THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

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SC Court of Appeals

Appellate Case No. 2016-002266

Renee Robles, Employee, Claimant, ...Appellant,

v.

Party Reflections, Inc., Employer, and
Employers Assurance Company, Carrier,....................................... Respondents,

---

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission properly calculated Appellant's average weekly wage.

2. Whether the Workers' Compensation Commission properly reversed the Single Commissioner's order for temporary total disability benefits.

STATEMENT OF FACTS

Appellant Renee Robles ("Appellant") is originally from Mexico. His ability to speak and understanding English is "[n]ot very good." (R. 262-63). Appellant avers he was injured on March 16, 2017, while employed at Respondent Party Reflections.

On or about June 20, 2014, Appellant submitted a Form 50, stating he injured his back, buttocks, and legs as he was "lifting heavy object[s]." (R. 23). Appellant noted in his Form 50 that he was paid weekly wages of $935.00. (Id.).

On or about July 28, 2014, Respondents submitted their Form 20. (R. 25). In their Form 20, Respondents calculated an average weekly wage of $786.03 with $524.05 as the compensation rate, and indicated the proper method for calculation was "report of earnings of injured employee who did not complete four quarters based on actual time worked." (Id.).

A hearing was scheduled before the single commissioner. At the opening of the hearing, the single commissioner stated: "There being no further objections the Commission's File becomes a part of the record with the exception of self-serving declarations and unstipulated medical records."

(R. 256, lines 7-10). The single commissioner then asked the parties to state their position regarding compensation. Counsel for Appellant responded:

> Our position on average weekly wage is that the Claimant earned for 52 weeks before his initial injury on April 15, 2013 $55,099.99 and that most fairly and accurately represents what his average weekly wage would be because subsequently he had two more injuries and he was missing time from work to attend doctors' appointments and so forth. $55,099.99 divided by the prior 52 weeks gives you an average weekly wage of $1,059.61 and a comp[ensation] rate of $706.33.

(R. 256, lines 11-22).

Counsel for Respondent stated her position regarding the proper compensation rate:

> For the average weekly wage and compensation rates I disagree with how [Counsel for Appellant] thinks it should be calculated. Since there are three injuries he wants to use the average weekly wage and compensation rate from the earnings prior to the first accidents. It's our position that you should use the 52 weeks or the four quarters preceding the accident for which we're responsible. So we're here today on the March 16, 2014 accident or its our position you should use the four quarters from 2013 which are enclosed in [Appellant's] Pre-hearing Brief as well.

(R. 260, lines 8-18).

Through an interpreter, Appellant testified at the hearing before the single commissioner. Appellant was employed by Respondent Party Reflections. In his role, Appellant would deliver items for parties, such as tables, umbrellas, chairs, silverware, and glassware. (R. 263, lines 11-16). On March 16, 2014, Plaintiff was sent to build a tent at the South Carolina State House. When Appellant picked up the tent, he allegedly injured his back. (R. 263, lines 17-25).

Appellant reported his injury to his supervisor, Adam Vance, the following morning. (R. 264, lines 1-7). Appellant sought treatment at Doctor's Care on March 17, 2014. This visit was paid for by Party Reflections on the company credit card. (R. 265, lines 3-5). At this visit, Appellant was told that he injured his back. (R. 265, lines 1-2).

Appellant returned to Doctor's Care on March 24, 2014. (R. 265, lines 9-10). Appellant was given work restrictions at the March 24, 2014, appointment, stating not to lift more than five to ten pounds; do not lean down or turn abruptly. (R. 265, line 23 – R. 266, line 4). Party Reflections paid for this visit. (R. 266, lines 9-10).

Appellant followed-up with Doctor's Care on April 7, 2014. He was again given work restrictions, restricting his lifting to no more than 45

pounds, and restricted Appellant from leaning down and turning abruptly. He was also given a piece of paper to give to his "boss." (R. 266, lines 8-25). Appellant claimed that he could not read the piece of paper. (R. 267, lines 1-2).

Appellant returned to work on April 7, 2014, advised Vance of the doctor's work restrictions, and Vance advised Plaintiff to work and help clean and wash dishes. (R. 267, lines 3-12). Appellant was then sent home from work. He has not returned to work for the employer. (R. 267, lines 13-23).

