr. Jude: (a) entered the walk-in cooler with a cart (a device he had previously utilized to accomplish this task); and (b) was observed loading this cart by Ms. Manning, who was also present in the cooler.

13. Specifically, Ms. Manning testified: (a) Mr. Jude was retrieving the apples ("stack[ing]. . . the boxes on the cart") in the same manner as on previous occasions; (b) she and Mr. Jude were the only people in the cooler while he was stacking/loading the boxes; (c) the cooler door was closed during this time period, which not only prohibited communication with anyone located outside the cooler, but also prevented outside

observation while Mr. Jude was engaged in this activity; (d) she had never heard anyone question him as to the fashion in which he accomplished this task; (e) if someone "had made a big issue about it and made some noise" in her vicinity, she would have heard the comments; and (f) she heard no statements of this nature as Mr. Jude was loading the boxes onto the cart.

14. She also observed: (a) one of the apple boxes shift as Mr. Jude exited the cooler; (b) he tried to grab the box as it began to fall; (c) this process resulted in the cart "flipp[ing] over"; and (d) no one else was in the immediate vicinity of the falling cart (a response prompted by review of her prior deposition testimony).

15. Ms. Campbell initially testified she: (a) saw a "box start . . . slipping. . . [as] he was coming out of the cooler. . . [, which prompted him to] reach. . . over to grab the box"; (b) noticed that he simply "just reached over", rather than instinctively reacting to the situation; (c) was unaware "Mr. Jude had a problem with understanding instructions"; and (d) received assistance retrieving the apples which had spilled from the fallen box.

16. However, when confronted with her deposition testimony, she admitted: (a) "sometimes it was hard for him to understand"; (b) "his first reaction was to grab out and grab the box"; (c) "this was a quick spur-of-the-moment lunge to grab the box, to

try to keep it from falling and keep the cart steady"; (d) his course of action was "one of those quick decisions. . . you do not really even think about"; (e) "it was not anything where he was being slow and deliberate"; (f) the shifting/falling box was an "unexpected" occurrence; and (g) she had previously denied receiving any assistance picking up the apples.

17. A review of Ms. Wilson's hearing testimony similarly reveals several material inconsistencies with the accounts of other witnesses. Specifically, she alleged: (a) instructing Mr. Jude not to "stack the apples so high. . . [while] he was in the cooler"; (b) she was "standing outside of the cooler and. . . saw him actually in the process of. . . loading. . . [the boxes] on the cart"; and (c) "he had [no]. . . problem understanding things. . . ."

18. However, she later agreed/acknowledged: (a) her testimony relative to the provision of this cautionary directive was "inconsistent with. . . [Ms. Manning's statement] that [the]. . . cooler door was shut"; (b) having "to explain things to him" during the limited period (three weeks) they actually worked together; (c) Ms. Powers (who supervised Mr. Jude for a substantially greater period) "was familiar with all of the employees and. . . their. . . idiosyncrasies. . . [, to the extent] she could probably give a very accurate appraisal of [a particular]. . . employee's performance"; (d) her

characterization of Mr. Jude as an individual who "understood what he was suppose to do and. . . did it" materially conflicted with Ms. Powers' corroboration of his incapacity to follow instruction ("nine-out-of-ten times when you would ask him to do something he would get it wrong"); and (e) she "could not legitimately dispute. . . [Ms. Powers' appraisal of Mr. Jude's longstanding comprehension difficulties] based upon [her]. . . limited time with" him.

19. Conversely, Mr. Jude's description of the circumstances surrounding his accident is wholly consistent with the eyewitness accounts of Ms. Manning and Ms. Campbell (as clarified by their inspection of prior deposition testimony). Responding to questions in a simple/straightforward fashion, he credibly: (a) described the manner in which he had routinely performed the designated task (retrieving apples from the cooler); (b) denied receiving any contrary instruction (or admonition) from Ms. Wilson while in the process of loading the apple boxes onto the cart (a fact corroborated by Ms. Manning); (c) described a mechanism of injury that conforms, in all material respects, with the statements of these witnesses; (d) evidenced a lack of sophistication, which certainly corresponded with his established academic/intellectual deficiencies, as well as the observations of several witnesses (including Ms. Powers); and (e) did not deny making the comment relative to "workmen's comp" during breakfast

on his accident date, despite having no independent recollection of the conversation.

20. Shortly after sustaining this injury, Mr. Jude was directed by his Employer to Dillon Internal Medicine Associates, P.A., where he: (a) complained of low back and left leg pain; (b) advised the company physician (Dr. Clifford Medina) of his prior (August, 2005) back surgery; (c) exhibited "left lower back tender[ness]"; and (d) received prescriptions for Naproxen and Flexeril.

21. When his symptoms persisted, Mr. Jude was referred to Pee Dee Orthopaedic Associates, P.A., where he was evaluated by Dr. Dewey N. Ervin on February 8, 2006. At that time, this physician: (a) noted the presence of "continued. . . low back pain with radiation of pain into the L-5 distribution of the left lower extremity"; (b) observed Mr. Jude exhibited "significant ankle dorsiflexion weakness" involving the left leg; and (c) ordered a lumbar MRI scan, which was interpreted to reveal "a focal soft tissue ventral defect to the left of midline which extends into the left foramen."

22. Upon examining Mr. Jude (February 23, 2006), in light of this scan, Dr. A. Cecil Bozard, Jr. (another member of the Pee Dee Orthopaedics Associates Practice): (a) determined this soft tissue defect "represent[ed]. . . a recurrent disc rather than scar", especially in view of Mr. Jude's particular medical

history; (b) certified Mr. Jude was "[u]nable to return to work until further notice"; and (c) recommended evaluation by Dr. W.S. (Bill) Edwards, Jr.

23. As confirmed by his April 4, 2006 report, Dr. Edwards: (a) felt Mr. Jude "gave an appropriate effort on examination and exhibited no non-organic physical signs"; (b) noted the presence of several clinical abnormalities (left sciatic notch tenderness, limited lumbar range of motion, "a gross extensor lag", "decreased gastroc soleus strength and dorsaflexor strength on the left side", absent ankle reflexes. . . on the left side" and "marked sciatic stretch sign. . . on the left"); (c) confirmed the February 17, 2006 MRI scan "show[ed]. . . a large recurrent disc herniation at L5, S1 on the left side compatible with. . . [Mr. Jude's] symptoms"; (d) concluded that "based on the history. . . given and the clinical and radiographic findings, this gentleman has a large recurrent disc herniation that emanates from his work related injury"; and (e) recommended "surgical intervention in the form of microlumbar discectomy."

24. On March 8, 2008, Dr. William W. Stewart of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science administered several tests for the purpose of determining "Mr. Jude's functional achievement (reading and arithmetic) abilities, as well as his overall intellectual level." This testing revealed: (a) a reading score

at the "3.5 grade level (1st percentile)"; (b) Mr. Jude was only capable of performing arithmetic "at the 2.9 grade level (below 1st percentile)"; (c) he was functioning "in the illiterate range of educational ability"; and (d) his I.Q. fell "in the Mentally Deficient" range.

25. Based upon these findings, as well as the nature of Defendants' current allegations (i.e., Mr. Jude "staged" the January 26, 2006 accident in order to receive compensation), Dr. Stewart concluded: (a) his "achievement and intellectual functional abilities are reflective of a person who would not consciously think of or plan a work-accident, whereby he would intentionally or deliberately injure himself"; (b) Mr. Jude "does not have the intellectual capacity to formulate and implement a plan of this nature"; and (c) "he would. . . [instead] be limited to a more simplistic thought process and would require repeated instruction in order to perform relatively basic work activities."

26. During the course of his March 27, 2008 deposition, Dr. Stewart verified/reiterated: (a) Mr. Jude "put forth his best effort" in connection with this testing; (b) his "overall high school grade point average. . . [(a D)] is certainly more compatible with . . . the[se] test scores" than the exit exam results; (c) individuals possessing below average intelligence quotients are "basic in their thinking patterns. . . [, to the

extent they are] limited and locked into the present, . . . surviving and living in the present, as opposed to planning"; (d) Mr. Jude's behavioral history was consistent with this "concrete thinking pattern"; (e) given his documented academic performance ("overall average of 1.87, that's actually failing"), Mr. Jude "does not. . . actually possess what you would consider to be. . . a high education and ability commensurate with a high school diploma"; and (f) in view of his well documented academic performance (grades and standardized testing) there was no "doubt whatsoever. . . that Mr. Jude was in a program. . . designed for somebody who had moderately severe academic deficiency. . . ."

27. Additionally, he explained: (a) an individual functioning at this level did not "really possess the qualities or the ability to engage in. . . a moderately elaborate scheme or plan of the nature. . . alleged here"; (b) the 100 (+) point exit exam score increase was inconsistent with his demonstrated arithmetic abilities; (c) given Mr. Jude's academic record, as well as his prior performance on this examination, it was unlikely he "would have been capable of scoring. . . at that level, . . . short of blind chance"; (d) the substantial increases registered by the other students at his test site were likewise "unusual"; and (e) these scores (16 out of 19 passing scores, including several rather dramatic (100 (+) point)

increases) were inconsistent with the group's prior failure rate (3-4 failures per student).

28. At this juncture, Mr. Jude, who has received no medical treatment since April, 2006, remains moderately symptomatic, to the extent he: (a) continues to experience ongoing low back and left leg pain; (b) manifests functional left leg deficits; (c) develops increased symptoms when attempting to perform essentially any activities (daily living or light household chores); (d) finds extended sitting uncomfortable; and (e) has been incapable of returning to any prior form of employment.

29. After giving due consideration to the contents of the entire record, we specifically find Mr. Jude experienced a compensable accident while in the process of transporting several boxes of apples from the walk-in cooler at the East Elementary School cafeteria in Dillon, South Carolina. Specifically, this injury occurred when: (a) Mr. Jude was conveying these boxes, via use of a cart, in the same fashion through which he had previously/routinely accomplished this task; (b) one of the boxes suddenly/unexpectedly shifted and began to fall from the cart; and (c) Mr. Jude quickly/instinctively lunged toward the box, in an attempt to prevent it from falling.

30. We also find: (a) at the time he sustained this compensable accident, Mr. Jude was performing duties arising out of and within the course and scope of his employment as a

cafeteria worker for Dillon School District No. 2; and (b) Defendants were provided with timely notice (same day) as to the occurrence of this accident.

31. While the ultimate assessment of witness credibility lies with this Panel, we are not obliged to disregard the observations of the hearing commissioner, who: (a) had the opportunity to observe the witnesses as they testified; and (b) thoroughly analyzed the substance (including inconsistencies) of the respective witnesses' testimony.

32. Despite Defendants' contention to the contrary, we find the credible evidence establishes: (a) Mr. Jude was not instructed to perform this task in a manner which was different from the method he had routinely utilized in the past (particularly as it related to the stacking of boxes); (b) the cooler door was closed as he was in the process of loading the boxes onto the cart (in the presence of Ms. Manning); (c) assuming *arguendo* Ms. Wilson was attempting to instruct him to transport the boxes in a different fashion, he would have been unable to hear her (due to the closed door); and (d) Mr. Jude did not violate or ignore any directive of supervisory personnel on the date in question, so as to have materially deviated from the course/scope of his employment.

33. Although Defendants argue Commissioner Funderburk "erred in finding. . . [Mr. Jude] to be more credible than all of

his coworkers", we find the testimony of several co-workers: (a) validated his assessment of Mr. Jude's intellectual capacity; and (b) corroborated Mr. Jude's account of the circumstances surrounding his compensable accident. While Defendants similarly suggest the testimony of Ms. Wilson should have been afforded greater weight, we find: (a) Commissioner Funderburk correctly determined critical elements of her testimony materially conflicted with the statements of other witnesses to the events surrounding Mr. Jude's accident; and (b) his ultimate determination is amply supported by the evidence of record.

34. We also find: (a) the physicians affiliated with Pee Dee Orthopaedic Associates were provided with a sufficient history of injury to render opinions as to the causal relationship between his accidental trauma and MRI findings; (b) the L5-S1 recurrent disc herniation proximately results from Mr. Jude's January 26, 2006 compensable accident; and (c) he was rendered temporarily totally disabled, effective February 8, 2006, by this injury and remains so at this time.

35. Additionally, we find, consistent with the testimony of various witnesses, including Mr. Mangum, that Mr. Jude: (a) suffers from lifelong cognitive deficits, which compromise his ability to concentrate, understand instructions, retain information and learn; (b) his academic record and previously generated standardized test scores are certainly reflective of

these cognitive deficits; (c) this diminished intellectual capacity is unquestionably validated by the testimony of Ms. Powers, a longtime supervisor; (d) despite his intellectual shortcomings, Mr. Jude has endeavored to lead a normal/productive life; (e) he has likewise been characterized as an honest/trustworthy person (either directly or indirectly) by each witness who has spoken to this issue; (f) Dillon School District No. 2 (through its employee) was obviously aware of Mr. Jude's lack of sophistication/capacity to take instruction ("nine-out-of-ten times when you would ask him to do something he would get it wrong"); and (g) assuming *arguendo* he was directed to transport the boxes of apples in a different manner on the date in question, his Employer undoubtedly knew or should have known he would not be able to digest/follow this instruction.

36. We also find: (a) Mr. Jude does not possess the intellectual capability/capacity to devise a scheme of the nature alleged by Defendants; (b) the circumstances surrounding his mechanism of injury (as corroborated by at least two co-workers) clearly indicate his trauma resulted from an accidental, unexpected, unforeseen and sudden occurrence; (c) to suggest otherwise would require us to disregard uncontradicted evidence relative to Mr. Jude's compromised intellectual abilities and his lifelong pattern of honesty/trustworthiness; (d) while the subject of "workmen's comp" was briefly mentioned prior to his

sustaining this accident, the impact of this comment is insignificant when compared to the remainder of the of the evidence of record; and (e) Mr. Jude's compensable injury was not occasioned by his willful intention to injure himself.

37. The medical treatment, evaluations, medications, evaluative procedures, etc. which Mr. Jude has heretofore received/undergone as a result of his compensable injury have been reasonable, medically necessary and tended to lessen his ultimate period of disability. We also find: (a) he requires further treatment of the nature recommended by Dr. Edwards; and (b) this treatment, including surgical intervention, is reasonable, medically necessary and geared toward lessening his ultimate period of disability.

38. We finally find: (a) a Form 20 completed by Ms. Jean Moody of Dillon School District No. 2 confirms Mr. Jude earned gross wages of \$8,001.94 during the 38 week period which comprised the standard school year (encompassing 2005); and (b) the parties do not dispute this gross wage figure.

CONCLUSIONS OF LAW

In view of these FINDINGS OF FACTS, WE CONCLUDE AS MATTERS OF LAW:

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.

2. On January 26, 2006, Mr. Jude, an employee within the meaning of S.C. Code Ann. Section 42-1-130 (1976, as amended), sustained a compensable back injury within the meaning of Section 42-1-160, while performing duties arising out of and within the course and scope of his employment with Dillon School District No. 2, an employer within the meaning of S.C. Code Ann. Section 42-1-140 (1976).

3. Defendants received timely notice of this accident in accordance with the provisions of Section 42-15-20.

4. Section 42-9-60 provides in pertinent part that "[n]o compensation shall be payable if the injury. . . was occasioned. . . by the wilful intention of the employee to injure. . . himself. . . ." In this regard, our Appellate Courts have held: (a) "the term 'wilful intention,' as used in [this]. . . statute, means a deliberate or formed intention." Zeigler v. S.C. Law Enforcement Division, 250 S.C. 326, 157 S.E. 2d 598, 599 (1967); and (b) the party asserting this defense "has the burden of proof." Chandler v. Suitt Construction Company, 288 S.C. 503, 343 S.E. 2d 633, 634 (Ct. App. 1986); Thompson v. Cisson Construction Company, 377 S.C. 137, 659 S.E. 2d 171, 188 (2008).

5. While Defendants contend Mr. Jude's comment relative to "workmen's comp" is dispositive of this issue, we agree with Commissioner Funderburk that their argument necessarily ignores: (a) his co-workers' confirmation that the precipitating event

(falling box) was sudden/unexpected/accidental; (b) Ms. Campbell's acknowledgment of Mr. Jude's immediate/instinctive reaction (lunging to catch the box); (c) his known inability to follow instructions; (d) Mr. Jude's well documented/longstanding cognitive/intellectual deficits; (e) his incapacity to devise a scheme of this nature; and (f) the consistent characterization (directly and indirectly) of Mr. Jude as an honest/trustworthy individual.

6. Based upon these facts, we believe Commissioner Funderburk properly concluded: (a) this isolated statement pales in comparison to the supportive/corroborative evidence of record; (b) Defendants have not established "a deliberate or formed intention" on the part of Mr. Jude to injure himself; and (c) they have failed to meet the burden of proof imposed by S.C. Code Ann. Section 42-9-80 (1976) (which governs this claim).

7. "When an employee is in the performance of the duties of the employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instruction or rules of the employer does not make the injury one incurred outside the scope of employment." Gray v. The Club Group, LTD., 339 S.C. 173, 528 S.E. 2d 435, 444 (Ct. App. 2000). Although Defendants maintain Mr. Jude's alleged failure to follow instruction from Ms. Wilson constituted a sufficient deviation from his job duties to negate the compensable nature of his

accident, we conclude this assertion is inconsistent with the credible evidence of record. However, assuming *arguendo* Ms. Wilson's account of the facts surrounding her purported direction of Mr. Jude was dispositive, we likewise conclude: (a) the conveying of the boxes "in violation of instruction" is legally inconsequential; and (b) Defendants cannot legitimately disclaim his Employer's obvious awareness of Mr. Jude's inability to follow instruction (as described by Ms. Powers).

8. S.C. Code Ann. Section 42-1-40 (1976, as amended) provides in pertinent part:

"Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of injury. . . . "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred. . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained.

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

9. Previously, in Breeland v. Colleton County, 216 S.C. 147, 57 S.E. 2d 63 (1950), the South Carolina Supreme Court had occasion to construe Section 7035-2 of the 1942 Code (a prior codification of Section 42-1-40) in a substantially similar context. Specifically, a review of the relevant facts reveals: (a) a school bus driver, whose period of employment and receipt of wages were also tied to the school year, died as a result of a compensable accident; (b) he received approximately three weeks of holiday vacation during the school year; and (c) his beneficiaries consequently argued the provisions of this statute required that his average weekly wage be based upon a thirty-six (36) week period, rather than the thirty-nine (39) week school term.

10. Without discussion, the hearing commissioner excluded the holiday period from the driver's average weekly wage calculation, dividing his earnings by thirty-six (36) weeks. This determination was subsequently affirmed by the Full Commission and later by the Circuit Court, which noted that the award was "just and fair" in accordance with the language of Section 7035-2.

11. On appeal, the bus driver's beneficiaries further maintained that the "exceptional reasons" proviso of Section 7035-2 was controlling. However, in response to this assertion, the Court noted the Commission's "award was not based upon

exceptional reasons" and further concluded that nothing in the record would have justified the application of the "exceptional reasons" proviso. Significantly, the Court held:

The error of the commission appears too plainly to require further discussion. There is no ambiguity in the statute here applicable. There is no doubt of the meaning of the words, quoting again, "Where 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. . . ." Unquestionably, the result is fair and just and the prescribed method should have been applied in this case. Breeland, 57 S.E. 2d at 64. (Emphasis added).

12. Based upon this ruling, it is clear the Court concluded the Commission was: (a) statutorily required to compute the bus driver's average weekly wage based upon the earnings he received during the thirty-nine (39) weeks which comprised the school term; and (b) not empowered to artificially increase or decrease the employment period by either adding to or deducting from the school term/contract period. It similarly determined the mere fact an individual's employment was tied to the standard public school term did not, in and of itself, authorize resort to the "exceptional reasons" proviso.

13. Additionally, the Legislature has recognized that a public school employee's service "for the regular school year in

any district shall be equivalent to one year's service" for retirement purposes. See, S.C. Code Ann. Section 9-1-840 (1976).

14. The applicability of the Breeland construction is further validated by the 1996 amendment of Section 42-1-40, which inserted the following sentence:

"Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Employment Security Commission's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. (Emphasis added).

15. Where, as here, the Legislature "adopt[s] . . . an amendment to a statute, . . . [it] is presumed to have intended to make some change in existing law." Glover v. United States, 337 S.C. 307, 523 S.E. 2d 763, 765 (1999); Kennedy v. South Carolina Retirement System, 345 S.C. 339, 549 S.E. 2d 243, 253 (2001); See also, Vernon v. Harleysville Mut. Cas. Co., 224 S.C. 152, 135 S.E. 2d 841, 844 (1964); Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E. 2d 766, 775 (1999). Similarly, "there is a basic presumption that the . . . [L]egislature has knowledge of previous legislation as well as judicial decisions construing that legislation when later statutes are enacted concerning related subjects." Whitner v. State, 328 S.C. 1, 492 S.E. 2d 777, 779 (1997); Russo v. Nationwide Insurance Company, 334 S.C. 455, 513 S.E. 2d 127, 129 (Ct. App. 1999) ("We presume

the. . . [L]egislature's awareness of our decision when passing. . . amendment" to previously construed statute).

16. It is equally certain that in applying an amendment of this nature, the adjudicating tribunal "must presume. . . [the Legislature] intended by its action to accomplish something and not to do a futile thing." State ex. rel. McCloud v. Montgomery, 244 S.C. 308, 136 S.E. 2d 778, 782 (1964); South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 354 S.C. 585, 582 S.E. 2d 410, 413 (2003).

17. Significantly, application of these rules of construction: (a) recognizes the Legislature's awareness of its prior enactment (which primarily focused on a 52 week period), as well as the Breeland ruling; (b) presumes the amendatory language ("divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less") was inserted "to make some change in existing law"/ "intended. . . to accomplish something"; and (c) evinces a legislative intent to mandate calculation of average weekly wage/compensation rate based upon "the actual number of weeks for which wages were paid. . . ." See also, Hyde v. South Carolina Department of Mental Health, 314 S.C. 207, 442 S.E. 2d 582, 583 (1994); Buist v. Huggins, 367 S.C. 268, 625 S.E. 2d 636, 640 (2006) ("subsequent statutory amendment may be interpreted as clarifying original legislative intent").

18. As previously noted, Mr. Jude earned gross wages amounting to 8,001.94 during the "four quarters immediately preceding the quarter in which the injury occurred. . . ." Application of the formula prescribed by Section 42-1-40 (through a Breeland analysis or use of the unambiguous amendatory language): (a) yields an average weekly wage of \$210.57; and (b) establishes a compensation rate of \$140.38.

19. Mr. Jude has been temporarily totally disabled within the meaning of S.C. Code Ann. Section 42-9-10 (1976, as amended) since February 8, 2006 and remains so at this time.

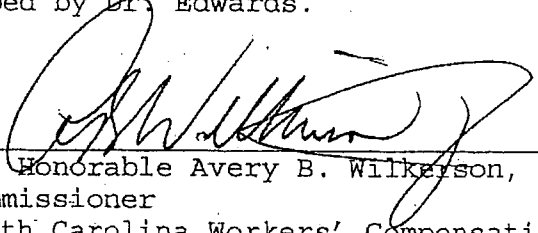
20. Defendants are financially responsible for all medical treatment, evaluations, medications, evaluative procedures, etc. which Mr. Jude has heretofore received/undergone as a result of his compensable injury per S.C. Code Ann. Section 42-15-60 (1976, as amended), as these modalities were reasonable, necessary and tended to lessen his period of disability. They shall likewise accept financial responsibility for the additional medical modalities provided/prescribed by Dr. Edwards, as these modalities are reasonable, necessary and geared toward lessening his period of disability per Section 42-15-60.

AWARD

ACCORDINGLY, IT IS HEREBY ORDERED that the June 26, 2008 Order of Commissioner Funderburk is affirmed in all respects. IT IS FURTHER ORDERED Defendants shall: (a) pay Mr. Jude accrued

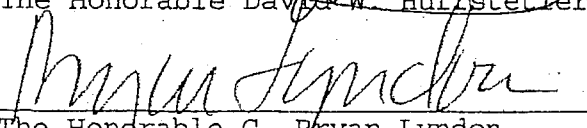
temporary total disability compensation, at the rate of \$140.38, effective February 8, 2006; (b) continue payment of weekly compensation until such time as this obligation is relieved by further Order of the Commission; (c) accept financial responsibility for the medical modalities which he has heretofore received/undergone as a result of his compensable injury and its consequences; and (d) similarly authorize the additional medical modalities provided/prescribed by Dr. Edwards.

IT IS SO ORDERED.


The Honorable Avery B. Wilkerson, Jr.
Commissioner
South Carolina Workers' Compensation
Commission

WE CONCUR:


The Honorable David W. Huffstetler

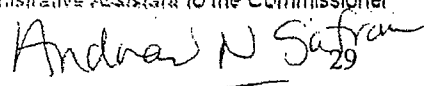
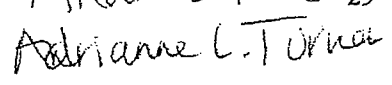

The Honorable G. Bryan Lyndon

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for each party.

This 29 day of April, 2009
By Valerie D. Deller

Administrative Assistant to the Commissioner

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 1104105

Kelly McPherson,

Claimant,

vs.

Charleston County School District,

Employer/Self-Insured,

Defendants.

RESPONDENT'S BRIEF
(EMPLOYER/SELF-INSURED)

This matter originally came to be heard before Commissioner Melody James in St. George, SC on April 9, 2015 pursuant to notice timely and properly given to all parties of record. The Claimant sustained admitted injuries to her neck and low back on February 3, 2011. The Self-Insured Employer filed a Form 21 on January 27, 2015, asserting the Claimant had reached maximum medical improvement, and requesting a determination of the Claimant's permanent disability. The Claimant filed a Form 22 Answer to Request for Hearing on February 19, 2015. The Claimant asserted that she was in need of additional medical care and treatment, and requested a determination of permanent partial disability pursuant to S.C. Code Ann. section 42-9-30. The Claimant also asserted that her average weekly wage should be determined by dividing her total annual wages by 38 weeks instead of 52 weeks. On her pre-hearing brief, the Claimant asserted she was owed past temporary total disability benefits for work she allegedly missed during the summer while recovering from surgery. However, the Claimant's attorney indicated at the hearing that the Claimant was no longer seeking past TTD.

After carefully considering all of the medical evidence and testimony in the record, Commissioner James issued an Order on September 11, 2015, awarding the Claimant 45%

permanent partial disability relative to her neck and low back injuries. She ordered the Employer to continue providing medical treatment as recommended by the authorized treating physician. Finally, Commissioner James determined that the Claimant's average weekly wage should be determined by dividing her total earnings during 2010 by 52 weeks, as such method for calculating the average weekly wage produces a result that is fair and just, and is an accurate approximation of the Claimant's earnings were it not for the injury.

The Claimant filed a timely Form 30 request for Commission Review on September 25, 2015, asserting the Single Commissioner erred in awarding less than 50% PPD to the back. The Claimant further asserted that the Commissioner should have determined the average weekly wage by dividing the Claimant's total earnings by 38 weeks instead of 52 weeks, even though this method of calculating the average weekly wage results in an unfair windfall for the Claimant, artificially increasing her wages by over 35%. The Claimant earned an annual salary of \$40,403.01. She proposes an average weekly wage of \$1,063.24, which would be the same average weekly wage as an employee who earns \$55,288.48 for a 52-week period. This result does not fairly reflect the Claimant's actual annual earnings. In fact, it is over \$15,000.00 more than what the Claimant admitted she actually earns in any given year as a teacher.

The Employer asserts that the Single Commissioner's Order is wholly correct based upon the great weight of the preponderance of the evidence in the record. Furthermore, the Order is founded on and supported by the Single Commissioner's sound interpretation of the law, and her well-reasoned application of the law to the facts of this case. The Commissioner correctly recognized that dividing the Claimant's total annual earnings by 52 weeks produces an average weekly wage and compensation that is fair and just to both parties, and accurately reflects the amount the Claimant would be earning were it not for the injury. Furthermore, the Single

Commissioner correctly determined that the Claimant has sustained 45% permanent partial disability relative to her compensable neck and low back injuries, based upon her careful consideration of the entirety of the evidence and testimony in the record. Accordingly, the Single Commissioner's Order must be affirmed in its entirety.

STATEMENT OF THE FACTS

The Claimant is 44 years old. She began working as a middle school and 9th grade math teacher for the Employer in August, 2009. On February 3, 2011, the Claimant sustained admitted injuries to her neck and low back when she was struck during a fight between two students. (Hrg. Tr. p. 28-29). She currently lives in Arizona and continues to work as a middle school math teacher.

- A. The Claimant admitted that she was paid a yearly salary, and believed that she has never earned more than \$50,000.00 in gross income in any single year working as a teacher.**

The Claimant admitted that, while working for the Employer, she was a salaried employee paid gross earnings of \$40,403.01 for 52 weeks during 2010. She received a paycheck every two weeks, including during the summer when she was not working. She admitted that her gross income in 2011 was substantially the same as 2010. She further testified that her earnings in prior teaching jobs in Michigan were substantially similar. Her current salary in Arizona is also comparable to her pay when she was working for the Employer. She testified that she did not think she had ever earned more than \$50,000.00 in one year as a teacher. (Hrg. Tr. 68-73).

- B. The Claimant's medical treatment included successful surgeries at C5-6 and L5-S1.**

After her February 3, 2011 injury, the Claimant received initial examination and treatment with several doctors in Charleston before moving to Arizona. She underwent a cervical MRI on February 17, 2011, a lumbar MRI on April 6, 2011, and a repeat cervical MRI on April 6, 2011.

(Clm. APA p. 1-3). Dr. Stephen Rawe reviewed the MRI results, and concluded that the Claimant was not a surgical candidate at that time. He recommended continuing conservative treatment as directed by Dr. J. Reilly Keffer. (Clm. APA p. 30). The Claimant continued to receive conservative treatment from Dr. Keffer until September 15, 2011. She did not miss any time from work during this period of treatment with Dr. Keffer. (Clm. APA p. 4-26).

Thereafter, the Claimant moved to Arizona, and began treating with doctors there. She received an initial consultation with Dr. Vibhooti Dave on June 21, 2012. Dr. Dave provided conservative treatment, to include injections and a TENS unit. (Def. APA p. 1-9).

