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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner

Case No. 2015-002505

John Faubert, Employee,.....Respondent.

v.

University of SC Apprentice Students, Employer, and State Accident Fund, Carrier.....Appellants.

BRIEF OF APPELLANT

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II. DID THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION ERR IN FAILING TO FIND S.C. CODE ANN. §42-7-65, AND *SMITH V. BARNWELL COUNTY*, 384 S.C. 520, 682 S.E.2D 828 (2009) WERE THE CONTROLLING AUTHORITY APPLICABLE TO THE DETERMINATION OF THE AVERAGE WEEKLY WAGE AND CORRESPONDING COMPENSATION RATE?

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals from the appeal of an Order of the Appellate Panel of the South Carolina Workers' Compensation Commission. The primary issue is dispute between the parties is whether the Respondent, John Faubert, is entitled to an increase in the calculation of his average weekly wage and compensation rate to include both, his statutorily determined wages as an apprentice through the University of South Carolina (the Defendant/Appellant/Employer), as well as the wages he earned from his job as a manager at McDonalds. The Defendants are represented by Peter P. Leventis, IV, Esquire of The McKay Firm (McKay, Cauthen, Settana, & Stubley, P.A.). The Claimant, John Faubert, is represented by Zandra Johnson of the law firm Zandra L. Johnson, LLC.

The Claimant suffered an admitted compensable work accident when he tripped and fell on or about January 29, 2014, causing bodily injury. At the time of the injury, he was in a work study program completing his course in a graduate program through a satellite campus of the University of South Carolina. Respondent Johan Faubert was also employed at McDonalds as a manager at this time. After the accident on January 29, 2014, the Claimant was unable to return to his work study/graduate program until March 24, 2014. However, as of the date of the trial hearing in this matter before the single Commissioner, on September 23, 2014, Mr. Faubert was still unable to return to his job as a manager at McDonalds.

Graduate students in work study programs, such as Mr. Faubert, are not actually paid wages for the work study projects in which they participate for the purpose of completing credit hours. Normally, they would not be considered employees for the purposes of workers' compensation benefits. However, by virtue of S.C. Code Ann. §42-7-65, these students have been provided specified and limited workers' compensation benefits by the legislature. "The

average weekly wage for students of [...] state-supported colleges and universities while engaged in [...] apprentice programs [....] is fifty percent of the average weekly wage in the State for the preceding fiscal year" See Generally S.C. Code Ann. §42-7-65.

One of the primary purposes for the original Form 50 hearing requested by the Claimant Faubert, was for a determination of his average weekly wage and compensation rate for this claim, and specifically requesting to include his additional earnings from McDonalds into this calculation. In an Order issued on March 20, 2015, Commissioner Aisha Taylor held that S.C. Code Ann. §42-1-40 controlled the calculation of the average weekly wage and compensation rate in this matter, and that the case of *Smith v. Barnwell County*, 384 S.C. 520, 682 S.E.2d 828 (2009) was not applicable to this claim. (See Taylor Order, Findings of Fact No's. 1-2 (R. pp. 14-15)).

Pursuant to that Order, Mr. Faubert was therefore entitled to include his earnings from McDonalds into his average weekly wage and compensation rate, in addition to the statutorily prescribed average weekly wage and compensation rate, for the purposes of calculating his weekly indemnity benefits or total and/or partial disability. The single Commissioner further ruled that Respondent Faubert was entitled to temporary partial disability benefits, after his return to the graduate studies and apprentice program on March 24, 2014 based on the difference in average weekly wage and compensation rate of the monies he was no longer earning at McDonalds. The amount of the temporary partial compensation was awarded at the rate of two thirds of the difference between his newly calculated average weekly wage (which included the McDonalds earnings), and the statutorily assigned wage from the legislature to qualifying apprentices under S.C. Code Ann. §42-7-65. (See Taylor Order at Finding of Fact No. 7 (R. pp. 15-16)).

Within the applicable time period, Defendants/Appellants filed a Form 30 appeal to the full Commission citing four (4) grounds for exception and judicial review of the single Commissioner's Order issued March 20, 2015. The Appellate Panel of the Workers' Compensation Commission subsequently affirmed the single Commissioner Order as to the disputed issues over the calculation of the average weekly wage and compensation rate to include the McDonalds wages. That Order of the Appellate Panel was issued on November 3, 2015. This appeal by the Employer/Carrier to the Court of Appeals followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited to the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. §1-23-380(A)(5) (Supp. 2006).