Regarding the piece of paper obtained from the doctor on April 7, 2014, Appellant denied having knowledge or an understanding of the contents of the writing. Appellant denied having any information provided to him that was on the piece of paper. Appellant denied that he needed to follow-up with Doctor's Care on or after April 14, 2014. Appellant denied that he was aware he was to go to the doctor on or after April 14, 2014 if he did not feel better. Appellant denied that anyone told him he would be placed on fully duty as of April 14, 2014, if he did not return to the doctor for additional treatment. (R. 268, line 6 – R. 269, line 12).

Appellant avers that that he has not worked for Party Reflections since he was sent home on April 7, 2014. It is his position that based on the work restrictions given to him, he is unable to return to work. (R. 271, lines 12-25).

On cross-examination, Appellant confirmed that he was comfortable going forward with his deposition without the use of an interpreter and that he does not use an interpreter while at work. (R. 272, lines 7-24). Appellant denied that he ever asked the doctor or any friend or family member to interpret the April 7, 2014, note from Doctor's Care. (R. 273, lines 2-8). He further denied ever asking Vance if he could go back to Doctor's Care after April 7, 2014. (R. 273, line 22 – R. 274, line 4).

Vance also testified at the hearing before the single commissioner. Vance testified that Appellant reported his injury to him the day following the incident. (R. 282, lines 8-13). When Appellant reported the injury, Vance referred him to Doctor's Care, which was paid for with the company credit card. (R. 282, line 14 – R. 283, line 5). Vance recalled that Appellant was placed on light duty. (R. 283, lines 6-10). Vance provided Appellant with light duty work. (R. 283, lines 11-16).

Vance confirmed Appellant returned to Doctor's Care on March 24, 2014, at the direction of Vance. This appointment was again paid for by the company credit card. (R. 283, line 17 – R. 284, line 2).

Vance confirmed Appellant's last day of employment at Party Reflections was April 7, 2014. (R. 284, lines 3-6). Vance further confirmed that Appellant attended a Doctor's Care appointment on April 7, 2014, and that this appointment was paid for by Appellant and Party Reflections was not alerted to the need for payment. Vance testified that it was on this date that Appellant came to him with his release from Doctor's Care as of April 14, 2014. (R. 284, lines 7-18). Vance understood the report from Doctor's Care to be a standard return to work form and explained that Appellant should be placed on light duty until April 14, 2014, at which time Appellant can return to full duty. (R. 284, line 24 – R. 285, line 5). Upon his reading of the Doctor's Care report, Vance understood that Appellant could return to full duty on April 14, 2014. (R. 285, lines 9-12).

Vance could not recall if he spoke with Appellant about the content of the Doctor's Care report. (R. 285, lines 13-16). Vance did not recall telling Appellant to return to Doctor's Care on April 14, 2014. (R. 291, lines 3-23). Vance did not have any recollection whether Appellant asked if he could

return to Doctor's Care after April 7, 2014. (R. 285, lines 23-25). Vance denied that Appellant ever told him he did not feel better and felt like he needed to go back to the doctor. (R. 286, lines 1-4). If requested, Vance would have allowed Appellant to return to Doctor's Care. (R. 286, lines 5-8).

Vance was first aware that Appellant's April 7, 2014, Doctor's Care visit had not been paid by Party Reflections on the date of the hearing. (R. 287, lines 8-18). Vance confirmed that Appellant worked between March 16 and April 7, 2014, within his light duty restrictions. (R. 293, lines 3-5).

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by Appellant on March 16, 2014. The Employer, Party Reflections, Inc. provided a short period of medical treatment. Appellant was eventually terminated from his employment by Party Reflections, Inc.

Appellant filed a Form 50 alleging injuries to his back, buttocks, and legs while lifting a heavy object at work on March 16, 2014. (R. 23). In his Form 50, Robles requested additional medical examination and treatment for pain, discomfort and limitations. (Id.).

Respondents filed a Form 51, disputing, inter alia, the nature and extent of the alleged injury. (R. 24). Respondents subsequently filed a Form 20 with their position on the calculation of wages. (R. 25).