The Claimant saw Dr. Paul Gause for a surgical consultation on May 14, 2013. Upon review of updated MRI results, Dr. Gause recommended continuing conservative treatment of the lumbar spine. With regard to the cervical spine, Dr. Gause recommended a C5-6 anterior cervical discectomy and fusion. (Def. APA p. 10-16). The Claimant underwent this procedure on July 16, 2013. (Def. APA p. 20-23). She did not miss any time from work, because the surgery occurred during the summer when she was not teaching. She continued to receive her regular paychecks during her recovery from surgery. (Hrg. Tr. p. 63).

Based upon Dr. Gause's narrative reports, the Claimant had an excellent recovery from this procedure. The Claimant returned to Dr. Gause on December 13, 2013, and reported that her neck was "doing well." She stated that she was having minimal radicular symptoms in her arms, and that she continued to work full time as a teacher. Dr. Gause stated that "overall, she is happy with the outcome of her neck surgery at this point as her arm symptoms are essentially gone." (Def. APA p. 24). Dr. Gause performed a physical examination of the Claimant's cervical spine. He found that there were no paraspinal muscle spasms, and the Claimant had minimal bilateral trapezial tenderness. He stated that the Claimant's range of motion was "nearly full without significant

pain.” He concluded that the Claimant demonstrated full motor strength in the upper extremities, with normal sensation and reflexes. (Def. APA p. 25).

Dr. Gause further concluded that the Claimant had reached maximum medical improvement with regard to her cervical spine. He assigned a 7% medical impairment rating based upon the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended continued physical therapy and consideration of acupuncture with regard to the Claimant’s lumbar spine. The Claimant continued to work at modified duty, and did not miss any time from work as a result of her cervical spine surgery and subsequent recovery. (Def. APA p. 26-27).

On April 4, 2014, the Claimant returned for follow up with Dr. Gause. She reported that her neck continued to do “quite well.” Dr. Gause stated that the Claimant had “occasional mild numbness in the arm at night, but this is fairly minimal for her.” (Def. APA p. 28). The Claimant reported increasing back and left leg symptoms. Dr. Gause concluded that the Claimant would benefit from lumbar spine surgery, as conservative treatment had failed. Dr. Gause recommended a lumbar arthrodesis at L5-S1. He determined that a combined anterior/posterior decompression and fusion would be beneficial, due to the Claimant’s relatively young age. (Def. APA p. 30). The Claimant underwent these procedures on June 2, 2014 and June 4, 2014, without complication. (Def. APA p. 35-42). The Claimant did not miss any time from work as a result of these surgeries, as they occurred during the summer when she was not working as a teacher. As with her previous surgery, she continued to receive her regular paychecks during her recovery.

As with the Claimant’s cervical spine surgery, Dr. Gause’s reports indicate that the Claimant had an excellent recovery from the lumbar procedure. The Claimant returned to work without restrictions pursuant to Dr. Gause’s report dated August 22, 2014. (Def. APA p. 43). Upon her return to Dr. Gause on September 19, 2014, the Claimant reported that she was “doing quite well.”

The Claimant told Dr. Gause that she had some "mild residual low back pain with pain in the left buttock and occasionally left lateral thigh." (Def. APA p. 44). The Claimant was continuing to do well as of her next visit with Dr. Gause on October 17, 2014, although she did report some soreness from physical therapy and her exercise program. She continued to work full duty, with limitations on lifting. (Def. APA p. 48). Dr. Gause recommended that the Claimant continue with physical therapy, and instructed her to return in one month. (Def. APA p. 51).

On December 9, 2014, the Claimant reported to Dr. Gause that "her pre-operative symptoms [had] completely resolved. She does not note any significant leg pain or weakness. She is walking one mile per day for exercise without difficulty. She has done well overall since surgery." (Def. APA p. 52).

Dr. Gause determined the Claimant reached maximum medical improvement for her lumbar spine on January 23, 2015. On that date, he stated that the Claimant continued to do "quite well." The Claimant reported no significant radicular pain in her leg. Dr. Gause stated that the Claimant's "back pain is mild at this point. She is working as a teacher with normal duties. She is taking no pain medications." (Def. APA p. 57). Dr. Gause performed a physical examination of the Claimant's lumbar spine, which revealed normal posture, non-antalgic gait, mild lower lumbar paraspinal tenderness, "some increased pain" with range of motion, full muscle strength, and normal sensation and reflexes. Straight leg raising and femoral stretch tests were negative for any abnormality. The Claimant exhibited only mild tenderness to palpation over the SI joint. (Def. APA p. 58). Dr. Gause concluded that the Claimant reached maximum medical improvement with 7% medical impairment of the lumbar spine, based on the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Gause recommended two years of supportive care, to

include four office visits a year, physical therapy, medications, and three injections per year. He stated that the claimant would be reevaluated after two years. (Def. APA p. 62).

Dr. Gause completed a work status report on March 16, 2015. He assigned permanent restrictions of no lifting more than 40 pounds, no sitting/standing/walking for more than 60 minutes at a time without a few minutes change in position/activity, and no bending/twisting/stooping of the back more than 10 times per hour. (Clm. APA p. 42). On March 23, 2015, Dr. Gause completed a medical questionnaire prepared by the Claimant's attorney. The questionnaire indicated that, according to the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment, the Claimant would qualify for DRE Category IV impairment ratings of 25-28% of the cervical spine and 20-23% of the lumbar spine, as a result of a one-level fusion at both areas of the spine.¹ (Clm. APA p. 40).

Dr. Keffer prepared a supplemental report on March 30, 2015, in which he indicated that the Claimant's attorney had asked him to comment on the Claimant's impairment rating. Dr. Keffer assigned impairment ratings based upon the 5th edition of the AMA Guides of 25% relative to the Claimant's cervical spine, and 25% relative to the lumbar spine. He did not examine the Claimant before assigning these impairment ratings, and in fact has not seen her since she moved to Arizona in 2011. (Clm. APA p. 27-28).

C. The Claimant's testimony regarding pain complaints and alleged physical limitations are not documented in Dr. Gause's reports, and in some instances directly contradict his reports.

The Claimant was the only witness to testify at the hearing. She admitted she is not currently taking any prescription pain medication, and testified that she takes Motrin once or twice

¹ Dr. Gause's earlier impairment ratings of 7% impairment of the cervical spine and 7% impairment of the lumbar spine are based upon the more recent 6th edition of the AMA Guides. As discussed below, Dr. Gause confirmed in his deposition testimony that these ratings are correct under the 6th edition and remain an accurate reflection of the Claimant's actual physical impairment.

per week. (Hrg. Tr. p. 61-64). The Claimant admitted that she is able to drive herself to and from work every day. She is also able to drive as necessary to pick up and drop off her kids for school and other activities. (Hrg. Tr. p. 52-54).

The Claimant also testified at length regarding numerous limitations and problems that do not appear anywhere in Dr. Gause's narrative reports, and in some instances directly contradict his reports. Her testimony regarding her physical limitations also conflicted with Dr. Gause's assigned restrictions. The Claimant testified that she was pleased with the treatment she received from Dr. Gause, and would like to continue seeing him. Nevertheless, she disagreed with Dr. Gause's opinion as to her work restrictions, stating that there is "no way" she could lift 40 pounds. The Claimant testified that she avoids lifting anything from the floor that weighs more than ten pounds (the Claimant had previously received a permanent 10-pound weight lifting restriction as a result of a prior work-related injury). She said that her back injury limited her ability to sit or stand for more than 30 minutes at a time. She also stated that she experiences pain whenever she bends at the waist. She asserted that she can squat down to help students at their desks and return to an upright position a few times an hour. She avoids climbing, crawling, pushing, and pulling, as she experiences pain with those activities. However, she admitted that she is able to push a dust mop. (Hrg. Tr. p. 41-46).

Contrary to Dr. Gause's report stating unequivocally that the Claimant was "walking one mile per day for exercise without difficulty," the Claimant testified that she walked only up to three quarters of a mile before school each day. She stated a mile would be about the longest distance that she could walk at any one time. The Claimant admitted her pedometer shows she walks an aggregate of about two miles each day.

The Claimant further testified regarding her difficulty riding a bike, performing household chores, gardening, playing with her children, and having sex with her husband. (Hrg. Tr. p. 46-51). With regard to her neck, the Claimant admitted that her pain was mostly gone. She testified that she experiences some soreness in her neck after grading papers that typically goes away after a couple of days. She stated that she does not have full range of motion. She experiences numbness in her pinky and ring fingers on her left hand. She testified that she worked with jewelry before the injury, but is now unable to do so. The Claimant admitted that she did not discuss with Dr. Gause any of these various difficulties referenced in her hearing testimony. (Hrg. Tr. p. 55-58).

D. Dr. Gause testified that he did not recall pain complaints or limitations referenced in the Claimant's testimony, and he confirmed the accuracy of his 7% impairment ratings.

Contrary to the Claimant's testimony, Dr. Gause testified in a deposition on April 30, 2015 that he was unaware of any problems or difficulty the Claimant had in her daily life as a result of her injuries, other than limited walking and issues with prolonged standing. (Dr. Gause Depo. p. 40-41). He confirmed that his earlier 7% impairment ratings are correct, and an accurate reflection of the Claimant's impairment, pursuant to the 6th Edition of the AMA Guides. (Dr. Gause Depo. Tr. p. 16-18, 26-27). He testified that these ratings result in a combined value of 14% total impairment relative to the spine. (*Id.* p. 27).

Dr. Gause further testified that the claimant had good results from surgeries at levels C5-6 and L5-S1. He confirmed that, no matter how well a patient recovers after these procedures, the 5th Edition of the AMA Guides requires a DRE Category IV impairment rating, while the more recent 6th Edition has no such requirement for a specific classification as a result of surgery. (*Id.* p. 31-33). Dr. Gause confirmed that the regional impairment ratings Dr. Keffer assigned based upon the 5th

Edition of 25% to the cervical spine and 25% to the lumbar spine would result in a combined value of 44% total impairment, according to the combined values chart set forth in Guides. (*Id.* p. 39). Finally, Dr. Gause testified that the work restrictions he assigned on March 16, 2015 were the only accommodations that he recommended relative to the claimant's job as a school teacher. (Clm. APA pg. 42).

E. The Claimant provided conflicting and contradictory testimony regarding her prior neck injury and settlement in excess of \$100,000.

The Claimant confirmed that she sustained a prior injury to her head and neck in 1992 while working as a deck hand in Michigan. She admitted that she underwent a procedure in which the treating physician "burned" nerves in her neck. The doctor recommended that she avoid lifting more than 10 pounds. She testified that she could not remember the amount of her settlement in that case, contrary to her earlier sworn deposition testimony that the settlement was "more than \$100,000." (Hrg. Tr. p. 25-28; 65-68; Clm. 8/2/11 Dep. p. 17).

ARGUMENT AND CITATION OF AUTHORITY

A Decision and Order of a Single Commissioner must be affirmed if it is supported by a preponderance of the evidence in the record, and is not based on "surmise, conjecture, or speculation." Linen v. Ruscon Construction Co., 286 S.C. 67, 70, 332 S.E. 2d 211, 212 (1985). Additionally, the Full Commission should give weight to the Single Commissioner's decision, based upon the fact that the Full Commission does not have the opportunity or benefit of observing the witnesses, as does the Single Commissioner. Green v. Raybestos - Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967). In the present case, the Single Commissioner's Order is wholly correct based upon the great weight of the preponderance of the evidence in the record. Furthermore, the Order is founded on and supported by the Single Commissioner's sound interpretation of the law,

and her well-reasoned application of the law to the facts of this case. Accordingly, the Single Commissioner's Order must be affirmed in its entirety.

I. THE SINGLE COMMISSIONER CORRECTLY CALCULATED THE CLAIMANT'S AVERAGE WEEKLY WAGE.

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

The Single Commissioner determined the Claimant's average weekly wage after very careful consideration of the law, and the proper application of the law to the facts of this particular case. Her decision is founded on and supported by a sound interpretation of the requirements set forth in the Act. Accordingly, the Single Commissioner's Order must be affirmed.

Computation of the average weekly wage is controlled by S.C. Code Ann. section 42-1-40, which provides that the claimant's average weekly wage "must be determined by taking the Claimant's total wages for the four quarters preceding the quarter in which the accident occurred, and dividing by 52 or by the actual number of weeks for which wages were paid, whichever is less." The statute further states "[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.*" Finally, the statute requires that "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

In this case, the Single Commissioner correctly determined that exceptional circumstances require the Claimant's average weekly wage to be calculated by dividing her total earnings during 2010 by 52 weeks. The Claimant was a salaried employee paid \$40,403.01 for 52 weeks during

2010. She did not work during the summer months. Nevertheless, using a 38-week divisor to calculate the average weekly wage would artificially inflate the Claimant's actual annual earnings. A 38-week divisor would result in an average weekly wage of \$1,063.24. Instead of accurately reflecting the Claimant's actual earnings, this average weekly wage reflects annual earnings of \$55,288.48 ($52 \times \$1,063.24 = \$55,288.48$). Therefore, under this calculation, the Claimant would have the same average weekly wage as an employee with an annual salary of \$55,228.48, **over \$15,000.00 more than what the Claimant admitted she actually earns in any given year as a teacher.** This 35% increase would be a windfall to the Claimant, and would unfairly punish the Employer. Therefore, the Single Commissioner's Order must be affirmed.

The Claimant testified that her gross annual earnings were about \$40,000.00 every year during the years before, during, and after her injury in this case. It stands to reason that her average weekly wage for workers' compensation purposes should reflect this trend in her actual earnings. As the South Carolina Supreme Court stated in Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978), the "ultimate objective" of the Act's average weekly wage statute is to fairly reflect the injured worker's probable future earning loss. In Bennett, a case that is analogous to the present case, the claimant was 62 years old and drawing Social Security. He worked for a short time each year until he received \$2500, the maximum income he was permitted to earn without penalty while drawing social security payments. To determine the average weekly wage in that case, the Commission divided the claimant's pay by the actual number of weeks he worked, which would have nearly doubled his typical earnings for the year. The Supreme Court reversed the Commission, and held that the claimant's average weekly wage should have been determined by another method that would most nearly approximate the amount the injured employee would be earning had he not sustained the injury. The Court concluded that the Commission's order was

inequitable, reasoning that "It is grossly unfair to the employer to require payments of almost twice [the Claimant's yearly earnings]. The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99.

Similarly, in this case, the Claimant also works less than 52 weeks, but dividing her total earnings by the actual number of weeks worked would artificially increase her average weekly wage. The Claimant proposes an average weekly wage that would reflect an increase in her earnings of over 35%. She admitted that her annual gross income in any given year as a teacher is in the range of \$40,000.00. However, according to the Claimant's calculation, she would have the same average weekly wage as a person who earns \$55,228.48 in a year, which is over \$15,000.00 more than the Claimant's actual earnings in any given year. As in Bennett, such a result would be grossly unfair to the Employer, and would not be an accurate approximation of the Claimant's future earnings. On the other hand, dividing the Claimant's total earnings by 52 weeks is fair and provides an accurate reflection of the Claimant's probable future earning loss. For these reasons, the Single Commissioner correctly determined the Claimant's average weekly wage, and the Order should be affirmed.

Furthermore, the Single Commissioner correctly concluded that, although Bennett is analogous to the present case, there is no South Carolina appellate court that directly addresses the proper calculation of a teacher's average weekly wage. As a result, the Single Commissioner appropriately considered a North Carolina decision, Conyers v. New Hanover County Schools, 188

N.C.App. 253, 654 S.E.2d 745 (2008), to inform her interpretation of the Act's average weekly wage statute.

Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007); see also Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). In this case, the applicable provisions of the North Carolina Workers' Compensation Act are almost identical to South Carolina's statute. As a result of the striking similarity between the applicable statutes, the Court of Appeals of North Carolina's interpretation of that state's law is very persuasive and directly on point with the present case. Therefore, the Single Commissioner's decision was properly informed by the North Carolina decision, and her Order should be affirmed.

In Conyers, the Court of Appeals of North Carolina addressed the exact issue before the Commission. The court interpreted North Carolina's average weekly wage statute, which is substantially similar to South Carolina's law. The court held that the claimant's average weekly wage as a school bus driver should be determined by dividing her total annual earnings by 52 weeks, even though she worked as a bus driver for only 40 weeks during the school year. The claimant in Conyers had worked for the school district for 12 years. Every year, she only worked during the school year, and was not employed during the summer. The court cites language in North Carolina's average weekly wage statute that is almost identical to that of South Carolina. The

court referenced three statutory methods of calculating average weekly wage, which are exactly the same as the methods in the South Carolina law, set forth above. The court concluded that dividing the claimant's total annual earnings by the 40 weeks she actually worked would unfairly increase the claimant's wages. Such a result would not be "fair and just" because the Employer would be "unduly burdened," and the Claimant would receive a "windfall." The court further stated that "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." Therefore, the court concluded that calculating the Claimant's average weekly wage by dividing her total annual earnings by 52 weeks yielded a result that most nearly approximated the claimant's earnings were it not for her injury.

As in Conyers, calculating the Claimant's average weekly wage in this case by dividing her total annual earnings by the 38 weeks she worked during the school year would unfairly increase the claimant's wages. The average weekly wage that would result from such a calculation would be the same as an employee who earns over \$55,000 a year. To the contrary, the Claimant testified that she earned about \$40,000.00 in the years before and after her injury, and continues to earn a comparable annual salary in her work as a teacher. Therefore, a 38-week divisor would artificially inflate the Claimant's average weekly wage by over 35%. Such a result would be unduly burdensome on the Employer, and would be a windfall for the Claimant. To the contrary, using a 52-week divisor yields a result that is fair and just, and most nearly approximates the Claimant's earnings were it not for her accident. Therefore, the Single Commissioner correctly applied the Conyers holding, and her Order should be affirmed.

The Conyers court further reasoned that the Claimant's job as a school bus driver was comparable to "seasonal" workers whose work fluctuated between "peak" periods and "slack"

periods. The court determined that the school year represented the claimant's "peak time," while the summer was her "slack time." To base the claimant's average weekly wage only on the earnings during the peak time would cause a windfall for the claimant. *Id.* at 259-61. The same reasoning applies in the present case. The Claimant worked only during the school year and was not required to work during the summer. To base the Claimant's average weekly wage only on her peak time during the school year would artificially inflate her wages, resulting in a windfall to the Claimant, and an undue burden on the Employer. See also *Brunson v. Wal-Mart Stores, Inc.*, 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001) (remanded to Commission for recalculation of seasonal employee's average weekly wage where Commission had only considered claimant's wages during peak seasonal period).

In this case, the Claimant admitted that, after her injury, her total income in 2011 was substantially the same as 2010. She further testified that her earnings in prior teaching jobs in Michigan were also substantially similar. Finally, her current salary in Arizona is also comparable to her pay when she was working for the Employer. She did not believe she had ever earned more than \$50,000.00 in a year while working as a teacher. To the contrary, the Claimant proposes an average weekly wage of \$1,063.24, which would be the same average weekly wage as an employee who earns \$55,288.48 for a 52-week period. **This result does not fairly reflect the Claimant's actual annual earnings. In fact, it is over \$15,000.00 more than what the Claimant admitted she actually earns in any given year as a teacher.** It would be a windfall to the Claimant, and would unfairly punish the Employer. The fact that the Claimant receives an annual salary for her work as a teacher, that she earns substantially the same amount annually from year to year, and the sheer magnitude of the disparity between the Claimant's actual annual earnings every year and the earnings reflected by using a 38-week divisor are exceptional circumstances that justify using an

alternative method to calculate the average weekly wage. Therefore, the Claimant's average weekly wage must be calculated by dividing the Claimant's total earnings of \$40,403.01 by 52 weeks, resulting in an average weekly wage of \$776.98. This result is fair and just to both parties, and most nearly approximates the amount the Claimant would be earning but for the injury. Accordingly, the Single Commissioner's calculation of the average weekly wage is correct and must be affirmed.

- b. The Claimant's "total compensation rate" argument as set forth in the Appellant's Brief is erroneous, misleading, and does not represent an accurate comparison between the Claimant's actual earnings and her compensation rate.**

The Single Commissioner correctly held that the average weekly wage proposed by the Claimant would artificially inflate her wages and result in a windfall for the Claimant. The Claimant's net income for one year of workers' compensation benefits under the Claimant's proposed average weekly wage would be higher than her net income while actually working for the Employer. Therefore, the Single Commissioner's Order should be affirmed.

To the contrary, the Claimant seeks to mislead this Commission by presenting a false comparison between her pre-injury gross annual earnings (before taxes) and her expected income for one year of tax-free workers' compensation benefits. The Claimant argues that one year of benefits based on the average weekly wage and compensation rate proposed by the Claimant would still be lower than her gross pre-injury earnings, and therefore she is not actually receiving a windfall. This is a false comparison in these circumstances. One year of the Claimant's actual take home pay *after taxes* would provide an accurate comparison to one year of workers' compensation benefits.² But the Claimant has presented no such comparison. Instead, the Claimant is comparing

² Consideration of the applicable state and federal tax provisions to estimate the Claimant's net income provides a more apt comparison. See 26 U.S.C. section 1(c) and corresponding 2010 Tax Table at <https://www.irs.gov/pub/irs-prior/i1040tt--2010.pdf>; S.C. Code Ann. section 12-6-510(A), and corresponding 2010 Tax Table at https://dor.sc.gov/forms-site/Forms/IIT%20Book_092410.pdf. The federal tax for the Claimant's 2010 gross income is \$6,288, and the SC state tax is \$2,366, resulting in an estimated net income after taxes of \$31,749.01. To

apples to oranges, and as a result her argument is completely erroneous and misleading. The Single Commissioner correctly rejected the Claimant's false comparison and determined that dividing the Claimant's total annual salary by 52 weeks produces an average weekly wage and compensation rate that most nearly approximates what the Claimant would have been earning if it were not for the injury. Accordingly, the Single Commissioner's Order must be affirmed.

Furthermore, according to the chart on page 12 of the Appellant's Brief, the "Total Comp Rate" that the Claimant would receive in one year of workers' compensation benefits pursuant to the Single Commissioner's Order (using a 52-week divisor) would be exactly two thirds of her pre-injury annual salary of \$40,403.01. This result is precisely what is required by regulation 67-1603 ("Calculating the Compensation Rate") and the Commission's Form 20 ("the general rule for calculating the compensation rate is to multiply average weekly wage by .6667"). The Claimant testified that her typical annual salary as a school teacher is in the range of \$40,000.00. A compensation rate that is $\frac{2}{3}$ of this amount is exactly what the Act and regulations require. **To the contrary, the Claimant's proposed compensation rate would result in annual payments over 90% of her actual annual gross earnings!** Accordingly, the Single Commissioner correctly held that the Claimant's proposed compensation rate would result in a significant windfall for the Claimant, and her order must be affirmed.

Finally, the Claimant argues in her Brief that her proposed average weekly wage would not be unfair because the Employer's total annual payments for workers' compensation benefits would be lower than the Claimant's actual gross earnings. This circumstance is of no consequence

the contrary, one year of tax-free benefits at the Claimant's proposed compensation rate of \$708.81 would total \$36,858.12, a windfall of more than \$5,000.00. This estimate is not meant to prove the exact extent of the windfall the Claimant would receive under her proposed calculation, but simply to further illustrate that the Claimant's comparison between her pre-tax income and one year's worth of tax-free workers' compensation benefits is misleading and is not helpful in analyzing the fairness of the Claimant's proposed calculation. The Single Commissioner correctly rejected the Claimant's argument and her decision must be affirmed.

whatsoever to the fairness analysis required by section 42-1-40. As indicated above, the Act states that the compensation rate is two-thirds of the average weekly wage. In every single workers' compensation case, therefore, a claimant's compensation rate is two-thirds lower than her actual gross earnings. As a result, every employer in every workers' compensation claim pays less in disability compensation than the claimant's gross wages. This is simply a function of the no-fault workers' compensation system; employees' benefits are capped in exchange for coverage of all workplace injuries, regardless of fault. This feature of the workers' compensation system does not somehow require that the Claimant receive compensation benefits that are higher than her actual earnings while working for the Employer. The average weekly wage calculation proposed by the Claimant would still be a windfall and would unfairly punish the Employer. Not only would it be an inaccurate reflection the Claimant's gross annual earnings as a teacher, it would also result in actual disability payments that are higher than her actual net take home pay. Furthermore, under this calculation, the employer would be paying a compensation rate that is 90% of the Claimant's actual annual earnings. Such a result is directly counter to the Act, and would unfairly punish the Employer, because the Employer would be paying at a rate that is higher than that which accurately reflects the Claimant's actual earnings were it not for the injury. Therefore, the Single Commissioner correctly determined that the Claimant's comparison between her pre-injury gross annual earnings (before taxes) and her expected annual income from tax-free workers' compensation benefits is false, misleading, and does not support the Claimant's position. The Single Commissioner wisely rejected this misleading argument, and her Order should be affirmed.

c. Defense counsel's statements at the hearing, which the Claimant deceptively quotes out of context in her brief, are of no consequence to the accuracy and veracity of the Single Commissioner's Decision and Order.

The Single Commissioner carefully interpreted the Act's average weekly wage statute and its application to the specific circumstances presented in this particular case. She was very well informed as to each party's position and legal arguments prior to reaching her decision. She allowed both parties to state their positions on the record at the hearing, and accepted memoranda of law from both parties, along with the parties' prehearing briefs. Moreover, she examined and considered cases and legal arguments that were not presented by either party at the hearing, including the Conyers case from North Carolina that ultimately formed the basis of her decision. Therefore, the Commissioner accepted some portions of the Employer's argument at the hearing, rejected other portions, and developed her own reasoning to support her conclusions.

For example, the undersigned defense counsel argued at the hearing that the fairness provision set forth in the first paragraph of S.C. Code Ann. section 42-1-40 controls here (i.e. "as long as results fair and just to both parties will be obtained"). Therefore, defense counsel argued, it would not be necessary to invoke the "exceptional circumstances" language in the second paragraph to warrant an alternative method of calculating the average weekly wage. The Single Commissioner did not reference this argument in her decision, and instead found that the disparity between the Claimant's actual earnings and those that would result from a 38-week divisor was itself an exceptional circumstance that warranted using an alternative method of calculating the average weekly wage. The mere fact that the Employer made an argument at the hearing that was not ultimately accepted by the Commissioner is of no consequence whatsoever. The Claimant deceptively presented defense counsel's comments out of context in her brief, implying that the Employer somehow conceded the Claimant's argument that a 38-week divisor

would be appropriate to determine the average weekly wage in this case. To the contrary, the Employer has *never* conceded that a 38-week divisor would result in anything other than an unfair and unjust windfall for the Claimant. The Single Commissioner correctly considered and weighed all the arguments presented at the hearing, in conjunction with her own review of the applicable law. Her decision is supported by a sound interpretation of this law, and it must be affirmed.

d. South Carolina law does not require the Commission to use a 38-week divisor in this case.

The Single Commissioner correctly held that the Claimant's proposed method of average weekly wage calculation would produce a patently unfair result, and is not mandated by any South Carolina statute or court precedent. The law cited by the Claimant is inapplicable to support the Claimant's position. Therefore, the Single Commissioner's Order must be affirmed.

The Claimant argues that she is entitled to workers' compensation benefits that reflect higher annual earnings than she has ever actually received in her career as a middle school math teacher. However, she has not presented a cogent argument to support this inequitable position. Instead, the Claimant's argument is a confounding patchwork of misinterpreted case law, mistaken citations to statutes that have no bearing on the issues before the Commission, and misplaced references to the rules of statutory construction, in addition to the misleading and deceptive "total compensation rate" comparison referenced above. As a result, the Claimant's legal arguments have no substance and amount to mere smoke and mirrors designed to trick the Commission into ordering an average weekly wage and compensation rate that would artificially overinflate the Claimant's income. The Single Commissioner correctly held that the average weekly wage calculation proposed by the Claimant would be unfair and is not mandated by the law. Her decision is based upon a sound interpretation of the law and a thoughtful application of

the law to the facts of this particular case. For these reasons, the Single Commissioner's Order must be affirmed in its entirety.

- i. **Breeland v. Colleton County does not support the Claimant's position, and in fact supports the Single Commissioner's conclusion that a 38-week divisor would artificially increase the Claimant's average weekly wage.**

The Single Commissioner correctly determined that Breeland v. Colleton County, 216 S.C. 147, 57 S.E.2d 63 (1950), does not mandate calculating the Claimant's average weekly wage based upon a 38-week divisor. If anything, this case supports the Commissioner's determination that the average weekly wage would be artificially increased by using a 38-week divisor. The legal issue disputed in the present case was not before the court in Breeland. The holding in Breeland has absolutely no bearing whatsoever on whether it is just and fair to calculate the average weekly in this case based upon 38 weeks. As a result, the Claimant's reliance on this 1950 decision is misplaced, and the Commissioner's Order rejecting the application of Breeland in support of the Claimant's position should be affirmed.

The limited facts and circumstances presented in Breeland were much different from the present case. The claimant in Breeland died in an accident arising out of his employment as a school bus driver. The court's written opinion does not include any information about the accident itself, including when it occurred. The opinion states only that the claimant was paid a monthly salary of \$75 during the nine month school year. There is no evidence presented as to how long the Claimant worked as a bus driver before his accident, what the claimant did during the months he was not working for the employer, or what the Claimant's typical annual earnings were. Those facts and circumstances were not relevant to the very narrow disputed issue before the court. Therefore, Breeland provides very little or no guidance to the Commission as to the issue in the

present case, and the Single Commissioner's Order correctly distinguished the present case from Breeland.

The only issue in dispute in Breeland was whether the Claimant's nine-month work period consisted of 39 or 36 weeks. The employer asserted that an average 9-month period was comprised of 39 weeks, and therefore calculated the Claimant's average weekly wage by dividing his total earnings by 39 weeks. The Claimant asserted that his average weekly wage should be based upon 36 weeks (thereby increasing his average weekly wage), because schools were closed for a total of three weeks during the nine-month school year. For reasons not set forth in the opinion, the Court concluded that using the 39-week period, *in that particular case*, was fair and just. Furthermore, the court determined that schools being closed for three weeks each year is not an "exceptional reason" that would justify an alternative average weekly wage calculation.

