THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Commissioner
Melody James, Commissioner
Aisha Taylor, Commissioner

Appellate Case No. 2017-000692
Trial Court Case No. 1406130

Billy Wayne Herndon, Employee,	Claimant, Appellant-Respondent,
v.	
G & G Logging, Inc., Employer, and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc., Carrier.	Respondents-Appellants.

INITIAL BRIEF OF APPELLANT-RESPONDENT

---

s/ Andrea C. Roche
Andrea C. Roche, Esquire
Mickle & Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250
(803) 929-0029
aroche@mickleandbass.com
SC Bar No. 7563
Attorney for Appellant-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION WHEN THE FINDING WAS BASED ON SURMISE AND SPECULATION REGARDING THE CLAIMANT'S PLANS TO WORK IN THE FUTURE?

2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION WHEN ANY ASSERTED LIMITATION ON INCOME WAS TEMPORARY AND NOT INDICATIVE OF THE CLAIMANT'S PROBABLE FUTURE EARNINGS?

3. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THE DEFENDANTS WERE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS WHEN THE DEFENDANTS PAID AT THE HIGHER RATE FOR WELL OVER TWO YEARS, AND THE EMPLOYER KNEW THERE WAS A POTENTIAL ISSUE WITH THE COMPENSATION RATE YET FAILED TO ACT?

STATEMENT OF THE CASE

Billy Wayne Herndon ("the Claimant") requested a hearing in this admitted workers' compensation claim on August 18, 2015 against G&G Logging, Inc. ("the Employer") and its workers' compensation carrier Palmetto Timber Self Insurance Fund (collectively "the Defendants"). At a hearing on May 3, 2016, the Claimant argued his average weekly wage was $695.00 with a resulting compensation rate of $463.36 based on the actual wages he had earned with the Employer. (Transcript of hearing before the Single Commissioner, p. 5) He further argued the admitted accident had rendered him permanently and totally disabled, entitling him to all benefits arising therefrom. (Tr. p. 5)

At the hearing, the Defendants argued exceptional reasons existed to deviate from the standard wage calculation, and the Claimant was not permanently and totally disabled. (Tr. p. 7-10) By order dated July 26, 2016, the Single Commissioner found (1) the standard wage

calculation as found on the Form 20 was correct, (2) the Defendants had not contested the standard wage calculation for over two years, and (3) the Claimant was permanently and totally disabled. (Order of the Single Commissioner, p. 18, 22) The Defendants appealed.

By order dated February 23, 2017, the Full Commission affirmed the finding of permanent and total disability and reversed the finding regarding the wage calculation. (Order of the Full Commission, p. 22) The Full Commission found exceptional reasons existed to deviate from the standard wage calculation and found the Claimant's average weekly wage to be $297.69 with a resulting compensation rate of $198.47. (Order of the Full Commission, p. 16) The Full Commission also awarded the Defendants a credit for overpayment of benefits totaling $36,527.82. (Order of the Full Commission, p. 17) The Claimant filed a Notice of Appeal to this Court on March 21, 2017.

FACTS

The Claimant sustained an admitted injury by accident arising out of and in the course and scope of his employment on May 12, 2014. (Order of the Full Commission, p. 17) The Claimant was involved in an accident while driving a logging truck. He sustained an injury to his neck that affected his left shoulder, left arm, left hand and fingers. (Order of the Full Commission, p. 20)

The Claimant worked as a logging truck driver for over twenty years. (Tr. p. 33) In 2012, he attempted to retire, thinking at the time his Social Security would be enough to live on. (Tr. p. 39) Because his Social Security check did not prove adequate, he returned to work later in 2012 with Bootle, his employer for the last twenty years. (Tr. p. 39) He drove for Bootle whenever he was called to help. (Tr. p. 40, 59) In 2012, he earned approximately $7,700 and in

2013, he earned approximately $8800. (Tr. p. 58) He did not have any plan to limit his earning with Bootle. (Tr. p. 59) He testified that once he decided to return to work, he was going to work whenever he was needed. (Tr. p. 59)

