THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM 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.

BRIEF OF APPELLANT

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   B. Respondents argued at all levels that the preceding four quarters method must be used;
   C. There were no special circumstances found for the Appellate Panel to depart from the four-quarter method; and
   D. The method used is not fair and just to Appellant.

2. Whether the Workers' Compensation Commission erred as a matter of law in reversing the Single Commissioner's order for temporary total disability benefits from April 7, 2014 until MMI, as Appellant had legally established his right to receive temporary compensation prior to April 14, 2014, such that even if he had been released "to work without restrictions" on that date, temporary compensation would have to be continued because the Employer never "offer[ed] comparable employment" and the Appellate Panel found he was not at MMI.

3. Even if Appellant is not legally entitled to temporary compensation after April 14, 2014, there is no substantial evidence for the Appellate Panel to deny temporary compensation after June 2, 2014 when he was placed on work restrictions by Dr. Westerkam, was not at MMI, and no comparable employment was offered.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Appellant, Renee Robles, on March 16, 2014. The Employer, Party Reflections, Inc., accepted Robles's claim and provided a short period of medical treatment under Title 42, the Workers' Compensation Act. Robles received medical treatment at Doctors' Care from March 16, 2014 through April 7, 2014. When he returned to the Employer on April 7th with a work slip, the Employer terminated his employment. No further medical treatment was provided nor was Robles paid any temporary compensation.

On June 20, 2014, Robles filed a Form 50 (Employee's Request for Hearing) alleging injuries to his back, buttocks and legs while lifting a heavy object at work on March 16, 2014. [R. p. 23]. Robles requested additional medical treatment and temporary total disability compensation.

On June 30, 2014, Party Reflections and its insurance carrier, Employers Assurance Company, filed a Form 51 admitting that Robles had given notice of a work accident, but denying all other allegations. [R. p. 24].

A hearing was held before Commissioner Michael R. Campbell, II, on September 25, 2014.[1] The primary issues in dispute were (1) the average weekly wage and compensation rate; (2) whether Robles was entitled to additional medical treatment; and (3) whether Robles was entitled to temporary total disability compensation.

Commissioner Campbell issued a Decision and Order on March 8, 2016, making the following rulings:

> . . . the Claimant sustained a compensable injury by accident to the back, left lower extremity, arising out of and in the course of his employment;

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[1] The caption on the hearing transcript incorrectly identifies Commissioner Andrea C. Roche as the hearing commissioner. [R. p. 253].

> . . . Defendants are to pay the Claimant, Rene Robles, for temporary total disability at the compensation rate of $706.33 beginning April 7, 2014 until terminated in accordance with the rules and regulations of the South Carolina Workers' Compensation Act; and it is further;
>
> . . . that the Claimant shall receive causally related medical care for his back and lower left extremity until at maximum medical improvement.

[R. p. 12].

On March 22, 2016, the Employer and Carrier timely filed a Form 30 (Notice of Appeal). [R. p. 86].

Oral arguments were heard before the Appellate Panel on June 21, 2016.

On September 2, 2016, the Appellate Panel (Commissioners Scott Beck, Gene McCaskill and Melody James) issued a Decision and Order reversing the Single Commissioner. The Appellate Panel ordered:

> **IF IS ORDERED** the average weekly wage is $786.03 with a compensation rate of $524.05.
>
> **IT IS FURTHER ORDERED** Claimant's request for temporary total disability benefits from April 7, 2014 and continuing is denied,
>
> **IT IS FURTHER ORDERED** the Defendants shall provide the Claimant with evaluation and treatment with an orthopedist of their choice to determine if Claimant is in need of any additional medical treatment as a result of his March 14, 2014 work related accident.

[R. p. 21].

Appellant's Motion to Alter or Amend the Judgement was filed on September 8, 2016, and denied on October 17, 2016. [R. p. 22].

This Appeal followed.

STATEMENT OF THE FACTS

Appellant Renee Robles is a 39 year old man originally from Mexico. He testified through an interpreter as his ability to speak and understand English is "Not very good." He neither reads nor writes in English. [R. p. 262, line 20 - p. 263, line 3].

Robles worked for Party Reflections/Palmetto Party Rental for 12 years. His wife and two brothers also worked there. His work involved delivering and setting up items for large parties such as tents, tables, umbrellas, chairs, silverware, and glassware. [R. pp. 258-69].

