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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Commissioners T. Scott Beck, Aisha Taylor, and Melody L. James

W.C.C. File No: 1117221
Appellate Case No.: 2016-001788

Michelle Davis
Employee/Clamant Appellant

vs.

Fraenkische USA, LP
Employer, and
Maryland Casualty Company
c/o Zurich North America
Carrier Respondents

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SC Court of Appeals

RECORD ON APPEAL

Michael F. Mullinax (S.C. Bar No. 4133)
Mullinax Law Firm, P.A.
Post Office Box 2665
Anderson, South Carolina 29621
(864) 261-6242
(864) 261-6680 (fax)
Attorney for the Appellant

Mr. Mark A. Allison
McAngus Goudelock & Courie, LLC
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Ms. Helen F. Hiser
McAngus, Goudelock & Courie, LLC
Post Office Box 650007
Mt. Pleasant, South Carolina 29465
(843) 576-2900
Attorneys for the Respondent

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WCC File #: _____
Carrier File #: 2800077386
Carrier Code #: 0090
Employer FEIN #: 030449731000

Claimant's Name: Michelle L Davis SSN: 2-0512631 Employer's Name: FRAENKISCHE USA LP
Address: [REDACTED] Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED] City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
Home Phone: (864) 570-0042 Work Phone: (864) 328-0021 Insurance Carrier: Maryland Casualty Company
Preparer's Name: John Rumsy Preparer's Phone #: 864.328.0021 x.111

Date of Injury: 10-21-2011
month day year

A. Total Wages Paid

1. Check Applicable Method:

- ☐ Report of earnings of injured employee based on four completed quarters.
☒ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st		\$
2nd		\$
3rd	09/25/11	\$2,698.80
4th	12/04/11	\$4,990.44

Total Paid 2. \$ 7,689.24

3. List total value of other allowances of any character made in lieu of wages during four quarters above.

3. \$ 0

4. Add lines 2 and 3.

TOTAL WAGES PAID:

4. \$ 7,689.24

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 6

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).

AVERAGE WEEKLY WAGE:

6. \$ 1,281.54

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate.

7. \$ 854.40

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8. _____
☒ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. \$ 854.40

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803)737-5723.

SC Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715

Columbia, South Carolina 29202-1715

(803)737-5723



WCC File #: 1117221

Carrier File #: 2800077386-001

Carrier Code #:

Employer FEIN #:

Michelle Davis

Claimant's Name

251 Liberty Road

Anderson, South Carolina 29621

Address City State Zip

Home Phone #

Work Phone #

Preparer's Name

Law Firm

Fraenkische USA LP

Employer's Name

16 AM Ellison Road

Anderson, South Carolina 29621

Address City State Zip

Maryland Casualty Company c/o Zurich North America

Insurance Carrier

Phone Number

Date of Injury: 10/21/2011

A. Total Wages Paid**1. Check Applicable Method:**

- ☐ Report of earnings of injured employee based on four completed quarters.
- ☒ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
- ☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
- ☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st	8/22/11 to 10/14/11	\$3,761.16
2nd		\$
3rd		\$
4th		\$

Total Paid 2. \$3,761.16

3. List total value of other allowances of any character made in lieu of wages during four quarters above.

3. \$0.00

4. Add lines 2 and 3.**TOTAL WAGES PAID:**

4. \$3,761.16

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 7.7143

B. Average Weekly Wage**6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).****AVERAGE WEEKLY WAGE:**

6. \$487.56

C. Compensation Rate**7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate.**

7. \$325.05

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
- ☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
- ☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
- ☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8.
- ☒ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. \$325.05

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803)737-5723.

Reply To

MARK A. ALLISON
Direct Dial: (864) 242-1713
mallison@mgclaw.com

October 15, 2015

Amy Bracy, Judicial Director
S. C. WORKERS' COMPENSATION COMMISSION
Post Office Box 1715
Columbia, South Carolina 29202-1715

RE: Michelle Davis v. Fraenkische USA LP and Maryland Casualty Company c/o
Zurich North America
Date of Accident: October 21, 2011
WCC File No.: 1117221
Our File No.: 20216.15027
Claim No.: 2800077386-001

Dear Ms. Bracy:

Please find enclosed our Form 21 for filing in this matter. We also enclose copies of a current Form 18, an updated form 20, and our filing fee in the amount of \$25.00.

By copy of this letter to Michael F. Mullinax, the claimant's attorney, we are notifying him of this submission, and serving a copy of same upon him by mail.

If you have any questions, or if you need further assistance from us, please do not hesitate to call.

Very truly yours,



Mark A. Allison

MAA/jcl

Enclosures

cc: Vivian Hardin, Zurich North America
Michael F. Mullinax, Mullinax Law Firm, PA

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. Box 1715
Columbia, SC 29202-1715
(803) 737-5700 www.wcc.sc.gov



WCC File # 1117221
Carrier File # 2800077386-001
Carrier Code #
Employer FEIN #

Claimant's Name: Michelle Davis SSN: 243-51-2881 Employer's Name: Fraenkische USA LP
Address: 551 Liberty Road, Anderson, South Carolina 29621
Address: 416 AM Wilson Road, Anderson, South Carolina 29621
Home Phone # (864) 570-0042 Work Phone # Insurance Carrier: Maryland Casualty Company c/o Zurich North America
Preparer's Name: Mark A. Allison Law Firm: McAngus Goudelock & Courie Phone Number: (864) 242-1713

The date of injury reported on Form 12A is: 10/21/2011.