In 2014, the Claimant began working for the Employer. (Tr. p. 59) He worked until the accident in May. (Tr. p. 59) During the time he worked, he earned $9,285. (Tr. p. 59) Because the Claimant began drawing Social Security benefits before his full retirement age, he was subject to the Social Security earnings test. 42 U.S.C. § 403; 20 C.F.R. 404.401 *et. seq.* If he earned over a certain amount, Social Security would withhold certain amounts and return them once he reached full retirement age. Id. The Claimant testified regarding the earnings test threshold:

Q. And was it your intention in 2014 then to earn as much as you could without reducing your retirement benefits?

A. Yes, sir.

Q. And did you tell that information to George Page during your vocational evaluation?

A. I don't remember whether I did or I didn't.

Q. Okay. If he put it in his report do you have any reason to believe that he made that up or would that have been sometime [*sic*] you may have talked about?

A. No, we may have talked about it. I just – I don't remember for sure.

Q. Did you discuss that arrangement with Greg Gruber? [the employer]

A. Me and Greg talked about what I could make and then what we would do after I made that. We would make that decision when we got to that point.

Q. Okay. So y'all had a discussion about giving you work up to a certain

point and that was about $15,000?

A. And then we would discuss what we was going to do from then on.

(Tr. p. 59-60)

The Defendants submitted a vocational report prepared by George Page. (APA p. 104) In the report, Mr. Page noted "Mr. Herndon retired at age 62 and began working part-time and revealed he could make up to $15,000 per year. He noted he would work until reached $15,000 and not work the rest of the year. He noted G&G Logging was aware." (APA p. 106)

ARGUMENTS

I. BECAUSE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION RELIED ON SURMISE AND SPECULATION IN DETERMINING THE CLAIMANT'S FUTURE EARNINGS, THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION.

II. BECAUSE THE ASSERTED LIMITATION ON THE CLAIMANT'S INCOME WAS TEMPORARY AND NOT INDICATIVE OF HIS PROBABLE FUTURE EARNINGS, THE COMMISSION ERRED IN FINDING EXCEPTIONAL REASONS EXISTED TO DEVIATE FROM THE STANDARD WAGE CALCULATION.

"The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This Court can "reverse or modify the decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Substantial evidence is neither a "mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Id.

Furthermore, in reviewing decisions of the Commission, the Court must consider two principles. "First is the guiding principle undergirding our workers' compensation system that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Id.

Section 42-1-40 of the Workers' Compensation Act governs calculation of the average weekly wage:

> "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. 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.

S.C. Code Ann. § 42-1-40. The determination of whether exceptional reasons exist to deviate from "the standard wage calculation method provided by the Workers' Compensation Act is a question of law." Elliot v. S.C. Dept. of Transportation, 362 S.C. 234, 237, 607 S.E.2d 90, 92 (Ct. App. 2004).

In Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978), the supreme court stated: "[t]he 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." Id. at 98-99, 245 S.E.2d at 132.

It was surmise, conjecture, and speculation to find the Claimant was going to cease

working once he reached the threshold of the Social Security earnings test. The Full Commission and the Single Commissioner specifically found the Claimant was credible. (Order of the Full Commission, p. 21) The Claimant testified although he retired in 2012 thinking he would have enough money, he had to go back to work because the money he had was not enough to get by. (Tr. p. 39) He testified he worked for Bootle in 2012 and 2013 with no plan to limit his earnings to the Social Security threshold, but rather just when Bootle needed someone to work. (Tr. p. 58-59) This testimony is uncontradicted in the record and is further bolstered by the fact there is no evidence the Claimant stopped working during 2012 or 2013. The only evidence in the record is he earned the amounts he did with Bootle because that is all the work Bootle offered to him. The Commission used the earnings for 2012 and 2013 as evidence that the Claimant was limiting his income because of the earnings test threshold, but there is absolutely no evidence in the record to support the Commission's finding.