Robles had three work-related injuries while working for Party Reflections and its predecessor company, Palmetto Party Rental.[2] He injured his right wrist on April 15, 2013 and his left knee on September 14, 2013. [R. p. 80]. These prior injuries involve separate workers' compensation claims against Palmetto Party Rental which are not part of this appeal. This appeal concerns the third injury, which is a back injury claim against Party Reflections arising on March 16, 2014.

On March 16, 2014, Robles injured his back lifting a tent that had been put in the wrong place. The next morning he went in to work and reported his injury to his supervisor, Adam Vance. Vance told him "if I would say that the accident happened at my house that he would go ahead and pay for the doctors' bills. And that if I was going to say it was at work, they were going to investigate me and that they were going to do a drug test." [R. p. 263, line 22 - p. 264, line 21].

Following this conversation, Robles was sent to Doctors Care on March 17. 2014. Adam Vance gave him the company credit card to pay for the visit. [R. p. 265, lines 3-5]. Robles was treated for "sudden backache while lifting a [sic] object 50-75 lbs at work place on 3/16/14." [R. p.

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[2] Adam Vance testified that Party Reflections purchased Palmetto Party Rental sometime after Robles hurt his knee in September 2013. [R. p. 293, line 22 - p. 295, line 5]. Per the payroll records, the purchase appears to have taken place in late December 2013.

66]. He was given work restrictions of no lifting more than 10 pounds and ground level work only. [R. p. 32].

According to Robles, he did not resume work after seeing Doctors Care and taking his restrictions to his supervisor. Adam Vance "told me to stay at home and that he would let me know as soon as they would hear about a clearance." [R. p. 265, lines 12-19]. Robles testified he did not work at all between March 16th and April 7th, only returning to work for about 3 hours on April 7, 2014, until Vance sent him home and never offered further work. Vance testified that during this period "I'd say he could have worked five to ten days, maybe. I believe also he was given sick time, vacation time to rest." [R. p. 292, line 25 - p. 293, line 10].

Robles returned to Doctors Care on March 24, 2017. He was given work restrictions of "No lifting more than 5-10 pounds; No repetitive bending, stooping squatting, pushing, jerking, twisting, or bouncing; Limited use of Lumbar spine." [R. p. 72; p. 265, line 20 - p. 266, line 4]. The company again paid for the visit with a credit card. [R. p. 266, lines 9-10]. Doctors Care made a referral for Robles to "Please go to Physical therapy." Despite the referral, Party Reflections never sent him for physical therapy.

On April 7, 2014, Robles returned to Doctors Care for what ultimately turned to be his last visit. Robles testified his restrictions (as told to him orally by the doctor) were "Not to lift any more than 45 pounds, not to lean down, not to turn abruptly." [R. p. 266, lines 16-22]. He was given a piece of paper to give to his boss. He testified he could not read the piece of paper (as he is unable to read English). [R. p. 266, line 23 - p. 267, line 2].

According to the piece of paper (a work status form), his lifting restrictions were changed from 5-10 pounds to 45 pounds. The work status stated "May perform full duty activities as of 4/14/14 without accommodations." It also stated "Return for re-evaluation at this office on 4-14-14

if not better." A handwritten notation on the form stated "To do home exercise, since WC did not approve PT." [R. p. 76].

Robles took the form to Adam Vance. He told Vance that the doctor had told him he could not lift more than 45 pounds. In response, Vance "told me that was fine that I could – and to go to work and help my wife cleaning and washing dishes." [R. p. 267, lines 3-12].

After Robles worked for about three hours, Vance "told me that he needed to talk to me at his office and told me that the company had said that I had to go home and wait until he would hear from some clearance." Vance sent Robles home that day and never offered him further work. [R. p. 267, lines 14-23]. This point is undisputed as Respondents' counsel stipulated that Adam Vance would agree with testimony "concerning him sending Mr. [Robles] home on April the 7th and never asking that he return." [R. p. 280, lines 6-18].