A hearing was held before the Single Commissioner. The Single Commissioner issued a Decision and Order on March 8, 2016, with the following findings of fact and conclusions of law:

- Appellant's average weekly wage at the time of his injury by accident on March 16, 2014, was $1,059.61, resulting in an applicable weekly compensation rate of $706.33;
- Respondent Party Reflections complied with the work restrictions issued to Appellant after his

March 17 and March 24, 2014 Doctor's Care visits;

- The record "is clear" Appellant was not aware that he was allowed to return to Doctors Care on April 14, 2014, if he was unimproved and that Appellant was placed on full duty on April 14, 2014, because he was not aware that he was allowed to return to Doctor's Care;

- Appellant is entitled to an evaluation and treatment by an orthopedic physician, with a specialty to the back, of Respondents' choosing;

- Appellant is not at Maximum Medical Improvement (MMI);

- Appellant is entitled to reimbursement for his out-of-pocket expenses and mileage for his April 7, 2014, Doctor's Care visit; and

- Appellant shall be paid for Total Temporary Disability (TTD) starting from April 7, 2014 and forward, until he is placed at MMI.

(R. 1).

Respondents subsequently filed a Form 30, Request for Commission Review. (R. 86). Following the submissions of appellate briefs to the South Carolina Workers' Compensation Commission, a hearing was held before the Commission. The Commission made the following findings of facts:

- Appellant suffered a minor back injury on March 16, 2014, while employed by Party reflections;

- On April 7, 2014, Appellant was given a Return to Work form stating: "Work Status: May return to full duty activity as of 4-14-14 without accommodations. May work with the following accommodations as of 4-7-14: No lifting more than 45 lbs., ground level work only, no ladders or heights, no repetitive bending, stooping, squatting, pushing, jerking, twisting, or bouncing when he feels discomfort. Return for re-evaluation at this office on 4-14-14 if not better";

- Robles never asked Respondent Party Reflections to return to the doctor after April 7, 2014;

- Appellant had two prior workers' compensation injuries with Palmetto Party Rental, which was purchased by Party Reflections;

- Appellant answered all questions asked in a deposition without the help of an interpreter, understood Doctor's Care's explanation of medical bills and temporary work restrictions without an interpreter, and signed the same Return to Work form agreeing he understood the form;

- Appellant was released to full duty on April 14, 2014;

- There is no evidence Appellant missed any time from work with Party Reflections as a result of his two prior workers' compensation injuries;

- The average weekly wage is $786.03, resulting in a compensation rate of $524.05;

- Appellant's average weekly wage is based on his actual earnings with Party Reflections;

- Appellant is entitled to reimbursement for his out of packet expenses and mileage for the April 7, 2014, doctors appointment; and

- Appellant is not at MMI.

The Commission made the following conclusions of law:

- The Single Commissioner erred as a matter of law by using an average weekly wage and compensation based on Appellant's earnings from a prior workers' compensation claim while working for Party Reflections, a predecessor company; this method is not allowed under the statute;

- Pursuant to statute, the average weekly wage is $786.03 with a compensation rate of $524.05; and

- Appellant missed less than eight days of work as a result of his March 16, 2014 work-related injury and is not entitled to TTD compensation.

(R. 14).

Appellant subsequently filed a motion to amend judgment pursuant to Rule 59e, SCRCP and S.C. Code Ann. § 1-23-380. (R. 105). Appellant's motion was denied. (R. 22). This appeal follows.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). In appeals from an order of the commission, the appellate court reviews facts based on the substantial evidence standard. Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). "[T]he appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." Id. (citing S.C. Code Ann. § 1-23-380(A)(6) (2005)). "The appellate court may reverse or modify the Commission's 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." Id. at 612, 632 S.E.2d at 878. "Substantial evidence is not 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." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

I. The Average Weekly Wage was Properly Calculated Using the Method Prescribed by the South Carolina Workers' Compensation Act

"'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 the injury….." S.C. Code Ann. § 42-1-40 (emphasis added). The primary calculation method provided by the statute is 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. Id. The commission must use this method **unless the employment extended over a period of less than fifty-two weeks.** Id. (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." Id. (emphasis added). "If, for exceptional reasons, the calculation method would be unfair, 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.