Check appropriate section(s). The Employer's Representative requests a hearing to:

☐ **Stop payment of compensation.** Claimant has reached maximum medical improvement and Claimant continues to receive temporary compensation payments. The employer's representative requests a hearing pursuant to § 42-9-260(D) to stop payment of temporary compensation. A hearing requested pursuant to this section must be held within sixty days of the date of the request.

Claimant reached maximum medical improvement on ____ (m/d/yyyy) (copy of medical report must be attached).

Compensation payments are current as of ____ (m/d/yyyy) and shall continue until otherwise ordered or until Form 17 is signed by the claimant.

A Form 17 was offered and refused on ____ (m/d/yyyy).

☒ **Address suspension, termination, or reduction of temporary disability payments for any cause.**

☐ a. At any time pursuant to § 42-9-260(E).

☒ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.

The basis for the termination/ suspension is Reduce TTD due to lower compensation rate

☐ **Determine if compensation is due** pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:

Claimant reached maximum medical improvement on ____ (m/d/yyyy) (copy of medical report must be attached).

☒ **Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.**

☐ **Determine amount of compensation for claims involving a fatality.**

☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.

☐ b. Amount of compensation for death of employee due to accident pursuant to § 42-9-290.

☐ **Mediation**

☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.

☐ b. Mediation is required pursuant to Reg. 67-1802.

☐ c. Mediation is requested by consent for the Parties pursuant to Reg. 67-1803.

☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Failure to respond pursuant to Reg. 67-208 B in writing or by submission of a Form 22 may result in ordered mediation pursuant to Reg. 67-1801 B.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

certify I have served this document pursuant to Reg. 67-211 by delivering a copy to

Post Office Box 2665

Address: Anderson, South Carolina 29622

Michael F. Mullinax, Mullinax Law Firm, PA

on the 15th day of October 20 15

☒ first class postage ☐ certified mail ☐ personal service.

25.00 filing fee and updated Form 18 is required.

Mark A. Allison

Preparer's Signature

Attorney for Employer/Carrier

Title

mallison@mgclaw.com

Email

October 15, 2015

Date

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or jud@wcc.sc.gov or mediation@wcc.sc.gov. Refer to regulations 67-211, 67-504, 67-505, 67-506; and 67-510.

C FORM # 21

Revised 7/13

21

Employer's Request for Hearing

4



Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Michelle Davis SSN: 249-91-2631 Employer's Name: Fraenkische USA LP
Address: 361 Liberty Road Address: 416 AM Ellison Road
City: IVA State: SC Zip: 29655 City: Anderson State: SC Zip: 29624
Home Phone: 864 642 - 5662 Work Phone: () Insurance Carrier: Maryland Casualty Ins Co c/o Zurich NA
Preparer's Name: Michael F. Mullinax Law Firm: Mullinax Law Firm, PA Preparer's Phone #: 864-261-6242

Date of Injury or Illness: 10/21/2011

Complete each information blank. Clearly specify when contention are admitted in part and denied in part. The Claimant's answer to the claim respectfully shows:

I. ☐ Stop payment of compensation.

It is admitted/denied the Claimant has reached maximum medical improvement and continues to receive temporary compensation payments.
It is admitted/denied the Claimant's temporary total payments are current.
It is admitted/denied the Claimant's temporary total payments have been properly stopped as of _____ (m/d/yyyy) pursuant to Reg. 67-505.

II. ☐ Address suspension, termination, or reduction of temporary disability payments for any cause.

- ☐ a. At any time pursuant to § 42-9-260(E).
☐ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.
☐ c. Temporary total compensation was suspended, terminated, or reduced without proper order of the Commission.
☐ d. Additional compensation and penalties are requested pursuant to Reg. 67-510.

The basis for additional compensation and penalty is _____

III. ☒ Determine if compensation is due pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:

Premature

Claimant reached maximum medical improvement on _____ (m/d/yyyy) (copy of medical report must be attached).

It is admitted/denied the Claimant has reached maximum medical improvement.

Claimant has/ has not returned to work. Claimant has/ has not returned to light duty.

- ☒ a. Permanency is premature at this time.
☒ b. Claimant is in need of additional medical care and treatment
☐ c. Claimant is entitled to permanent partial disability pursuant to 42-9-30.
☐ d. Claimant is entitled to wage loss pursuant to 42-9-20.
☐ e. Claimant is entitled to total and permanent disability pursuant to 42-9-10 or 42-9-30(21) and Reg. 67-1802.

IV. ☐ Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.

It is admitted/denied that the Employer/Carrier is due a credit for overpayment.

V. ☐ Determine amount of compensation for claims involving a fatality.

- ☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.
☐ b. Amount of compensation for death of employee due to accident pursuant to § 42-9-290.