The Claimant left Bootle and went to work for the Employer. The Claimant testified he and his Employer discussed the earnings test threshold, discussed that once the threshold was reached, they would further discuss and decide what the Claimant would do at that point. Although the Full Commission found the Claimant's testimony to be credible, it completely ignored this testimony and speculated that the Claimant would stop working once he reached the threshold. No one from the Employer testified. The Defendants offered no proof as to how the standard wage calculation required by § 42-1-40 would be unfair to the Employer.

The vocational expert hired by the Defendants included in his report the Claimant "noted he would work until he reached the $15,000 and not work the rest of the year," nevertheless, this is not borne out by the previous two years (no evidence the Claimant stopped work at any time during the year) and by the Claimant's credible testimony the he and his boss would discuss what

direction to take once he reached the threshold.

Even if the Claimant had intended to work only to the threshold, this limitation on his income was temporary; in fact, it would have only lasted approximately six months from the time of his accident. After that he would no longer be subject to any reduction of Social Security benefits. 42 U.S.C. 402-403. Therefore, any reliance on this temporary limitation of income to determine exceptional reasons to deviate from the standard wage calculation was error.

At the hearing below, the Defendants relied on Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978). In Bennett, the claimant, due to Social Security's earnings test threshold, worked for a few months and then quit for the rest of the year once he reached the threshold. He did this for nine years. The Commission's decision in Bennett was not based on speculation or surmise; it was based on the evidence that for nine years the claimant would stop working once he reached the threshold. At the time, the earnings test threshold applied to all recipients of Social Security retirement benefits, regardless of age. See Senior Citizens Freedom to Work Act (2000) As the law stood then, there was no time in the future where the earnings test threshold would not apply to the claimant in Bennett.

In contrast, for the Claimant in the case at bar, the earnings test threshold would be greatly increased on January 1, 2015 (from $15,720 to $41,880—an amount above what he was on schedule to earn for the Employer) and completely cease to exist in 2016. 20 C.F.R. §§ 404.401 *et seq.* Therefore, at the very least, the Social Security earnings test would have affected the Claimant's "probable future earning capacity" and "probable future earnings" for a very small period of time (6½ months). The Commission appears to have not considered the temporary nature of the earnings limitation, as it is not mentioned at all it its order. By failing to consider any limitation on his earning was very short-lived, the Commission erred by failing to

"arrive at a fair approximation of his future earning capacity."

In conclusion, the Commission relied on surmise and conjecture in determining what the future held for the Claimant upon reaching the earnings test threshold. Also, the Commission failed to consider the short-term effect any earning limitation would have of the Claimant's future earning capacity. The Claimant therefore requests this Court reverse the Commission and reinstate the average weekly wage as determined by the standard wage calculation method of § 42-1-40 of the Workers' Compensation Act or remand the case to the Commission to consider the short-term effect of the earning limitation in computing a fair approximation of the Claimant's future earning capacity.

III. BECAUSE THE EMPLOYER WAS AWARE OF A POTENTIAL COMPENSATION RATE ISSUE FOR WELL OVER TWO YEARS AND FAILED TO ACT, THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ABUSED ITS DISCRETION BY FINDING THE DEFENDANTS WERE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS.

Section 42-9-210 of the Workers' Compensation Act provides that "[a]ny payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made *may*, subject to the approval of the commission, be deducted from the amount to be paid as compensation." S.C. Code Ann. § 42-9-210 (emphasis added). Whether to award a credit is within the discretion of the Commission.

Assuming, *arguendo*, the Claimant intended to limit his income, the evidence in the record is clear the Employer was aware. The Claimant testified he discussed the issue with his Employer. The vocational report upon which the Defendants so heavily rely states the Employer was aware. Contrary to the assertions of defense counsel below, and the clearly erroneous

finding of the Full Commission that these issues were not known until discovery, the Defendants, through the Employer, were aware of this issue all along. The Employer knew for the almost three years it was paying temporary total disability at the higher rate. The Defendants could have easily requested a hearing at any time to address the average weekly wage issue.

Due to the Defendants' failure to act, the Commission abused its discretion by awarding the credit to the Defendants. The Claimant requests this Court reverse the finding of a credit for overpayment if the lower average weekly wage stands.