In Respondents' Form 20, the method for calculation of the average weekly wage was a "report of earnings of injured employee who did not complete four quarters based on actual time worked." (R. 25). This position was taken because Appellant had not been employed by Respondent Party Reflections for the four quarters preceding the date of injury. Rather, Appellant worked for Palmetto Party Rental, with workers' compensation coverage provided by Auto-Owners Insurance, until the company was purchased by Party Reflections. (R. 294, lines 2-5). Therefore, because Appellant was not employed by Party Reflections for the four quarters preceding this injury, the proper method for calculation of the average weekly wage was the earnings during the period of employment at Party Reflections divided by the number of weeks and parts thereof during which Appellant earned wages. Based on this method, Appellant's average weekly wage is $786.03, with a compensation rate of $524.05. (R. 25).

At the hearing before the Single Commissioner, Respondents argued, "It's our position that you should use the 52 weeks or the four quarters preceding the accident for which we're responsible. So we're here today on the March 16, 2014 accident or its our position you should use the four quarters from 2013 which are enclosed in Claimant's Pre-hearing brief as

well." (R. 260, lines 13-18). At the hearing, Appellant asserted that the average weekly wage should be based on wages from the 52-week period prior to Appellants' April 15, 2013, injury for the previous employer. Appellant maintained that this method of calculation "most fairly and accurately represents what his average weekly wage would be because subsequently he had two more injuries and he was missing time from work to attend doctors' appointments and so forth." (R. 256, lines 13-20).

Ultimately, the Single Commissioner opted to dispense with the methods for calculating average weekly wages mandated in the Act and adopted Appellants' approach. (R. 1).

The Full Commission reversed, finding the proper method for the calculation of Appellant's average weekly wage was Appellant's actual earnings with Party Reflections. In short, the Commission adopted the method put forth by Respondents in their Form 20. (R. 14).

Appellant now argues the Commission erred in the calculation of the average weekly wage. (App. Br. p. 10).[1] However, the Commission

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[1] Of note, until the filing of this appeal, Appellant maintained that his average weekly wage should be based on the fifty-two week period prior to a previous work injury occurring on April 15, 2013, a position the Single Commissioner ultimately adopted. (R. 256, lines 13-22; Reply Brief, pp. 4-7). Now, for

calculated average weekly wages pursuant to the proper method prescribed by the Act and articulated by Respondents in their Form 20.

A. The Commission Calculated the Average Weekly Wage by an Alternative Method Prescribed by the Act and, Therefore, The Commission's Order is Not Controlled by an Error of Law

The Act precisely defines average weekly wage and the primary method to calculate average weekly wage. See S.C. Code Ann. § 42-1-40. Should it not be possible for the Commission to use the primary method of calculating a claimant's average weekly wage, the Act sets forth four alternative methods for the Commission to calculate the average wage. Forrest v. A.S. Price Mechanical, 373 S.C. 303, 308, 644 S.E.2d 784, 786 (Ct. App. 2007); see also Pilgrim, 391 S.C. at 46-47, 703 S.E.2d at 245 (stating the alternative methods for calculating average weekly wage). An error of law is committed only if substantial evidence illustrates that the calculation method was improper. See Pilgrim, 391 S.C. at 45, 703 S.E.2d at 244. The Commission must use the primary method for calculation of average weekly wage prescribed by the Act unless "the employment, prior to the injury, extended over a period of less than fifty-two weeks." Id.

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the first time, Appellant argues Appellants' average weekly wage should be calculated pursuant to the primary method prescribed in the Act.

Appellant simply cannot argue the Commission committed an error of law because there is substantial evidence in the record to support the chosen method of calculation by the Commission. Shealy, 341 S.C. at 455, 535 S.E.2d at 442 (defining "substantial evidence"). Along with their Form 20, Respondents submitted a Statement of Earnings, clearly indicating that Appellant worked for Party Reflections for less than four quarters prior to the subject injury. (R. 25-26). This record supports the Commission's method for calculating Appellant's average weekly wage. See generally Thompson, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (finding appellate court cannot substitute judgment as to the weight of the evidence).

In short, the Commission complied with statutory requirements in selecting its method for calculating wages. Such compliance cannot be considered an error of law such that this Court can reverse the Commission's determination. Id. ("The appellate court may reverse or modify the Commission's 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.").

Because the Commission's method for calculating average weekly wage was not an error of law, this Court must affirm the Commission's order.

