

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal From The South Carolina  
Workers' Compensation Commission

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**RECEIVED**

Avery B. Wilkerson, Jr., Commissioner  
T. Scott Beck, Commissioner  
Aisha Taylor, Commissioner

**FEB 17 2017**

**SC Court of Appeals**

WCC File No. 1104105  
Appellate Case No. 2016-000597

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Kelly McPherson,

Claimant/Appellant,

v.

Charleston County School District,

Employer/Carrier/Respondent,

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**RESPONDENT'S REPLY BRIEF TO  
THE SOUTH CAROLINA EDUCATION ASSOCIATION'S *AMICUS CURIAE* BRIEF IN  
SUPPORT OF APPELLANT**

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## STATEMENT OF THE ISSUES ON APPEAL

- I. **Did the South Carolina Workers' Compensation Commission correctly calculate the Claimant's average weekly wage when it divided her salary for the last four quarters by fifty-two?**

### INTRODUCTION

This appeal is not about the value of a teacher. No governing body, not the courts, not the Legislature, and not the South Carolina Workers' Compensation Commission ("Commission"), could determine the true value that teachers provide to society. Instead, the appeal is about the calculation of one's weekly wage under the South Carolina Workers' Compensation Act (the "Act"). As our Supreme Court has held, "[t]he objective of wage calculation is to arrive at a fair approximation of the claimant's probably future earning capacity."<sup>1</sup>

### ARGUMENTS AND CITATION OF AUTHORITY<sup>2</sup>

- I. **The Commission correctly calculated the Claimant's average weekly wage when it divided her salary for the last four quarters by fifty-two.**

The South Carolina Education Association's (the "SCEA") argument that provisions of the South Carolina Code of Laws outside of the Act should effect how the Commission applies the Act is misplaced. The Commission correctly concluded that S.C. Code Ann. § 59-21-20 (Supp. 2015) did not mandate the use of a 38-week divisor. (R. p. 90, ¶ 22.) Section 59-21-20 confirms that the General Assembly shall make sufficient appropriations to pay all public school teachers for 190 days. Similarly, S.C. Code Ann. § 59-1-400(A) (Supp. 2015) merely provides for how sick leave should be calculated, and S.C. Code Ann. § 59-1-425(A) (Supp. 2015) simply sets the statutory school term at 190 days annually with a minimum of 180 days of instruction.

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<sup>1</sup> Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978).

The purpose of the South Carolina School Code, which includes § 59-1-400, § 59-1-425, and § 59-21-20, is “to provide for a State system of public education and for the establishment, organization, operation, and support of such State system.” S.C. Code Ann. § 59-1-20 (Supp. 2015); see also S.C. Code Ann. § 59-1-10 (Supp. 2015). The South Carolina School Code does not mandate how to determine the average weekly wage of a public school employee under the Act.<sup>3</sup> If the SCEA’s and the Claimant/Appellant Kelly McPherson’s (the “Claimant”) argument is accepted, it would lead to the unfair result of the Claimant being paid 90% of her yearly earnings, instead of the “sixty-six and two-thirds percent” required by the statute. (R. p. 82, ¶ 42.) S.C. Code Ann. § 42-9-30(21) (Supp. 2015). This would lead to a specific, court-created rule only applicable to public school employees, which is done at the expense of the public school districts.

“Workers’ compensation statutes abrogate traditional common law approaches to compensate workers injured on the job. With rare exceptions, workers’ compensation displaces tort law with a no-fault system for on-the-job injuries. . . . By displacing traditional tort law the Legislature intended to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation.” Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003).

“It is essential to remember that the Legislature created a system, for good or ill, which ‘serve[s] a social function by providing the injured employee with sufficient income and medical care to keep him from destitution .... [they] are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep

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<sup>2</sup> Respondent Charleston County School District (the “School District”) relies upon the Statement of Case, Statement of Facts, and Standard of Review set forth in its principal brief.

<sup>3</sup> Similarly, regulations implemented by the State Board of Education, such as S.C. Reg. 43-240 (Summer School Programs) (regulating how credits are awarded for summer school), should

him from being a burden to others.” Id. at 116, 580 S.E.2d at 108 (citing Gary A. Scarzafava and Frank Herrera, Jr., *Workplace Safety—The Prophylactic and Compensatory Rights of the Employee*, 13 St. Mary’s L.J. 911, 944 (1982)).

The South Carolina Workers’ Compensation system is not perfect, but it does provide a no-fault system with quick recovery and limited litigation. “In exchange for these benefits, the parties and society as a whole bear some costs.” Id. at 115, 580 S.E.2d at 107. One such exchange is that an injured worker receives sixty-six and two-thirds percent of her average weekly wage based on a schedule of benefits as set forth in § 42-9-30.<sup>4</sup> Unlike tort law where all lost wages (both past and future) may be recovered, the injured worker under the South Carolina Workers’ Compensation system is limited to sixty-six and two-thirds percent of her average weekly wage for a period of time based upon the injury.

Notably, the fifth statutory method of computing the average weekly wage allows for the use of such other methods “[w]hen for exceptional reasons the foregoing would be unfair, **either to the employer or employee.**” S. C. Code Ann. § 42-1-40 (Supp. 2015) (emphasis added). “The objective of wage calculation is to arrive at a fair approximation of the claimant’s probably future earning capacity.” Bennett, 271 S.C. at 98, 245 S.E.2d at 131. In an effort to fairly approximate the Claimant’s future earning capacity and to “bring[] about a result fair to the employee and to the employer[,]” the Commission correctly applied the fifth statutory method and

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have no impact on how the **South Carolina Workers’ Compensation** Commission applies the **South Carolina Workers’ Compensation Act**.

<sup>4</sup> If the injured worker has more than one injured scheduled member, is partially disabled because of an injury not to a scheduled member, or is totally disabled, she may recover under S.C. Code Ann. § 42-9-10 (Supp. 2015) or S.C. Code Ann. § 42-9-20 (Supp. 2015), both of which determine the disability compensation by calculating sixty-six and two-thirds percent of the average weekly wage by a specific number of weeks.

divided the Claimant's yearly earnings by 52 weeks. See id. at 99, 245 S.E.2d at 131. (R. p. 81, ¶ 37; R. pp. 83-86, ¶¶ 7-13.)

Assuming, *arguendo*, that determining a teacher's average weekly wage using the fifth statutory method of § 42-1-40, the exceptional reason method, to divide her yearly earnings by 52 weeks was inequitable, "such sources of inequities are the province of the Legislature to correct by balancing the interests, risks and rewards of such a large, comprehensive program." Wigfall, 354 S.C. at 116, 580 S.E.2d at 108. The Legislature saw fit to allow exceptions to the mandate that no more than 500 weeks of compensation be paid for total disability if the injured worker was a paraplegic, a quadriplegic, or had suffered physical brain damage. See § 42-9-10(C). If the average weekly wage statute as written creates an inequity for teachers, it is for the Legislature to revise § 42-9-10 and not for this honorable Court to correct.

### **CONCLUSION**

The Commission's decision and order must be affirmed. The Commission's decision and order is not affected by any error of law, and it is supported by substantial evidence in the record for the reasons set forth in the School District's principal brief.

*[Signature on following page.]*

Respectfully submitted,

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