This holding has absolutely nothing to do with the issues in the present case and does not mandate the Claimant's proposed average weekly wage calculation. The surface-level similarities between these cases are of no consequence whatsoever. The simple fact that both cases involve a public school worker and an average weekly wage dispute does not mean that the court's holding in Breeland mandates the same result in this case. The only dispute in Breeland was whether it was fair and just to conclude that the nine-month period of the Claimant's employment consisted of 39 weeks. The court in Breeland determined only that, **in that particular case**, using a 39-week period was fair and just, and there were no exceptional circumstances to warrant using the claimant's proposed alternative method to calculate the average weekly wage. **In this case, however, using a 38-week divisor is *not* fair, and there *are* exceptional circumstances that warrant using an alternative average weekly wage calculation.** Limiting the relevant period for average weekly wage determination in this case to the 38-week school year would artificially

increase the Claimant's earnings, would be a windfall to the Claimant, and would unfairly punish the Employer. The fact that the Claimant receives an annual salary for her work as a teacher, the similarity of her annual earnings from year to year, and the large disparity between the Claimant's actual annual earnings every year and the income that would result from using a 38-week divisor are all exceptional circumstances that justify using an alternative method to calculate the average weekly wage.

Furthermore, the Breeland decision actually supports the Commissioner's conclusion that discounting the summer months from the average weekly wage calculation would artificially inflate the Claimant's wages. Just as the court in Breeland commented that the average weekly wage would be "artificially increased" by deducting the three vacation weeks from the Claimant's period of employment, so would the Claimant's average weekly wage be artificially increased in this case by deducting the summer months from consideration. For these reasons, Breeland does not mandate the use of a 38-week divisor to determine the average weekly wage in every case involving a public school employee. Contrary to the Claimant's argument in her brief, Breeland did not create precedent that prevents the Single Commissioner from properly considering for guidance the Conyers decision out of North Carolina. Breeland is a very fact specific case with little application to the present matter, other than to support the Single Commissioner's conclusion that discounting the summer months would artificially increase the average weekly wage. Therefore, the Commissioner properly rejected the application of Breeland to support the Claimant's position, and her Order must be affirmed.

ii. Bazen v. Badger R. Bazen is also inapplicable to the present case.

The Single Commissioner also correctly determined that Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010), does not mandate a 38-week divisor in the

present case. Bazen is factually distinguishable from this case, and, like Breeland, provides no support for the Claimant's argument. Therefore, the Single Commissioner's Order rejecting the application of Bazen should be affirmed.

In Bazen, the claimant and the employer (the claimant's father) entered into an oral contract by which the claimant would receive \$30,000.00 for one year of work. But the Claimant only received \$27,500, because he took a one month vacation, "during which time he did not receive compensation." Bazen, 388 S.C. at 66. Therefore, the court determined the Claimant's pay in that particular case should be divided by the "actual number of weeks Bazen paid Claimant wages" to determine the average weekly wage and compensation rate. Id.

Unlike in Bazen, the Claimant and the Employer in the present case did not have a prior agreement for a higher amount of pay that was later reduced based on a period the claimant did not work. The Claimant received her regular salary during the entirety of the 52 weeks in 2010. Her annual salary as a teacher was substantially similar from one year to the next. In Bazen, dividing the claimant's pay the actual number of weeks he worked produced an accurate approximation of his average weekly wages, and reflected his expected annual earnings of \$30,000.00. But in this case, dividing the Claimant's wages by 38 weeks would artificially inflate her earnings, would be a windfall to the Claimant, and would unfairly punish the Employer. Instead, dividing the Claimant's total annual wages in this case by 52 weeks produces a result that is fair and just to both parties, and most nearly approximates what the Claimant would have been earning if it were not for the injury. Therefore, the Single Commissioner correctly determined that Bazen does not apply to mandate a similar result in the present case, and her Order should be affirmed.

iii. The statutes referenced by the Claimant do not mandate a 38-week divisor.

The Single Commissioner correctly held that S.C. Code Ann. section 59-21-20, which governs mandatory minimum appropriations by the state legislature, is not applicable to a determination of average weekly wage in the context of a workers' compensation case. Section 59-21-20 provides that the legislature shall make sufficient appropriations to pay salaries of all public school teachers on the basis of 190 days. However, this statute has no bearing whatsoever on the proper determination of the Claimant's average weekly wage. The appropriations statute merely ensures that teachers are paid for the work they perform during the school year. There is no dispute that the claimant worked for 38 weeks during the school year, and that she did not work during the summer months. The Employer concedes this fact. However, section 59-21-20 does not somehow mandate an average weekly wage calculation that undermines the Act's requirement that the average weekly wage accurately reflect the Claimant's earnings were it not for the injury. Dividing the Claimant's total annual salary by only 38 weeks would artificially inflate her earnings and result in a windfall to the Claimant. The Single Commissioner correctly concluded that the appropriations statute does not mandate such an inequitable result, and her Order must be affirmed.

The Claimant's argument as to the provisions of S.C. Code Ann. section 9-1-840 is equally without merit. This statute provides that a public school employee's service "for a regular school year in any district shall be equivalent to one year's service" for retirement purposes. This provision does not support the Claimant's position. To the contrary, the presumption that the Claimant's work for 38 weeks is equal to one year for retirement purposes actually supports the Single Commissioner's decision in favor of a 52-week divisor. If the Claimant's actual work during the school year is the equivalent to one year for retirement purposes, then her earnings for that work are appropriately considered as an annual salary for purposes of calculating the average weekly wage.

Accordingly, S.C. Code Ann. section 9-1-840 does not mandate a 38-week divisor, and in fact supports the Single Commissioner's decision in favor of calculating the average weekly wage in a way that accurately reflects the Claimant's actual earnings. For these reasons, the Single Commissioner's Order must be affirmed.

iv. The Single Commissioner correctly declined to follow nonbinding precedent.

The Single Commissioner correctly determined that Hynes v. CCSD, Case No. 2010-CP-10-7739, a Circuit Court decision, and Henson v. Berkely County School Board, 2000-UP-163 (Ct. App. 2000), an unpublished Court of Appeals decision, are not binding on the Commission and do not mandate the Claimant's proposed average weekly wage. These cases state that a teacher's average weekly wage should be calculated based upon dividing the claimant's total annual wages by 38 weeks. However, neither court addresses whether the results are fair and just, or whether the results are an accurate approximation of the Claimant's earnings were it not for the injury. In fact, the results mandated by these decisions are *not* fair and just to both parties, would be unduly burdensome to the Employer, and would be a windfall to the Claimant. The method of calculating the average weekly wage as set forth in these orders would not accurately approximate the Claimants' earnings were it not for her injury. The Single Commissioner correctly determined that the courts' conclusions in Hynes and Henson are erroneous and are not binding on the Commission. Additionally, and for the exact same reasons, the WCC hearing decision cited by the Claimant in her brief is incorrect and is not binding on this Panel. Therefore, the Single Commissioner correctly declined to follow this erroneous and non-binding precedent, and her Order should be affirmed.

v. The Claimant's statutory construction argument is wholly without merit.

The Claimant's statutory construction argument is nonsensical and ignores the fairness provisions of S.C. Code Ann. section 42-1-40. The Claimant argues that a 1996 amendment to section 42-1-40 somehow reaffirmed the holding in Breeden and mandates the use of a 38-week divisor to determine average weekly wage in this case. This argument is wholly without merit. The amendment referenced by the Claimant's attorney had no impact whatsoever on the statute's provision that permits using an alternative method of calculating the average weekly wage. The Single Commissioner correctly determined that dividing the Claimant's total wages by 52 weeks would produce a result that is fair and just to the parties and would accurately reflect the Claimant's earnings were it not for the injury. The statutory amendment referenced by the Claimant has no bearing on this decision whatsoever. Therefore, the Single Commissioner's Order must be affirmed.

The Claimant further asserts that the Single Commissioner seeks to "circumvent the statute" by using a 52-week divisor to calculate the average weekly wage in this case, even though the Claimant worked for only 38 weeks. This argument is likewise baseless and without merit. The Single Commissioner simply recognized that dividing the Claimant's wages by the actual number of weeks she worked during the four quarters prior to the date of injury would produce an artificially inflated average weekly wage in this particular case. She correctly determined that "exceptional circumstances" in this case would therefore permit using an alternative method that accurately reflects the Claimant's actual earnings. The fact that the "alternative method" that is appropriate in this particular case happens to be the same as the standard 52-week method is of no consequence whatsoever. This coincidence does not somehow require the Commission to order an inequitable average weekly wage and compensation rate that would create a windfall for the Claimant. The Single Commissioner's Order correctly determined that using a 52-week divisor was the best

available method for calculating a fair and accurate average weekly wage in this particular case, even though the Claimant worked less than 52 weeks. Therefore, her Order must be affirmed.

Finally, the Claimant also incorrectly asserts that the Single Commissioner's decision somehow renders portions of section 42-1-40 moot. The Claimant contends that, in view of the Single Commissioner's decision, the legislature could have drafted the statute to include only two methods of calculation, one method based on 52 weeks, and a second method based on exceptional circumstances. This argument is also without merit. In the vast majority of cases, including those where the claimant is employed for less than a year prior to an injury, the average weekly wage can be fairly and accurately calculated by dividing the total earnings by the actual number of weeks worked. However, the employment arrangement and pay structure for a school teacher presents a unique situation, an "exceptional circumstance," in which a 52-week divisor is appropriate, even though the claimant has worked for less than 52 weeks. Contrary to the Claimant's argument, the application of the statute's fairness provisions in these unique circumstances does not render the other provisions of the statute moot. It is simply the correct result for this particular case. Therefore, the Single Commissioner's Order is founded on and supported by a sound interpretation of the law. Her calculation of the Claimant's average weekly wage is fair and just to both parties, and produces a result that most nearly approximates the Claimant's earnings were it not for her injury. For these reasons, the Single Commissioner's Order should be affirmed in its entirety.

II. THE SINGLE COMMISSIONER CORRECTLY DETERMINED THE CLAIMANT SUSTAINED 45% PPD TO THE BACK.

The Single Commissioner's 45% PPD award is founded on and supported by the great weight of the preponderance of the evidence in the record. In reaching her decision, the Single Commissioner carefully considered the entirety of the evidence in the record, including the Commissioner's observation of the Claimant at the hearing, her consideration of the Claimant's

testimony, and her thorough examination of the complete medical evidence, including the deposition testimony of Dr. Paul Gause. A Decision and Order of a Single Commissioner must be affirmed if it is supported by a preponderance of the evidence in the record, and is not based on "surmise, conjecture, or speculation." Linen v. Ruscon Construction Co., 286 S.C. 67, 70, 332 S.E. 2d 211, 212 (1985). Additionally, the Full Commission should give weight to the Single Commissioner's decision, based upon the fact that the Full Commission does not have the opportunity or benefit of observing the witnesses, as does the Single Commissioner. Green v. Raybestos - Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967). Here, the Single Commissioner's disability award is not impacted by surmise or conjecture, but instead is supported by a preponderance of the reliable evidence in the record, and therefore should be affirmed.

The extent of an injured worker's disability is a question of fact for determination by the Commission. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "the Commission determines the weight and credit to be given to the expert testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The Commission is also given discretion to weigh and consider all the evidence, including both lay and expert testimony. Id. at 341. In this case, the preponderance of the evidence, including the medical records, the testimony of Dr. Gause, the Claimant's testimony, and the Single Commissioner's observation of the Claimant at the hearing, firmly support the Single Commissioner's conclusion that the Claimant has sustained 45% permanent partial disability of the back.

The claimant is 44 years old. By all accounts, she had an excellent recovery from single-level fusions at C5-6 and L5-S1. She continues to work full time as a school teacher. The claimant

is able to drive to and from work, and as needed to take her children to various activities. Dr. Gause's medical narrative reports state that the claimant walks a mile a day before school (although the Claimant disputed the length of her walks in her testimony at the hearing). The claimant testified that, according to her pedometer, she walks on average an additional two miles throughout the course of her normal activities during the day. The claimant does not take any prescription pain medication, and takes Motrin only once or twice a week. The Claimant's testimony at the hearing regarding difficulties in her home life and activities of daily living is not reliable, as it is unsubstantiated by the medical evidence. In fact, her testimony is contradicted by Dr. Gause's reports, his findings on physical examination of the claimant, and his deposition testimony.

The Claimant's testimony is further called into question by her contradictory statements regarding a prior disability award she received for a previous workers' compensation claim involving a head and neck injury she sustained in Michigan. The Claimant received a permanent 10-pound weight lifting restriction as a result of that injury. She testified in her deposition that she settled that claim for more than \$100,000.00. However, at the hearing, she changed her testimony and insisted that she could not remember the amount of her prior settlement. Therefore, the Commissioner correctly considered and weighed the totality of the evidence in reaching her decision regarding PPD, including the Claimant's contradictory and conflicting testimony. The Single Commissioner's award is supported by the preponderance of the reliable evidence in the record, and her award must be affirmed.

Furthermore, the 14% combined impairment rating assigned by the authorized treating physician is accurate and provides a reliable indicator as to the Claimant's actual functional capacity. The fact that this rating is based upon the 6th edition of the AMA Guides (as opposed to the 5th edition) is of no consequence whatsoever to the validity of this rating in support of the Single

Commissioner's disability award. There is no law or regulation in South Carolina that mandates a preferential view of one version of the AMA Guides over the other. Therefore, the Single Commissioner correctly considered Dr. Gause's accurate impairment rating in conjunction with all of the other evidence in the record, and her award must be affirmed.

Dr. Gause, the authorized treating physician, confirmed in his sworn deposition testimony that his 14% impairment rating is correct under the 6th Edition of the AMA Guides. He testified that his rating is an accurate reflection of the claimant's actual impairment based upon the subjective history the claimant gave Dr. Gause, and his physical examination of the claimant, which indicated an excellent recovery from surgery and no verifiable radicular symptoms. To the contrary, the 5th Edition of the AMA Guides requires a DRE Category IV impairment rating for any patient who undergoes a fusion surgery, no matter how well a patient recovers after this procedure. Dr. Gause testified that the more recent 6th Edition has no such requirement for a specific classification as a result of a particular surgery. Therefore, Dr. Gause's impairment ratings assigned pursuant to the 6th edition are an accurate and reliable reflection of the Claimant's actual functional ability. The Single Commissioner correctly considered the weight to be given this impairment rating in relation to all the other evidence in the record.

To the contrary, Dr. J. Reilly Keffer's March 30, 2015 report is not reliable at all. Dr. Keffer last saw the claimant on December 15, 2011, over *three years* before he prepared his report. He never saw the Claimant in person after she underwent the surgeries performed by Dr. Gause. Dr. Keffer did not perform a physical examination of the Claimant before assigning his impairment ratings. Dr. Gause testified that the impairment ratings assigned by Dr. Keffer of 25% to the cervical spine and 25% to the lumbar spine would result in a combined value of 44% total impairment, pursuant to the combined values table in the 5th Edition. The Single Commissioner

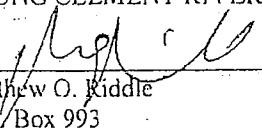
carefully considered all of these medical opinions in reaching her decision, in conjunction with all the other relevant evidence and testimony in the record. The Claimant has had an excellent recovery and continues to work full time in the same type of job she held prior to the 2011 accident. Therefore, the preponderance of the evidence in this case supports the Single Commissioner's 45% disability award. As a result, the Single Commissioner's Order must be affirmed.

CONCLUSION

The Single Commissioner's calculation of the Claimant's average weekly wage and compensation rate is founded on and supported by a sound interpretation of the law and careful application of that law to the facts of this particular case. The Commissioner correctly recognized that dividing the Claimant's total annual earnings by 52 weeks produces an average weekly wage and compensation that is fair and just to both parties, and accurately reflects the amount the Claimant would be earning were it not for the injury. As a result, her calculation of the Claimant's average weekly wage must be affirmed. Furthermore, the Single Commissioner correctly determined that the Claimant has sustained 45% permanent partial disability relative to her compensable neck and low back injuries, based upon her careful consideration of the entirety of the evidence and testimony in the record. Her award is supported by a preponderance of the reliable evidence in the record, and it likewise must be affirmed.

Respectfully Submitted,

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Attorneys for the Employer/Self-Insured

Charleston, South Carolina

Dated: November 25, 2015

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1104105

EMPLOYEE/CLAIMANT: KELLY McPHERSON

EMPLOYER: CHARLESTON COUNTY SCHOOL DISTRICT

CARRIER: SELF-INSURED

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 9TH DAY OF
APRIL, 2015, COMMENCING AT THE HOUR OF 1:14 P.M., IN
SAINT GEORGE, SOUTH CAROLINA, BEFORE THE HONORABLE
MELODY L. JAMES, ATTENDED BY COUNSEL AS FOLLOWS:

TIMMI A. PARRISH
VERBATIM REPORTER

ORIGINAL

TIMMI A. PARRISH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, SC 29376
864-921-8743

APPEARANCES

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ATTORNEY FOR THE EMPLOYER/CARRIER.

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1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN SAINT GEORGE,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * *

6 BY COMMISSIONER JAMES:

7 TODAY IS APRIL THE 9TH, 2015. WE ARE HERE ON
8 WCC FILE NUMBER 1104105. THIS IS THE MATTER OF
9 KELLY McPHERSON VERSUS CHARLESTON COUNTY SCHOOL
10) DISTRICT AND CHARLESTON COUNTY SCHOOL DISTRICT.
11 PRESENT ON BEHALF OF THE CLAIMANT IS MR. FRED
12 RIESEN. ALSO PRESENT FOR THE CLAIMANT IS MR. TRIP
13 RIESEN. THE EMPLOYER AND CARRIER ARE REPRESENTED BY
14 MR. MATT RIDDLE. THE DATE OF ACCIDENT IS FEBRUARY
15 THE 3RD, 2011. THE AVERAGE WEEKLY WAGE AND
16 COMPENSATION RATE ARE IN CONTEST. I WILL DISCUSS
17 THOSE IN JUST A MOMENT. WE ARE HERE ON THE EMPLOYER
18 AND CARRIER'S FORM 21. ARE THERE ANY OBJECTIONS TO
19 APAs, JURISDICTION, VENUE, OR ANY OTHER ITEMS ON
20 BEHALF OF THE DEFENDANT?

21 BY MR. RIDDLE:

22 NO OBJECTIONS, COMMISSIONER.

23 BY THE COMMISSIONER:

24 ON BEHALF OF THE CLAIMANT?

25 BY MR. RIESEN:

1 NONE. DO YOU WANT TO BE ABLE TO ANSWER TO HIS
2 BRIEF OR ---

3 BY MR. RIDDLE:

4 NO.

5 BY MR. RIESEN:

6 NONE.

7 BY THE COMMISSIONER:

8 ALL RIGHT. WITHOUT OBJECTION THE COMMISSION
9 FILE BECOMES A PART OF THE RECORD WITH THE EXCEPTION
10 OF ANY SELF-SERVING DECLARATIONS AND UNSTIPULATED
11 MEDICAL REPORTS. WE HAVE HAD A LENGTHY PRETRIAL AS
12 WELL AS A TELEPHONE CONFERENCE ON A PREVIOUS DATE
13 WITH REGARDS TO WHETHER OR NOT THE DEPOSITION SHOULD
14 BE LEFT OPEN OR THE -- FOR DR. GAUSE, THE TREATING
15 PHYSICIAN, OR WHETHER THE MATTER SHOULD BE
16 CONTINUED. AND AS THE CLAIMANT HAD ALREADY
17 PURCHASED A PLANE TICKET, WE ARE GOING TO CONTINUE
18 WITH THE HEARING TODAY AND LEAVE THE RECORD OPEN FOR
19 THE DEPOSITION OF DR. GAUSE. SO, OTHER THAN THAT,
20 WITHOUT OBJECTION THE COMMISSION FILE BECOMES A PART
21 OF THE RECORD WITH THE EXCEPTION OF ANY SELF-SERVING
22 DECLARATIONS AND UNSTIPULATED MEDICAL REPORTS.

23 BOTH PARTIES AGREE THAT THE CLAIMANT IS AT
24 MAXIMUM MEDICAL IMPROVEMENT AND THAT SHE HAD AN
25 ADMITTED INJURY TO HER BACK IN WHICH SHE HAD TWO

1 SURGERIES -- OR I MAY BE MISQUOTING; THERE MAY BE
2 ADDITIONAL. BUT THERE WERE SURGERIES TO THE NECK
3 AND TO THE LOW BACK. THEIR CONTENTION, BOTH, IS
4 THAT THE AWARD SHOULD BE UNDER 42-9-30. IT IS THE
5 DEFENDANT'S CONTENTION THAT HER PERCENTAGE OF
6 DISABILITY IS LESS THAN 50 PERCENT, AND, THEREFORE,
7 THE AWARD SHOULD BE BASED ON 300 WEEKS. IT IS THE
8 CLAIMANT'S CONTENTION THAT HER AWARD IS GREATER THAN
9 50 PERCENT AND SHOULD BE BASED ON 500 WEEKS.

10 THE PARTIES AGREE THAT THERE IS HARDWARE THAT
11 IS GOING TO BE MAINTAINED PURSUANT TO THE ACT AND
12 THAT THE FUTURE MEDICALS ARE DETERMINED, AND THEY
13 AGREE THAT THEY ARE AS OUTLINED BY DR. GAUSE IN HIS
14 FINAL REPORT OF JANUARY 23RD, 2015.

15 THERE IS ALSO ONE OTHER SUBSTANTIAL ISSUE IN
16 THE FILE. THE PARTIES DISAGREE ON THE AVERAGE
17 WEEKLY WAGE AND COMPENSATION RATE. THE DEFENDANT'S
18 POSITION IS THAT THE AVERAGE WEEKLY WAGE IS 776.98,
19 WITH A CORRESPONDING COMPENSATION RATE OF 518.01,
20 AND THAT AS THE CLAIMANT IS A SCHOOL TEACHER THAT
21 HER WAGES ARE DIVISIBLE BY THE 52-WEEK PERIOD. AND
22 BOTH PARTIES ARE GOING TO SET THIS OUT IN ORAL
23 ARGUMENT. THE CLAIMANT'S POSITION IS THAT SHE DID
24 NOT WORK 52 WEEKS OUT OF THE YEAR; THAT SHE'S
25 CONTRACTED AND BY STATUTE HER SALARY IS DETERMINED

1 ON 38 WEEKS. HER POSITION IS THAT HER AVERAGE
2 WEEKLY WAGE IS \$1,063.24, WITH A CORRESPONDING
3 COMPENSATION RATE OF 704.92.

4 NOW, WITHOUT GOING INTO THE ARGUMENT ON AVERAGE
5 WEEKLY WAGE AND COMPENSATION RATE BUT JUST AS TO THE
6 OUTLINE OF WHAT THE ISSUES ARE TO BE DETERMINED, IS
7 THERE ANYTHING FURTHER FROM THE DEFENDANTS?

8 BY MR. RIDDLE:

9 COMMISSIONER, I JUST WANT TO CLARIFY THAT AS
10 FAR AS THE FUTURE MEDS THAT THEY WOULD BE LIMITED TO
11 WHAT IS ON DR. GAUSE'S FINAL REPORT IN ADDITION TO
12 MAINTENANCE OF THE HARDWARE.

13 BY THE COMMISSIONER:

14 AND I HAVE TO FOLLOW 42-15-60, WHICH REQUIRES
15 ME TO SPECIFY, EXCEPT FOR I THINK IT'S "C" THAT SAYS
16 IF IT'S P&T THEN IT'S ALL INCLUSIVE.

17 BY MR. RIDDLE:

18 CORRECT.

19 BY THE COMMISSIONER:

20 SO, I DON'T THINK ANYBODY IS ARGUING -- THERE'S
21 NOT AN ARGUMENT PRESENTED TODAY WITH P&T.

22 BY MR. RIDDLE:

23 JUST IN CASE THAT ISSUE WERE TO COME UP IN THE
24 FUTURE, I JUST WANT TO CLARIFY EXACTLY WHAT THE
25 MEDICALS ARE LIMITED TO, AND THAT WOULD BE, I

1 BELIEVE, DR. GAUSE'S REPORT OF 1/23/15.

2 BY THE COMMISSIONER:

3 AND I THINK THE STATUTE REQUIRES ME TO CLARIFY
4 NOW AFTER THE 2007 AMENDMENT. IS THERE ANYTHING
5 FURTHER FROM -- AND, AGAIN, WE'RE GOING TO ENTERTAIN
6 ARGUMENT WITH THE AVERAGE WEEKLY WAGE AND
7 COMPENSATION ---

8 BY MR. RIESEN:

9 THE ONLY QUESTION I'VE GOT IS, YOU KNOW, HE IS
10 GOING TO BE TAKING THE DOCTOR'S DEPOSITION, AND I
11 THINK IT'S GOING TO BE ABOUT A MONTH, AND MY CONCERN
12 WOULD BE IF AT THAT TIME THERE WAS ANY CHANGE IN
13 WHAT FUTURE TREATMENT MIGHT BE. I MEAN, THAT ---

14 BY THE COMMISSIONER:

15 WELL, AND THAT IS ONE OF THE REASONS WHY I DO
16 NOT LIKE LEAVING THE RECORD OPEN, ---

17 BY MR. RIESEN:

18 RIGHT. I KNOW.

19 BY THE COMMISSIONER:

20 --- IS BECAUSE THINGS CAN CHANGE, EVEN
21 INCLUDING THE FACT THAT SOMEBODY CAN THEN BE FOUND
22 NOT TO BE AT M.M.I., AND WE'VE ALL TRIED -- WE ALL
23 HAVE TRIED IT WITH THE PRESUMPTION THAT THAT WAS THE
24 CASE, AND THEN EVERYBODY WILL BE BACK TO A DIFFERENT
25 SQUARE MEDICALLY ---

1 BY MR. RIESEN:

2 RIGHT.

3 BY THE COMMISSIONER:

4 --- THAN WE WERE LEGALLY. SO, YES, AND WE'LL
5 HAVE TO -- THE DOCTOR'S DEPOSITION WILL HAVE TO BE
6 TAKEN IF THAT'S WHAT YOU ALL ARE LEAVING THE RECORD
7 OPEN FOR, WHICH IS WHAT I'VE SAID, AND I REALIZE
8 THAT THINGS CAN CHANGE, WHICH IS ONE OF THE REASONS
9 WHY I DON'T LIKE TO LEAVE THE RECORD OPEN.

10 BY MR. RIESEN:

11 RIGHT.

12 BY THE COMMISSIONER:

13 BECAUSE SOMETIMES THINGS BECOME VERY DIFFERENT
14 IN COMPLEXION THAN WHAT WE SEE IN THE ACTUAL
15 COURTROOM. OKAY. SO I ACKNOWLEDGE THAT ALSO, MR.
16 RIESEN. ALL RIGHT.

17 NOW, THE DEFENDANT IS THE MOVING PARTY, SO I'M
18 GOING TO ALLOW THE DEFENDANT TO PRESENT THEIR
19 ARGUMENT ON THE AVERAGE WEEKLY WAGE FIRST, AND THEN
20 WE'LL GO TO THE CLAIMANT'S ARGUMENT.

21 BY MR. RIDDLE:

22 CERTAINLY. AND, COMMISSIONER, DO YOU WANT ME
23 TO ALSO ADDRESS OUR POSITION AS FAR AS PERMANENT
24 PARTIAL DISABILITY AT THIS TIME OR HOLD OFF ON THAT?

25 BY THE COMMISSIONER:

1 ACTUALLY, WITH THAT, THAT IS ONE OF THOSE
2 ISSUES THAT IS GOING TO BE DEPENDENT ON ALL OF THE
3 FACTS AND THINGS YOU ALL POINT OUT TO ME AND MY
4 READING OF THE RECORD. IT'S NOT REALLY LEGAL
5 ARGUMENT. SO ---

6 BY MR. RIDDLE:

7 THERE IS ---

8 BY THE COMMISSIONER:

9 --- I DON'T NEED FOR YOU TO EXPAND ON IT UNLESS
10 YOU ALL FEEL THAT YOU WANT TO.

11 BY MR. RIDDLE:

12 I FEEL THERE IS ONE ISSUE THAT WE DIDN'T GET TO
13 IN THE PREHEARING BECAUSE WE BEGAN TALKING ABOUT THE
14 AVERAGE WEEKLY WAGE ISSUE, AND THAT IS WITH REGARD
15 TO A PREEXISTING WORKERS' COMP CLAIM, AND I WOULD
16 JUST ASK THAT YOU TAKE THAT INTO CONSIDERATION AS
17 WELL AS FAR AS THE EXTENT OF DISABILITY.

18 BY THE COMMISSIONER:

19 ALL RIGHT. I'M GOING TO -- BECAUSE I -- I'M
20 GOING TO GO OFF RECORD FOR JUST A MOMENT.

21 (OFF THE RECORD)

22 BY THE COMMISSIONER:

23 WE'RE BACK ON RECORD. IF YOU CAN GO AHEAD AND
24 PRESENT YOUR POSITION ON THE PREEXISTING ISSUE YOU
25 RAISED.

1 BY MR. RIDDLE:

2 CERTAINLY, COMMISSIONER. THE CLAIMANT DID HAVE
3 A PRIOR WORKERS' COMPENSATION CLAIM IN MICHIGAN, I
4 BELIEVE, IN 1992 THAT INVOLVED AN INJURY TO HER HEAD
5 AND TO HER NECK. SHE HAD A SUBSTANTIAL SETTLEMENT
6 IN THAT CASE. WE HAVEN'T BEEN ABLE TO IDENTIFY ANY
7 SPECIFIC RECORDS ABOUT THE AMOUNT OF DISABILITY, THE
8 AMOUNT OF IMPAIRMENT ASSIGNED BY THE DOCTOR, OR THE
9 -- OR WHETHER THERE ARE ANY WORK RESTRICTIONS FROM
10 THAT CLAIM. SO THE ONLY INFORMATION WE HAVE IS THE
11 CLAIMANT'S TESTIMONY WITH REGARD TO THE EXTENT OF
12 HER INJURIES IN THAT PRIOR CLAIM. BUT WE -- I WOULD
13 CONTEND THAT THAT IS EVIDENCE THAT'S RELEVANT TO A
14 DETERMINATION OF HER PERMANENT DISABILITY IN THE
15 PRESENT CLAIM IN VIEW OF THE 42-9-150 STATUTE THAT
16 SAYS WHEN THERE HAS BEEN ANOTHER INJURY IN OTHER
17 EMPLOYMENT THAT COMPENSATION PAID IS ONLY FOR THE
18 DEGREE OF DISABILITY THAT WOULD HAVE EXISTED FROM
19 THE LATER ACCIDENT IF THE EARLIER DISABILITY OR
20 INJURY HAD NOT EXISTED. AND I'D JUST CONTEND THAT
21 THAT STATUTE APPLIES HERE AND WOULD ASK THAT YOU
22 TAKE THAT INTO CONSIDERATION WITH REGARD TO THE
23 PERMANENT DISABILITY DETERMINATION, ALONG WITH ALL
24 THE OTHER ISSUES WE DISCUSSED IN THE PREHEARING, AND
25 THAT WILL BE ADDRESSED IN THE CLAIMANT'S TESTIMONY.