CONCLUSION

For the reasons stated, this Court should reverse the decision and order of the South Carolina Workers' Compensation Commission as to the average weekly wage or, in the alternative, remand this case to the Commission.

Respectfully submitted,

September 12, 2017

s/ Andrea C. Roche
Andrea C. Roche, Esquire
Mickle & Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250
(803) 929-0029
aroche@mickleandbass.com
SC Bar No. 7563
Attorney for Appellant-Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Commissioner
Melody James, Commissioner
Aisha Taylor, Commissioner

Appellate Case No. 2017-000692
Trial Court Case No. 1406130

Billy Wayne Herndon,
Employee,

Claimant, Appellant-Respondent,

v.

G & G Logging, Inc.,
Employer, and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.,
Carrier.

Respondents-Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondents-Appellants have been served the Initial Brief of Appellant-Respondent and Designation of Matter by depositing a copy in the United States Mail, first class postage prepaid, on September 12, 2017, addressed to the attorneys of record, as follows:

Brian Gallagher O'Keefe, Esquire
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Post Office Box 650007
Mount Pleasant, South Carolina 29465

Helen F. Hiser, Esquire
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Post Office Box 650007
Mount Pleasant, South Carolina 29465

Jonathan Gregory Lane, Esquire
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Post Office Box 650007
Mount Pleasant, South Carolina 29465

September 12, 2017

s/ Andrea C. Roche
Andrea C. Roche, Esquire
Mickle & Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250
(803) 929-0029
aroche@mickleandbass.com
SC Bar No. 7563
Attorney for Appellant-Respondent

MICKLE & BASS
Attorneys At Law

Ann McCrowey Mickle*†
J. Alan Bass*†
Derrick L. Williams*†
Andrea C. Roche *†
James "Jamie" Davidson, IV

September 12, 2017

Reply to: Columbia Office

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Billy Wayne Herndon, Appellant-Respondent v. G & G Logging, Inc. and Palmetto Timber S.I. Fund, c/o Walker, Hunter & Associates, Inc., Respondents-Appellants
Appellate Case No. 2017-000692

Dear Ms. Kitchings:

Enclosed for filing please find the original and two (2) copies of the Initial Brief of Appellant-Respondent and Designation of Matter in the above case. Please return a clocked-in copy in the self-addressed, stamped envelope provided.

If you have questions, please do not hesitate to contact me. With kind regards, I am,

Sincerely,
s/ Andrea C. Roche
Andrea C. Roche, Esquire
S.C. Bar No.: 7563
Mickle & Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250
(803) 929-0029
Attorney for Appellant-Respondent

ACR/dbc
Enclosures

930 Oakland Avenue
PO Box 10751
Rock Hill, SC 29731
(803) 980.0083
(803) 328.2525 fax

1519 Richland Street
PO Box 5639
Columbia, SC 29250
(803) 929.0029
(803) 929.1024 fax

1039 44th Avenue North
Suite 102
Myrtle Beach, SC 29577
(843) 839.2501
(843) 839.2507 fax

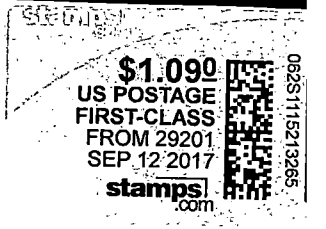
1517 Sam Rittenburg Blvd.
Charleston, SC 29407
(843) 406-2800
(888) 884-8311 fax

+Partner
*former SC Workers' Compensation Commissioner
www.MickleAndBass.com

Ann McCrowey Mickle*†
J. Alan Bass*†
Derrick L. Williams*†
Andrea C. Roche *†
James "Jamie" Davidson, IV

cc: Brian Gallagher O'Keefe, Esquire
Helen F. Hiser, Esquire
Jonathan Gregory Lane, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2780
Attorneys for Respondents-Appellants

Mickle & Bass, LLC
1519 Richland Street (29201)
PO Box 5639
Columbia, SC 29250



The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appea
1220 Senate Street (29201)
PO Box 11629
Columbia SC 29211-1629