B. Appellant Argues Purely Questions of Fact Which Are Left to the Sound Discretion of the Commission

Respondents maintain that because the Commission adopted a method for calculating average weekly wage prescribed by the Act, there is no error of law upon which this Court can reverse the Commission. Appellant appears to argue purely factual issues rather than errors of law. Appellant's brief notably lacks an allegation that the Commission committed legal error; rather, Appellant argues a factual error of fairness and what method of calculation is fair. However, such factual findings cannot be reversed by this Court absent clear error. Respondents aver that the wage evidence submitted with the Form 20 supports the Commission's findings of fact and conclusions of law.

The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. Seller v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). "When the [Commission] determines the primary method of calculation is not permissible, it is required to consider which of the alternative methods for

calculating the average weekly wage is most appropriate based on the facts. Before [the Commission] may use any one of the[] alternatives, the [Commission] must find, or the record must clearly show, that the necessary conditions[, as prescribed in Section 42-1-40,] exist. The first alternative method of wage calculation [actual earnings divided by the number of weeks actually worked] is proper if two predicate conditions exist: (1) it is "practicable" to use the alternative method and (2) the calculation yields a result 'fair and just' to both parties." Pilgrim, 391 S.C. at 44-46, 703 S.E.2d at 244-45. Ordinarily, the Commission should make **factual findings** that the two predicate conditions—practicality and fairness—exist. Id. at 46, 703 S.E.2d at 245. Accordingly, whether the calculation is fair and just is an ultimate question of fact, one left to the Commission, who is the ultimate fact finder. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). As long as evidence in the record exists to support the Commission's factual findings in concluding what method of calculation is fair and just to the parties, the Commission's decision must not be disturbed on appeal. See William v. Drywall, 402 S.C. 173, 739 S.E.2d 892 (Ct. App. 2013); see generally Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981) (stating

it is not the task of the Appellate Courts to weigh the evidence as found by the Full Commission).

i. Appellant Was Employed by Respondent Party Reflections For a Period of Less Than Fifty-Two Weeks

Appellant avers that he was employed by Party Reflections and its predecessor company for four quarters prior to the date of the injury and, therefore, the Commission erred in departing from the primary method for calculating Appellant's average weekly wage.

The Act specifically provides that average weekly wages are the "earnings of the injured employee **in the employment in which he was working at the time of the injury** ...." S.C. Code Ann. § 42-1-40 (emphasis added). The issue of employment is one of fact. Addison v. Dixie Chevrolet Co., 246 S.C. 86, 90 142 S.E.2d 442, 444 (1965). "[T]he appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." Thompson, 369 S.C. at 612, 632 S.E.2d at 877.

Here, the only evidence in the record supports the Commission's finding that Appellant was employed with Party Reflections for a period less than fifty-two weeks prior to his injury. Specifically, Adam Vance,

Appellant's direct supervisor, testified at the hearing that Appellant worked for Palmetto Party Rental, with workers' compensation coverage provided by Auto-Owners Insurance, until the company was purchased by Party Reflections sometime in December 2013. (R. 294, lines 2-5). Indeed, Vance considered himself as previously **employed** by Palmetto Party Rental. (R. 293, line 22 – R. 294, line 5). Moreover, counsel for Appellant conceded at the hearing before the Commission that it was not simply a name change upon purchase, but the ownership of the company had changed. (R. 374, lines 1-2). Furthermore, Appellant testified at his deposition that he was not paid the same by Palmetto Party Rental as he was paid by Party Reflections. (R. 208, lines 1-12).

The Commission ostensibly agreed with Respondents, finding that the calculation of Appellants average weekly wage is based on his actual earnings with Party Reflections. (R. 19-20). Indeed, the Commission made the specific finding of fact that Appellant had two prior workers' compensation injuries with Palmetto Party Rental, "which was purchased by Party Reflections, **the employer in this case**." (Id.) (emphasis added).

The Commission made the ultimate finding of fact that Appellant was employed by Party Reflections at the time of this injury. Such finding cannot be disturbed on appeal. Thompson, 369 S.C. at 612, 632 S.E.2d at 877.

ii. Appellant Seeks to Have This Court Weigh the Evidence

Appellant generally contends that no such evidence supports a finding of an exceptional circumstance allowing for the Commission to depart from the statutory primary method for calculating average weekly wage. However, the evidence in the record supports that Appellant was employed by Party Reflections after its purchase of Palmetto Party Rental (R. 294, lines 2-5); Appellant was employed by Party Reflections for fourteen weeks prior to the injury (R. 25-56); the purchase did not result in a simple name change to the employer but actual ownership (R. 374, lines 1-2); and Appellant was paid a different wage under each employer. (R. 208, lines 1-12).