1 CORRECTLY ACCORDING TO THE PLAIN LANGUAGE OF THE
2 STATUTE 42-1-40 THAT STATES THAT THE AVERAGE WEEKLY
3 WAGE MUST BE CALCULATED BASED ON THE TOTAL WAGES
4 PAID FOR THE LAST FOUR QUARTERS IMMEDIATELY
5 PRECEDING THE QUARTER IN WHICH THE INJURY OCCURRED
6 DIVIDED BY 52 OR BY THE ACTUAL NUMBER OF WEEKS FOR
7 WHICH WAGES WERE PAID. AND WITH REGARD TO THAT
8 LANGUAGE, COMMISSIONER, WE WOULD CONTEND THAT WAGES
9 WERE PAID FOR 52 WEEKS. THE AVERAGE WEEKLY WAGE WAS
10 CALCULATED BASED ON 52 WEEKS' COMPENSATION PAID TO
11 THE CLAIMANT. AND THEN GOING ON WITH THE LANGUAGE
12 OF THE STATUTE, THE NEXT SENTENCES SAYS, "WHEN THE
13 EMPLOYMENT PRIOR TO THE INJURY EXTENDED OVER A
14 PERIOD OF LESS THAN 52 WEEKS, THE METHOD OF DIVIDING
15 THE EARNINGS DURING THAT PERIOD BY THE NUMBER OF
16 WEEKS AND PARTS THEREOF DURING WHICH THE EMPLOYEE
17 EARNED WAGES SHALL BE FOLLOWED AS LONG AS RESULTS
18 FAIR AND JUST TO BOTH PARTIES WILL BE OBTAINED."
19 AND, COMMISSIONER, I WOULD CONTEND THAT THAT IS THE
20 CONTROLLING LANGUAGE HERE, THAT LAST BIT ABOUT THE
21 RESULTS BEING FAIR, BECAUSE IF WE WERE TO CALCULATE
22 MS. BOZYDAJ'S AVERAGE WEEKLY WAGE AS SHE CONTENDS
23 AND THAT HER AVERAGE WEEKLY WAGE WAS BASED ON THE
24 NUMBER OF WEEKS IN THE SCHOOL YEAR, IT WOULD RESULT
25 IN WAGES OF \$1,063.24, WHICH IS A 37 PERCENT

1 BY THE COMMISSIONER:

2 ALL RIGHT. MR. RIESEN, THE CLAIMANT'S POSITION
3 ON -- LET'S JUST DO THESE ONE AT A TIME. DOES THE
4 CLAIMANT HAVE ANYTHING ADDITIONAL WITH THE POSITION
5 ON THE PREEXISTING?

6 BY MR. RIESEN:

7 YES. IT'S OUR POSITION THAT ANYTHING THAT SHE
8 SAID IN THAT IS, QUITE FRANKLY, IRRELEVANT. BUT,
9 ADDITIONALLY, IT'S 23 YEARS AGO, AND SHE WAS WORKING
10 FULL TIME WITHOUT ANY PROBLEMS WHATSOEVER. THERE'S
11 NO EVIDENCE OF ANY KIND OF RATINGS OR ANYTHING, AND
12 SO WE THINK IT HAS NO BEARING WHATSOEVER.

13 BY THE COMMISSIONER:

14 ALL RIGHT. MR. RIDDLE, YOUR POSITION ON THE
15 AVERAGE WEEKLY WAGE?

16 BY MR. RIDDLE:

17 THANK YOU, COMMISSIONER. THE EMPLOYER'S
18 POSITION IS THAT IT PROPERLY AND ACCURATELY
19 CALCULATED THE CLAIMANT'S AVERAGE WEEKLY WAGE BASED
20 ON HER SALARY OF \$40,403.01 THAT WAS PAID FOR 52
21 WEEKS DURING 2010 AND THAT THE ACCURATE AVERAGE
22 WEEKLY WAGE AS SET FORTH ON THE FORM 20 THAT THE
23 EMPLOYER FILED IS \$776.98, WITH A CORRESPONDING
24 COMPENSATION RATE OF \$518.01. THE FORM 20 WAS
25 PREPARED AND THE AVERAGE WEEKLY WAGE WAS CALCULATED

1 INCREASE OVER HER ACTUAL EARNINGS. THE CLAIMANT,
2 THEREBY, WOULD BE EARNING MORE WHILE ON DISABILITY
3 THAN WHILE ACTUAL -- WHILE ACTUALLY WORKING IN GROSS
4 TAKE HOME PAY -- EXCUSE ME; IN NET TAKE HOME PAY.

5 AND THE CASE THAT MR. RIESEN HAS REFERENCED,
6 THIS BREELAND VERSUS COLLETON COUNTY, IS COMPLETELY
7 DISTINGUISHABLE FROM OUR SITUATION HERE AT HAND.
8 THAT CASE INVOLVED A SCHOOL BUS DRIVER, NOT A
9 TEACHER. THERE WAS NO INDICATION THAT MR. BREELAND
10 WAS PAID OVER THE COURSE OF 52 WEEKS. HE WORKED, I
11 BELIEVE IT SAID, 36 WEEKS IN THE CASE AND WAS NOT
12 PAID FOR A THREE-WEEK VACATION, AND THE EMPLOYER IN
13 THAT CASE TRIED TO DIVIDE IT BY 39. THAT'S NOT WHAT
14 WE HAVE HERE, COMMISSIONER. MS. -- EXCUSE ME. THE
15 SCHOOL DISTRICT PAID MS. BOZYDAJ FOR 52 WEEKS. SHE
16 HAD A SALARY OF \$40,000. THEY PAID THAT OVER 52
17 WEEKS. THERE WAS NO UNPAID VACATION. THERE WAS NO
18 PERIOD THAT SHE DIDN'T RECEIVE COMPENSATION.
19 THEREFORE, THE METHOD THAT THE SCHOOL DISTRICT HAS
20 USED IS ACCURATE. FURTHERMORE, OTHER CASES THE
21 CLAIMANT HAS CITED ARE NOT BINDING ON THE COMMISSION
22 AND HAVE NO PRECEDENTIAL VALUE. THERE'S A CIRCUIT
23 COURT CASE AND AN UNPUBLISHED COURT OF APPEALS CASE.
24 ALSO, THE RESULTS IN THOSE CASES ARE ERRONEOUS FOR
25 THE SAME REASONS I'VE ALREADY STATED. THE CLAIMANT

1 ALSO CITES THIS BAZEN CASE, B-A-Z-E-N, WHICH I WOULD
2 ALSO CONTEND IS NOT APPLICABLE HERE. THE CLAIMANT
3 IN THAT CASE ALSO HAD A PERIOD OF UNPAID VACATION,
4 AND THE ISSUE WAS WHETHER THAT PERIOD OF UNPAID
5 VACATION WOULD BE INCLUDED IN THE AVERAGE WEEKLY
6 WAGE. BUT THE COURT FOUND THAT THE -- THAT THE
7 SINGLE COMMISSIONER CORRECTLY DIVIDED THE CLAIMANT'S
8 PAY BY THE, QUOTE, ACTUAL NUMBER OF WEEKS BAZEN PAID
9 CLAIMANT WAGES TO DETERMINE THE COMPENSATION RATE.
10 UNDER THAT LOGIC, THE ACTUAL NUMBER OF WEEKS THE
11 SCHOOL DISTRICT PAID THE CLAIMANT'S WAGES WAS 52,
12 AND THE EMPLOYER DIVIDED THE TOTAL WAGES PAID IN
13 2010 BY 52 TO REACH AN ACCURATE AVERAGE WEEKLY WAGE
14 AND COMPENSATION RATE.

15 AND FOR THESE REASONS WE'D JUST ASK THAT THE
16 ESTABLISHED AVERAGE WEEKLY WAGE AND COMP RATE ON THE
17 FORM 20 BE ORDERED AS THE CORRECT AVERAGE WEEKLY
18 WAGE AND COMPENSATION RATE IN THIS CASE. THANK YOU.

19 BY THE COMMISSIONER:

20 ALL RIGHT. AND I BELIEVE MR. TRIP RIESEN,
21 YOU'RE GOING TO PRESENT ARGUMENT ON THIS ISSUE?

22 BY MR. RIESEN, III:

23 YES, YOUR HONOR. THANK YOU. AS YOU'RE AWARE,
24 SECTION 42-1-40 PROVIDES FOUR METHODS OF COMPUTING
25 THE AVERAGE WEEKLY WAGE. THE PRIMARY METHOD

1 REQUIRES YOU TO TAKE THE TOTAL WAGES PAID FOR THE
2 LAST FOUR QUARTERS BEFORE THE INJURY AND DIVIDING BY
3 52 OR BY THE ACTUAL NUMBER OF WEEKS FOR WHICH WAGES
4 ARE PAID, COMMA, WHICHEVER IS LESS. THIS IS
5 IMPORTANT LANGUAGE. ACCORDING TO PILGRIM, THE
6 COMMISSION MUST USE THIS METHOD UNLESS IT WOULD BE
7 UNFAIR TO DO SO FOR EXCEPTIONAL REASONS. SO HERE WE
8 WOULD PROPOSE THAT YOU NEED TO USE THE PRIMARY
9 METHOD, AND IF WE DO THAT IT IS STIPULATED THAT MS.
10 BOZYDAJ'S WAGE WAS 40,403.01. WHAT DEFENSE COUNSEL
11 DID NOT MENTION IS THAT SOUTH CAROLINA CODE 59-21-20
12 MANDATES AND DEFINES SALARIES BY STATING THAT SCHOOL
13 TEACHERS' SALARIES ARE BASED ON 180 DAYS, OR 38
14 WEEKS. SO, IF WE USE THE PRIMARY METHOD AND TAKE
15 THE TOTAL WAGES, WHICH WAS 40,403.01, THEN WE NEED
16 TO DIVIDE BY THE ACTUAL NUMBER OF WEEKS FOR WHICH
17 WAGES WERE PAID, WHICHEVER IS LESS. AND ACCORDING
18 TO 59-21-20, AS A PUBLIC SCHOOL TEACHER WAGES ARE
19 PAID FOR 180 DAYS, OR 38 WEEKS. THIS IS CLEARLY
20 LESS THAN THE 52 WEEKS PURSUANT TO THE STATUTE. MS.
21 MCPHERSON -- EXCUSE ME; MS. BOZYDAJ, FORMERLY MS.
22 MCPHERSON -- I APOLOGIZE -- ONLY WORKED FOR NINE
23 MONTHS, 38 WEEKS, AND DID NOT WORK DURING THE
24 SUMMERS FOR THE SCHOOL DISTRICT. SO, IF WE WERE TO
25 USE THEIR POSITION OF BEING PAID ON 52 WEEKS, THEN

1 THAT'S LIKE SAYING THAT THEY COULD DICTATE WHAT SHE
2 DID DURING THE SUMMERS, AND THAT'S NOT THE CASE.
3 SHE WAS ONLY HIRED AND PAID -- HER WAGES WERE ONLY
4 PAID FOR THOSE 38 WEEKS. AND SO IN DOING SO, THE
5 PRIMARY CALCULATION WOULD BE 40,000 DIVIDED BY --
6 40,403 DIVIDED BY 38 WEEKS.

7 NOW, IF THE COMMISSION DECIDED TO USE ONE OF
8 THE OTHER METHODS FOR SOME REASON, FIRST WE WOULD
9 ARGUE THAT EXCEPTIONAL REASONS WOULD NOT APPLY IN
10 THIS CASE, AND ACCORDING TO THE BREELAND CASE THAT
11 WOULD BE THE PRECEDENT TO SAY THAT YOU WOULD NOT GO
12 TO EXCEPTIONAL REASONS IN A CASE LIKE THIS. BUT IF
13 WE WERE AND WE WERE TO TALK ABOUT WHAT'S FAIR AND
14 JUST OR WHAT MOST NEARLY APPROXIMATES THE EARNINGS,
15 THEN I THINK WE NEED TO LOOK TO MORE THAN JUST
16 AVERAGE WEEKLY WAGE, AND I THINK WE NEED TO LOOK AT
17 THE TOTAL COMP RATE, AND IN DOING THAT, IF WE WERE
18 TO TAKE THE 40,403.01, DIVIDE IT BY 38 WEEKS, YOU
19 GET AN AVERAGE WEEKLY WAGE OF 1,063.24. IF WE
20 MULTIPLY THAT TIMES .667 UNDER THE STATUTE TO GET
21 THE TOTAL COMP RATE, WE GET \$709.17. THAT'S THE
22 TOTAL COMP RATE. IF WE MULTIPLY THAT TIMES 52
23 WEEKS, WE GET A SALARY OF 36,876.84. I KNOW WE'RE
24 TALKING GROSS VERSUS NET AND TAXES AND STUFF. BUT
25 THAT NUMBER IS A LOT CLOSER TO WHAT HER SALARY WAS

1 OF 40,000 THAN IF WE USE THEIR FORMULA, WHETHER YOU
2 CONSIDER NET OR GROSS. IF YOU USE THEIR FORMULA AND
3 DIVIDE IT BY 52 WEEKS, YOU BASICALLY GET \$26,948.80,
4 WHICH IS \$13,454.24 LESS THAN HER SALARY. SO IF
5 WE'RE LOOKING TO A DIFFERENT METHOD AND YOU WANT TO
6 LOOK TO FAIR AND JUST OR WHAT MOST NEARLY
7 APPROXIMATES THE -- WHAT SHE WAS EARNING BEFORE,
8 THEN 38 WEEKS IS CLEARLY A LOT CLOSER TO THAT
9 NUMBER.

10 I'VE PROVIDED A BRIEF WITH THE CASE LAW ON IT.
11 I THINK BREELAND SUPPORTS US. I KNOW THAT HE,
12 DEFENSE COUNSEL, ADDRESSED THE HINES CASE, WHICH WAS
13 DECIDED BY JUDGE HARRINGTON, WHICH IS A CIRCUIT
14 COURT OPINION WHICH WAS BEFORE THE COURT OF APPEALS.
15 WE UNDERSTAND THAT DOESN'T HAVE LEGAL BINDING, BUT
16 IT CERTAINLY CAN PROVIDE SOME GUIDANCE BECAUSE IT'S
17 THE SAME EXACT ISSUE.

18 I THINK THAT'S ALL I HAVE. THANK YOU, YOUR
19 HONOR.

20 BY THE COMMISSIONER:

21 IS THERE ANYTHING IN RESPONSE?

22 BY MR. RIDDLE:

23 JUST BRIEFLY, YOUR HONOR. MR. RIESEN
24 MENTIONED, YOU KNOW, IF WE'RE GOING TO GET INTO THE
25 FAIR AND JUST LANGUAGE UNDER THE EXCEPTIONAL REASONS

1 SECTION, AND I WOULD JUST CLARIFY THAT WE'RE NOT
2 EVEN GETTING INTO THE EXCEPTIONAL REASONS SECTION.
3 I'M REFERENCING THE LANGUAGE THAT COMES IN THE FIRST
4 SECTION OF THE STATUTE. WHEN THE EMPLOYMENT PRIOR
5 TO THE INJURY EXTENDED OVER A PERIOD OF LESS THAN 52
6 WEEKS, THE METHOD OF DIVIDING THE EARNINGS DURING
7 THAT PERIOD BY THE NUMBER OF WEEKS AND PARTS THEREOF
8 DURING WHICH THE EMPLOYEE EARNED WAGES SHALL BE
9 FOLLOWED AS LONG AS RESULTS FAIR AND JUST TO BOTH
10 PARTIES WILL BE OBTAINED. AND AS I INDICATED
11 BEFORE, THAT -- THERE'S NO QUESTION THAT THAT
12 LANGUAGE APPLIES HERE. I THINK WE'RE NOT GETTING
13 INTO THE EXCEPTIONAL REASONS STATUTE, EVEN UNDER --
14 EVEN IF BREELAND DID APPLY. AND I DON'T KNOW
15 EXACTLY WHAT THE SPECIFIC CIRCUMSTANCES OF MR.
16 BREELAND'S PAY ARRANGEMENT WERE, BUT I DO KNOW THAT
17 THAT CASE IS DISTINGUISHABLE FROM WHAT WE HAVE
18 BEFORE US. AND SO, FOR WHATEVER REASON, THE
19 COMMISSION AND THE COURT IN BREELAND DETERMINED THAT
20 THE CALCULATION THAT WAS USED WAS FAIR AND JUST.
21 BUT HERE, COMMISSIONER, I JUST -- IT -- THERE'S NO
22 QUESTION THAT -- IN MY MIND, THAT THE -- TO
23 CALCULATE AN AVERAGE WEEKLY WAGE THAT WOULD RESULT
24 IN A 37 PERCENT INCREASE OF HER ACTUAL SALARY WOULD
25 BE AN INEQUITABLE WINDFALL FOR THE CLAIMANT AND AN

1 UNFAIR PENALTY TO THE EMPLOYER TO THE POINT WHERE
2 SHE'S EARNING MORE WHILE SHE'S ON DISABILITY THAN
3 SHE WOULD BE WHILE SHE'S ACTUALLY WORKING. AND AS
4 FAR AS WHAT HER NET EARNINGS WERE AFTER TAXES AND
5 HOW THAT COMPARES TO WHAT THE TOTALS WOULD BE WITH
6 REGARD TO AVERAGE WEEKLY WAGE, I DON'T BELIEVE
7 ANYONE HAS PRESENTED ANY EVIDENCE OF WHAT HER NET
8 EARNINGS WERE IN 2010, SO I WOULD JUST ARGUE THAT
9 THAT -- YOU CAN'T CONSIDER THAT INFORMATION, AS IT
10 WOULD BE SPECULATIVE. BUT, AGAIN, I WOULD JUST ASK
11 THAT YOU AFFIRM THE AVERAGE WEEKLY WAGE ON THE FORM
12 20 AS CORRECT IN THIS CASE. THANK YOU.

13 BY THE COMMISSIONER:

14 ALL RIGHT. AND AS THE MOVING PARTY ARE YOU
15 GOING TO RELY ON YOUR MEDICALS AND RESERVE THE RIGHT
16 OF CROSS EXAMINATION?

17 BY MR. RIDDLE:

18 YES, COMMISSIONER.

19 BY THE COMMISSIONER:

20 ALL RIGHT. MS. MCPHERSON, IF YOU'D RAISE YOUR
21 RIGHT HAND FOR ME, PLEASE, MA'AM.

22 * * * * *

23 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
24 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
25 MATTER HEREIN:

KELLY BOZYDAJ,

BEING FIRST DULY SWORN, TESTIFIED ON HER OATH AS
FOLLOWS:

BY THE COMMISSIONER:

YOUR WITNESS, SIR.

BY MR. RIESEN:

DO YOU MIND IF I SIT DOWN?

BY THE COMMISSIONER:

ABSOLUTELY; GO AHEAD AND SIT. WHATEVER YOU'RE
COMFORTABLE WITH.

BY MR. RIESEN:

WHEREVER IT'S CLOSE. OKAY.

DIRECT EXAMINATION BY MR. RIESEN:

Q. CATCH ME IF I PRONOUNCE YOUR NAME WRONG. NOW THAT
YOU'VE REMARRIED IT'S BOZYDAJ, RIGHT?

A. BOZYDAJ.

Q. BUT YOU WERE McPHERSON WHEN I REPRESENTED YOU EARLY
ON, RIGHT?

A. CORRECT.

Q. OKAY. ALL RIGHT. LET'S JUST GO THROUGH SOME
GENERAL INFORMATION FIRST, YOU KNOW. WHAT -- WHAT'S
YOUR CURRENT MARITAL STATUS?

A. MARRIED.

Q. AND HOW LONG HAVE -- AND THIS IS YOUR -- I
UNDERSTAND YOU WERE DIVORCED. THIS IS YOUR SECOND

- 1 MARRIAGE?
- 2 A. CORRECT.
- 3 Q. OKAY. AND HOW LONG HAVE YOU BEEN MARRIED?
- 4 A. SINCE DECEMBER OF 2011.
- 5 Q. OKAY. AND WAS THAT JUST BEFORE YOU WENT TO ARIZONA?
- 6 A. YES, SIR.
- 7 Q. OKAY. AND YOU PRESENTLY RESIDE WHERE NOW?
- 8 A. GLENDALE, ARIZONA.
- 9 Q. OKAY. DO YOU HAVE ANY DEPENDENTS?
- 10 A. YES, I HAVE THREE.
- 11 Q. ALL RIGHT. AND WHAT ARE THEIR NAMES AND AGES?
- 12 A. ZACHARY; HE'S 13. SYDNEY; SHE'S 11. AND RYAN IS
- 13 NINE.
- 14 Q. ALL THESE WERE FROM YOUR FIRST MARRIAGE?
- 15 A. CORRECT.
- 16 Q. AND YOU HAVE -- YOU HAVE CUSTODY OF THE CHILDREN?
- 17 A. YES.
- 18 Q. OKAY. I HATE TO ASK THIS, BUT YOUR AGE?
- 19 A. FORTY-THREE.
- 20 Q. OKAY. ALL RIGHT. EDUCATION-WISE, KIND OF GO
- 21 THROUGH THAT FOR US.
- 22 A. I GRADUATED HIGH SCHOOL IN MICHIGAN, AND THEN I WENT
- 23 TO ADRIAN COLLEGE AND GOT MY BACHELOR'S DEGREE,
- 24 BACHELOR'S OF ARTS WITH A MAJOR IN MATHEMATICS AND A
- 25 MINOR IN BIOLOGY TO TEACH SECONDARY EDUCATION. AND

1 THEN IN FEBRUARY OF 2012 I COMPLETED MY MASTER'S OF
2 SCIENCE OF EDUCATION WITH A SPECIALIZATION IN MIDDLE
3 SCHOOL MATHEMATICS, GRADES SIX THROUGH EIGHT.

4 Q. OKAY. AND LET'S TALK A LITTLE BIT ABOUT YOUR WORK
5 HISTORY, OKAY?

6 A. UH-HUH.

7 Q. HOW LONG HAVE YOU NOW BEEN EMPLOYED IN ARIZONA?

8 A. SINCE JANUARY 2012.

9 Q. OKAY. AND WHAT ARE YOU DOING THERE?

10 A. I TEACH MIDDLE SCHOOL MATH.

11 Q. OKAY. AND WHAT GRADE AND EXACTLY WHAT ARE YOU
12 TEACHING?

13 A. I TEACH EIGHTH GRADE MATH THIS YEAR. I HAVE TAUGHT
14 SEVENTH AND EIGHTH GRADE SINCE I'VE BEEN THERE, BUT
15 THIS YEAR I'M EIGHTH GRADE AND THEN I ALSO DO SOME
16 INTERVENTION.

17 Q. AND OBVIOUSLY FROM WHAT'S GOING ON NOW YOU'RE ABLE
18 TO WORK WITHIN THE RESTRICTIONS THAT YOU HAVE?

19 A. YES.

20 Q. AND PRIOR TO THIS JOB, WHERE DID YOU WORK?

21 A. I'M SORRY?

22 Q. RIGHT AFTER THIS JOB, WHERE WERE YOU WORKING?

23 A. RIGHT BEFORE THIS JOB?

24 Q. YES.

25 A. RIGHT BEFORE THIS JOB I WAS TEACHING AT LINCOLN HIGH

1 SCHOOL.

2 Q. OKAY. AND THAT'S IN THE NORTH AREA IN CHARLESTON?

3 A. IN McCLELLANVILLE.

4 Q. McCLELLANVILLE, OKAY. AND THEN PRIOR TO

5 McCLELLANVILLE YOU WERE TEACHING WHERE?

6 A. I WAS AT HAUT GAP MIDDLE SCHOOL FOR ONE SEMESTER.

7 Q. AND THEN PRIOR TO THAT?

8 A. NORTH CHARLESTON HIGH SCHOOL FOR A YEAR.

9 Q. OKAY. AND YOU WERE INJURED AT WHAT LOCATION?

10 A. AT LINCOLN HIGH SCHOOL.

11 Q. OKAY. NOW, PRIOR TO COMING TO CHARLESTON, DID YOU
12 TEACH ALSO BEFORE SOMEWHERE ELSE?

13 A. YEAH. I TAUGHT FOR TEN YEARS IN MICHIGAN.

14 Q. WHERE?

15 A. IN MICHIGAN.

16 Q. OKAY. AND HOW LONG DID YOU TEACH THERE?

17 A. TEN YEARS.

18 Q. AND WHAT WERE YOU TEACHING?

19 A. I'VE TAUGHT EVERYTHING FROM SEVENTH GRADE MATH TO
20 TRIGONOMETRY.

21 Q. OKAY. AND I THINK YOU'VE ALSO TESTIFIED SOMETHING
22 ABOUT ANOTHER TYPE OF JOB THAT YOU HAD BEFORE, A
23 COFFEE SHOP OR SOMETHING LIKE -- TELL US ABOUT THAT.

24 A. I OWNED TWO COFFEE SHOPS 70 MILES APART, AND I OWNED
25 AND MANAGED THOSE. FOR MOST OF IT I WAS A SINGLE

1 MOTHER.

2 Q. OKAY. IS THAT -- COULD YOU POSSIBLY -- WITH YOUR
3 INJURIES NOW, COULD YOU DO THAT JOB, THE COFFEE SHOP
4 JOB?

5 A. ABSOLUTELY NOT.

6 Q. WHY NOT?

7 A. I CAN'T STAND ON MY FEET FOR THE 12 HOURS A DAY THAT
8 IT TOOK TO DO THAT, YOU SPINNING AND TWISTING AND
9 BENDING TO GET THE MILK OUT OF THE REFRIGERATOR.
10 YOU DO THAT PROBABLY 50 TO 100 TIMES IN A COUPLE
11 HOURS. I CAN'T LIFT THE CASES OF THE SYRUPS AND
12 STUFF. I'M NOT ABLE TO LIFT THAT.

13 Q. ALL RIGHT. AND THEN IT LOOKED LIKE -- WE TALKED
14 ABOUT THIS MAYBE -- I DON'T KNOW IF YOU WERE IN HERE
15 AT THE TIME. BUT AT ONE POINT WHEN YOU WERE IN YOUR
16 20'S YOU WERE WORKING AS A DECK HAND DURING THE
17 SUMMER?

18 A. CORRECT.

19 Q. AND THAT IS WHERE YOU HAD AN INJURY; IS THAT
20 CORRECT?

21 A. CORRECT.

22 Q. IN 1992, IS THAT WHEN IT HAPPENED?

23 A. YES, SIR.

24 Q. OKAY. AND WHAT -- WHAT PART OF YOUR BODY WAS
25 INJURED AT THAT TIME?

1 A. I WAS STRUCK IN THE HEAD WITH A BOAT PYLON, AND THEN
2 I HAD HEADACHES AFTER THAT, AND MY NECK HURT FOR A
3 WHILE.

4 Q. DID YOU HAVE A FULL RECOVERY FROM THAT?

5 A. YES.

6 Q. OKAY. AND ABOUT HOW LONG AFTER THAT INJURY WAS IT
7 BEFORE YOU RECOVERED?

8 A. PROBABLY IN 2000 IS WHEN I WAS -- IT WAS FINE. SO
9 THAT'S EIGHT YEARS AFTERWARDS. AND THEN -- AND BY
10 THEN I WAS LIVING A VERY NORMAL LIFE.

11 Q. OKAY. DID YOU RECALL ANY RATINGS OR ANY
12 RESTRICTIONS AT THAT TIME?

13 A. I'VE NEVER KNOWN OF A RATING. I DIDN'T KNOW WHAT A
14 RATING WAS UNTIL THIS SITUATION. BUT I -- THEY GAVE
15 ME A TEN-POUND WEIGHT RESTRICTION, JUST A GENERAL
16 RULE FOR LIFE, BUT I DIDN'T HAVE PAPERWORK THAT I
17 HAD TO TAKE TO AN EMPLOYER AND SAY THAT. SO THEY
18 WANTED ME TO DO THAT. BUT IN 2001 I HAD MY SON, AND
19 HE WAS EIGHT POUNDS, EIGHT AND A HALF POUNDS, AND BY
20 TWO MONTHS HE WAS 16 POUNDS. SO, IN ORDER FOR ME TO
21 BE A MOTHER, YOU KNOW, YOU -- YOU DO WHAT YOU HAVE
22 TO DO, AND I DIDN'T NEED TO ABIDE BY ANY WEIGHT
23 RESTRICTIONS. I WAS LIFTING CHILDREN AND DOING
24 EVERYTHING ELSE.

25 Q. AND DID YOU FEEL LIKE YOU HAD GOTTEN BACK TO NORMAL,

1 A TOTAL NORMAL LIFE?

2 A. OH, YES. WE PLAYED WITH THE KIDS ALL THE TIME, WENT
3 BIKE RIDING AND PLAYED SPORTS WITH THE KIDS. I WAS
4 VERY NORMAL, DID ALL OF THE HOUSE CLEANING,
5 EVERYTHING.

6 Q. WHEN THIS ACCIDENT HAPPENED THAT WE'RE HERE TODAY
7 ABOUT, WERE YOU HAVING ANY ISSUES FROM THAT ACCIDENT
8 23 YEARS AGO?

