THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1419428
Appellate Case No. 2017-001515

Timothy D. Jones, Employee, Claimant ..... Appellant,

v.

YMCA of Greenville, Employer,
and Accident Fund Insurance Company
of America, Carrier, ... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Workers' Compensation Commission erred in entering an average weekly wage that bears no resemblance to Tim Jones' proven earning capacity, ignoring his lengthy history as a high wage-earner and the unusual timing of his injury.

II. Whether the commission's finding that Jones' injury did not impact his ability to earn money during his period of temporary disability is clearly erroneous in view of the evidence.

STATEMENT OF THE CASE

This case involves the Workers' Compensation Commission's calculation of an injured worker's "average weekly wage."

Tim Jones has worked full time throughout his adult life. Since retiring from the Marine Corps in 2009 most of his jobs have involved working with contingency contracts and government contracts, often overseas. (2/10/16 Tr.pp.14-18).

In 2012 Jones began teaching exercise classes at the YMCA in addition to his regular job, and in December of 2014 he was injured while teaching one such class. (Id.pp.18, 30-31). Jones' injury happened to occur during a period of months when his part-time wages from the YMCA were the only wages he earned. Jones had left a high-paying job a few months before his injury and started an engineering firm with friends. (Id.pp.19-25). Within months of his injury he would gain a new high-paying job. (Id.pp.19-25); (APA p.73).

In spite of this high earning history, the Workers' Compensation Commission calculated Jones' average weekly wages based solely on his part-time job at the YMCA, finding Jones' average weekly wage was $23.95. (6/13/17 Or.p.15, ¶7). A single commissioner found this "may appear to be an unjust result" but believed it was required by

a "plain reading" of the average weekly wage statute. (Id.p.9, ¶23). Jones' argument was "well-reasoned," but the commissioner found the statute "unambiguous." (Id.p.8, ¶19).

The appellate panel affirmed by a 2 to 1 vote, concluding there were no exceptional reasons to calculate Jones' earning based on anything other than his wages from the YMCA. (6/13/17 Or.pp.8-9). The commission cited Jones' age, level of education, the extent of his injury, and the fact that he had returned to gainful employment. *Id.*

The appellate panel's dissenting member, who is also a lawyer, explained exceptional reasons justified expanding the average weekly wage calculation beyond Jones' part-time wages at the YMCA, observing Jones' pre-injury and post-injury wages indicated Jones' earning capacity. (Id.p.16).

Most of the facts were not contested. The commission noted the injury was admitted. (6/13/17 Or.p.2). The commission noted Jones worked at the YMCA an average of 2 to 5 hours per week and that the job was part-time. *Id.* The commission noted Jones changed jobs four months before his injury to start his own business and that his salary at his former job was in excess of $100,000 per year. *Id.* The commission noted Jones had a 16% impairment rating to his spine, a 10% impairment to his left arm, and that the injury required surgery. (Id.pp.13-14).

As to average weekly wage, the parties contested whether it was appropriate to limit the calculation to Jones' wages from the YMCA and whether Jones' injury—particularly his surgery and recovery—impacted Jones' ability to earn money from the business he started. Jones argued limiting his average weekly wage to his earnings from the YMCA gave a misleading picture of his earning capacity. (Jones' Panel Brief, pp.1-10). Respondents

argued Jones wasn't working anywhere other than the YMCA at the time of his injury, that using any other wages would require "speculation," and that a low average weekly wage made sense because Jones' return to work proved Jones had not actually lost any earning capacity at all. (Respondents' Panel Brief, pp.1-18).

ARGUMENT

There are two reasons this Court should reverse.

First, the commission erred in entering an average weekly wage that bears no resemblance whatsoever to Tim Jones' proven earning capacity. The average weekly wage statute's goal is to make a fair estimate of someone's earning capacity, and there is no serious dispute that Jones is and always has been a high wage-earner. The commission actually used Jones' *increased* future earnings to justify its ridiculously low estimate of his earning *capacity*. This makes no sense and constitutes an error of law. Jones' extended history as a high wage-earner and the unusual timing of his injury make it evident that a fair estimation of his earning capacity requires looking beyond his part-time earnings from the YMCA.

Second, the commission's finding that Jones' injury did not impact his ability to earn money during his period of temporary disability is clearly erroneous. Jones provided the only testimony in this case, and he plainly explained his surgery impaired his work on his start-up engineering firm. This is confirmed by additional evidence as well as common sense—Jones' ability to work was obviously affected while he was recovering from surgery. Anyone's ability to work would be affected during such an experience. The Court should reverse and remand, instructing the commission to enter an award of temporary and permanent disability benefits based on the appropriate average weekly wage.

I. The commission erred in entering an average weekly wage that bears no resemblance to Tim Jones' proven earning capacity, ignoring his lengthy history as a high wage-earner and ignoring the unusual timing of his injury.