This Court can only reverse or modify a decision of the Commission if such findings, inferences, conclusions or decisions of the Commission are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. As articulated, there is evidence in the record to conclude that Appellant only worked for Party Reflections for less than the four quarters preceding the date of injury. While the scope of this Court's

review is limited to that of clear error, Appellant attempts to circumvent this Court's standard of review. Specifically, Appellant would have this Court weigh the evidence before the Single Commissioner and Commission and substitute its own opinion for that of Commission. Such review is not within the purview of this Court's review. Thompson, 369 S.C. at 612, 632 S.E.2d at 877 ("[T]he appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact.") (citing S.C. Code Ann. § 1-23-380(A)(6)).

C. Party Reflections' Position Was Initially Outlined in Its Form 20, Which Was Ultimately Incorporated into the Record

Appellant contends that Respondents are bound by counsel's statement at the single commissioner hearing regarding the method used to determine Appellant's average weekly wage. Specifically, Appellant maintains that because counsel for Respondents stated on the record that Respondents' position was to use the four quarters from 2013 to determine the average weekly wage, Respondents are bound by such statements and the Commission erred in adopting a position not advanced by Respondents.

Appellant initially asserts that Respondents' position taken before the Commission—that the average weekly wage should be calculated by the total

compensation while employed with Party Reflections divided by the total number of weeks employed—was contrary to its position both before the Single Commissioner and in Respondents' Appellate Brief to the Commission. Appellant further contends that Respondents are barred from making alternative arguments for the same relief not made at the single commissioner's hearing.

However, unlike civil matters before a trial judge, workers' compensation matters are form driven. At the outset of the hearing, the Single Commissioner incorporated the Commission's File as part of the record. (R. 256, lines 7-10). Part of the Commission's File was the Form 20 filed by Respondents, outlining their position for the calculation method of Appellant's average weekly wage. (R. 25). Respondents' position was clearly articulated in their Form 20, stating that Appellant was employed with Party Reflections for less than fifty-two weeks prior to the date of the injury and, therefore, Appellant's average weekly wage should be calculated by the total wages paid by Party Reflections divided by the number of weeks actually worked. (Id.).

Furthermore, Respondents maintained their position in their Appellate Brief to the Full Commission by stating in their prayer for relief: "[T]his

Panel should find [Appellant] to have an average weekly wage of $786.03 and a compensation rate of $524.05…." (R. 94). This position is the same as outlined in Respondents' Form 20, which was incorporated as part of the record before the Single Commissioner.

Moreover, Respondents are not barred from extending alternative arguments. While Respondents' Form 20 is not consistent with their argument before the Single Commissioner (R. 260, lines 13-18), such argument presented before the Single Commissioner was merely an alternative method for calculating wages. Because Respondents have never wavered from their position in their Form 20, Respondents' argument—and the Full Commission's adoption of the same—as to the average weekly wage is not barred. See contra Robbins v. Walgreens and Broadspire Services, Inc., 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (finding issue of additional medical treatment was not raised before the single commissioner or the Appellate Panel and was, therefore, waived).

Further, South Carolina Code Ann. Reg. 67-1603 ostensibly grants the Commission the authority to determine the average weekly wage and compensation rate from information in the Commission's file and statements or evidence presented at the hearing. This leaves the Commission with the

authority to, based on the Commissioner's file, statements, and evidence, apply the method of calculation that results in fairness to both parties. That is exactly with the Commission did in this case.

Finally, while Appellant attempts to argue that Respondents' position as to average weekly wage has not been consistent during the administrative proceedings and is, therefore, waived, Respondents note that Appellant, for the first time in this matter, argues that his average weekly wage should be calculated pursuant to the primary method prescribed in the Act. Specifically, prior to this appeal, Appellant has consistently maintained that Appellant's average weekly wage should be calculated based on the fifty-two weeks prior to a previous work injury occurring on April 15, 2013. Appellant, for the first time in his initial brief, argues that the proper method of calculating Appellant's average weekly wage is the primary method prescribed by the Act. Such argument is barred. See Robbins, 375 S.C. at 266, 652 S.E.2d at 94.