9 A. NO. I WAS -- I WAS FINE. I WAS COMPLETELY GREAT.
10 LIFE WAS GOOD. I WAS ENGAGED AND READY TO, YOU
11 KNOW, HAVE A NEW LIFE AND EVERYTHING WAS GREAT. I
12 DIDN'T HURT PHYSICALLY.

13 Q. I THINK THERE WAS SOME MENTION THROUGHOUT YOUR
14 DEPOSITIONS THAT AT SOME POINT IN TIME YOU HAD SOME
15 MIGRAINE HEADACHES?

16 A. CORRECT.

17 Q. OKAY. AND APPROXIMATELY HOW LONG DID YOU HAVE
18 THOSE?

19 A. THEY STARTED AFTER THE FIRST INJURY THAT I RECEIVED
20 IN '92, AND THEN THEY STOPPED AND I WASN'T TAKING
21 ANY MEDICINE FOR SIX YEARS OR SO, AND THEN THEY --
22 THEY CAME BACK AND SO I -- THEY PUT ME ON SOME
23 MEDICINE.

24 Q. OKAY. AND ARE YOU ON SOME MEDICATIONS TODAY FOR
25 HEADACHES?

1 A. YES.

2 Q. OKAY. WHAT ARE YOU TAKING?

3 A. INDERAL.

4 Q. OKAY. AND YOU'RE NOT CONTENDING THAT YOUR HEADACHES
5 HAVE ANYTHING TO DO WITH THIS PARTICULAR INJURY, ARE
6 YOU?

7 A. ABSOLUTELY NOT.

8 Q. OKAY. AND DID THOSE HEADACHES EVER KEEP YOU FROM
9 DOING ANYTHING AND EVERYTHING YOU WANTED TO DO?

10 A. NO. I DID WHATEVER I WANTED.

11 Q. WERE YOU TAKING ANY PAIN MEDICATIONS AT THE TIME
12 THIS INJURY OCCURRED?

13 A. NO.

14 Q. WHY DON'T YOU -- YOU DON'T HAVE TO GO INTO DETAIL
15 BECAUSE THIS IS AN ACCEPTED ACCIDENT. WHY DON'T YOU
16 BRIEFLY EXPLAIN TO THE COMMISSIONER WHAT HAPPENED
17 WHEN YOU WERE INJURED.

18 A. I WAS TEACHING. I HAD ABOUT EIGHT STUDENTS IN MY
19 CLASSROOM, AND I WAS AT THE FRONT OF MY CLASSROOM,
20 AND TWO KIDS STARTED TO ARGUE ABOUT SOMETHING THAT
21 HAPPENED ON A FIELD TRIP, A BOY AND A GIRL. AND SO
22 I ADDRESSED THE BOY, AND I HAD HIM CALMED DOWN, AND
23 WHEN I WENT TO TURN TO FACE THE OTHER STUDENT, SHE
24 WAS ALREADY OUT OF HER DESK KIND OF CHARGING TOWARDS
25 THE CLASSROOM AND HIT ME IN THE CHEST WITH HER BODY

1 AND IT KNOCKED ME BACKWARDS. I DIDN'T FALL TO THE
2 GROUND, BUT I TIPPED TO WHERE I LOST MY BALANCE AND
3 THEN I STOOD BACK UP, AND THEN SHE BACKED UP AND HIT
4 ME AGAIN IN THE CHEST WITH HER BODY, AND THEN SHE
5 PROCEEDED TO CONTINUE TO PUSH THROUGH ME. AND SO I
6 -- I EVENTUALLY -- I ASKED -- I CALLED FOR HELP, AND
7 NO ONE WAS COMING QUITE YET, SO I MOVED HER. WE GOT
8 HER OUTSIDE, AND THEN I WAITED FOR HELP TO COME, AND
9 THE ART TEACHER CAME AND THEN BROUGHT HER TO THE
10 OFFICE.

11 Q. AND WHAT TYPE OF INJURIES DID YOU SUSTAIN AT THAT
12 TIME?

13 A. MY NECK HURT AND SO DID MY LOW BACK.

14 Q. AND I UNDERSTAND -- AND, AGAIN, THE MEDICAL RECORDS
15 ARE IN THE FILE, SO YOU DON'T NEED TO GO INTO A
16 WHOLE LOT OF DETAIL. BUT I'M GOING TO KIND OF RUN
17 THROUGH THEM, AND YOU JUST KIND OF LET ME KNOW IF
18 THIS IS -- WE'RE THE RIGHT DIRECTION, OKAY?

19 A. OKAY.

20 Q. IT LOOKS LIKE YOUR FIRST MEDICAL VISIT WAS LIKE
21 DOCTORS CARE?

22 A. CORRECT.

23 Q. AND DO YOU REMEMBER HOW LONG AFTER THE ACCIDENT YOU
24 WENT THERE?

25 A. THE ACCIDENT HAPPENED AT THE END OF THE DAY, AND SO

1 AFTER SCHOOL WAS OUT I WENT IN AND TALKED TO THE
2 ADMINISTRATORS, AND THEN THEY SENT ME THERE. SO IT
3 WAS ---

4 Q. THE SAME DAY?

5 A. YES.

6 Q. OKAY. AND IT LOOKED LIKE THEY MAY HAVE DONE AN MRI,
7 AND THEN YOU WERE SENT, APPARENTLY, FROM THEM TO DR.
8 AYMOND; IS THAT CORRECT?

9 A. YES.

10 Q. ALL RIGHT. AND THROUGH DR. AYMOND IT LOOKS LIKE
11 MAYBE THERE WAS ANOTHER MRI DONE AND PERHAPS HE
12 ORDERED SOME P.T.?

13 A. YES.

14 Q. AND WITH THE P.T., DID YOU -- DID -- WAS THE P.T. HE
15 ORDERED APPROVED? DO YOU RECALL?

16 A. I BELIEVE SO.

17 Q. OKAY. AND I THINK HE MAY HAVE ORDERED SOME
18 INJECTIONS. WERE THEY APPROVED?

19 A. NO, THEY WERE NOT.

20 Q. ALL RIGHT. AT SOME POINT THEY REFERRED -- OR YOU
21 WERE REFERRED TO DR. JOYE?

22 A. I THINK HE WAS ---

23 Q. MARK? NOT MARK. WHAT'S HIS FIRST NAME?

24 A. TODD.

25 Q. TODD JOYE?

1 A. YEAH. I THINK HE WAS THE ONE THAT WAS SUPPOSED TO
2 DO THE INJECTIONS, BUT WHEN I SHOWED UP TO HAVE THE
3 INJECTIONS, HE SAID THAT THEY WERE DENIED AND HE
4 COULDN'T DO THEM.

5 Q. SO YOU NEVER GOT THEM? OKAY.

6 A. NO.

7 Q. AND AT SOME POINT THEN THEY SENT YOU FROM THERE TO
8 DR. RAWE; IS THAT CORRECT?

9 A. YES.

10 Q. AND HE'S A NEUROSURGEON?

11 A. YEAH, I THINK SO.

12 Q. AND AT SOME POINT HE REFERRED YOU TO DR. KEFFER; IS
13 THAT CORRECT?

14 A. CORRECT.

15 Q. AND DR. KEFFER ESSENTIALLY IS MORE OF A
16 CONSERVATIVE-TYPE DOCTOR WHO ---

17 BY MR. RIDDLE:

18 COMMISSIONER, I WOULD OBJECT TO HOW HE'S
19 CHARACTERIZING DR. KEFFER AS BEING -- OH, YOU MEAN
20 CONSERVATIVE CARE? OKAY. SORRY. GO AHEAD; I'M
21 SORRY. I APOLOGIZE, COMMISSIONER.

22 BY MR. RIESEN:

23 FOR CONSERVATIVE CARE.

24 BY THE COMMISSIONER:

25 MAYBE YOU'LL REPHRASE THAT.

1 BY MR. RIDDLE:

2 I APOLOGIZE.

3 DIRECT EXAMINATION RESUMED BY MR. RIESEN:

4 Q. THAT WAS CONSERVATIVE CARE? OKAY.

5 A. YEAH, PAIN MANAGEMENT.

6 Q. AND SO YOU WERE UNDER HIS DIRECTION, I UNDERSTAND,
7 UNTIL YOU MOVED TO ARIZONA; IS THAT CORRECT?

8 A. CORRECT.

9 Q. AND WHEN YOU MOVED TO -- WAS THERE ANY PARTICULAR
10 REASON WHY YOU HAD TO MOVE TO ARIZONA?

11 A. I DON'T HAVE ANY FAMILY HERE, AND I WANTED TO -- MY
12 PARENTS ARE IN ARIZONA. THEY LIVE ABOUT AN HOUR
13 AWAY. SO, I WANTED TO BE ABLE TO BE THERE TO GET
14 SUPPORT WITH THEM.

15 Q. OKAY. AND THEN WHEN YOU GOT TO ARIZONA, IT LOOKS
16 LIKE AT SOME POINT DR. -- THE SPINE INSTITUTE OF
17 ARIZONA IS WHERE THEY ALLOWED YOU TO GO?

18 A. CORRECT.

19 Q. AND I THINK YOU SAW A DR. DAVE THERE?

20 A. IT'S DAVE, BUT YES.

21 Q. AND HE WAS MORE CONSERVATIVE-TYPE CARE DOCTOR AS
22 WELL?

23 A. SHE. SHE WAS A ---

24 Q. SHE? I'M SORRY.

25 A. SHE WAS A PAIN MANAGEMENT PERSON.

- 1 Q. OKAY. AT SOME POINT YOU -- IT LOOKS LIKE THEN YOU
2 GOT TO SEE A DR. GAUSE?
- 3 A. CORRECT.
- 4 Q. OKAY. AND HE'S -- HE'S THE ORTHOPEDIST?
- 5 A. YES.
- 6 Q. AND HE WAS THE ONE THAT DID THE SURGERY FOR YOU?
- 7 A. CORRECT.
- 8 Q. OKAY. AND INITIALLY HE DID, I THINK, A -- WAS IT
9 TWO YEARS AGO HE DID THE CERVICAL FUSION?
- 10 A. YES. 2013, YES.
- 11 Q. 2013. AND WAS THAT DONE DURING THE SUMMER?
- 12 A. YES.
- 13 Q. THAT WAY YOU DIDN'T -- YOU WEREN'T WORKING AT THAT
14 TIME?
- 15 A. CORRECT.
- 16 Q. OKAY. AND AT IT LOOKS LIKE THE FOLLOWING YEAR HE
17 DID ANOTHER FUSION SURGERY TO YOUR LOWER BACK; IS
18 THAT CORRECT?
- 19 A. YES, ON TWO SEPARATE DATES.
- 20 Q. TWO SEPARATE DATES? MY UNDERSTANDING ONE WAS AN
21 ANTERIOR AND ONE WAS A POSTERIOR; IS THAT CORRECT?
- 22 A. CORRECT.
- 23 Q. OKAY. AND YOU HAVE BEEN SEEING HIM EVER SINCE?
- 24 A. YES, SIR.
- 25 Q. AND YOUR MOST RECENT VISIT WITH HIM WAS

1 APPROXIMATELY HOW LONG AGO?

2 A. MAYBE A MONTH AGO.

3 Q. OKAY. ALL RIGHT. LET'S TALK ABOUT NOW A COUPLE
4 THINGS. LET'S TALK ABOUT YOUR CURRENT MEDICAL
5 PROBLEMS.

6 A. OKAY.

7 Q. OKAY? AND THEN AFTER THAT WE WILL TRY TO TALK ABOUT
8 HOW -- HOW YOUR BACK LIMITS YOU. OKAY?

9 A. OKAY.

10 Q. SO, TO SPEED THINGS UP ---

11 BY MR. RIESEN:

12 YOUR HONOR, MATT TOOK HER DEPOSITION JUST,
13 WHAT, A FEW DAYS AGO? TWO OR THREE DAYS AGO. AND,
14 QUITE FRANKLY, HE ASKED A LOT OF THE SAME QUESTIONS,
15 VERY, VERY SIMILAR TO WHAT I WOULD ASK. AND WHAT I
16 THOUGHT I WOULD DO IS FOR, AT LEAST A FEW OF THESE
17 PAGES, PRETTY MUCH ASK THE SAME THING AND LET HER
18 KIND OF LOOK AT THE ANSWERS SO WE WON'T BE -- UNLESS
19 YOU'VE GOT A PROBLEM WITH THAT.

20 BY MR. RIDDLE:

21 I DON'T SEE WHY IT'S NECESSARY. I MEAN, THAT
22 -- WE DIDN'T TAKE THAT DEPOSITION AS A DE BENE ESSE
23 DEPOSITION. I MEAN, I THINK HE CAN ASK HER THE SAME
24 QUESTIONS AND SHE CAN ANSWER. I DON'T KNOW WHY SHE
25 HAS TO REFER TO -- I MEAN, I DON'T KNOW IF YOU'RE

1 TRYING TO AVOID ANY INCONSISTENCIES. I DON'T
2 NECESSARILY HAVE ANY OBJECTION TO IT, BUT IT'S JUST
3 ---

4 BY MR. RIESEN:

5 WELL, DO YOU WANT ME TO JUST KIND OF START ONE
6 AT A TIME AND THEN IF YOU HAVE AN OBJECTION YOU WANT
7 TO OBJECT?

8 BY MR. RIDDLE:

9 THAT'S FINE.

10 BY MR. RIESEN:

11 OKAY.

12 DIRECT EXAMINATION RESUMED BY MR. RIESEN:

13 Q. LOOK AT PAGE 12 OF YOUR DEPOSITION. AND A FEW OF
14 THESE QUESTIONS ARE THE SAME QUESTIONS I WOULD ASK.
15 ON PAGE 12, NUMBER 13, I HAD ASKED YOU A QUESTION ON
16 LINE 23.

17 BY MR. RIESEN:

18 LOOK AT THAT, MATT, AND SEE IF YOU'VE GOT ANY
19 QUESTION ABOUT IT.

20 BY MR. RIDDLE:

21 AND THIS IS ON PAGE 12?

22 BY MR. RIESEN:

23 PAGE 12.

24 BY MR. RIDDLE:

25 LINE NUMBER 23?

1 BY MR. RIESEN:

2 LINE 23, YEAH.

3 BY MR. RIDDLE:

4 OKAY. YEAH, THAT'S FINE.

5 BY MR. RIESEN:

6 OKAY.

7 DIRECT EXAMINATION RESUMED BY MR. RIESEN:

8 Q. WELL, HE ASKED YOU -- AND THIS IS JUST WHAT HIS
9 QUESTION WAS. ON DECEMBER THE 13TH, 2013, YOU HAD
10 AN EXAM WITH DR. GAUSE, AND IT STATED THAT A PORTION
11 IN YOUR SUBJECTIVE QUOTE WAS, "KELLY IS FOUR MONTHS
12 OUT OF HER CERVICAL A.C.D.F. SHE FEELS LIKE HER
13 NECK IS DOING WELL. SHE NOTES MINIMAL ARM SYMPTOMS.
14 SHE CONTINUES TO WORK FULL TIME TEACHING. OVERALL
15 SHE IS HAPPY WITH THE OUTCOME OF HER NECK SURGERY AT
16 THIS POINT, AS HER SYMPTOMS ARE ESSENTIALLY GONE,"
17 END QUOTE. AND THEN THE QUESTION WAS ASKED, "DO YOU
18 AGREE WITH THAT STATEMENT?" AND WHAT WAS YOUR
19 ANSWER ON NUMBER TEN ON PAGE 13?

20 A. "CURRENTLY OR THEN?"

21 Q. "CURRENTLY NOW." ALL RIGHT. AND THEN THE QUESTION
22 WAS, "AT THAT TIME, I GUESS FOUR MONTHS LATER AFTER
23 YOUR SURGERY." AND WHAT WAS YOUR RESPONSE?

24 A. "YEAH. I WAS VERY HAPPY WITH THE SURGERY. I STILL
25 HAD TINGLING IN MY PINKY AND RING FINGER

INTERMITTENTLY AT THAT TIME."

1
2 Q. ALL RIGHT. AND THEN NEXT MATT'S QUESTION WAS,
3 "OKAY. THEN GOING ON TO PAGE 28 OF THE APAs IS YOUR
4 VISIT WITH DR. GAUSE ON APRIL THE 4TH, 2014."
5 THAT'S MY WIFE'S BIRTHDAY, BY THE WAY. "SO ABOUT A
6 YEAR AGO. AND HE SAYS UNDER SUBJECTIVE QUOTE,
7 'KELLY RETURNS TODAY FOR FOLLOWUP. THE NECK
8 CONTINUES TO DO QUITE WELL. SHE HAS OCCASIONAL MILD
9 NUMBNESS IN THE ARM AT NIGHT, BUT THIS IS FAIRLY
10 MINIMAL FOR HER.' DO YOU AGREE WITH GAUSE'S
11 STATEMENT?" WHAT'S YOUR ANSWER?

12 A. "YES."

13 Q. OKAY. AND IT SAYS -- MATT SAYS, "IT LOOKS LIKE AT
14 THAT POINT YOU WERE HAVING SOME INCREASING PROBLEMS
15 WITH YOUR LOW BACK AND YOUR LEG, IS THAT RIGHT?"
16 YOUR ANSWER?

17 A. "YES. I'VE ALWAYS HAD IT. BUT WHEN I SAW HIM, HE
18 SAID WE WERE GOING TO ADDRESS THE NECK BEFORE WE
19 ADDRESS THE LOW BACK."

20 Q. RIGHT. AGAIN, MATT'S QUESTION: "OKAY. AND THEN
21 EVENTUALLY YOU DID UNDERGO SURGERY FOR YOUR LOW
22 BACK, AND IT LOOKS LIKE DR. GAUSE ACTUALLY PERFORMED
23 TWO DIFFERENT PROCEDURES, ON JUNE THE 2ND AND JUNE
24 THE 4TH, 2014, IS THAT RIGHT?"

25 A. "YES; THAT'S CORRECT."

1 Q. OKAY. "AGAIN, JUST TO BE CLEAR, DID YOU MISS ANY
2 TIME FROM THE REGULAR SCHOOL YEAR AS A RESULT OF
3 THOSE SURGERIES?"

4 A. "NO, EXCEPT FOR THE MATH PROGRAM DURING THE SUMMER."

5 Q. OKAY. ALL RIGHT. AND I'LL JUST -- AND, AGAIN, MATT
6 IS GOING TO SKIP TO DECEMBER THE 9TH, 2014. "THIS
7 IS PAGE 52 OF THE DEFENDANTS' APAs. I'LL READ THIS
8 PORTION AND ASK IF THIS IS AN ACCURATE STATEMENT.
9 QUOTE, 'KELLY RETURNS TODAY FOR FOLLOWUP. SHE IS
10 ACCOMPANIED BY HER CASE MANAGER. SHE IS SIX MONTHS
11 POST LUMBAR FUSION. SHE IS DOING BETTER EACH DAY.
12 SHE IS WORKING HARD IN PHYSICAL THERAPY FOR CORE
13 STRENGTHENING AND FLEXIBILITY EXERCISES. SHE HAS
14 RETURNED TO WORK AND IS FUNCTIONING WELL UNDER HER
15 RESTRICTIONS. SHE DOES HAVE SOME MUSCULAR
16 TENDERNESS OVER THE RIGHT SIDE OF HER LOW BACK. BUT
17 HER PRE-OPERATIVE SYMPTOMS HAVE COMPLETELY RESOLVED.
18 SHE DOES NOT NOTE ANY SIGNIFICANT LEG PAIN OR
19 WEAKNESS. SHE IS WALKING ONE MILE PER DAY FOR
20 EXERCISE WITHOUT DIFFICULTY. SHE HAD DONE WELL
21 OVERALL SINCE SURGERY,' END QUOTE. WERE THOSE
22 STATEMENTS FROM GAUSE ACCURATE?" YOUR RESPONSE?

23 A. "I THINK THAT WHEN HE SAID THERE WAS PAIN IN MY LOW
24 BACK ON THE RIGHT SIDE -- WAS THAT WHAT HE SAID?
25 IT'S THE SIDE OF MY BACK THAT BURN -- THAT HURTS A

1 LITTLE BIT. BUT THE LEFT SIDE IS THE SIDE THAT HAS
2 THE MAJORITY OF THE PAIN, WHERE THEY PUT IN THE
3 SCREWS. SO THAT WOULD BE A MORE ACCURATE -- THE
4 SIDE THAT ALWAYS HURTS SINCE I'VE HAD SURGERY, SINCE
5 IT'S ALWAYS BEEN VERY TENDER WHEN THEY TOUCH IT."

6 Q. "OKAY. AND THEN I HAVE ONE MORE REPORT FROM JANUARY
7 23RD, 2015. I UNDERSTAND YOU SAW DR. GAUSE AGAIN A
8 COUPLE OF WEEKS AGO, IS THAT RIGHT?"

9 A. "YES."

10 Q. "DO YOU HAVE ANY OTHER APPOINTMENTS SCHEDULED WITH
11 DR. GAUSE?"

12 A. "NO. HE TOLD ME TO COME BACK IN LIKE THREE MONTHS,
13 BUT HIS CALENDAR IS NOT AVAILABLE TO SET
14 APPOINTMENTS YET, SO I CAN'T DO THAT."

15 Q. "DO YOU PLAN TO STILL GO BACK AND SEE HIM?"

16 A. "YES."

17 Q. ALL RIGHT. "AT SOME POINT IN THE NEXT THREE TO SIX
18 MONTHS?"

19 A. "YES. HE'S WATCHING WHERE THE SCREWS ARE. HE
20 MENTIONED THAT IF THEY ARE TOO BOTHERSOME HE
21 SOMETIMES -- HE SAID SOMETIMES THEY WILL HAVE TO
22 TAKE THEM OUT, BUT HE SAID WE DON'T WANT TO HAVE TO
23 DO -- TO GO QUITE THERE, AT LEAST UNTIL AFTER A YEAR
24 AFTER THE SURGERY, HOPEFULLY LONGER, IF THEY HAVE TO
25 DO IT."

1 Q. "OKAY. AND NOW WE'RE KIND OF GETTING TO WHERE WE
2 ARE TODAY. AND SO HOW IS YOUR BACK DOING NOW?"

3 BY MR. RIDDLE:

4 COMMISSIONER, AT THIS POINT I AM GOING TO
5 OBJECT TO JUST READING THE DEPOSITION TRANSCRIPT
6 INTO THE RECORD. I MEAN, I DON'T KNOW WHY SHE CAN'T
7 JUST PROVIDE HER TESTIMONY INSTEAD OF READING THIS
8 LIKE A SCRIPT. THIS IS VERY UNUSUAL, AND IT APPEARS
9 TO ME IT COULD BE THAT THEY'RE JUST TRYING TO AVOID
10 ANY INCONSISTENCIES THAT MIGHT OCCUR THAT WOULD
11 IMPACT HER CASE, AND I THINK WE WOULD JUST BE MAYBE
12 MORE COMFORTABLE IF SHE WOULD JUST TESTIFY INSTEAD
13 OF READING THE DEPOSITION TRANSCRIPT INTO THE
14 RECORD.

15 BY THE COMMISSIONER:

16 MR. RIESEN, IF YOU'LL GO AHEAD AND ASK HER THE
17 QUESTION.

18 BY MR. RIESEN:

19 I WILL BE HAPPY TO.

20 BY THE COMMISSIONER:

21 YES. I DON'T THINK IT'S -- ALTHOUGH YOU ALL
22 MAY CAN AGREE TO IT, I DON'T THINK I CAN ALLOW IT AS
23 PROPER USE OF DEPOSITION. SO IF YOU WOULD GO AHEAD
24 AND ASK HER THE QUESTIONS.

25 BY MR. RIESEN:

1 OKAY. BE HAPPY TO.

2 DIRECT EXAMINATION RESUMED BY MR. RIESEN:

3 Q. HOW IS YOUR BACK DOING NOW?

4 A. I STILL HAVE A LOT OF SORENESS, A LOT OF TENDERNESS.

5 I CAN'T DO MOST OF WHAT I USED TO DO.

6 Q. ALL RIGHT. LET'S GO THROUGH SOME THINGS THEN. ALL
7 RIGHT?

8 A. OKAY.

9 Q. LET'S JUST TAKE A NUMBER OF DIFFERENT ACTIVITIES.

10 OKAY? DO YOU HAVE PROBLEMS SITTING?

11 A. YES, I DO.

12 Q. ABOUT HOW LONG -- AND YOU'RE SITTING RIGHT NOW.

13 ABOUT HOW LONG CAN YOU SIT WITHOUT DISCOMFORT?

14 A. I CAN SIT FOR ABOUT 30 MINUTES, BUT I MOVE QUITE A
15 BIT. IF IT -- THE PAIN WILL START AFTER ABOUT FIVE
16 OR SIX MINUTES, TEN MINUTES. THEN I MOVE.

17 Q. ALL RIGHT.

18 A. I CAN'T JUST SIT STILL LIKE A STATUE.

19 Q. ALL RIGHT. WHAT ABOUT STANDING?

20 A. I CAN STAND FOR ABOUT 30 MINUTES AS WELL. IF I
21 STAND, YOU KNOW, A WHOLE HOUR, THEN MY BACK HAS GOT
22 A LOT OF CRAMPS IN IT AND IT'S VERY PAINFUL. SO --
23 AND EVEN THEN I CAN'T STAND STILL. I JUST HAVE TO
24 BE MOVING. I CAN STAY UP FOR A LITTLE BIT AND THEN
25 I HAVE TO GO MOVE, SHIFT MY WEIGHT.

1 Q. OKAY. WHAT ABOUT WALKING?

2 A. RIGHT NOW I WALK EVERY MORNING BEFORE SCHOOL. I
3 WALK ABOUT THREE-QUARTERS OF A MILE, AND THEN THAT'S
4 ABOUT -- A MILE WOULD BE ABOUT THE LONGEST DISTANCE
5 THAT I CAN WALK AT ANY ONE GIVEN TIME. I HAVE A
6 PEDOMETER THAT I WEAR, AND I -- I TRY TO MAKE SURE
7 THAT I WALK UP TO TWO MILES A DAY, BUT IT'S NOT
8 STRAIGHT. IT'S, YOU KNOW, IN MY CLASSROOM OR
9 BETWEEN BREAKS, BETWEEN CLASSES THAT I'LL WALK TO
10 THE BATHROOM AND WALK BACK. SO THAT IS COUNTED IN
11 THAT DISTANCE.

12 Q. AND WITH REGARDS TO WALKING, HOW MUCH MORE WALKING
13 DID YOU DO PRIOR TO YOUR INJURY?

14 A. I WOULD WALK THREE OR FOUR MILES AT A TIME WITHOUT
15 PROBLEMS.

16 Q. OKAY. AND HAVE YOU GOT AN IDEA OF LIKE THE
17 PERCENTAGE OF LOSS THAT YOUR BACK HAS GIVEN YOU JUST
18 FROM A WALKING STANDPOINT, WHAT YOU'VE LOST?

19 A. I'D SAY MAYBE 75 PERCENT, YOU KNOW, IF I COULD WALK
20 FOUR MILES THEN AND NOW ONLY A MILE.

21 Q. OKAY. LIFTING; WHAT PROBLEMS DO YOU HAVE LIFTING?

22 A. I DON'T LIFT TOO MUCH OFF THE FLOOR. IF SOMETHING
23 FALLS IN THE CLASSROOM, I USUALLY HAVE A STUDENT
24 PICK IT UP. BUT IF THERE'S -- IF SOMETHING WAS
25 PLACED ON THIS DESK, YOU KNOW, ANYTHING LESS THAN 40

1 POUNDS, I CAN SLIDE IT OFF AND PUT IT UP AGAINST MY
2 BODY TO HANG ON TO IT TO MOVE IT. BUT TO JUST BEND
3 OVER AND PICK IT UP, I CAN'T DO.

4 Q. OKAY. SO I THINK THE DOCTOR HAD MENTIONED 40
5 POUNDS. AND WITH REGARDS TO YOU AND THE 40 POUNDS,
6 IT'S A WHOLE LOT DIFFERENT THAN WHAT YOU'RE SAYING,
7 REACHING DOWN AND PICKING IT UP, IS THAT RIGHT?

8 A. YEAH, I DON'T -- I DON'T REACH DOWN AND PICK IT UP
9 OFF THE FLOOR.

10 Q. HOW MUCH DO YOU THINK YOU CAN LIFT? NORMALLY LIFT,
11 NOW; NOT WHAT YOU JUST SAID.

12 A. I CAN -- I CAN PICK UP -- LIKE IF I SQUAT DOWN TO
13 PICK IT UP AND USE MY LEGS, I CAN PICK UP LIKE A
14 TEN-POUND BAG OF POTATOES. BUT -- MAYBE A GALLON OF
15 MILK OFF THE FLOOR, SOMETHING. BUT OTHER THAN THAT,
16 I DON'T THINK I COULD PROBABLY DO TOO MUCH MORE
17 WITHOUT PAIN.

18 Q. ALL RIGHT. WHAT ABOUT BENDING?

19 A. TYPICALLY WHEN I BEND, IF I -- WHEN I'M BENDING
20 FORWARD, IF I BEND AT THE WAIST, IT'S VERY PAINFUL
21 IF I HAVE TO HOLD IT FOR ANY CERTAIN AMOUNT OF TIME.
22 EVEN DOING DISHES, I NORMALLY DON'T UNLOAD THE LOW
23 RACK BECAUSE IT HURTS TOO MUCH, THE REPETITIVE
24 BENDING LIKE THAT. I CAN DEAL WITH THE RACK ON THE
25 TOP PRETTY MUCH. BUT, YOU KNOW, PUTTING ANY OF THE

1 DISHES THAT HAVE TO GO IN THE CABINETS BELOW THE --
2 YOU KNOW, BELOW THE COUNTER, MY KIDS PUT THOSE AWAY;
3 I DON'T. THE -- IN THE CLASSROOM IF I BEND TOO MUCH
4 -- I HAVE TO LIMIT THE AMOUNT OF TIMES I DO THAT
5 WHILE I'M TRYING TO TEACH. MY KIDS WILL COME TO A
6 TABLE I HAVE SET UP. THE SCHOOL SET A TABLE UP SO
7 THEY CAN COME TO ME. WE HAVE TO DO A STAMPING THING
8 FOR EVERY CLASS PERIOD, AND TO BEND OVER AND STAMP
9 FOR 20 OR 30 KIDS IN THE CLASS IS TOO MUCH. SO
10 THEY'VE ALLOWED THE KIDS TO COME TO ME TO MODIFY
11 THAT.