Vance did not explain to Robles that, per the form, he would be at full duty on April 14th nor that had the option to return to Doctors Care on the 14th if he was not better. Party Reflections did not pay for the April 7, 2014 visit nor for any physical therapy. [R. p. 267, line 24 - p. 269, line 12; p. 290, line 18 - p. 291, line 23]. Robles paid $95.00 for the visit. [R. p. 77].

After April 7, 2014, Robles' wife continued to work for Party Reflections. On occasions when he would go and pick up his wife, Vance would tell him he had not heard anything yet about whether he could return to the doctor. [R. p. 273, line 22 - p. 274, line 1].

On June 2, 2014, Robles was evaluated by Dr. Daniel Westerkam. For the back injury, Dr. Westerkam recommended physical therapy, along with medication. He assigned temporary work restrictions (lasting until Robles had been fully treated) of "a maximum lift of 40 pounds, a frequent lift of no greater than 20 pounds, and no repetitive bending, stooping, squatting, or crawling." [R. p. 80].

At the time of the hearing, Robles testified he did not feel he was physically able to return to work at this time at Party Reflections. He wanted the treatment recommended by Doctors Care and Dr. Westerkam. His brother is a doctor in Mexico who was sending him medication for back pain and inflammation. [R. p. 269, line 13 - p. 270, line 21].

STANDARD OF REVIEW

"[T]he guiding principle undergirding our workers' compensation system [is] 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." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 681 S.E.2d 595 (Ct.App.2009) (citing S.C. Code Ann. § 1-23-380). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Id. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977) (when only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts).

ARGUMENT

1. The 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.

At the Single Commissioner hearing, counsel for Party Reflections 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 16th, 2014 accident *or it's our position you should use the four quarters from 2013* which are enclosed in Claimant's Pre-hearing Brief as well." [R. p. 260, lines13-18]. In the four quarters of 2013 Robles earned $53,122.55. [R. p. 26]. This results in an average weekly wage of $1,021.59 with a compensation rate of $681.09.

Conversely, Robles argued the average weekly wage should be based on wages from the 52-week period prior to Robles' April 15, 2013 right wrist injury with the predecessor company to Party Reflections. Robles had argued this period "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. p. 256, lines 13-22].

The Single Commissioner agreed with Robles and ruled the Average Weekly Wage (AWW) was $1,059.61 with a resulting compensation rate of $706.33. [R. p. 9, lines 3-4].

When Party Reflections appealed the Single Commissioner's order, it argued the Single Commissioner erred in by departing from the primary method of using the wage records from the previous four quarters without finding special circumstances permitted a departure from this method. [R. pp. 89-92].

The Appellate Panel reversed, finding:

> The average weekly wage is $786.03 resulting in a compensation rate of $524.05. This is based on his actual earnings with Party Reflections. This average weekly wage is a fair reflection of Claimant's earnings and there are no exceptional

circumstances upon which to deviate from the calculation methods provided by the statute.

[R. p. 20, lines 8-12].

The Appellate Panel erred in this finding in two respects: (1) allowing Party Reflections to prevail on an argument which differed sharply from its position at trial and in its brief to the Appellate Panel; and (2) limiting the wage determination period to the successor entity without a finding that special circumstances dictated such a divergence.

A. Party Reflections is bound by Counsel's statement at trial regarding the method used to determine the average weekly wage.

At the trial level, counsel for Party Reflections made the explicit statement that "it's our position you should use the four quarters from 2013" to determine the average weekly wage. [R. p. 8, lines 13-18]. Furthermore, in their brief to the Appellate Panel, they took the same position, writing: "Based upon a preponderance of the evidence, calculating Robles' average weekly wage using the primary method is fair. Robles worked the four quarters preceding the quarter of *this* injury and the fifty-two weeks prior to *this* injury." [R. p. 91(emphasis in original)]. In short, Party Reflections was arguing for an average weekly wage of $1,021.59 with a compensation rate of $681.09. As a matter of well-established law, Party Reflections is bound by the statements of their counsel at trial and in their brief. See Smith v. Pearson, 210 S.C. 524, 530, 43 S.E.2d 479, 481 (1947) (finding appellants bound by statement made by counsel at the outset of hearing before trial judge).