The judicial review of the Workers' Compensation Commission's appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(5) (Supp. 2006).

However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial

evidence on the whole record." S.C. Code Ann. §1-23-380(A)(5)(e) (Supp. 2006); (*Houston v. Deloach & Deloach*, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)). See also *Grant v. Grant Textiles*, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) (noting that a reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law) (reversed on other grounds (*Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007)).

ARGUMENT

I. **DID THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION ERR IN RULING THAT THE APPLICABLE STATUTE FOR DETERMINATION OF AVERAGE WEEKLY WAGE IN THIS MATTER WAS S.C. CODE ANN. §42-1-40?**

II. **DID THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION ERR IN FAILING TO FIND S.C. CODE ANN. §42-7-65, AND *SMITH V. BARNWELL COUNTY*, 384 S.C. 520, 682 S.E.2D 828 (2009) WERE THE CONTROLLING AUTHORITY APPLICABLE TO THE DETERMINATION OF THE AVERAGE WEEKLY WAGE AND CORRESPONDING COMPENSATION RATE?**

Defendants contend that as to the question of stacking additional wages in this matter from a second job, onto the wages statutorily provided for by the legislature under S.C. Code Ann. §42-7-65 is a clear cut issue, and is not permitted. This question has already been expressly decided in South Carolina, through binding legal precedent of the Supreme Court in the case of *Smith v. Barnwell County*, 384 S.C. 520, 682 S.E.2d 828 (2009). Therefore, the case of *Smith* is worth quoting at length. Claimant Smith, was an inmate, who was entitled to workers' compensation benefits, and an assignment of a statutorily prescribed average weekly wage for his workers' compensation claims in the amount of $40.00 per week, through the introduction of

S.C. Code Ann. §42-7-65. "Average weekly wage designated for certain categories of employees."

In that case, Claimant Smith sought to increase the statutorily derived $40.00 average weekly wage through the inclusion of additional wages. Smith worked at another job during the week days, but had fallen and hurt his back while on a work assignment during his time serving out a sentence, on the weekends, for a prior conviction. In reversing the lower court's ruling, which had provided Smith was permitted to combine his wages, the Supreme Court made the following determinations and interpretation of the differences between S.C. Code Ann. §42-7-65 and §42-1-40:

> S.C. Code Ann. § 42-1-40 provides the method for calculating the average weekly wage, but allows for deviation from the method "for exceptional reasons. . . ." S.C. Code Ann. § 42-1-40 (2005). This Court has held that concurrent employment is one such exceptional reason. See *Foreman v. Jackson Minit Markets, Inc.*, 265 S.C. 164, 217 S.E.2d 214 (1975).
>
> Barnwell County argues on appeal that Smith was not an "employee" of Barnwell County and therefore, since Smith was not working for two or more employers when the injury occurred, Smith may not recover compensation for concurrent employment. We need not reach this issue because we agree with the County that, even assuming Smith is an "employee" for workers' compensation purposes, he may not combine wages under § 42-1-40.
>
> Originally, the average weekly wage for prisoners was addressed in § 42-1-40, which contained the "exceptional reasons" provision. In 1983, after this Court's decision in *Foreman*, the General Assembly removed the inmate section from § 42-1-40 and included it in the newly-created §42-7-65, which contains no "exceptional reasons" provision. Section [§]42-7-65 is entitled "Average weekly wage designated for certain categories of employees" and provides in part, "[t]he average weekly wage for county and municipal prisoners is forty dollars a week."
>
> By removing inmates from §42-1-40, designating a specific weekly wage for inmates, and not providing an "exceptional reasons" provision in §42-7-65, we find that the General Assembly intended that inmates not be allowed to combine wages in determining their average weekly wage. If the General Assembly had not intended such a result, there would have been no reason to remove inmates from §42-1-40.

> Given the above, we find that the General Assembly intended to deny inmates the ability to combine wages in determining their average weekly wage.
>
> *Smith v. Barnwell* at *Id.* (internal citations omitted).

In addition to the evaluation of these two different average weekly wages statutes by the *Smith* Court, Defendants/Appellants would further assert that the language of §42-7-65 indicates in the preamble to the listing of wages – in the very first sentence – that "the total average weekly wage of the following categories of employees is the following:" (emphasis supplied).

In the single Commissioner's ruling on this issue, as affirmed without modification by the Commission's Appellate Panel, the Claimant Faubert was permitted to stack his wages, The Orders of the Commission delineated different sections of §42-7-65 for which the trial Commissioner and Appellate Panel held that stacking of wages may, or may not, be applicable for exceptional reasons.