The average weekly wage statute is codified at S.C. Code Ann. § 42-1-40 (Supp. ____) and contains a progression of methods for computing someone's average weekly wage. Average weekly wage ordinarily involves dividing the injured worker's earnings from the four quarters preceding the injury by 52 or the actual number of weeks worked. Alternative methods apply when the employment has extended for less than 52 weeks and when the employment has been so casual or short in duration that is impractical to use any of these methods. *Id.*

These methods are limited to the job the claimant was working at the time of his or her injury. This was established in *McCummings v. Anderson Theatre Co.*, even though the principle itself was stated in the circuit court's order and the Supreme Court stated the order was not binding precedent. 225 S.C. 187, 192-194, 81 S.E.2d 348, 349-350 (1954).

The final part of the average weekly wage statute is not limited to the job the claimant was working at the time of the injury. This part of the statute applies when "exceptional reasons" make the statute's default methods of computation "unfair" to either the employer or the employee. See § 42-1-40. In these circumstances, "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." *Id.* This case concerns the proper application of this language to the circumstances of this case.

a. The statute's goal is to determine a fair estimate of someone's earning capacity and the commission's decision is inconsistent with that goal.

The statute's purpose is to arrive at a fair estimate of a claimant's earning capacity. The Supreme Court explained this in *Foreman v. Jackson Minit Markets*, noting a deceased worker's dependents were "entitled to compensation on the basis of the employee's earning capacity." 265 S.C. 164, 168, 217 S.E.2d 214, 216 (1975). *Foreman* rejected the argument that it was unfair to combine the worker's wages from multiple jobs, observing the failure to do so "would not fairly reflect the earnings of a man who, with both employers, actually engaged in 70-odd productive hours each week." *Id.* at 170, 217 S.E.2d at 216.

The same principle appears in other sources. A leading treatise explains "the entire objective is to arrive at as fair an estimate as possible of claimant's future earning capacity[.]" Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* Ch.93, at 93-1 (2003). The same treatise later says:

> This worker's disability reaches into the future, not the past; the loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of the worker's life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis.

Id., § 93.01[1][g], at 93-17 to 93-18. This Court has said the statute is aimed at the "usual" situation of the claimant with one employer and that each case is a "quest" for truth. *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 308-311, 644 S.E.2d 784, 787-788 (Ct. App. 2007). The statute directs the quest to follow a different method if the claimant's job situation is *un*usual.

The commission's decision conflicts with these policies. Jones has a long history of full-time work. (2/10/16 Tr.p.15, line 3 - p.18, line 7). His engineering start-up was full-time work, (id.p.21, lines 4-14), and he ultimately returned to full-time work as an engineer about a year after his injury. (Id.p.25, lines 2-8). Oddly, the commission's decision noted each of these things, yet the commission also concluded the best estimate of Jones' weekly earning capacity was $23.95. That decision cannot be squared with the purpose of average wage calculation. Average weekly wage is not based on a snapshot of an arbitrary moment in time and does not require blinding out someone's long and established earning history.

b. The commission used Jones' *increased* future earnings to justify its shockingly low estimate of his *earning capacity*. This makes no sense and constitutes an error of law.

The single commissioner and the appellate panel's majority separately noted Jones had returned to work at a higher rate of pay than he was earning at the time of his injury. The single commissioner said this indicated Jones' earning capacity had not been impacted by his work-related injury. (5/16/16 Or.p.8, ¶19). The appellate panel said Jones' return to work at a higher rate of pay was relevant because average weekly wage is designed to estimate an injured worker's future earning *loss* and Jones has suffered no such loss. (6/13/17 Or.pp.10-12).

This reasoning makes no sense. If average weekly wage was tied to actual lost earnings, anyone who goes back to work without restrictions should have an average weekly wage of zero. Multiple precedents note that it is immaterial under the scheduled disability statute if a claimant returns to work at greater earnings than before an injury. *Lyles v.*

Quantum Chem. Co., 315 S.C. 440, 446, 434 S.E.2d 292, 295 (Ct. App. 1993); *G. E. Moore Co. v. Walker*, 232 S.C. 320, 325, 102 S.E.2d 106, 108 (1958); *Ripley v. Anderson Cotton Mills*, 209 S.C. 401, 406, 40 S.E.2d 508, 510 (1946). If a claimant's return to work may not be used to reduce an award, it is difficult to see how return to work provides a legal basis for driving down the average weekly wage.

The commission's reasoning relies on a misreading of precedent. South Carolina courts have often observed the goal of wage calculation is to arrive at a fair estimate of the claimant's probable future "earning capacity" and also that a claimant's "loss" from an injury must be thought of in terms of its "impact" on the claimant's "probable future earnings." This language first appeared in *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98–99, 245 S.E.2d 129, 131 (1978), and is lifted nearly verbatim out of *Larson's*, though *Bennett* does not attribute any source. *Larson's*, § 93.01[1][g], at 93-17 to 93-18. The commission relied on the language discussing "loss" to future earnings in justifying a lower average weekly wage, reasoning Jones has gone back to work and hasn't lost anything. (6/13/17 Or.p.10).