Although the argument in the brief matched their position at trial, in the prayer for relief they change their position and ask for "an average weekly wage of $786.03 and a compensation rate of $524.05." [R. p. 94(emphasis in original)]. This amount appears to be based on a 14 week period immediately before Robles' March 16, 2014 accident – a position completely contrary to the original argument made at trial (and in their appellate brief). A party is simply not allowed to change its

position on appeal. This even extends to making alternative arguments for the same relief not made at trial. See Robbins v. Walgreens and Broadspire, 652 S.E.2d 90, 375 S.C. 259 (Ct. App. 2007) (argument for additional medical treatment on alternative grounds was not preserved for appeal because alternative ground was not raised at trial level). Merely listing a contrary amount in the prayer does not solve the problem, as such conclusory assertions are deemed abandoned on appeal. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when an appellant "fails to provide arguments or supporting authority for his assertion"); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

Party Reflections did make the perfectly legitimate argument that there was insubstantial evidence of work missed due to the prior injuries, such that no exceptional circumstances existed to depart from the preceding four quarter period specified in the statute. The Appellate Panel found as a fact that "There is no evidence in the record that Robles missed any time from work with Party Reflections as a result of his two prior workers' compensation injuries." [R. p. 20, lines 6-7]. As this finding appears to be supported by substantial evidence, Appellant concedes that no special circumstances existed for the Commission to depart from the statutory definition of average weekly wage. See S.C. Code Ann. § 42-1-40 (2007)("'Average weekly wages' 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.").

The payroll records show that Robles earned $53,122.55 in the previous four quarters.[3] This evidence is undisputed. As Respondents *correctly* argued for the compensation rate to be based on the previous four quarters as required by the statute, the Court should reverse the Appellate Panel and find the average weekly wage is $1,021.59 with a compensation rate of $681.09 as a matter of law. See Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977) (when only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts).

B. A mere change in ownership is not an exceptional circumstance allowing for the Commission to depart from the statutory 52-week requirement when the employee is continuously employed in the same employment.

Robles worked continuously for a total of 12 years for Party Reflections and its predecessor company. [R. p. 263, lines11-12]. Adam Vance, the General Manager of the Columbia store and Robles' supervisor, testified he had "been at Party Reflections [for] Five years, five months and three weeks." [R. p. 282, lines 1-5]. At some point in December 2013, Party Reflections purchased Palmetto Party Rental, making Party Reflections a successor employer. [R. p. 293, line 24 - p. 294, line 5]. The employment of both Robles and Vance continued unabated with no changes to the employment or operation other than the name of the company. The employees plainly considered it to be the same employment. Cf. Addison v. Dixie Chevrolet Co., 246 S.C. 86, 142 S.E.2d 442 (1965)(change in ownership did not change employment relationship where "During the whole period of his employment, from June, 1956, to the time of his injury in June, 1960, he did substantially the same work, in the same place, and under the same 'boss' . . .").

Furthermore, Respondents never contended the change in ownership would make any difference to Robles' average weekly wage. Respondents have consistently argued that the average

[3] Robles earned $53,122.55 from December 21, 2013 through December 20, 2014.

weekly wage must be based on the four quarters of 2013 – even though most of this time was under the predecessor to Party Reflections. [R. p. 260, lines13-18]. The testimony about the change in ownership was brought up during Vance's redirect testimony late in the hearing over a collateral issue (the unrelated September 2013 left knee injury). [R. p. 293, line 22 - p. 294, line 5].

The Appellate Panel made a finding that the average weekly wage is $786.03 resulting in a compensation rate of $524.05. They made this finding "based on his actual earnings with Party Reflections." [R. p. 20, lines 8-12]. While this is the *figure* requested by Party Reflections, it is not based on the *method* requested by Party Reflections nor does it comport with the statute.[4] Indeed, the only legal justification to adopt this method would be if there were exceptional circumstances justifying its use – a notion belied by the finding that "there are no exceptional circumstances upon which to deviate from the calculation methods provided by the statute." [R. p. 20, lines 8-12]. See Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010)(alternative methods of calculating average weekly wage can only be used when the commission makes specific factual findings that using an alternative method is practicable and yields a result which is fair and just to both parties).