Both the single Commissioner's Order, as fully affirmed by the Appellate Panel, went on to hold that while *Smith* was applicable to inmates, it was therefore inapplicable students in apprentice programs for the purposes of construing the ability to combine wages. (See Taylor Oder at Findings of Fact No's 1-2 (R. pp. 14-15)). In response, these Defendants would simply assert that there is no support for this finding or the delineation of the different subsections of such employees – for purposes of attempting to distinguish the *Smith* claim and the instant case. Most importantly on this point - inmates and school apprentice/work programs fall under the exact same paragraph and subsection of §42-7-65. Therefore, the analysis in *Smith* falls foursquare on the facts of this case. Moreover, the Commission's determination of a differentiation in the calculation of average weekly wage for apprentices in work study programs and inmates – or any other category enumerated in this section of §42-7-65 – is inapplicable and

misplaced. Inmates and student apprentices in work study programs are *literally* right next to each other in the statute, one sentence after the other, in the exact same paragraph.

> The average weekly wage for inmates of the State Department of Corrections as defined in Section 42-1-480 is forty dollars a week. However, the average weekly wage for an inmate who works in a federally approved Prison Industries Enhancement Certification Program must be based upon the inmate's actual net earnings after any statutory reductions. **The average weekly wage for county and municipal prisoners is forty dollars a week.** The **average weekly wage for students** of high schools, state technical schools, and **state-supported colleges and universities while engaged** in work study, marketing education, or **apprentice programs** on the premises of private companies or while engaged in the Tech Prep or other structured school-to-work programs on the premises of a sponsoring employer is fifty percent of the average weekly wage in the State for the preceding fiscal year.
>
> S.C. Code Ann. §42-7-65 (emphasis supplied)

The single Commissioner, affirmed by the Appellate Panel, further held that §42-1-40 and the reasoning of the Court in *Steele v. Self Serve, Inc.*, 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999) are controlling, as opposed to §42-7-65 and *Smith, supra.* (See Taylor Order Finding of Fact No. 2 (R. pp. 14-15)). Further still §42-7-65 must be controlling and compelling in this matter. But for the dictates of §42-7-65 providing certain workers' compensation benefits to the Claimant by virtue of his status in a study apprenticeship, while earning graduate college credit hours, he would not even be entitled to workers' compensation benefits in the first instance.

III. **DID THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE CLAIMANT/RESPONDENT WAS PERMITTED TO 'STACK' HIS WAGES FROM A SECOND JOB IN ORDER TO DETERMINE THE CALCULATION OF HIS AVERAGE WEEKLY WAGE?**

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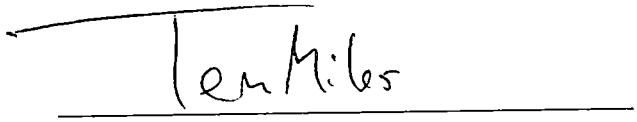
For the reasons outlined in arguments sections "1" and "2" hereinabove, Defendants assert that a higher average weekly wage and compensation rate is inapplicable to this claim for benefits. As such, the rulings of the single Commissioner and the Appellate Panel should be overturned on these points, meaning the Claimant's/Respondent's average weekly wage and compensation rate for this matter should be based solely on the prescribed wages outline in §42-7-65, without inclusion of consideration of any additional wages from his income from any other sources or employers. Therefore, the aspect of the single Commissioner's and Appellate Panel's Order(s) awarding additional temporary total and partial indemnity benefits, utilizing a calculation of any wages or earnings from secondary employment, is similarly inapplicable and should be reversed.

CONCLUSION

Based on the forgoing arguments, these Appellants, request that the Court of Appeals reverse and modify the findings and conclusions of the Worker's Compensation Commission as outlined hereinabove: A) In that S.C. Coded Ann. §42-7-65 is the appropriate and controlling statute in this matter for calculation of average weekly wage and weekly compensation rate

benefits.; B) *Smith v. Barnwell*, *supra*, is the appropriate and controlling authority for the analysis for determination of average weekly wage and compensation rate determination in this matter; C) And that any finding of additional/further temporary or permanent, partial or total, disability benefits, prefaced on secondary employment awarded by the Commission should therefore be reversed.

Respectfully Submitted



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June 3, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of the Appellants complies with the requirements of Rule 211(b), SCACR.

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June 6, 2016

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PROOF OF SERVICE

I certify that I have served the Final Brief on the attorney of record for John Faubert by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2016. Addressed as follows:

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June 6, 2016

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