12 Q. WHAT OTHER -- WHAT OTHER ACCOMMODATIONS HAS YOUR
13 SCHOOL DONE FOR YOU IN TEACHING WHERE YOU ARE NOW?

14 A. THERE'S A CART OF COMPUTERS THAT I HAVE TO HAVE IN
15 MY ROOM EVERY DAY FOR THREE CLASS PERIODS, AND
16 TYPICALLY THEY DON'T ALLOW STUDENTS TO PUSH IT. SO
17 -- BUT THEY HAVE MADE THAT ACCOMMODATION FOR ME.
18 THE STUDENT GOES AND PICKS IT UP, AND THEN ANOTHER
19 STUDENT AT THE END OF THE DAY TAKES IT BACK TO THE
20 ROOM IT'S SUPPOSED TO GO TO. AFTER I HAD MY LOW
21 BACK SURGERY, THEY ALLOWED ME TO TEACH FOR THE FIRST
22 MONTH OR TWO BACK TO SCHOOL IN A ANTI-GRAVITY LAWN
23 CHAIR SO I COULD TIP BACK AND LAY BACK AND STILL
24 TEACH. AND THEN I ALSO HAVE A -- THE EXERCISE BALLS
25 IN MY CLASSROOM, SO I CAN SIT AT THE KIDS' LEVEL AND

1 THEN I CAN ROLL BACK AND IT STRETCHES MY BACK WHEN
2 IT GETS SORE. THEY'VE BEEN VERY, VERY
3 ACCOMMODATING. I SIT -- I HAVE A BIG ROUND HALF
4 TABLE IN THE FRONT OF THE ROOM SO IF I NEED TO WORK
5 WITH A BUNCH OF KIDS OR EVEN JUST A COUPLE KIDS THAT
6 REQUIRES ME TO BE BENT OVER, I CAN JUST SIT UP THERE
7 AND THE KIDS CAN COME UP TO ME. SO REALLY THE KIDS
8 ARE -- THE KIDS ARE VERY, VERY ACCOMMODATING.

9 Q. HOW ABOUT PROBLEMS STOOPING?

10 A. IF I HAVE TO WORK WITH A STUDENT AT A DESK, THAT'S
11 WHAT I HAVE TO DO; I HAVE TO SQUAT TO STOOP DOWN TO
12 WORK WITH THEM SO I'M AT THEIR LEVEL 'CAUSE I CAN'T
13 BEND OVER. I CAN DO THAT, BUT IT'S HARD COMING BACK
14 UP TO STAND BACK UP TO THE STANDING POSITION, BUT I
15 CAN DO THAT A FEW TIMES AN HOUR BUT NOT A LOT.

16 Q. OKAY. SQUATTING? DID YOU SAY SQUATTING OR
17 STOOPING? SQUATTING?

18 A. I DON'T KNOW EXACTLY THE DIFFERENCE BETWEEN STOOPING
19 AND SQUATTING. THEY'RE KIND OF THE SAME TO ME, SO
20 IT WOULD BE THE SAME THING I SAID FOR STOOPING.

21 Q. OKAY.

22 A. UNLESS THERE'S A DEFINITION I'M UNAWARE OF.

23 Q. DO YOU DO ANY CLIMBING THESE DAYS?

24 A. I DON'T. I DON'T LIVE ANYWHERE REALLY WHERE THERE'S
25 STAIRS, EXCEPT MAYBE, ONE OR TWO, AND I CAN GET UP

1 THOSE. BUT -- AND IF I GO OUTSIDE WHERE THERE'S --
2 EVERY MORNING WE HAVE A LITTLE INCLINE THAT WE WALK,
3 AND MY HUSBAND USUALLY HANGS ON OR GIVES ME A TUG TO
4 HELP SUPPORT ME WHEN I GO UP THAT BECAUSE IT CAUSES
5 PAIN.

6 Q. HOW ABOUT CRAWLING?

7 A. I DON'T REALLY CRAWL, BUT THERE WAS AN EXERCISE THAT
8 THEY HAD ME DO FOR -- TO HELP STRENGTHEN THE CORE.
9 THEY HAD TO MODIFY IT BECAUSE WHEN I'M IN THAT
10 POSITION MY NECK HANGS AND IT BECOMES VERY PAINFUL.
11 SO THEY -- YOU KNOW, THEY WANTED ME TO REST MY HEAD
12 ON MY ARM SO MY ARM WAS SUPPORTING MY HEAD. IF --
13 IF I'M AT HOME AND I'VE LOST SOMETHING UNDER THE BED
14 OR SOMETHING, THEN MY HUSBAND OR CHILDREN WILL LOOK
15 FOR IT. BUT I DON'T TYPICALLY GET ON ALL FOURS TO
16 TRY TO LOOK.

17 Q. OKAY. PUSHING AND PULLING?

18 A. DEPENDS ON THE WEIGHT REALLY. I CAN PUSH MY DUST
19 MOP, BUT I DON'T PUSH OR PULL THE COMPUTER CART AT
20 SCHOOL, AND IT ONLY HAS TEN COMPUTERS IN IT, BECAUSE
21 IT CAUSES PAIN TO TRY TO STEER SOMETHING LIKE THAT;
22 SO...

23 Q. LET'S TALK ABOUT A FEW THINGS THAT YOU DO, YOU KNOW,
24 OUTSIDE AND AROUND THE HOUSE. I THINK YOU MENTIONED
25 BIKING BEFORE. YOU'VE INDICATED YOU DID A FAIR

- 1 AMOUNT OF BIKING BEFORE?
- 2 A. WHEN WE LIVED HERE WE GOT ALL THE KIDS BIKES AND
3 EVERYTHING, AND WE WERE BIKING AS A FAMILY
4 REGULARLY. BUT NOW I -- IF I GET ON THE STATIONARY
5 BIKE AT HOME, THE LONGEST I CAN RIDE IT IS ONE TO
6 TWO MINUTES. IF I RIDE IT -- I TRIED TWO AND A HALF
7 MINUTES, AND THEN I REALLY COULDN'T WALK VERY WELL
8 FOR THE NEXT THREE DAYS 'CAUSE MY BACK WAS REALLY
9 SORE. IT'S THAT ROCKING MOTION.
- 10 Q. SO, FROM A BIKING STANDPOINT, WHAT FUNCTIONAL LOSS
11 DO YOU THINK YOU HAVE ON YOUR BACK TO KEEP YOU FROM
12 BIKING?
- 13 A. ABOUT 95 PERCENT, BECAUSE BEFORE I USED TO BE ABLE
14 TO DO IT AND NOW I CAN'T REALLY. I MEAN, I CAN --
15 TWO MINUTES AT A TIME IS NOT REALLY A BIKE RIDE.
- 16 Q. OKAY. AND, AGAIN, I THINK YOU TALKED ABOUT WALKING.
17 HOW MUCH LESS ARE YOU ABLE TO WALK NOW THAN YOU WERE
18 ABLE TO WALK THEN, AGAIN, IF YOU HAVE A PERCENTAGE-
19 WISE?
- 20 A. I THINK I SAID 75 PERCENT.
- 21 Q. DID YOU?
- 22 A. YEAH.
- 23 Q. OKAY. LET'S TALK ABOUT SOME OF YOUR HOUSE WORK.
24 DISHES; DO YOU DO THE DISHES?
- 25 A. I DO SOME WORK WITH THE DISHES ON THE TOP RACK.

1 Q. I THINK YOU MENTIONED THAT.

2 A. YEAH.

3 Q. OKAY. WHAT PERCENTAGE OF LOSS OF WASHING THE DISHES
4 CAN YOU DO THAT YOU ATTRIBUTE TO THIS ACCIDENT?

5 A. WELL, I USED TO BE THE ONLY ONE TO DO THE DISHES,
6 AND NOW I ALWAYS HAVE TO HAVE HELP TO DO IT. SO I
7 WOULD SAY PROBABLY 80 PERCENT.

8 Q. ALL RIGHT. SWEEPING; WHAT ABOUT SWEEPING? HOW MUCH
9 HAVE YOU LOST YOUR ABILITY TO SWEEP?

10 A. WE HAVE TILE FLOORS ON MY -- IN MY HOUSE, AND I'VE
11 HAD TO SWITCH FROM THE REGULAR BROOMS THAT YOU PULL,
12 THAT YOU PULL THE DIRT TOWARDS YOU, BECAUSE IT'S TOO
13 MUCH TWISTING AND PULLING. IT MAKES MY BACK HURT.
14 MAYBE WITH THAT TYPE OF BROOM I CAN ONLY DO IT MAYBE
15 FIVE MINUTES. WITH THE DUST MOP, BECAUSE IT SWIVELS
16 FOR YOU, YOU JUST MOVE YOUR ARM AND IT SWIVELS
17 EVERYWHERE AND YOU JUST PUSH IT, I CAN DO THAT FOR
18 LONGER. I STILL HAVE TO DO MY HOUSE IN SECTIONS. I
19 CAN'T JUST SAY, HEY, I HAVE TEN MINUTES; LET ME GO
20 SWEEP THE WHOLE FLOOR, 'CAUSE I NEED TO TAKE A BREAK
21 IN BETWEEN.

22 Q. AND WHAT DO YOU THINK YOUR PERCENTAGE OF LOSS THERE
23 IS?

24 A. DEPENDING ON THE TYPE OF BROOM OR SWEEPER, IT WOULD
25 MAKE A DIFFERENCE. BUT PROBABLY 75 PERCENT.

1 Q. ALL RIGHT. HOW ABOUT VACUUMING?

2 A. I DON'T VACUUM.

3 Q. CAN YOU VACUUM AT ALL NOW?

4 A. IF I DO, IT HURTS, AND I -- I USED TO BE THE ONLY
5 ONE THAT VACUUMED, AND NOW IF I TRY TO VACUUM, MY --
6 THE MOTION IN MY BACK, IT GETS VERY TIGHT AND IT
7 HURTS AND I HAVE TO SIT DOWN AND REST.

8 Q. SO YOUR PERCENTAGE OF LOSS THERE YOU WOULD ESTIMATE
9 TO BE WHAT?

10 A. MAYBE 90 PERCENT, 'CAUSE BEFORE I DID IT ALL THE
11 TIME AND NOW IT'S VERY, VERY RARE. I DON'T DO IT.

12 Q. ALL RIGHT. CAN YOU SCRUB FLOORS NOW?

13 A. NO. MY DAUGHTER DOES IT.

14 Q. HOW ABOUT CLEANING YOUR BATHROOM?

15 A. I DON'T CLEAN THE BATHROOMS. MY -- MY KIDS AND MY
16 HUSBAND PRETTY MUCH DO THE CLEANING. IF I HAD TO
17 CLEAN THE BATHROOM, 'CAUSE THE SINK IS AT A LEVEL
18 WHERE I DON'T HAVE TO BEND OVER, I CAN SOMETIMES --
19 I'LL HAVE THE KIDS CLEAN IT FIRST, AND THEN I GO IN
20 BEHIND THEM AND CLEAN UP TO MAKE IT A LITTLE MORE MY
21 QUALITY OF CLEANING. AND THEN IF THEY HAVEN'T
22 CLEANED JUST THE INSIDE OF THE TOILET BOWL TO WHERE
23 I'M LIKE, OKAY, IT NEEDS TO GET DONE, I CAN SQUIRT
24 THE STUFF IN AND SWIRL THE BRUSH AROUND. BUT EVEN
25 THAT LENGTH OF TIME TO CLEAN INSIDE TO BRUSH, TO

1 STAND BACK UP IS -- IS PAINFUL.

2 Q. CARRYING THE LAUNDRY?

3 A. I DON'T CARRY THE LAUNDRY. ALL OF OUR LAUNDRY
4 BASKETS HAVE WHEELS ON THEM SO IF I HAVE TO MOVE THE
5 BASKET IT MOVES EASIER. BUT MY KIDS AND MY HUSBAND
6 HAUL ALL THE LAUNDRY OUT TO THE GARAGE TO GET WASHED
7 AND ---

8 Q. DID YOU DO ALL OF THAT BEFORE?

9 A. I WAS A SINGLE MOTHER OF THREE KIDS. I DID
10 EVERYTHING. MY KIDS WERE TWO, FOUR, AND SIX, SO I
11 -- I DID EVERYTHING.

12 Q. I THINK THERE WAS AN INTERESTING THING THAT YOU SAID
13 ABOUT ONE OF YOUR FAVORITE THINGS WAS GARDENING.
14 WHAT TYPE OF GARDENING WERE YOU ABLE TO DO BEFORE
15 YOU GOT HURT?

16 A. WE LIVED ON TWO ACRES, AND SO I CUT ALL THE GRASS.
17 I -- I HAD A VERY LARGE GARDEN. I HAD 140 TOMATO
18 PLANTS AND ZUCCHINI AND PUMPKINS AND STUFF. AND WE
19 OWNED A HOUSE THAT DIDN'T HAVE ANY LANDSCAPING ON
20 IT, AND WE -- I PUT IN THE BEDS AND PLANTED ALL THE
21 PLANTS, AND WE PLANTED, I THINK, SIX TREES. SO I
22 DID IT. I DID IT A LOT.

23 Q. SINCE YOU GOT -- SINCE YOU TRIED TO -- HAVE YOU
24 TRIED GARDENING SINCE YOU'VE BEEN INJURED?

25 A. YEAH. IF IT -- WE JUST TRIED TO PUT SOME PLANTS IN

1 AROUND OUR POOL THAT WE'RE PUTTING IN, AND THE -- MY
2 KIDS HAD TO DIG THE HOLES, AND I EVEN HAD TROUBLE
3 GETTING THE PLANTS OUT OF THE POTS: MY KIDS HAD TO
4 HELP ME DO THAT. THEY DID MOST OF THE WORK. AND
5 THEN ONCE I GOT IT SLID OUT AND I WAS SQUATTED ON
6 THE GROUND, I COULD HOLD IT WHILE WE PUT SOME DIRT
7 IN, BUT THAT WAS ABOUT THE EXTENT. I SAT DOWN MOST
8 OF THE TIME AND SAID, "WELL, THAT SPOT OVER THERE
9 LOOKS GOOD. GO DIG THE HOLE." SO I BECAME MORE OF
10 A SUPERVISOR THAN I DID A PARTICIPANT.

11 Q. AND SO YOU THINK OF YOUR PERCENTAGE LOSS OF
12 GARDENING WORK, ABOUT HOW MUCH HAVE YOU LOST?

13 A. PROBABLY 85 PERCENT, 'CAUSE I USED TO DO IT ALL AND
14 NOW I CAN'T.

15 Q. ALL RIGHT. WITH REGARD -- I THINK -- AGAIN, WE'RE
16 NOT INTO HIS DEPOSITION NOW, BUT I THINK YOU TALKED
17 ABOUT -- HE ASKED YOU SPECIFICALLY ABOUT THE
18 PROBLEMS YOU'RE HAVING WITH YOUR NECK NOW.

19 A. MAY I STAND UP FOR A FEW MINUTES?

20 Q. PLEASE, PLEASE.

21 BY MR. RIESEN:

22 SHE CAN STAND UP?

23 BY THE COMMISSIONER:

24 CERTAINLY.

25 BY THE WITNESS:

1 ALL RIGHT. I'M SORRY. GO AHEAD.

2 DIRECT EXAMINATION RESUMED BY MR. RIESEN:

3 Q. OKAY. WITH REGARDS TO YOUR NECK NOW, WHAT PROBLEMS,
4 IF ANY, ARE YOU HAVING?

5 A. FOR THE MOST PART THE PAIN IN THE NECK IS GONE.
6 WHEN I BACK -- WHEN I DRIVE AND I TRY TO BACK UP, I
7 DON'T TURN REALLY. I USE MY MIRRORS ONLY BECAUSE
8 IT'S TOO HARD TO TURN. AND THEN MY PINKY AND MY
9 RING FINGER ON MY LEFT HAND, THEY GO TO SLEEP ALMOST
10 EVERY NIGHT.

11 Q. SO IS YOUR SLEEPING AFFECTED AS WELL?

12 A. YEAH. I HAVE TO WAKE UP EVERY NIGHT AND TRY TO MOVE
13 MY NECK IN A POSITION THAT WHATEVER IS PINCHED ISN'T
14 SO THE FINGERS AREN'T NUMB.

15 Q. ANY PARTICULAR HOBBIES OTHER THAN GARDENING THAT YOU
16 USED TO LOVE TO DO, I MEAN, OTHER THAN, YOU KNOW,
17 BIKING AND ALL THAT STUFF, ANYTHING ELSE?

18 A. I USED TO DO JEWELRY. I USED TO MAKE JEWELRY WITH
19 BEADS AND STUFF, AND I DON'T DO THAT ANYMORE 'CAUSE
20 IT'S TOO MUCH WITH YOUR HEAD DOWN TRYING TO -- TO
21 WORK.

22 Q. ALL RIGHT. AND HOW IS YOUR DRIVING AFFECTED OTHER
23 THAN WHAT YOU TALKED ABOUT THE MIRRORS? HOW LONG
24 CAN YOU DRIVE WITHOUT HAVING TO REST?

25 A. I DON'T DRIVE MYSELF MORE THAN 30 MINUTES. IF IT'S

1 LONGER THAN THAT MY HUSBAND TAKES ME. I -- IT'S --
2 'CAUSE IT'S HARD TO SIT STILL AND SO I DON'T DRIVE
3 MORE THAN 30 MINUTES.

4 Q. BEFORE THAT HOW LONG COULD YOU DRIVE?

5 A. I USED TO DRIVE SIX HOURS STRAIGHT. MY
6 GRANDPARENTS, WHEN I LIVED IN MICHIGAN, WERE SIX
7 HOURS AWAY. SO I'D DRIVE IT ONE SHOT.

8 Q. YOU'RE A MATH MAJOR, SO WHAT PERCENTAGE OF YOUR
9 DRIVING ARE YOU NOT DOING NOW THAT YOU USED TO DO?

10 A. PROBABLY 85 PERCENT. I STILL DRIVE TO WORK EVERY
11 DAY, BUT IT'S LESS THAN TEN MINUTES, SO I CAN -- I'M
12 STILL ABLE TO DRIVE, AND I HAVE TO AS A MOM.

13 Q. OKAY. I HATE TO ASK YOU THIS, BUT HOW ABOUT -- HAS
14 IT AFFECTED YOUR SEX?

15 A. YEAH. MY HUSBAND GETS -- GETS VERY FRUSTRATED
16 BECAUSE THE FREQUENCY IS MUCH LESS THAN WHAT IT WAS
17 BEFORE I GOT HURT, AND MY NECK ALWAYS HAS TO BE
18 SUPPORTED OR MY BACK ALWAYS HAS TO BE SUPPORTED, SO
19 IT'S MORE CHOREOGRAPHED THAN IT SHOULD BE. IT'S NOT
20 NATURAL. AND HE'S -- EVEN JUST TO GIVE ME A HUG, HE
21 USED TO HUG ME, YOU KNOW, TEN, FIFTEEN TIMES A DAY.
22 NOW I'M LUCKY IF I GET ONE HUG A DAY BECAUSE HE'S
23 AFRAID TO HURT ME, AND HE DOESN'T WANT TO ADD ANY
24 UNDUE PAIN, YOU KNOW.

25 Q. HOW DO YOU THINK YOUR MOTHERING AND YOUR PARENTING

1 HAS BEEN AFFECTED?

2 A. I'M SORRY. I'M THIS -- I'M MY KIDS' ROCK, AND
3 THEY'LL EVEN SAY, "YOU'RE NOT THE PERSON YOU USED TO
4 BE." I DON'T GET TO PLAY WITH THEM THE WAY I USED
5 TO. WE -- MY KIDS ARE ALL ATHLETES, AND I CAN'T GO
6 OUT AND PLAY SOCCER; I CAN'T GO OUT AND THROW THE
7 BALL ANYMORE; I CAN'T GO FOR BIKE RIDES. SOMETIMES
8 THEY ASK ME WHY I'M SUCH A LAME MOM. AND MY HUSBAND
9 NOW, MY CURRENT HUSBAND, WILL TRY TO FILL IN, BUT
10 HE'S NOT MOM. SO IT'S BEEN -- IT'S BEEN VERY HARD,
11 AND I DON'T -- I DON'T LIKE MAKING MY KIDS ALWAYS
12 HAVE TO HELP ME OR ASK FOR HELP. I'M A VERY
13 STUBBORN PERSON, AND I DON'T LIKE HAVING TO ASK
14 PEOPLE FOR HELP, AND I ALWAYS HAVE TO ASK MY KIDS.
15 IF I HAVE TO GO TO THE GROCERY STORE, THEY HAVE TO
16 COME. I DON'T GO ALONE. YOU KNOW, THEY -- THEY
17 HAVEN'T HAD A NORMAL CHILDHOOD JUST BECAUSE THEY'RE
18 ALWAYS TAKING CARE OF A PARENT THAT'S INJURED, AND I
19 DON'T THINK IT'S FAIR TO THEM.

20 Q. OKAY. WHAT DO YOU THINK YOUR OVERALL ESTIMATE OF
21 THE LOSS OF YOUR BACK HAS BEEN? AND I'M TALKING
22 ABOUT NECK AND LOWER BACK.

23 A. I WOULD SAY 75, 80 PERCENT. I'M NOT THE PERSON I
24 USED TO BE. I'M NOT FULL OF ENERGY, AND I CAN'T
25 EVEN WEAR -- I CAN'T EVEN WEAR DRESSES ANYMORE

1 'CAUSE I CAN'T WEAR HEELS. SO I HAVE TO DRESS
2 DIFFERENTLY. I HAVE TO DO SO MANY THINGS
3 DIFFERENTLY THAN WHAT I USED TO BE ABLE TO DO, AND
4 IT'S SO FRUSTRATING.

5 Q. NOW, ADDITIONAL MEDICAL CARE, I UNDERSTAND THAT YOU
6 CONTINUE TO SEE DR. GAUSE?

7 A. YES.

8 Q. IS THAT SOMEONE YOU'D LIKE TO CONTINUE TO SEE?

9 A. YES.

10 Q. HAVE YOU GENERALLY BEEN PLEASED WITH HIM?

11 A. YES.

12 Q. OKAY. LET'S TALK ABOUT SOME OF HIS RESTRICTIONS.

13 A. OKAY.

14 Q. OKAY? I THINK HE INDICATED, AND THIS MAY BE ON HIS
15 14, BUT SOMEWHERE IN HIS RECORDS, THAT YOU ARE
16 LIMITED TO MODIFIED DUTY. WOULD YOU AGREE WITH
17 THAT?

18 A. YES.

19 Q. OKAY. AND HE SAYS NO BENDING, TWISTING, STOOPING OF
20 BACK MORE THAN TEN TIMES AN HOUR. WHAT ARE YOUR
21 THOUGHTS IN THAT REGARD?

22 A. IF THAT'S CUMULATIVE, IF YOU ADD ALL THOSE THINGS UP
23 TEN TIMES IN AN HOUR, I WOULD SAY THAT'S PROBABLY
24 ACCURATE. BUT IF YOU SAID I CAN DO ALL OF THOSE
25 THINGS SEPARATELY TEN TIMES, I WOULD BE IN A LOT OF

1 PAIN.

2 Q. OKAY. HE SAYS NO SITTING, STANDING -- SITTING OR
3 STANDING MORE THAN 60 MINUTES. AND WHAT ARE YOUR --
4 WITHOUT CHANGING POSITIONS. AND WHAT ARE YOUR
5 THOUGHTS IN THAT REGARD?

6 A. I CAN'T SIT VERY LONG BEFORE I HAVE TO CHANGE
7 POSITIONS. IF IT MEANS I CAN SIT FOR UP TO 60
8 MINUTES BEFORE I HAVE TO GET UP AND WALK AROUND BUT
9 I'M STILL SHIFTING IN MY SEAT, OKAY. I MEAN ---

10 Q. SO IF YOU SHIFT -- IF YOU CAN SHIFT THEN YOU CAN --
11 OKAY.

12 A. YEAH. BUT...

13 Q. NO LIFTING, CARRYING, PUSHING, OR PULLING MORE THAN
14 40 POUNDS. WHAT ABOUT THAT?

15 A. I THINK IT DEPENDS ON WHERE THE POUNDS ARE LOCATED.
16 YOU KNOW, IF THEY'RE ON THE FLOOR, THAT'S NOT GONNA
17 HAPPEN. THERE'S NO WAY. I COULDN'T CARRY THE BAGS
18 OF DIRT TO PUT IN THE GROUND WHEN WE PLANTED THE
19 PLANTS. MY KIDS HAD TO CARRY THAT. BUT IF IT -- IF
20 IT'S SOMETHING THAT'S AT THE TABLE LENGTH AND I CAN
21 USE THE REST OF MY BODY AND JUST KIND OF HANG ON
22 TIGHT WITH MY ARMS AND MOVE IT, THEN THAT MIGHT BE
23 REASONABLE. BUT IT REALLY DEPENDS ON WHERE THINGS
24 ARE POSITIONED.

25 Q. OKAY. WHEN THESE RESTRICTIONS WERE SET, DID YOU

1 HAVE ANY DETAILED DISCUSSION WITH DR. GAUSE? HOW
2 LONG -- YOU KNOW, THIS LAST APPOINTMENT, ABOUT HOW
3 LONG DID IT LAST?

4 A. MAYBE TEN MINUTES.

5 Q. OKAY. DID YOU GO THROUGH WHAT I'VE BEEN THROUGH NOW
6 WITH HIM?

7 A. NEVER.

8 Q. OKAY.

9 A. NO. WE -- HE JUST SAID, "THESE WILL BE YOUR
10 RESTRICTIONS." BUT HE DIDN'T SAY -- HE DIDN'T ASK.

11 Q. SO YOU DIDN'T TELL HIM ABOUT THE PROBLEMS YOU'RE
12 HAVING WITH THE GARDENING AND THE BIKING, TAKING
13 CARE OF YOUR HOUSE WORK AND ALL THAT STUFF?

14 A. I'VE MENTIONED LITTLE THINGS, ONLY BECAUSE THE
15 APPOINTMENTS ARE TEN MINUTES LONG AND HE'S GIVING
16 THE EXAM AND HE'S RUNNING THE CONVERSATIONS, YOU
17 KNOW. WE'VE DISCUSSED -- HE SAID TRY TO ---

18 BY MR. RIDDLE:

19 I OBJECT TO ANYTHING THE DOCTOR SAID.

20 BY THE COMMISSIONER:

21 SUSTAINED.

22 DIRECT EXAMINATION RESUMED BY MR. RIESEN:

23 Q. YOU CAN'T SAY WHAT HE SAID. JUST TELL US WHAT
24 OCCURRED AFTER YOU LEFT.

25 A. TELL YOU WHAT OCCURRED ---

- 1 Q. YOU'RE NOT SUPPOSED -- IT'S HEARSAY FOR YOU TO QUOTE
2 WHAT HE SAID. BUT TELL US WHAT YOU CAME OUT WITH.
- 3 A. WE DISCUSSED HOW LONG I SHOULD TRY TO RIDE THE BIKE,
4 AND I'M SUPPOSED TO TRY TO INCREASE IT BY 30-SECOND
5 INCREMENTS OR ONE-MINUTE INCREMENTS. BUT IT'S NOT
6 WORKING, YOU KNOW, EVEN THOUGH YOU TRY. AND THEN
7 WHEN I WAS DONE, THOSE WERE THE RESTRICTIONS THAT HE
8 SAID THAT I WOULD HAVE.
- 9 Q. OKAY. AND, AGAIN, YOU MENTIONED SEEING DR. KEFFER
10 DOWN HERE. I UNDERSTAND THAT HE RECENTLY HAD A
11 CONVERSATION WITH YOU OVER THE PHONE?
- 12 A. YES.
- 13 Q. YOU COULDN'T -- YOU ALL COULDN'T GET DOWN HERE FOR
14 HIM TO SEE YOU FOR AN EXAMINATION, IS THAT RIGHT?
- 15 A. THAT'S CORRECT.
- 16 Q. AND DID YOU TELL HIM, YOU KNOW, ESSENTIALLY WHAT WAS
17 GOING ON AND YOUR PROBLEMS AND THAT TYPE OF THING,
18 SOME OF THEM ANYWAY?
- 19 A. YES. WE -- I THINK WE HAD LIKE A TEN-MINUTE
20 CONVERSATION ON THE PHONE.
- 21 Q. OKAY. AND HAVE YOU -- DID YOU GET A CHANCE THIS
22 MORNING TO READ HIS REPORT?
- 23 A. YES, I DID.
- 24 Q. OKAY. AND WERE YOU PRETTY MUCH IN AGREEMENT WITH
25 WHAT HE SAYS?

1 A. YES.

2 Q. AS FAR AS WHAT YOU TOLD HIM?

3 A. YES. ON THE FIRST PAGE HE HAD THE SECOND SURGERY
4 DATE WRONG, BUT OTHER THAN THAT, EVERYTHING'S GREAT.

5 Q. LOOKS OKAY?

6 A. UH-HUH.

7 Q. ALL RIGHT.

8 A. HE HAD IT RIGHT ON THE SECOND PAGE.

9 Q. AND I BELIEVE I'M PRETTY MUCH AT THE END HERE. YOU
10 MAY HAVE ALREADY TOLD US THIS, BUT TOUCH BASIS ON
11 YOUR CURRENT WORK SITUATION. YOU INDICATED, DID YOU
12 NOT, THAT THEY WERE VERY ACCOMMODATING? AND WHAT
13 ARE THEY DOING FOR YOU WHEN YOU TEACH THAT ALLOWS
14 YOU TO BE ABLE TO DO WHAT YOU'RE DOING TEACHING?