Therefore, because Respondents' argument regarding the calculation method for Appellant's average weekly wage is not barred, the Commission properly considered the same and properly found, as a matter of law, that

method for the calculation of average weekly wage is Appellants' actual earnings divided by the actual weeks worked.

II. Appellant is Not Entitled to Temporary Total Disability Benefits

An employee is entitled to temporary benefits when he has a loss of income as a result of a work injury. S.C. Code Ann. § 42-9-260. The employer may start temporary benefits when the employee has been out of work due to a work-related injury for eight days. Id.

In the instant case, Appellant was accommodated by his employer until April 7, 2014, when Robles received updated work restrictions from Doctor's Care indicating restrictions until April 14, 2014. (R. 267, lines 9-12; R. 283, lines 6-16). The report notes Appellant can return to work without restrictions seven days later, April 14, 2014. Since Appellant was not out of work due to a work-related injury for the required eight days (beginning on April 7, 2014), he is not entitled to temporary total disability benefits.

Appellant alleges he was not released by Doctor's Care to return to work without restriction, in direct contradiction to the Return to Work form presented in his APA submissions, which Robles admits he gave to his supervisor. Ultimately, the Commission made factual findings that Appellant was indeed released to work without restrictions on April 14, 2014,

and that Appellant was able to read and understand the work restrictions form issued by Doctor's Care releasing Appellant to work without restrictions on April 14, 2014 because he signed an acknowledgement noting the same. (Order pp. 6-7; APA p. 49). See Thompson, 369 S.C. at 612, 632 S.E.2d at 877.

Appellant contends that the "evidence shows [Appellant] had already missed more than 8 days of work due to his injury prior to the April 14, 2014 date the Appellate Panel found he had been released to full duty." (App. Br. p. 16). Specifically, Appellant contends that he missed more than 8 days of work between March 17 and April 14, 2014. Appellant's contentions are based on mere conjecture. Appellant maintains that even though Vance testified Appellant could have worked five to ten days between March 17 and April 7, 2014, Appellant would have been out of work for the other days between March 17 and April 14th, 2014. This is based on mere speculation that Appellant was scheduled to work every day between March 17 and April 14, 2014. See Glover v. Columbia Hospital, 236 S.C. 410, 414, 114 S.E.2d 565, 567 (1960) (finding an award cannot be based on surmise, conjecture or speculation).

Appellant further contends that Respondents conceded that Appellant would be entitled to TTD benefits.[2] (App. Br. p. 17). However, Respondents

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[2] From this argument, Appellant avers that the Commission's "twin findings" that Appellant was released to full duty on April 14, 2014, but that Appellant is not at maximum medical improvement, cannot be reconciled without a finding that Appellant is entitled to TTD benefits. (App. In. Br. p. 18). Specifically, Appellant contends Respondents were obligated to pay TTD benefits and that pursuant to S.C. Code Ann. § 42-9-260, TTD benefits can only unilaterally be suspended or terminated when certain conditions are met. Appellant maintains the condition applicable to the instant case is when "the employee has been released by the treating physician to work without restrictions and the employer offers comparable employment." S.C. Code Ann. § 42-9-260(B)(4).

Appellant contends the Commission erred because the first condition ("released by the treating physician to work without restrictions") had been met, but that the second condition (employer offers comparable employment") had not been met. Appellant relies on several cases that held that the employee was entitled to temporary compensation until he reached MMI and was released without restrictions. <u>See</u> App. In. Br. p. 20 (citing <u>Lee v. Bondex, Inc.</u>, 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013); <u>Cranford v. Hutchinson Constr.</u>, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012); <u>Grayson v. Carter Rhoad Furniture</u>, 317 S.C. 306, 454 S.E.2d 320 (1995)).

Appellant's reliance on these cases is misplaced. It cannot be disputed that Appellant was released to work **<u>without work restrictions.</u>** Specifically, the Commission made a factual finding that Appellant did indeed understand the April 7, 2014, Doctor's Care note, providing for work restrictions and advising that Appellant can return to full duty work on April 14, 2014. This is supported by substantial evidence in the record that Appellant understood the work restrictions provided by Doctor's Care (Tr. p. 12, lines 24 – p. 13, line 8), Appellant did not require a translator at his Doctor's Care visits (<u>Id.</u>), Appellant was deposed without the use of a

merely provided an alternative argument at the hearing before the Single Commissioner. (R. 259, lines 8-21) ("**If he is entitled to any temporary total benefits** it would only be during his time period of being on light duty up until April 14, 2014 when he was released to return to work in a full duty capacity.") (emphasis added).