The statute does permit using a lesser number of weeks "[w]hen the employment, prior to the injury, extended over a period of less than fifty-two weeks . . ., as long as results fair and just to both parties will be obtained." S.C. Code Ann. § 42-1-40 (2007). That is not the case here. While there was a nominal change in ownership, Robles continued in the same employment. He did the same job, reported to the same location, to the same supervisor. A change in ownership does not

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[4] Respondents consistently argued that the Commission should apply the primary method required by the statute: "'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." S.C. Code Ann. § 42-1-40 (2007).

reset the clock. See Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971); Addison v. Dixie Chevrolet Co., 246 S.C. 86, 142 S.E.2d 442 (1965). "Employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent." Holloway v. G. O. Cooley & Sons, 208 S.C. 234, 243, 37 S.E.2d 666, 670 (1946).

It would create an absurd result if prior earnings were to be thrown out every time there was a change in ownership of a continuously operating business. See Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010)(average weekly wage "is designed to be based on a year of data."). In modern corporate America, businesses are frequently bought and sold – with no actual change in the employee's employment other than the name of the employer. For this reason, *employment* must be viewed from the employee's point of view. The statute indicates as such, for it states "'Average weekly wages' means 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 (2007)(emphasis added). Had the legislature intended the measured earnings to based on the identity of the legal entity writing the paychecks, rather than continuous employment in the same job, it would have written the statute differently with an emphasis on the *employer* rather the *employment*.[5]

The focus on the *employment* rather than the *employer* is further indicated by allowing an employee to include wages from concurrent employment (multiple jobs) in his average weekly wage.

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[5] The statute *could* have been written: "'Average weekly wages' means the earnings of the injured employee *paid by the employer for whom* he was working at the time of the injury . . ." At a later point in the statute, reference is made to the specific employer. However, this is only when the period of employment is so brier or casual as to require the using the wages of a similar employee. S.C. Code Ann. § 42-1-40 (2007)("Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.")

See Foreman v. Jackson Minit Markets, Inc., 265 S.C. 164, 217 S.E.2d 214 (1975)("wages earned concurrently from two separate employers are to be combined in determining the employee's 'average weekly wage'"). The statute endorses this concept even though the liable employer has not paid premiums on the concurrent employment.

The Appellate Panel summarily concluded as a matter of law that "Claimant's actual earnings while working for Party Reflections is an accurate reflection of his earnings and fair to all parties." [R. p. 21, lines 1-4]. There is nothing in the record to support the conclusion that using less than one quarter of wages during the slowest quarter of the year is fair to all parties. It certainly is not fair to Robles. The record shows Robles earned over $50,000.00 in the same employment in 2012 and 2013.

Equally important is the fact no testimony was taken on the issue of wages at the hearing. From the arguments of counsel on the record, the issue was based on a legal question over which 4-quarter period should be used. Party Reflections never argued that the average weekly wage was limited to the period after Party Reflections took over ownership of the business.

The Appellate Panel erred as a matter of law in using an alternative method for calculating Robles' average weekly wage rather than the 4-quarter method espoused by both parties and the statute. Even if the method used was permissible in some circumstances, it was not permissible here because the Appellate Panel gave no reason for deviating from the statute nor did it make any findings of fact on whether its alternate method was fair and equitable to the parties. Therefore, the Court should reverse the Appellate Panel and find the average weekly wage is $1,021.59 with a compensation rate of $681.09 as a matter of law.

2. As Robles had legally established his right to receive temporary compensation prior to April 14, 2014, even if he had been released "to work without restrictions" on that date, temporary compensation would have to be continued because the Employer never "offer[ed] comparable employment" and the Appellate Panel found he was not at MMI.

The Appellate Panel erred as a matter of law in reversing the Single Commissioner's finding that "The Claimant shall be paid for [Temporary Total Disability Compensation] starting from April 7, 2014 and forward, until he is placed at MMI." [R. p. 11, lines 11-12]. The evidence shows Robles 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. Moreover, as no actual doctor's visit took place on April 14th, it was speculation for the Appellate Panel to conclude Robles could work full duty at Party Reflections or any other employer from that point forward. Cf. Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)("Moreover, it is highly speculative to presume Employer would offer Employee light duty work had she remained with Employer). Indeed, the Appellate Panel never even mentioned Dr. Westerkam's opinion assigning similar work restrictions on June 2, 2014 – a mere 6 weeks later. [R. p. 80]. Yet it is Dr. Westerkam's opinion (combined with Robles' testimony) that provides substantial evidence for the Panel's finding that Robles had not reached MMI.