15 A. THEY DON'T EVEN REQUIRE THAT I TURN IN MY WORK
16 RESTRICTIONS BECAUSE THEY SAID, YOU KNOW, WHAT YOU
17 -- I TURN THEM IN TO THEM SO THEY HAVE THEM, BUT
18 THEY SAID, YOU KNOW, YOU KNOW WHO YOU ARE. SO, I --
19 THEY BROUGHT IN ALL THAT STUFF I ALREADY TALKED
20 ABOUT. YOU KNOW, THEY ALLOWED ME TO BRING IN A LAWN
21 CHAIR. HOW MANY SCHOOLS LET YOU TEACH FROM A LAWN
22 CHAIR IN THE RECLINED POSITION? AND THEN EXERCISE
23 BALL. THEY HAVE MODIFIED THE STANDARD PROGRAM FOR
24 WHERE WE CHECK THE KIDS, IF THEY DID THEIR HOMEWORK
25 OR NOT, 'CAUSE IT'S -- IT'S VERY STRICT AND IT'S

1 VERY UNDERSTOOD THAT EVERY TEACHER IS SUPPOSED TO
2 WALK AROUND THE CLASSROOM. BUT I DON'T HAVE TO.
3 THE KIDS COME TO ME TO GET THE JOB DONE. AND THEY
4 HAVE THAT TABLE IN THERE SO I CAN HELP KIDS. SO,
5 THEY -- YOU KNOW, I DON'T GET THE SAME WORKMAN'S
6 COMP BENEFIT IN ARIZONA THAT I DO HERE BECAUSE THE
7 INJURY HAPPENED HERE. SO MY TREATMENT HAD TO BE
8 WORKED AROUND THE WAY THAT I -- SO I WOULDN'T --
9 THAT'S WHY MY SURGERIES WERE IN THE SUMMER, SO I
10 WOULDN'T MISS SO MUCH SCHOOL. I COULDN'T JUST GET
11 THE SURGERY DONE IN APRIL BECAUSE THAT'S WHEN THE
12 DOCTOR SAID IT NEEDED TO BE DONE; I HAD TO -- I HAD
13 TO WAIT.

14 Q. NOTWITHSTANDING THEY WORK WITH YOU. IF YOU HAD TO
15 DO A NORMAL TEACHING JOB WITHOUT ALL THESE TYPE OF
16 ACCOMMODATIONS, COULD YOU DO IT?

17 A. NO.

18 BY MR. RIESEN:

19 ALL RIGHT. I HAVE NO FURTHER QUESTIONS, YOUR
20 HONOR.

21 BY THE COMMISSIONER:

22 CROSS?

23 BY MR. RIDDLE:

24 THANK YOU, COMMISSIONER.

25 CROSS EXAMINATION BY MR. RIDDLE:

- 1 Q. JUST GOING BACK QUICKLY TO YOUR SURGERY IN JULY
2 2013.
- 3 A. SO MY NECK.
- 4 Q. YOUR CERVICAL SPINE SURGERY.
- 5 A. OKAY.
- 6 Q. I THINK YOU SAID YOU WERE HAPPY WITH THE RESULT FROM
7 THAT SURGERY; IS THAT CORRECT?
- 8 A. YEAH. I USED TO HAVE A LOT OF BURNING PAIN IN MY
9 NECK, AND IT USED TO BE VERY PAINFUL, AND NOW, YOU
10 KNOW, THERE'S MUSCLE TIGHTNESS THAT I HAVE, AND I
11 CAN'T -- YOU KNOW, LIKE DOING EXERCISES, I HAVE TO
12 MODIFY THINGS. SO, YOU KNOW, THE ALTERNATIVE OF
13 SITTING IN THE PAIN THAT I WAS IN TO NOW, I'M HAPPY
14 WITH THE -- WITH THE RESULT. THE HAND STILL GOES
15 NUMB.
- 16 Q. ALL RIGHT. I BELIEVE YOU TOLD ME THAT YOU
17 ESSENTIALLY HAVE NO NECK PAIN OTHER THAN LIKE IF
18 YOU'RE GRADING PAPERS YOU'LL HAVE SOME SORENESS, BUT
19 THAT GOES AWAY AFTER A COUPLE DAYS?
- 20 A. YEAH. WHEN I -- WHEN I -- ANYTIME I HAVE TO -- IF I
21 HAVE TO GRADE A LOT OF PAPERS OR ANYTHING THAT
22 REQUIRES MY HEAD TO BE DOWN, I'M IN EXTRA PAIN. IT
23 DEPENDS ON, YOU KNOW, WHAT YOUR ACTIVITY IS. SO IF
24 IT WAS A GOOD DAY AND YOU DIDN'T REALLY HAVE TO
25 TEACH THAT MUCH, FINE. BUT I'M LEFT-HANDED, AND

1 THAT'S THE HAND I GET THE NUMBNESS IN, AND SO I
2 DON'T WRITE ON THE BOARD VERY OFTEN BECAUSE I CAN'T
3 KEEP MY ARM UP THAT LONG. THERE'S A PAIN THAT GOES
4 DOWN THROUGH HERE, AND THAT, FROM WHAT I UNDERSTAND,
5 IS TIED TO THIS STUFF, TOO. AND SO, A LOT OF TIMES
6 I'LL ASK A KID, "HEY, DO YOU WANT TO PUT THE PROBLEM
7 UP?" OR WHATEVER. SO -- OR I DO THINGS FROM
8 POWERPOINT AND THEN I CAN RUN IT FROM THAT AND
9 I'M...

10 Q. OKAY. BUT JUST AS FAR AS PAIN IN YOUR NECK, YOU
11 SAID THE SORENESS WILL GO AWAY AFTER A COUPLE DAYS
12 AFTER YOU'RE GRADING PAPERS?

13 A. TYPICALLY, UNLESS -- YOU KNOW, IF THERE'S SEVERAL
14 DAYS IN A ROW, THEN NO. BUT, YOU KNOW, TYPICALLY
15 YES.

16 Q. AND THEN AFTER THAT INITIAL SURGERY IN JULY 2013,
17 YOU DID RETURN FOR THE 2014 SCHOOL YEAR IN YOUR
18 NORMAL JOB AS A MIDDLE SCHOOL MATH TEACHER, CORRECT?

19 A. YES. I SUPPORT MY KIDS. I HAVE TO

20 Q. AND THEN, AGAIN, THE FOLLOWING SUMMER, 2014, YOU HAD
21 THE TWO PROCEDURES PERFORMED BY DR. GAUSE ON YOUR
22 LOW BACK, CORRECT?

23 A. CORRECT.

24 Q. BUT THAT WAS AT THE SAME LEVEL, RIGHT; L5-S1?

25 A. YEAR. THE FIRST DAY THEY WENT IN AND TOOK OUT THE

1 DISC, AND THEN THEY WANTED TO SEE IF THE LEG PAIN
2 STOPPED.

3 Q. RIGHT.

4 A. SO THEN IT DIDN'T. SO WHEN THEY WENT -- THEY WERE
5 ALREADY PLANNING TO PUT THE SCREWS IN. HE KNEW HE
6 HAD TO DO MORE.

7 Q. AND BOTH OF THOSE PROCEDURES WERE IN THE SUMMER, SO
8 YOU DIDN'T MISS ANY TIME FROM THE REGULAR SCHOOL
9 YEAR?

10 A. NOT THE REGULAR SCHOOL YEAR, BUT I MISSED NOT BEING
11 ABLE TO DO THE SUMMER MATH PROGRAM.

12 Q. YOU CONTINUED TO RECEIVE YOUR REGULAR PAY DURING THE
13 SUMMER?

14 A. BECAUSE MY PAYCHECK IS SPREAD OUT. I WORK FOR NINE
15 MONTHS AND THAT'S WHAT MY CALENDAR IS, BUT MY
16 PAYCHECKS ARE SPREAD OUT.

17 Q. OKAY. AND THAT'S EVEN IN ARIZONA, CORRECT; SAME
18 ARRANGEMENT THERE?

19 A. THAT'S A STANDARD TEACHING ARRANGEMENT. TYPICALLY
20 YOU GET TO CHOOSE NINE MONTHS -- TO RECEIVE YOUR
21 PAYCHECK IN NINE MONTHS OR TWELVE MONTHS, AND ALMOST
22 MOST -- ALMOST ALL TEACHERS WILL CHOOSE THE TWELVE
23 MONTHS SO THEY DON'T HAVE TO BUDGET THE MONEY. BUT
24 IT'S STILL BASED ON A CONTRACT.

25 Q. OKAY. AND YOU'RE NOT CURRENTLY TAKING ANY

- 1 PRESCRIPTION PAIN MEDICATION?
- 2 A. NO PRESCRIPTION, NO.
- 3 Q. I BELIEVE YOU TOLD ME YOU TAKE MOTRIN OCCASIONALLY,
- 4 MAYBE ONCE OR TWICE A WEEK?
- 5 A. YEAH. I'M ALLERGIC TO MOST OF THE PAIN MEDS, SO,
- 6 HENCE, THAT'S WHY I TAKE THAT.
- 7 Q. OKAY. AND YOU SAID IT WAS ONCE OR TWICE A WEEK,
- 8 CORRECT?
- 9 A. YES.
- 10 Q. AND SO IS IT FAIR TO SAY THAT YOU ALSO HAD A GOOD
- 11 RESULT FROM YOUR LUMBAR SURGERY?
- 12 A. AGAIN, THE BURNING PAIN, IT'S A VERY DIFFERENT PAIN
- 13 THAT I HAVE NOW THAN WHAT I HAD BEFORE, VERY
- 14 DIFFERENT. I DON'T KNOW IF YOU UNDERSTAND THAT.
- 15 BUT BEFORE IT WAS A BURNING, VERY PAINFUL. THE PAIN
- 16 WENT DOWN MY LEG ALL THE TIME. AND NOW IT DOESN'T
- 17 -- SOMETIMES IT -- ONCE IN A WHILE IT WILL GO DOWN
- 18 MY LEG, BUT IF I DO THE EXERCISES THAT THEY TAUGHT
- 19 ME, THEN THAT PAIN CAN GO AWAY AND -- 'CAUSE SOME
- 20 DAYS YOU COULDN'T HARDLY WALK FROM IT. BUT NOW
- 21 THAT'S -- SO, YES, THAT'S A GREAT RESULT, IN MY
- 22 OPINION.
- 23 Q. AND GENERALLY YOU'RE HAPPY WITH THE RESULT FROM BOTH
- 24 SURGERIES THEN?
- 25 A. PROVIDED I CAN GET RID OF THE MUSCLE TENDERNESS THAT

1 I HAVE, I'LL BE -- I'LL BE MUCH HAPPIER. I DON'T
2 THINK IT WAS A FULL SUCCESS 'CAUSE RIGHT NOW I STILL
3 AM NOT DOING THE THINGS -- I'M NOT THE PERSON I AM
4 -- THAT I WAS AT ALL.

5 Q. ALL RIGHT. SO AT THIS POINT I'M GOING TO ASK YOU
6 QUICKLY A COUPLE MORE QUESTIONS ABOUT YOUR PRIOR
7 CLAIM IN MICHIGAN IN 1992 THAT FRED TOUCHED ON
8 EARLIER. AND JUST TO CONFIRM, YOU SUSTAINED
9 INJURIES TO YOUR HEAD AND YOUR NECK IN THAT
10 ACCIDENT?

11 A. CORRECT.

12 Q. OKAY. AND YOU RECEIVED SOME TYPE OF INJECTIONS TO
13 YOUR CERVICAL SPINE OR A PROCEDURE ON YOUR CERVICAL
14 SPINE WHERE THEY, AS YOU PHRASED IT, BURNED THE
15 NERVES IN YOUR NECK?

16 A. CORRECT.

17 Q. OKAY.

18 A. I HAD -- I HAD THAT SAME WITH THIS PROCEDURE.

19 Q. AND YOU DON'T REMEMBER IF THE DOCTORS ASSIGNED AN
20 IMPAIRMENT RATING TO YOUR NECK?

21 A. I DON'T BELIEVE THEY DID. LIKE I SAID EARLIER, I
22 NEVER KNEW WHAT THAT WAS UNTIL THIS.

23 Q. BUT YOU DID HAVE PERMANENT RESTRICTIONS OF NO
24 LIFTING GREATER THAN TEN POUNDS ASSIGNED BY THE
25 DOCTOR?

1 A. I DON'T BELIEVE THEY WERE EVER WRITTEN.

2 Q. BUT DID THE DOCTOR TELL YOU AS A GENERAL RULE NOT TO
3 LIFT MORE THAN TEN POUNDS?

4 A. HE SUGGESTED IT.

5 Q. AND YOU SETTLED THAT WORKERS' COMPENSATION CLAIM IN
6 MICHIGAN?

7 A. YES.

8 Q. AND YOU RECEIVED A SETTLEMENT IN EXCESS OF \$100,000?

9 A. AGAIN, I DON'T -- I DON'T KNOW WHAT THE AMOUNT WAS.

10 Q. DIDN'T YOU TESTIFY IN YOUR FIRST DEPOSITION BACK IN
11 2011 THAT YOU RECEIVED A SETTLEMENT THAT WAS IN
12 EXCESS OF \$100,000?

13 A. I BELIEVE, IF YOU READ THE DEPOSITION, SHE WENT UP
14 BY INCREMENTS, AND I SAID -- WHEN SHE GOT TO THAT I
15 SAID, "I THINK SO."

16 Q. I THINK YOU SAID, "YES, IT WAS MORE THAN \$100,000."

17 BY MR. RIDDLE:

18 AND, COMMISSIONER, WOULD YOU LIKE -- DO I NEED
19 TO HAND UP THE DEPOSITION? WOULD THAT BE HELPFUL TO
20 YOU?

21 BY THE COMMISSIONER:

22 THAT'S UP TO YOU, SIR, IF YOU PREFER TO USE IT.

23 BY MR. RIDDLE:

24 JUST FOR THAT ONE ISSUE SINCE MS. BOZYDAJ --
25 JUST TO REFRESH HER MEMORY HERE ABOUT WHAT EXACTLY

1 THE TESTIMONY WAS JUST WITH REGARD TO THE AMOUNT
2 SINCE THAT'S THE ONLY EVIDENCE THAT WE HAVE
3 REGARDING THE EXTENT OF THE INJURY OR THE SEVERITY
4 OF THE INJURY.

5 CROSS EXAMINATION RESUMED BY MR. RIDDLE:

6 Q. ALL RIGHT. AND THIS IS ON PAGE 17 OF THE DEPOSITION
7 THAT WAS TAKEN BY LESLIE WHITTEN BACK ON AUGUST 2ND,
8 2011.

9 BY MR. RIESEN:

10 LINE 23.

11 BY MR. RIDDLE:

12 RIGHT.

13 CROSS EXAMINATION RESUMED BY MR. RIDDLE:

14 Q. AND JUST TO GIVE THE CONTEXT, I'LL START WITH LINE
15 17.

16 A. I CAN'T READ IT. SORRY.

17 Q. OKAY. THAT'S FINE. JUST TELL ME WHERE.

18 A. RIGHT THERE.

19 Q. ALL RIGHT. AND I'LL JUST READ THIS AND YOU CAN TELL
20 ME IF I READ IT CORRECTLY. ON LINE 17, ANSWER: "I
21 DON'T KNOW THE EXACT AMOUNT, SO, I MEAN..."

22 QUESTION: "WAS IT MORE THAN 10,000?" ANSWER: "IT

23 WAS MORE THAN 10,000, YES." QUESTION: "MORE THAN

24 50?" ANSWER: "YES." "MORE THAN 100?" ANSWER:

25 "YES, IT WAS MORE THAN \$100,000." DID I READ THAT

- 1 CORRECTLY?
- 2 A. YOU READ THAT CORRECTLY.
- 3 Q. OKAY. THANK YOU. SO WOULD YOU CONCEDE THAT IN THAT
- 4 DEPOSITION YOU SAID THAT IT WAS MORE THAN \$100,000
- 5 IN THAT SETTLEMENT?
- 6 A. IN MY DEPOSITION, YES, I DID.
- 7 Q. OKAY. AND YOU WERE UNDER OATH IN THAT DEPOSITION?
- 8 MA'AM?
- 9 A. I WASN'T SURE IF THAT WAS A QUESTION. SO, YES.
- 10 Q. YES. DO YOU UNDERSTAND THAT YOU WERE UNDER OATH AT
- 11 THAT TIME?
- 12 A. YES.
- 13 Q. OKAY. ALL RIGHT. I JUST HAVE A COUPLE QUESTIONS
- 14 ABOUT YOUR SALARY WHILE YOU WERE WORKING FOR
- 15 CHARLESTON COUNTY SCHOOL DISTRICT. YOU WERE PAID A
- 16 TOTAL SALARY OF \$40,403.01 FOR 52 WEEKS DURING 2010;
- 17 IS THAT CORRECT?
- 18 A. MY SALARY WAS SPREAD OUT OVER THE ENTIRE YEAR, YES.
- 19 Q. AND YOU RECEIVED A PAYCHECK EVERY TWO WEEKS?
- 20 A. YES.
- 21 Q. YOU STARTED WITH THE CHARLESTON COUNTY SCHOOL
- 22 DISTRICT IN AUGUST 2009?
- 23 A. CORRECT.
- 24 Q. AND IN 2009 YOUR EARNINGS WERE SUBSTANTIALLY THE
- 25 SAME AS WHAT WE'VE ESTABLISHED IN 2010?

1 A. WELL, I ONLY WORKED FOR A FEW MONTHS IN AUGUST. SO,
2 AUGUST, SEPTEMBER, OCTOBER, NOVEMBER, DECEMBER OF
3 2009.

4 Q. OKAY.

5 A. SO I CAN'T ANSWER YES TO THAT.

6 Q. ALL RIGHT. SO ---

7 A. BUT I THINK THAT ---

8 Q. WELL, LET'S ASK ABOUT 2011 THEN. IN THE YEAR 2011,
9 WAS YOUR INCOME SUBSTANTIALLY THE SAME AS 2010?

10 A. I THINK SO. BUT I THINK IN THE DEPOSITION IT SAID
11 THAT I WAS FURLOUGHED FOR FIVE DAYS 'CAUSE
12 CHARLESTON COUNTY WAS HAVING BUDGET ISSUES. SO I
13 THINK THEY FURLOUGHED THE TEACHERS. SO IT'S FAIRLY
14 CLOSE, I BELIEVE.

15 Q. OKAY. AND YOU WERE A TEACHER ELSEWHERE BEFORE YOU
16 CAME TO CHARLESTON, CORRECT?

17 A. CORRECT.

18 Q. IN MICHIGAN; IS THAT WHAT YOU SAID?

19 A. YES.

20 Q. AND AS BEST YOU CAN REMEMBER, THE EARNINGS WOULD
21 HAVE BEEN MUCH THE SAME AT THE PRIOR TEACHING JOBS
22 YOU HAD; 30,000, 35, \$40,000?

23 A. YES.

24 Q. OKAY. AND SINCE YOU'VE MOVED TO ARIZONA, YOUR
25 EARNINGS ARE STILL IN THAT RANGE? FOR INSTANCE, DO

1 YOU RECALL WHAT YOUR SALARY WAS LAST YEAR?

2 A. THEY -- THEY DO THE SALARY A LITTLE BIT DIFFERENT IN
3 ARIZONA BECAUSE THEY HAVE MERIT PAY. SO, MY BASE
4 SALARY WAS 37,000 AND SOME ODD HUNDRED DOLLARS, I
5 THINK LIKE \$400 OR SOMETHING.

6 Q. AND YOU'VE NEVER EARNED MORE THAN 50,000 IN ONE
7 YEAR, HAVE YOU?

8 A. AS A TEACHER?

9 Q. YES.

10 A. I DON'T THINK SO, BUT I CAN'T ANSWER THAT. I MEAN,
11 HONESTLY I CAN'T REMEMBER.

12 Q. OKAY. FAIR ENOUGH. GOING BACK TO 2010, THE YEAR
13 BEFORE YOUR INJURY, YOU RECEIVED YOUR REGULAR PAY
14 DURING THE SUMMER MONTHS WHILE YOU WERE NOT WORKING;
15 IS THAT CORRECT?

16 A. MY CONTRACT PAY WAS SPREAD OUT.

17 Q. OKAY. SO ---

18 A. SO I RECEIVED THE MONEY THAT -- I COULD HAVE
19 RECEIVED BIGGER CHUNKS, AND I SPREAD IT OUT, HAD I
20 TAKEN IT IN NINE MONTHS.

21 Q. OKAY. ALL RIGHT. DO YOU HAVE ANY ADDITIONAL PAID
22 VACATION IN ADDITION TO WINTER BREAK, SPRING BREAK,
23 SUMMER BREAK, OTHER DAYS THE STUDENTS ARE OUT OF
24 SCHOOL?

25 A. THOSE ARE NOT CONSIDERED PAID VACATIONS. YOU'RE

- 1 PAID FOR THE NUMBER OF DAYS THAT YOU WORK. SO ---
- 2 Q. WELL, LET ME ASK IT DIFFERENTLY THEN. DO YOU HAVE
- 3 ANY OTHER VACATION DAYS OR DAYS THAT YOU'RE ALLOWED
- 4 TO TAKE OFF WORK AS A TEACHER BESIDES DAYS THAT THE
- 5 STUDENTS ARE OUT OF SCHOOL?
- 6 A. I GET -- CURRENTLY I GET -- THE SCHOOL THAT I'M AT I
- 7 GET SIX SICK DAYS FOR THE YEAR, WHICH IS MUCH LESS
- 8 THAN HERE.
- 9 Q. OKAY. BUT OTHER THAN THAT, YOU'RE ONLY OUT OF WORK
- 10 WHEN THE STUDENTS ARE OUT OF SCHOOL; IS THAT
- 11 CORRECT?
- 12 A. YES.
- 13 Q. AND ARE THERE TEACHER WORK DAYS EVEN BEFORE THE
- 14 SCHOOL YEAR STARTS AND ON OTHER DAYS THE STUDENTS
- 15 ARE NOT IN SCHOOL?
- 16 A. YES. WE HAVE -- WE HAVE WORK DAYS. I WANT TO SAY
- 17 MAYBE FIVE BEFORE SCHOOL STARTS AND FIVE AFTER
- 18 SCHOOL STARTS, OR SOMEWHERE SIMILAR. AND THEN WE
- 19 ALSO HAVE -- THIS YEAR WE HAVE FOUR PROFESSIONAL
- 20 DEVELOPMENT DAYS. SO THE KIDS ARE NOT IN SCHOOL AND
- 21 WE GET TRAINING.
- 22 Q. AND AS FAR AS WHEN YOU GO TO WORK ON A NORMAL DAY,
- 23 YOU DON'T CLOCK IN WHEN YOU COME IN; YOU DON'T CLOCK
- 24 OUT WHEN YOU LEAVE?
- 25 A. WE DON'T ACTUALLY HAVE A CLOCK, BUT ON FRIDAYS WE

1 HAVE TO SIGN IN AND SIGN OUT. BUT OTHER THAN THAT,
2 NO.

3 Q. OKAY. YOU SAY ON FRIDAYS YOU HAVE TO SIGN IN AND
4 SIGN OUT. WHAT DO YOU MEAN BY THAT?

5 A. THE SCHOOL THAT I WORK AT NOW, WE TEACH EIGHT TO
6 FOUR, MONDAY THROUGH THURSDAY. I MEAN, WE'RE THERE,
7 OBVIOUSLY, BEFORE AND AFTER THAT, BUT THOSE ARE THE
8 KID HOURS. AND THEN ON FRIDAYS WE DO TUTORING FOR
9 THE KIDS. ANY KID THAT'S FAILING, WE HAVE THEM FROM
10 EIGHT TO ELEVEN. SO -- AND THEN WE HAVE MEETINGS
11 AFTER THAT, AND WE'RE USUALLY OUT BY TWO OR THREE.
12 SO WE GET OUT A LITTLE BIT EARLY. AND JUST FOR
13 ACCOUNTABILITY REASONS, THEY WENT TO US SIGNING IN,
14 ALSO IN CASE THERE'S A FIRE, 'CAUSE THEY DON'T
15 ALWAYS KNOW WHAT TEACHER LEFT, BECAUSE WE CAN LEAVE
16 EARLIER. IT'S NOT A SET TIME.

17 Q. OKAY. SO THE SIGN-IN AND SIGN-OUT IS NOT FOR THE
18 PURPOSE OF CALCULATING YOUR HOURS THAT YOU'VE BEEN
19 AT WORK; IT'S JUST AS A SECURITY MEASURE OR TO MAKE
20 SURE THAT PEOPLE ARE ACTUALLY ATTENDING SCHOOL, OR
21 THE TEACHERS ARE ACTUALLY ATTENDING?

22 A. WELL, IF YOU DON'T SIGN IN, THEN THEY COUNT YOU AS
23 NOT BEING THERE AND IT'S AN ABSENT DAY. SO, IT CAN
24 BE PUNITIVE TO YOU, YES.

25 Q. BUT IN OTHER WORDS, YOU'RE NOT PAID BY THE HOUR, IS

1 THAT RIGHT?

2 A. NO, I'M NOT HOURLY; I'M SALARIED.

3 Q. OKAY. GETTING BACK TO YOUR INJURIES AND YOUR
4 CURRENT CONDITION, I THINK YOU'VE ALREADY
5 ESTABLISHED YOU'RE CONTINUING TO TEACH FULL TIME AS
6 A MIDDLE SCHOOL MATH TEACHER?

7 A. WITH MODIFICATIONS, YES.

8 Q. ALL RIGHT. AND I THINK YOU SAID EARLIER THAT YOU
9 WALK A MILE EVERY DAY BEFORE SCHOOL; IS THAT
10 CORRECT?

11 A. IT'S JUST UNDER. IT'S ABOUT THREE-QUARTERS OF A
12 MILE.

13 Q. OKAY.

14 A. THE DOCTOR HAS ASKED THAT I WALK, SO I DO MY BEST TO
15 COMPLY.

16 Q. AND YOU WEAR A PEDOMETER, AND IT INDICATES THAT ON
17 AVERAGE YOU WALK ABOUT TWO MILES EVERY DAY JUST IN
18 THE COURSE OF YOUR NORMAL ACTIVITIES?

19 A. I TRY. IT'S THE BEST I CAN DO.

20 Q. YOU SAID YOU ARE ABLE TO DRIVE YOURSELF TO AND FROM
21 WORK EVERY DAY?

22 A. YES.

23 Q. AND YOU'RE ABLE TO DRIVE AS NECESSARY TO PICK UP AND
24 DROP OFF YOUR KIDS FOR SCHOOL AND OTHER ACTIVITIES?

25 A. YES, AS LONG AS IT'S WITHIN THE 30-MINUTE AREA OR

1 LESS.

2 BY MR. RIDDLE:

3 AND I APOLOGIZE, COMMISSIONER. I'M JUST ABOUT
4 FINISHED. I JUST WANT TO CLARIFY ONE THING.

5 BY THE COMMISSIONER:

6 CERTAINLY.

7 BY MR. RIDDLE:

8 OKAY. ACTUALLY THOSE ARE ALL MY QUESTIONS.

9 THANK YOU.

10 BY THE COMMISSIONER:

11 ANY REDIRECT?

12 BY MR. RIESEN:

13 JUST A COUPLE FOLLOW-UPS.

14 REDIRECT EXAMINATION BY MR. RIESEN:

15 Q. MY UNDERSTANDING IS YOU WERE BEING PAID FOR NINE
16 MONTHS' WORK, IS THAT CORRECT, WHEN YOU WERE WORKING
17 IN CHARLESTON COUNTY?

18 A. YES.

19 Q. BUT YOU'RE REQUIRED TO GET YOUR MONEY OVER 52 WEEKS;
20 IS THAT CORRECT?

21 A. YES.

22 BY MR. RIESEN:

23 THAT'S ALL I HAVE.

24 BY MR. RIDDLE:

25 I DON'T HAVE ANY OTHER QUESTIONS.

1 BY THE COMMISSIONER:

2 ALL RIGHT. THAT CONCLUDES THIS HEARING.

3 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS

4 CONCLUDED AT THE HOUR OF 2:46 A.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1104105

EMPLOYEE/CLAIMANT: KELLY McPHERSON

EMPLOYER: CHARLESTON COUNTY SCHOOL DISTRICT

CARRIER: SELF-INSURED

I, TIMMI A. PARRISH, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 75 PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF KELLY McPHERSON, TAKEN ON THE 9TH DAY OF APRIL, 2015.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND OFFICIAL SEAL THIS 31ST OF JULY, 2015.

TIMMI A. PARRISH
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 11-20-2018

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #1104105

KELLY MCPHERSON	)	
	)	
CLAIMANT,	)	
	)	SC WORKERS' COMPENSATION COMMISSION
VS.	)	
	)	FULL BOARD HEARING OF
CHARLESTON COUNTY	)	
SCHOOL DISTRICT	)	KELLY MCPHERSON
EMPLOYER,	)	
AND	)	VS
	)	
SELF-INSURED	)	CHARLESTON COUNTY SCHOOL DISTRICT
	)	
CARRIER.	)	

This is the Transcript of the South Carolina Workers' Compensation Full Board Hearing of Kelly McPherson versus Charleston County School District, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 3:54 P.M., Monday, December 14, 2015, at South Carolina Workers' Compensation Commission, 1333 Main Street Columbia, South Carolina.

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REPORTED

BY

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*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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STIPULATIONS

Commissioner Wilkerson: Madame Court Reporter, if you'll call the case. Thank you.

Court Reporter: Okay. Today is December 14th, 2015. This is South Carolina Workers' Compensation Commission -- Compensation Case number 1104105. This is the case of Kelly McPherson, the Claimant, versus Charleston County School District, Employer, and Charleston County is self-insured. The Appellant is the Claimant, represented by Tripp Riesen. The Respondent is represented by Matthew O. Riddle. Each side is allowed ten (10) minutes for oral argument and the Appellant three (3) minutes in reply. You are requested to argue the grounds of exception and stay within the record. The Single Hearing Commissioner was Commissioner James.

Mr. Tripp Riesen: Thank you, may it --

Commissioner Wilkerson: Please --

Mr. Tripp Riesen: -- please the panel.

Commissioner Wilkerson: -- Mr. Riesen, please. Thank you.

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1 Mr. Tripp Riesen: May I approach, Your
2 Honors?

3 Commissioner Wilkerson: Sure.

4 Mr. Tripp Riesen: I have two (2) -- two
5 (2) cases I have already provided. This is
6 from the Appellant Panel and Your Honor
7 you'll have to decide it's opinion, a couple
8 of years ago; it's the same exact issue as to
9 average weekly wage.