Alternatively, Appellant argues his physician, Dr. Westerkam,[3] placed him out of work on June 2, 2014, so he is entitled to TTD benefits for this claim. However, Appellants' physician does not place him completely out of work, and does not indicate the light duty restrictions recommended are the result of the March 16, 2014, work injury as opposed to the April or

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translator and testified that he understood all questions asked of him. (Depo. Tr. p. 74, lines 17-19).

It is undisputed that Appellant did not return to Doctor's Care after April 14, 2014, and, therefore, was released, **without restrictions**, on April 14, 2014. Respondents were under no requirement to provide any comparable employment to accommodate any work restrictions because Appellant had no work restrictions as of April 14, 2014.

Accordingly, Respondents aver that Appellant's argument attempting to reconcile two holdings by the Commission is misplaced.

[3] Notably, Appellant did not request authorized treatment and Dr. Westerkam's opinion is from an unauthorized physician, therefore prejudicing Respondents from mitigating benefits due by providing causally related treatment.

September 2013 accidents. (R. 80). Notably, Dr. Westerkam outlines Appellant's three injuries and recommended treatment. In a separate paragraph following the description of injuries and recommended treatment, Dr. Westerkam provides work restrictions. Dr. Westerkam never indicates the restrictions are the result of the March 16, 2014, work injury. (Id.). Further, Appellant did not present the work restrictions report to his employer until September 9, 2015, fifteen months after the report, despite seeing his employer on numerous occasions while picking up his wife from work. (R. 277, lines 9-12). Accordingly, Respondents were unable to attempt to accommodate Appellant's work restrictions.

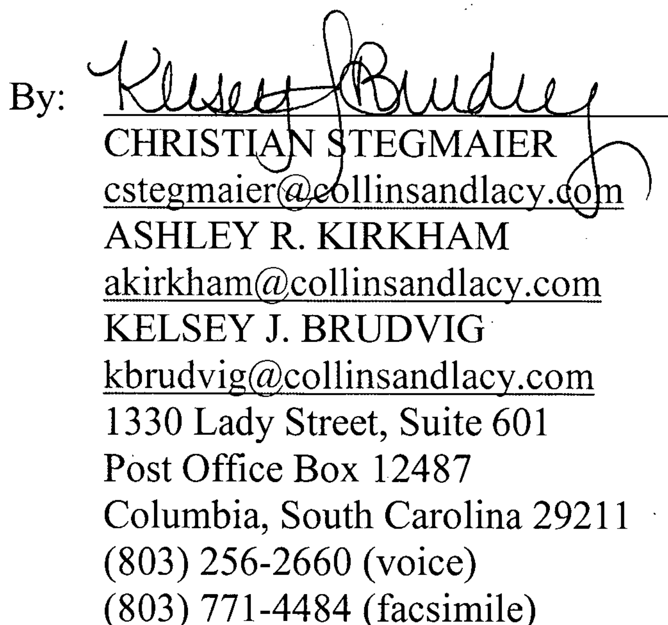
Since Appellant was not written out of work for eight days, received no additional work restrictions from the authorized treating physician after the April 14, 2014 work release, failed to provide Respondents with the restrictions recommended by his own physician to determine whether his restrictions could be accommodated, and did not request authorized treatment or receive work restrictions from any authorized physician, Appellant is not entitled to temporary disability benefits. Accordingly, the Court must affirm the Commission's Order.

CONCLUSION

Based on the aforementioned, the Commission committed no errors of law. Accordingly, this Court must affirm the Commission's Order finding Appellant's average weekly wage was $786.03 resulting in a compensation rate of $524.05 and denying Appellant TTD benefits.

Respectfully submitted,

COLLINS & LACY, P.C.



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RESPONDENTS' INITIAL BRIEF

Columbia, South Carolina
October 16, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2016-002266

Renee Robles, Employee, Claimant, ...Appellant,

v.

Party Reflections, Inc., Employer, and
Employers Assurance Company, Carrier,.. Respondents,

CERTIFICATE OF COUNSEL

Counsel for Respondent certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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