Robles was injured on March 16, 2014. At the very minimum, he was under work restrictions from March 17th through April 14th – a period of 29 days. According to Robles, his employer provided no work within that time except for about 3 hours on April 7, 2014, when Adam Vance "told me that he needed to talk to me at his office and told me that the company had said that I had to go home and wait until he would hear from some clearance." Vance sent Robles home that day and never offered him further work. [R. p. 267, lines 14-23].

Although it is undisputed that Party Reflections never offered Robles any work after April 7, 2014, the testimony from Vance was somewhat different than Robles. Vance testified that between March 17th and April 7th, "I'd say he could have worked five to ten days, maybe. I believe also he was given sick time, vacation time to rest." [R. p. 292, line 25 - p. 293, line 10].

From this testimony, the Appellate Panel could conclude Robles worked, at most, 10 days out of the 29 day period he was undisputedly under work restrictions. If Robles had worked 10 days, he would have been out of work for the other 19 days, thus requiring his employer to begin payment of temporary total disability compensation. At trial, Respondents' counsel made this exact point: "If he is entitled to any temporary total benefits it would only be during his time period of being on light duty up until March 14th of 2014 when he was released to return to work in a full duty capacity." [R. p. 259, lines 8-21]. Trial counsel's concession that Robles would be entitled to temporary compensation from March 17th through April 14th is a welcome recognition that Robles met the statutory requirements to receive temporary benefits through that period.

The statute and regulations provide a blueprint as to how this case should have been handled. Temporary disability benefits are triggered "[w]hen an employee has been out of work due to a reported work-related injury . . . for eight days[.]" S.C. Code Ann. § 42–9–260(A) (2007). Even though Respondents never started temporary benefits, they were legally required to do so. As a matter of law, when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation or wages in lieu of compensation. See S.C. Code Ann. § 42-9-190 (2005); S.C. Code Ann. § 42-9-200 (2007)("if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of disability"); S.C. Code Ann. § 42-9-260(A) (2007); S.C Code Ann.

Reg. 67-502 (2007)(defining "disability", "return to work without restriction", and "temporary partial incapacity").

Although the Appellate Panel found as a fact that "Robles was released to full duty on April 14, 2014," the Panel also found "The Claimant is not at maximum medical improvement." [R. p. 20, lines 5, 15-17]. If Party Reflections was legally obligated to pay temporary compensation to Robles for 19 days of the 29 day period – as they were – then what is the effect of these twin findings by the Appellate Panel?

The answer lies in the statute governing payment, suspension or termination of temporary compensation. Section 42-9-260 creates a 150-day grace period wherein the employer can unilaterally suspend or terminate temporary compensation when certain conditions are met.[6] The

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[6] The complete list of allowable grounds for unilateral termination or suspension are:

(B) Once temporary disability payments are commenced, the payments may be terminated or suspended immediately at any time within the one hundred fifty days if:

> (1) the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments must be resumed immediately; or
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> (2) the employee agrees that he is able to return to work and executes the proper commission form indicating that he is able to return to work; or
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> (3) a good faith investigation by the employer reveals grounds for denial of the claim; or
>
> (4) the employee has been released by the treating physician to work without restriction and the employer offers comparable employment; or
>
> (5) the employee has been released by the treating physician to limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released; or
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> (6) the employee refuses medical treatment, as provided in Section 42-15-60, or refuses an examination or evaluation, as provided in Section 42-15-80, and the termination or suspension of benefits continues until the refusal ceases or the commission determines the refusal is justified pursuant to either Section 42-15-60 or 42-15-80.

S.C. Code Ann. § 42-9-260(B) (2007)

section potentially applicable to this case is when "the employee has been released by the treating physician to work without restriction *and* the employer offers comparable employment . . ." S.C. Code Ann. § 42-9-260(B)(4) (2007)(emphasis added).

The Appellate Panel found the first condition had been met by finding "Robles was released to full duty on April 14, 2014." [R. p. 20, lines 5]. However, the second condition was not met. Party Reflections *never offered comparable employment.* For that reason, Party Reflections never met the statutory requirement to suspend Robles' right to temporary compensation. See Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006)(requiring strict compliance with statute governing termination of temporary compensation); Cf. Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(employee entitled to temporary compensation where employer never actually offered light duty work to employee).