The full quote from *Larson's* rejects that reasoning. Also, that reasoning has already been shown to be inconsistent with cases affirming awards for claimants who have gone back to work making more money. Jones' impairments will be with him for the rest of his life. His limited award of weekly benefits is designed to compensate him for the reduction that disability will cause in his earning capacity over his lifetime. *That* is why it is critically important to use a real average weekly wage, not a fictional one. The commission's use of Jones' increased earnings and his successful employment to justify its finding that his average wages are less than $25 per week was incorrect.

c. Exceptional circumstances are plainly present given Jones' extended history as a high wage-earner and the unusual timing of his injury.

Jones' case easily reconciles with other cases where computing average weekly wage required stepping outside the statute's usual methods.

Foreman v. Jackson Minit Markets involved a claimant who worked two jobs, devoting substantial hours to each. The court said using wages from only one of the jobs would not fairly reflect the earnings of someone "engaged in 70-odd productive hours each week." 265 S.C. at 170, 217 S.E.2d at 216. Limiting Jones' average weekly wages to his part-time hours at the YMCA would be a similarly unfair reflection of the earning capacity of someone who had an extended working history as a full-time engineer and who was working full-time in an engineering start-up, teaching exercise classes on the side. *Foreman* says the average weekly wage statute "indicates more concern with the unfair results . . . than to 'exceptional reasons' which cause the unfairness." *Id.* at 164, 170, 217 S.E.2d at 216.

Sellers v. Pinedale Residential Center holds the commission is "clearly" authorized to consider a claimant's probable future earnings. 350 S.C. 183, 191, 564 S.E.2d 694, 699 (Ct. App. 2002). This case does not involve any probabilities or speculation. Jones' continued high earning capacity as an engineer is not contradicted.

It is possible to distinguish *Foreman* and *Sellers* by pointing out particular features of those cases. The claimant in *Sellers* was a teenager rendered a paraplegic by his injury. The claimant in *Foreman* was killed on the job. But then there is *Pugh v. Piedmont Medical*, a case involving a claimant with an established work history and a method of average weekly wage calculation that gave a "misleading snapshot" of his average earnings. 396 S.C. 31, 37-

40, 719 S.E.2d 676, 680-681 (Ct. App. 2011). The same is true here. It is illogical to reason, as the commission appeared to reason, that a claimant's established work history counts *against* using that history as a barometer of his earning capacity. The lengthy histories here and in *Pugh* offered stronger evidence than was available in *Sellers*.

And just as it was unfair to the employer in *Brunson v. Wal-Mart* to treat a short period of dual employment as though it was going to extend into the future forever, 344 S.C. 107, 112-113, 542 S.E.2d 732, 734-735 (Ct. App. 2001), it is equally unfair to treat Jones as though he was probably going to continue working full-time on an engineering start-up, never making any money whatsoever from that effort. One could forgive Jones for being a little insulted by the commission using his entrepreneurship to find that the market value of his labor is $23.95 per week. The figure is so low it is comical.

The average weekly wage statute is not the place for comedy. It is designed to give a fair estimate of a claimant's earning capacity because the claimant's disability is presumed to impact the claimant's earning capacity over the rest of the claimant's working life. The commission did not follow the statute. The Court should reverse and remand for the commission to enter an award based on the appropriate average weekly wage.

II. The commission's finding that Jones' injury did not impact his ability to earn money during his period of temporary disability is clearly erroneous in view of the evidence.

The appellate panel found Jones' injury did not impact his ability to earn money from his start-up business or delay his return to a high-paying job. (6/13/17 Or.p.9). The standard of review permits this Court to reverse that finding because it is clearly erroneous. S.C. Code Ann. § 1-23-380(5)(e) (Supp. ____).

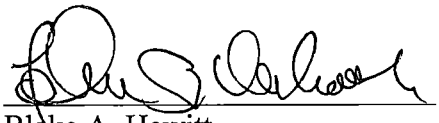
This finding selectively quoted the record. Jones was the only witness at the hearing. He explained he started an engineering business in August of 2014 and that he spent August to December developing contacts. (2/10/16 Tr.p.21). He explained he did not draw income from the business immediately because "it takes a lot of effort . . . to get things moving[.]" *Id.* He also explained his surgery left him disabled from January of 2015 until March of 2015. (Id.pp.23, 48). The business turned a substantial profit in March. (Id.pp.23-24).

Jones' testimony is also corroborated by the fact that he was paid temporary total disability benefits from January 6, 2015, to March 2, 2015. (6/22/15 Form 18). Employers do not generally pay temporary disability benefits to people who are not temporarily disabled. Jones' testimony is also supported by common sense. Jones had spinal surgery, fusing two of his vertebra together. (2/10/16 Tr.p.31). Any suggestion that his ability to work was not impacted while he was recovering from surgery could not be taken seriously.

CONCLUSION

The Court should reverse and remand for an award of temporary and permanent benefits based on the appropriate average weekly wage.

Respectfully submitted,



October 9, 2017

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Timothy D. Jones, Employee, Claimant ..... Appellant,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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October 9, 2017

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Timothy Jones v. YMCA Greenville
Case Tracking No. 2017-001515

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the *Initial Brief of Appellant* and *Designation of Matter for Inclusion in the Record on Appeal* in reference to the above matter. I have enclosed a proof of service of this document on counsel for the Respondents. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN, LLC

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Enclosures
cc: Kathryn Williams, Esquire
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