10 Commissioner Taylor: As long as he
11 gives us two (2), that's fine.

12 ARGUMENT FOR THE APPELLANT

13 By Mr. Tripp Riesen:

14 Your Honors, I -- I'm here before you on
15 two (2) issues but the main issue here is we have
16 a school teacher who was employed by the
17 Charleston County School District and the issue is
18 how to calculate her average weekly wage; I'm
19 going to be arguing that in about five (5) or six
20 (6) minutes and he's going to handle the -- the
21 disability portion. As you know, our public
22 school teachers are the hardest working and most
23 underpaid public servants in the state and Ms.
24 McPherson had a contract with the Charleston
25 County School District to work nine (9) months out

1 of the year. Her wages were based on her labor;
2 the labor she performed was based on thirty-eight
3 (38) weeks or nine (9) months. She did not work
4 summers and did not make a penny over the summers
5 working for the District and the School District
6 is the one who mandates that she receive her
7 payment allotted over fifty-two (52) weeks, even
8 though she only works for thirty-eight (38) weeks;
9 it's a type of deferred compensation. The Carrier
10 wants to -- it's our position the Carrier wants to
11 dilute her earning capacity divide -- by dividing
12 by fifty-two (52) weeks, even though she was only
13 paid for thirty-eight (38) weeks of work; her
14 earning capacity was based on thirty-eight (38)
15 weeks of work. Section 42-1-40, as you all know,
16 is -- is the statute here and it has four (4)
17 methods to determine average weekly wage. The
18 first is the primary method, as the Court has
19 said, and it must -- the word must is -- is in
20 that language -- the wage must be calculated by
21 taking the total wages paid and dividing by
22 fifty-two (52) or the actual number for which
23 wages were paid, whichever is less. That is the
24 language; that's what we believe is important
25 here. Ms. McPherson was paid for thirty-eight

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1 (38) weeks, thirty-eight (38) weeks are clearly
2 less than fifty-two (52); it's our position that
3 the plain reading of the statute is that you would
4 divide by thirty-eight (38) weeks. Additionally,
5 South Carolina Code Annotated 59-21-20
6 specifically states that teacher's salaries are
7 paid based on a length of a hundred and ninety
8 (190) days or thirty-eight (38) weeks.
9 Commissioner James determined in her order -- she
10 agreed with us that if she used the first method
11 that she would be required to divide by
12 thirty-eight (38); that was in conclusion of law
13 number six (6) on pages 21 and 22. Using the
14 second method, it basically states -- and that
15 would yield the same exact result, a thirty-eight
16 (38) week divisor. When employment prior to the
17 injury extended over a period of less than
18 fifty-two (52) weeks, you divide by the number of
19 weeks during which the employee earned wages, so
20 long as it's fair and just to both parties.
21 Again, Commissioner James determined if she
22 utilized this method it would require a
23 thirty-eight (38) week divisor rather than a
24 fifty-two (52) week; that was in her opinion. But
25 instead of utilizing the primary or secondary

1 methods, she invoked exceptional circumstances,
2 which is the catch-all or the -- or the fourth
3 (4th) method and -- but she used the same formula
4 from the primary method and divided by fifty-two
5 (52) weeks, which she previously determined would
6 require thirty-eight (38). Now, I want to talk
7 about Breland versus Colleton County; that's the
8 case that we think is the most important. That
9 had a school bus driver whose wages were tied to
10 the school year, which was a thirty-nine (39) week
11 period but he only worked thirty-six (36) weeks
12 because he had three (3) weeks of vacation. His
13 benefit -- he died, and his beneficiaries argued
14 that the average weekly wage should be based on
15 thirty-six (36) rather than thirty-nine (39) weeks
16 and they wanted to use the exceptional
17 circumstances reason. Our Supreme Court reversed
18 the Circuit Court and the Commission, who had --
19 who had actually used the exceptional
20 circumstances; they reversed and said, "There is
21 no ambiguity in the statute here applicable.
22 Where the employment prior to the injury extended
23 over a period of less than fifty-two (52) weeks,
24 the method of dividing the earnings during that
25 period by the number of weeks, and parts thereof,

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1 during which the employee earned wages shall be
2 followed. Unquestionably the result is fair and
3 just and the prescribed method should have been
4 applied in this case." We believe that is the
5 same issue in this case. Under both the primary
6 and secondary methods of calculations the statute
7 is unambiguously clear, Ms. McPherson's wages were
8 earned over a thirty-eight (38) week period. It
9 was -- Breland was further validated in '96, by
10 our Legislature when they inserted the word must
11 in the statute and most importantly they inserted
12 the language, divided by fifty-two (52) or by the
13 actual number of weeks which wages are paid;
14 whichever is less. They thought that that was
15 important enough to add that in '96; that wasn't
16 even in there when Breland was there. So, with
17 the Breland decision and the amendment the statute
18 is clear, exceptional circumstances would not
19 apply in this case. Commissioner James decided
20 Breland was distinguishable and she relied on a
21 North Carolina case of Conyers. However, Conyers
22 didn't have the Breland case as precedence and
23 also North Carolina's Conyers average weekly --
24 excuse me -- North Carolina's average weekly wage
25 statute has five (5) ranked -- five (5) ways to

1 determine rank in order of preference; each
2 subsequent method can only be applied if the
3 previous method is inapplicable. Notably, North
4 Carolina's primary method only states that wages
5 are to be divided by fifty-two (52) weeks; it
6 doesn't have our language, which says or the
7 number of weeks for which wages were paid,
8 whichever is less; that's not in their primary
9 method. So, Conyers couldn't use the primary
10 method; they had to work their way down. In fact,
11 no where in the statute of North Carolina does it
12 say whichever is less, nowhere. We've provided,
13 in our brief, the -- the case of Hines versus
14 Charleston County School District, again, that
15 precedence is no longer good but in the sense that
16 this went to the Circuit Court before it moved up
17 to the Court of Appeals but it is the same exact
18 issue, with the same school district, the same
19 argument that it would be a windfall because the
20 Claimant would be making more than her salary.
21 Judge Arrington disagreed, followed the strict
22 reading of the statute, as well as 59-21-20, which
23 is to pay and -- and decided that -- that she had
24 to follow the Breland and the -- the strict
25 reading of the statute and Charleston County

1 School District -- District chose not to appeal
2 that. Finally, with respect to exceptional
3 reasons, every case that I've looked at in South
4 Carolina, I've looked them all up, deal with
5 things like dual employment, three (3) to four (4)
6 months of work, not nine (9) months of work;
7 that's not exceptional. The question becomes what
8 is exceptional; when do you invoke exceptional
9 reasons. We know from Bazen versus Badger, which
10 is a case in my brief, the -- the Court of Appeals
11 decided in 2010, that if someone works only
12 forty-eight (48) weeks, then it's proper to
13 calculate the average weekly wage based off of
14 forty-eight (48) and not fifty-two (52). So, when
15 does it become unfair exceptional? Is it
16 forty-seven (47) weeks? Is it forty-six (46)
17 weeks? Is it thirty-eight (38) weeks? Who knows?
18 I -- I guess their position would be anytime
19 someone works less than fifty-two (52) weeks and
20 you have to divide by the lesser number it's
21 exceptional; I don't know. But the statute
22 clearly states that if it's -- your wages -- it's
23 the time for which your wages are paid and earned
24 and in this case it's thirty-eight (38) weeks.
25 That's -- that's basically all I have to say at

1 this point. I'll let my father take the rest and
2 I'll talk on rebuttal. Thank you.

3 Commissioner Wilkerson: Sure. Thank
4 you.

5 Mr. Fred Riesen: Mine is -- will be rather
6 short. My biggest issue that I had in this case
7 was the statute, which says if a person has got
8 more than fifty (50) -- fifty percent (50%) that
9 it should be based on a five (500) multiple rather
10 than the three hundred (300) multiple. I look up
11 at a -- at a school teacher as somebody that's
12 extremely credible. Somebody whose doctor said
13 she would never exaggerate. Somebody who had
14 surgeries during the summer so she could continue
15 to work the whole year. I -- I just think that
16 that particular section is such that when you have
17 -- now, they -- what they -- what was kind of
18 messed up in the beginning was that in Arizona
19 they only use the sixth (6th) edition and this
20 particular surgeon there utilized the sixth (6th)
21 edition and came up with like fourteen percent
22 (14%) versus -- I -- well, I ended up sending a
23 copy of the fifth (5th) edition and said we're
24 using both here, what are your thoughts? And he
25 -- he evaluated it and based upon that, what he

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1 said was, I think the fifth (5th) edition would be
2 more prevalent here and he -- he did mention that
3 there was some -- some problems with the sixth
4 (6th) edition as well. And if you take -- he --
5 he used the two (2) categories for the cervical
6 and for lumbar and if you take those two (2) and
7 you add them together -- because he didn't
8 specifically say fifty-one (51) or fifty (50), he
9 -- he used that average that was in the -- in the
10 AMA guides. If you take those two (2) and you
11 take an average of them, it's like fifty-one and a
12 half percent (51 1/2%). We also had him seen by
13 Dr. Keffer in Charleston, who was the treating
14 physician here before she moved to -- to Arizona.
15 And so, what we did, as well, is after we got all
16 of his notes and everything, we sent them all to
17 Dr. Keffer and asked him if he would give us a
18 rating. He rated her and his position was fifty
19 percent (50%), which was twenty-five (25) and
20 twenty-five (25) and he based it -- I think the
21 lower got -- got twenty-five (25) because there
22 was three (3) surgeries, not two (2). They had to
23 go -- on the lower they had to go in front and
24 back. And so, his position was -- was that. What
25 -- what blew us away is because we walked away it

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1 looked like we were getting five hundred (500)
2 weeks from what we were getting. I don't whether
3 that -- people can say things like that so you all
4 can settle the case; I don't know. But the bottom
5 line was we -- we didn't think it was going to be
6 an issue. So, months later when we got this thing
7 it kind of -- kind of blew us away. But the
8 bottom line is, well, I don't think she really
9 took that --

10 Commissioner Wilkerson: Finish your
11 thought pattern. You'll have three (3)
12 minutes in reply.

13 Mr. Fred Riesen: -- that was quick.

14 Commissioner Taylor: Well, no --

15 Commissioner Wilkerson: No, you can
16 finish your thought pattern.

17 Commissioner Taylor: -- oh, you can
18 finish that sentence.

19 Commissioner Wilkerson: Go ahead and
20 finish that thought.

21 Mr. Fred Riesen: Oh, okay.

22 Commissioner Wilkerson: Yes, sir.

23 Mr. Fred Riesen: Yes, I thought --

24 Commissioner Wilkerson: Just you can't
25 --

1 Mr. Fred Riesen: -- okay.

2 Commissioner Wilkerson: -- you can't --

3 Mr. Fred Riesen: What I'm saying --

4 Commissioner Wilkerson: -- can't

5 continue with --

6 Mr. Fred Riesen: -- what I think --

7 Commissioner Wilkerson: -- another

8 argument.

9 Mr. Fred Riesen: -- what I think is she

10 --

11 Commissioner Wilkerson: Yes, sir.

12 Mr. Fred Riesen: -- what she -- what she

13 didn't hang -- hang her hat on was the fact that

14 -- that this was a mathematical teacher; so, she

15 was pretty good with the numbers. So, I went

16 through all of the different things that she did

17 at the house and --

18 Mr. Riddle: This is a new argument.

19 Mr. Fred Riesen: -- and every -- and

20 everywhere else.

21 Commissioner Wilkerson: Is this -- is

22 this part of what you --

23 Mr. Riddle: This isn't finishing your

24 thought.

25 Commissioner Wilkerson: Yes, finish

1 your thought, not -- you don't get to
2 continue the argument. You've got ten (10)
3 minutes; you all get to decide how you want
4 to allot your ten (10) minutes. You've got
5 three (3) minutes in reply --

6 Mr. Fred Riesen: Oh, oh, oh --

7 Commissioner Wilkerson: -- but finish
8 your thought. Yes.

9 Mr. Fred Riesen: -- oh, this is just
10 the reply you were telling me?

11 Commissioner Taylor: No.

12 Commissioner Wilkerson: No, no.

13 Commissioner Beck: You're done.

14 Commissioner Wilkerson: You had ten
15 (10) -- you all had ten (10) minutes.

16 Mr. Fred Riesen: Okay.

17 Commissioner Wilkerson: Your --

18 Mr. Fred Riesen: And the ten (10)
19 minutes is up?

20 Commissioner Beck: Yes.

21 Commissioner Wilkerson: -- your ten
22 (10) minutes is up.

23 Mr. Fred Riesen: Okay.

24 Commissioner Wilkerson: I can't help
25 one side used seven and a half (7 1/2).

1 Mr. Fred Riesen: Well, all I can say is
2 -- all I can say is it's all in the brief.

3 Commissioner Wilkerson: Okay.
4 Absolutely.

5 Mr. Fred Riesen: All right.

6 Commissioner Wilkerson: We were -- I
7 was going to say that before you sat down;
8 we've got it in the brief. Thank you.
9 Please, Mr. --

10 Mr. Fred Riesen: I don't hear as good
11 as I used to, by the way; I'm sorry about
12 that.

13 Commissioner Wilkerson: -- that's okay.

14 Mr. Riddle: All right. May it please
15 the Commission.

16 Commissioner Wilkerson: Please.

17 ARGUMENT FOR THE RESPONDENT

18 By Mr. Riddle:

19 Mr. Riddle: The employer is requesting that
20 the Commissioner's well reasoned order be affirmed
21 in full. With regard to the average weekly wage,
22 the Single Commissioner correctly determined that
23 exception reasons justified calculating the
24 Claimant's average weekly wage in this case based
25 upon fifty-two (52) weeks even though she only

1 worked during the nine (9) month school year.
2 This method of calculation produces a result that
3 is fair and just to both parties and accurately
4 reflects the Claimant's actual earning capacity.
5 The Claimant in this case earned just over forty
6 thousand dollars (\$40,000.00) in 2010. The
7 Claimant testified that she earned substantially
8 the same amount each year that she works as a
9 teacher in the years she worked prior to 2010, and
10 ongoing until now; she continues to work as a
11 middle school math teacher and she continues to
12 earn about forty thousand dollars (\$40,000.00) a
13 year. Now, she only worked during the school year
14 and the Claimant is correct that under the
15 standard method, the first method in the -- in the
16 statute, we would only use those thirty-eight (38)
17 weeks and divide her earnings, about forty
18 thousand dollars (\$40,000.00), by thirty-eight
19 (38) weeks. But when you use that method it
20 results in an average weekly wage that's over a
21 thousand dollars (\$1,000.00) and that's the same
22 average weekly wage as someone who earns
23 fifty-five thousand dollars (\$55,000.00) a year;
24 that's fifteen thousand dollars (\$15,000.00) more
25 than what the Claimant testified she earns

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1 year-after-year. And therefore, using the
2 standard method the Single Commissioner correctly
3 deterred -- determined that would create a
4 windfall for the Claimant and would be an unfair
5 penalty to the Employer. The Single Commissioner
6 correctly recognized that this unfair result --
7 this disparity between the Claimant's actual
8 earnings year-after-year and an inflated average
9 weekly wage that would reflect a fifty-five
10 thousand dollar (\$55,000.00) annual earnings, this
11 exceptional reason justified using an alternative
12 method.

13 Commissioner Beck: But there was --
14 there was reference in the hearing transcript
15 that the prior year she was paid year around;
16 did I read that correctly or incorrectly?

17 Mr. Riddle: I'm not sure --

18 Commissioner Beck: Like every --

19 Mr. Riddle: -- Commissioner --

20 Commissioner Beck: -- every two (2)
21 weeks she --

22 Mr. Riddle: -- she may have testified
23 to that and would contend it doesn't make any
24 difference at all.

25 Commissioner Beck: -- but what happened

1 -- did -- did she have a choice of whether to
2 get paid over a twelve (12) month period or
3 was she required to be paid over a nine (9)
4 month period?

5 Mr. Riddle: That, I -- I believe that
6 testimony and evidence -- that is not in
7 evidence and whether she was --

8 Commissioner Beck: I couldn't find it;
9 that's what I'm trying to figure out.

10 Mr. Riddle: -- and -- and I would contend,
11 Commissioners, here today that that doesn't impact
12 the fairness provision of the statute and the --
13 and the decision that the Single Commissioner
14 made. What is relevant is the Claimant's actual
15 earnings year-after-year and whether that average
16 weekly wage calculated under the Act reflects her
17 actual earnings. The South Carolina Supreme Court
18 stated in Bennett versus Gary Smith Builders that
19 the ultimate objective of the Act's wage
20 calculation is to arrive at a fair approximation
21 of the Claimant's probable future earning
22 capacity; the Single Commissioner's ordered method
23 of calculation adheres to that objective. It
24 produces a result that is fair to both parties and
25 accurately reflects the Claimant's actual earnings

1 of about forty thousand dollars (\$40,000.00) a
2 year, year-end and year-out. Her decision is also
3 in line with the North Carolina case that Mr.
4 Riesen mentioned, which is Conyers versus New
5 Hanover County Schools. Now, North Carolina
6 decisions, of course, aren't binding on this
7 Commission but it's well established that North
8 Carolina case law is given weight because the --
9 the South Carolina Act -- it was patterned after
10 North Carolina's law. The Conyer -- Conyers case
11 is directly on point with the present case and the
12 Single Commissioner correctly considered that case
13 to inform her decision in favor of using fifty-two
14 (52) weeks. Now, the Claimant's arguments
15 opposing the Single Commissioner's order are
16 without merit. The Claimant first incorrectly
17 argues that using thirty-eight (38) weeks actually
18 somehow produces a fair result. The Claimant
19 argues that -- and this was mentioned in the
20 Claimant's brief -- that under their proposed
21 method of calculation, which creates an average
22 weekly wage that's over a thousand dollars
23 (\$1,000.00), one (1) year of TTD payments with --
24 at the max -- which would be at the max comp rate
25 under that average weekly wage, would still be

1 less than her actual gross annual earnings before
2 taxes but this -- the same is true in every
3 Workers' Comp case. A Claimant's comp rate is
4 typically two-thirds (2/3) lower than her actual
5 gross earnings unless the Claimant has earned the
6 minimum -- less than the minimum comp rate. As a
7 result practically every Claimant in every
8 Workers' Comp case receives less in compensation
9 benefits than her total gross earnings, pre-taxed
10 gross earnings. This basic figure of the no fault
11 Workers' Comp system does not somehow require that
12 the Claimant in this case receive an artificially
13 increased average weekly wage. One (1) year of
14 Workers' Comp benefits, pursuant to the Single
15 Commissioner's order using fifty-two (52) weeks,
16 would be exactly two-thirds (2/3) of her annual
17 earnings; this result is precisely what is
18 required by the Act and regulations. To the
19 contrary, under the Claimant's proposed comp rate,
20 it would result in annual TTD payments that equal
21 to ninety percent (90%) of her pre-injury annual
22 earnings. This is not what the Legislature
23 intended in devising the no fault Workers' Comp
24 system. The Single Commissioner correctly held
25 that this result would be a windfall and it's not

1 fair and that it would be an unfair penalty to the
2 Employer. The Claimant also contends that, based
3 on this Breland case that was mentioned, that
4 South Carolina law prohibits using fifty-two (52)
5 weeks in this case, even though the result would
6 be unfair; this argument is also without merit.
7 That 1950 case of Breland versus Colleton County
8 does not require that thirty-eight (38) weeks be
9 used in every case involving a school employee.
10 The Breland court only held that for that Claimant
11 in that case, who was a bus driver contracted to
12 earn seventy-five dollars (\$75.00) a month and he
13 died in a motor vehicle accident, his weekly wage
14 would be improperly and artificially increased by
15 excluding a three (3) week period, a vacation
16 period. And so, Breland actually supports the
17 Single Commissioner's order and is another reason
18 should be affirmed. The Court in Breland did not
19 address the issue before this panel, whether the
20 average weekly wage for school employees should be
21 based on thirty-eight (38) weeks or fifty-two (52)
22 weeks. We're not told in the Court's opinion why
23 the employer did not argue in favor of a fifty-two
24 (52) week divisor. We're likewise not told how
25 long the Claimant had worked for the County before

1 his accident occurred, what he did during the
2 months he wasn't working and what his typical
3 annual income was; those issues were not relevant
4 -- those facts were not relevant to the very
5 narrow issue before the Court in that case.
6 Therefore, the Single Commissioner correctly
7 concluded that Breland only applies to the present
8 case to support her conclusion that just as
9 average weekly wage in Breland was artificially
10 increased by deducting three (3) weeks from that
11 Claimant's work period; the Claimant's average
12 weekly wage in this case would be artificially
13 increased by deducting the summer months from
14 consideration. The Single Commissioner also
15 correctly determined that the other statutes and
16 case law cited by the Claimant were either
17 inapplicable, erroneous or not binding on this
18 Commission. And in the interest of time, I just
19 want to emphasize my primary arguments today, the
20 three (3) points that I've made, that the
21 Commissioner's decision is correct based on her
22 application of the average weekly wage statute and
23 the fairness provisions. And number two (2), that
24 using the standard method in calculating weekly
25 wage based upon thirty-eight (38) weeks inarguably

1 produces a windfall to the Claimant and an unfair
2 penalty to the Employer. And that's -- and three
3 (3), that South Carolina law, including the
4 Breland case, does not mandate a thirty-eight (38)
5 week divisor and, therefore, the Single
6 Commissioner properly considered the Conyers case
7 out of North Carolina to inform her decision. And
8 I would contend that the North Carolina statute is
9 -- is practically identical to the South Carolina
10 wage statute, there -- and the -- any difference
11 that Mr. Riesen mentioned before has no impact on
12 the application of this fairness provision that
13 allows flexibility for the Commission to calculate
14 an average weekly wage that accurately reflects
15 the Claimant's earnings. And now I'll move on to
16 the disability portion of the Commissioner's
17 order. She -- she ordered forty-five percent
18 (45%) PPD to the back. Her award is based on the
19 preponderance of the reliable evidence in the
20 record, including the Claimant -- the
21 Commissioner's observation of the Claimant at the
22 hearing and the deposition testimony of the
23 authorized treating physician, Dr. Paul Gause.
24 The Claimant is forty-four (44) years old. By all
25 accounts she had an excellent recovery from her

1 single level fusions at C5, 6 and L5, S1. The
2 Claimant continues to work as a middle school math
3 teacher, the same job she held before the
4 accident. She is able to drive. She walks a mile
5 a day, every day before school, and she walks
6 another two (2) miles during the course of her
7 normal activities during the day. She does not
8 use any prescription pain medication whatsoever
9 and, in fact, she hardly uses any pain medication
10 at all; she testified that she only takes Motrin
11 maybe once or twice a week. And furthermore, the
12 Claimant's testimony regarding all of her pain and
13 problems in her personal life directly contradicts
14 the medical narratives from the treating
15 physician. Dr. Gause's physical exam tells a
16 completely different story than the Claimant's
17 testimony at the hearing. His reports indicate
18 only that the Claimant had an excellent recovery
19 with no verifiable radicular symptoms and was able
20 to return to work in her pre-injury job. There is
21 no mention in his records whatsoever along --

22 Commissioner Wilkerson: Finish your
23 thought pattern.

24 Mr. Riddle: -- and the Commissioner
25 correctly considered all that evidence and

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1 testimony and it -- it's the preponderance of
2 reliable evidence that supports her decision and
3 should be affirmed. Thank you.

4 Commissioner Wilkerson: Okay. Three
5 (3) minutes in reply.

6 Mr. Tripp Riesen: Thank you. May it
7 please the Commission.

8 REPLY FOR THE APPELLANT

9 By Mr. Tripp Riesen:

10 Mr. Tripp Riesen: First of all, we've got to
11 go back to the primary method; it says the number
12 of weeks for which wages were paid or earned,
13 whichever is less. When would that ever come into
14 play if you're working less than fifty-two (52)
15 weeks? If you're working forty-eight (48) weeks,
16 like in Bazen or the Badgen case, the same
17 argument could be made that it's unfair and
18 exceptional. If you do the math, every single
19 time you divide by less than fifty-two (52) --
20 weeks when someone works less than fifty-two (52)
21 weeks you divide and then multiple by fifty-two
22 (52), you're always going to get more than
23 sixty-six and two-thirds percent (66 2/3%),
24 always, every time you divide by less than
25 fifty-two (52) weeks. So, arguably, it's always

1 an exception circumstance.

2 Commissioner Beck: Well, I don't know
3 if that's necessarily the case. If you had,
4 for example, a construction worker who comes
5 on the job and he has worked eight (8) weeks
6 and gets hurt, you may not have any other
7 option but to take those eight (8) weeks that
8 -- that -- what he earned during those eight
9 (8) and divide it by the eight (8). This is
10 -- this situation is a tad bit different in
11 that year after year, after year, at least
12 what the evidence is -- is showing me, is she
13 makes roughly the same amount of money every
14 year. This isn't -- those two (2) scenarios
15 are completely different, Mr. Riesen.

16 Mr. Tripp Riesen: Yes, she makes
17 --

18 Commissioner Beck: So, I -- so, I would
19 dispute your assertion that you would -- you
20 would never --

21 Mr. Tripp Riesen: -- well, the point
22 I'm making --

23 Commissioner Beck: -- use the fewer
24 number of weeks.

25 Mr. Tripp Riesen: -- yes, sir. What --

1 but the point I'm making is, but she is
2 earning that over nine (9) months; not a
3 year. She only works nine (9) months out of
4 the year.

5 Commissioner Wilkerson: So, let me ask
6 you a question.

7 Mr. Tripp Riesen: Yes, sir.

8 Commissioner Wilkerson: So, you would
9 only pay her thirty-eight (38) weeks of
10 temporary total every year?

11 Mr. Tripp Riesen: It would thirty (30)
12 -- straight out of what the statute says,
13 thirty (30) --

14 Commissioner Wilkerson: So, you
15 wouldn't pay her the other fourteen (14)
16 weeks of temporary total if she was out of
17 work?

18 Mr. Tripp Riesen: -- she would be paid
19 thirty-eight (38) for the -- thirty-eight
20 (38) weeks drawn out over fifty-two (52)
21 weeks, which is how the School District
22 mandates that.

23 Commissioner Wilkerson: My question is,
24 if she is out of work for the entire year --

25 Mr. Tripp Riesen: Yes, sir.

1 Commissioner Wilkerson: -- do you cut
2 her temporary total off for the last fourteen
3 (14) weeks?

4 Mr. Tripp Riesen: I'm not sure if I'm
5 following you.

6 Commissioner Wilkerson: If she is out
7 of work -- if she's written out of work for a
8 year --

9 Mr. Tripp Riesen: Yes, sir.

10 Commissioner Wilkerson: -- do you cut
11 off her last fourteen (14) weeks?

12 Mr. Tripp Riesen: No. You -- you would
13 -- it would be --

14 Commissioner Wilkerson: So, then she
15 would be getting ninety percent (90%) of her
16 pay as opposed to sixty-six and two-thirds
17 (66 2/3) of her pay, correct?

18 Mr. Tripp Riesen: She would be getting
19 the pay based on what her salary was over the
20 last four (4) quarters. So, if her salary
21 was forty thousand dollars (\$40,000.00), you
22 would divide it by thirty-eight (38) and
23 multiple -- and then basically multiple times
24 point six, six, six, seven (.6667) to get her
25 comp rate.

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1 Commissioner Beck: No, I think the --
2 the point Commissioner Wilkerson is making is
3 that if you did that over the course of the
4 year it goes back to Mr. Riddle's point, now
5 she's making fifteen thousand dollars
6 (\$15,000.00) more a year.

7 Mr. Tripp Riesen: Well, she's not
8 making that, we know, because -- she's not
9 making fifty-five thousand dollars
10 (\$55,000.00) because they're paid --

11 Commissioner Beck: That's right; she's
12 not.

13 Commissioner Wilkerson: I agree.

14 Mr. Tripp Riesen: -- they're paid
15 two-thirds (2/3) of it.

16 Commissioner Wilkerson: Okay.

17 Mr. Tripp Riesen: So, she's making
18 two-thirds (2/3) of that; so, she would make,
19 like, thirty-six thousand (\$36,000.00) versus
20 the -- the forty thousand (\$40,000.00). So
21 --

22 Commissioner Wilkerson: Go ahead, we'll
23 give you a little more time because we asked
24 you some questions.

25 Mr. Tripp Riesen: -- okay. I'm sorry. So

1 -- but the point I was making is, what I think we
2 -- I know it's not -- it's a different
3 circumstance but our teachers, they work -- they
4 work nine (9) months out of the year; that's what
5 they're paid for. And I don't know how she
6 follows -- I agree, if you're working two (2)
7 months out of the year, that -- yes, that is an
8 exceptional reason because it doesn't make sense,
9 but nine (9) months out of the year -- if the
10 Court has determined that forty-eight (48) weeks
11 requires a divisor of forty-eight (48), then why
12 not thirty-eight (38)? Where do you cut it off is
13 the question for you all. When does it become
14 unfair? And our teachers, they deserve this; this
15 is a whole class, this affects them going forever.
16 So, it's not just unfairness to the Employer; it's
17 unfairness to -- to the -- the teacher as well
18 because it reach -- their earning capacity reaches
19 into the future based on nine (9) months of work,
20 not twelve (12) months of work. Thank you.

21 Commissioner Wilkerson: All right.

22 Commissioner Beck: Thank you.

23 Commissioner Wilkerson: Thank you.

24 Commissioner Taylor: Thank you.

25 Commissioner Wilkerson: I appreciate

1 it. Thank you all. I appreciate it. This
2 concludes the hearing; thank you all for
3 being here this afternoon. Thanks.

4 (THERE BEING NO FURTHER ARGUMENTS, THE HEARING CONCLUDED AT

5 4:20 P.M.)

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STATE OF SOUTH CAROLINA)
) CERTIFICATE
 COUNTY OF RICHLAND)

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Full Board Hearing of Kelly McPherson, vs. Charleston County School District;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 33 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 31st Day of January, 2016.

 Gloria G. Davis
 Gloria G. Davis
 Notary Public for South Carolina
 My Commission Expires 12/21/21

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

W.C.C. File No.: 1104105

Kelly McPherson, ... Claimant/Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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September 28, 2016