Party Reflections contends it had no obligation to offer comparable employment. Trial counsel argued:

> It is our position that based on his full duty release that he had the opportunity to seek employment with anyone that he chose to do so and he, unfortunately, his own self, chose not to do that. So it's our position that he is not entitled to any temporary total benefits beyond April 14th of 2014.

[R. p. 259, lines 8-21].

A virtually identical argument was rejected by this Court in Lee v. Bondex. The court reasoned:

> [Employer] argues, a claimant must go into the marketplace and seek from other employers a job that does not conflict with his work restrictions. We disagree. This is not a claim for permanent disability compensation. For temporary disability benefits, a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position. Therefore, while a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits. Rather, the claimant satisfies his burden by proving

> work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer.

Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013)

The Single Commissioner's Order followed Lee and other cases dealing with similar situations. The Appellate Panel did not.

Two similar cases are Cranford and Grayson. As in this case, "Both employers terminated their employees shortly after the employees returned to work while the employees were still under work restrictions." Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012). In Cranford, the court held the employee was entitled to temporary compensation until he reached MMI and was released without restrictions. Id. See, also Smith v. S.C. Dep't. of Mental Health, 335 S.C. 396, 399, 517 S.E.2d 694, 695–96 (1999) ("Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent. This is precisely the reason to terminate temporary benefits in favor of permanent benefits upon a finding of MMI."). In Grayson, "[t]he supreme court held that because Grayson was released with work restrictions, there was in reality no evidence that Grayson's period of temporary total disability ever ended prior to his firing." See Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995) (as characterized by Cranford). As Grayson's temporary compensation was never properly terminated, he was entitled to have his benefits reinstated retroactively. Accord, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006).

Appellant requests this Court find the Appellate Panel committed an error of law in reversing the Single Commissioner's finding that "The Claimant shall be paid for [Temporary Total Disability Compensation] starting from April 7, 2014 and forward, until he is placed at MMI." [R. p. 11, lines 11-12]. On the undisputed facts of the case, Robles met the statutory requirements to receive temporary compensation continuously until he reaches MMI (or returns to work). Respondents

should not receive a windfall because of their wrongful refusal to start his temporary compensation. Robles should not be placed in a position worse than a similar employee whose employer complied with the law.

3. Even if Robles was able to work full duty on April 14, 2014, he should be paid temporary compensation from June 2, 2014 until MMI because he was under work restrictions from Dr. Westerkam.

As noted above, Robles should be paid temporary compensation from April 7, 2014 until he reaches MMI. Should the Court reject the legal analysis above, in the alternative, Robles should be paid temporary compensation from June 2, 2014 and continuing until he reaches MMI.

Dr. Westerkam evaluated Robles on June 2, 2014. He opined Robles required additional treatment, was not at MMI and should be under temporary work restrictions (lasting until Robles had been fully treated) of "a maximum lift of 40 pounds, a frequent lift of no greater than 20 pounds, and no repetitive bending, stooping, squatting, or crawling." [R. p. 80].

Even if we assume Robles was able to work full duty between April 14, 2014 and June 2, 2014, the fact he was put under medical restrictions from that point forward requires Party Reflections to pay temporary compensation. See Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(employee entitled to temporary compensation where employer never actually offered light duty work to employee). Johnson is particularly apropos because the employee in Johnson was placed on medical work restrictions many months after quitting her full-duty job with Rent-A-Center at a time when she had no restrictions. Johnson confirms that being placed on light duty after a period of full duty entitles an injured worker to temporary compensation when, as here, the employer never offers light duty work.

Appellant requests, in the alternative, that the Court hold Robles is entitled to receive temporary compensation from June 2, 2014, until he reaches MMI.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed as controlled by multiple errors of law. The Court should hold (1) the average weekly wage should be based on the actual wages for the four quarters preceding the quarter in which the accident occurred; and (2) Robles is legally entitled to receive temporary compensation from April 7, 2014 and continuing until he reaches MMI. In the alternative, Robles should receive temporary compensation from June 2, 2014 and continuing until he reaches MMI.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM 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

The undersigned certifies that this Brief of Appellant complies with Rule 211(b), SCACR.

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