VI. ☒ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☒ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Failure to respond pursuant to Reg. 67-208 B in writing or by submission of a Form 22 may result in ordered mediation pursuant to Reg. 67-1801 B.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Mark A Allison, McAngus Goudelock & Courie, LLC
Address 75 Bastille Place, Suite 300, Greenville, SC 29602 on the 10th day of Nov 2015, by:
☒ first class postage ☐ certified mail ☐ personal service ☐ electronic service.

[Signature] Attorney for Claimant
Preparer's Signature Title

mikemullinax@charter.net
Email

11/18/15
Date

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or judicial@wcc.sc.gov or mediation@wcc.sc.gov
Refer to Regulations 67-211, 67-504, 67-505, 67-506, 67-510; and 67-1801.



Claimant's Name: Michelle Davis

Employer's Name: Fraenkische USA LP

Address: 991 Liberty Rd

Address: 1600 W. Daniel Ballard Rd

City: Iva State: SC Zip: 29655

City: Anderson State: SC Zip: 29604

Home Phone: (864) 348-3993 Work Phone: ()

Carrier: Maryland Casualty Ins. Co.
c/o Zurich North America

Preparer's Name: Michael F. Mullinax
V. Laniel Chapman

Preparer's Phone #: (864) 261-6242

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation at: See Attached. AWW \$ See Attached Date of Injury: 10/21/2011
2. Type of injury and body part(s): Left foot caught in pallet causing fall onto floor and popping in ankle and foot with excruciating pain to left foot/ankle/leg; right hip/leg/knee; CRPS; L3 radiculitis; Back injury; antalgic gait; psychological anxiety & depression. Claimant has endured 4 surgeries and currently scheduled for SCS.
3. Facts in controversy: Claimant is totally and permanently disabled, more than one body part injured, and mediation is mandatory; Claimant is not at MMI because SCS has not been implanted; Carrier miscalculated AWW and Compensation rate and Claimant is entitled to Commission Ruling pursuant to
§42-1-40. Claimant has suffered injury to more than one body part and is entitled to PTD; Continuing Medical Care and Treatment with Hardware
4. Legal issues involved: Claimant's average weekly wage and compensation rate pursuant to §42-1-40 and credit for overpayment.
5. Unusual aspects: Mediation is necessary; Wage rate not correct per §42-1-40; Employer has refused to accommodate Claimant and has terminated her employment. §42-9-35; §42-9-10; §42-9-20; §42-15-60; 42-9-30 (23).
6. Witnesses (designate if expert):* Claimant, Michelle Davis; Jason Gwardiak, and any other witnesses who may have knowledge of the case.
7. Exhibits: See attached Exhibit A (Form 20 dated 12/13/2011); Exhibit B and B(1) (Wage Calculations); Exhibit C (Employee Earnings Report), and Exhibit D (2011 - 2014 W-2's).
8. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
None at this time.
9. Name, address, and specialty, if any, of the treating physician: Michael E. Tollison, MD (Orthopaedic Surgeon) 1050 Grove Rd Greenville, SC 29605; James Paul Behr (Pain Medicine) 1330 Boiling Springs Rd, Ste 1600, Spartanburg SC 29393; W. Daniel Ballard (Podiatrist) 24 Parkway Commons Way Greer, SC 29650
10. Impairment rating(s); body part(s); physician and date of opinion:
12. I am amending my Form 50/51 in the following manner:

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Mark A Allison, McAngus Goudelock Courie, LLC

at Post Office Box 2980, Greenville SC 29602 on the 29th day of December 2015, by:

First class postage ☐ certified mail ☐ personal service ☐ electronic service

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature: [Signature]
Date of hearing: January 8, 2016 11:00 am

Email: mikemullinax@charter.net
Time needed for hearing: 2 1/2 hours

Continued

Claimant was injured on October 21, 2011. As a result of her injury, Claimant underwent four surgeries: 2/20/2012; 7/1/2013; 12/31/2013; and 11/24/2014. A Form 20 provided by the Defendants [dated 10/15/2015] is not valid as it does not accurately reflect Claimant's work history and raises that she received after she was injured, and had returned to work, and does not reflect the pay increases she received, nor does it reflect the pay increase that she should have received but for the injury. At the time of her injury, her rate of pay was \$12.48 and she received numerous overtime hours. She continued to work after the injury, and on January 20, 2012, her pay was increased to \$13.00 per hour and she continued to work overtime hours even with the injured left foot. Her rate of pay was increased to \$13.35 per hour on August 31, 2012.

On February 15, 2013, she received an additional pay raise to \$16.07 per hour and she worked on a continuous basis to July 1, 2013 when was forced to quit due to the fact that she had a second surgery. She was never able to return to full term employment following that second surgery and then Defendant unilaterally terminated Claimant and never offered to accommodate her injuries and disabilities following the second, third and fourth surgeries.

The testimony and evidence to be presented at the hearing will show that prior to July 1, 2013, Plaintiff would have been appointed as Team Leader due to her obvious job skills which would have increased her pay by .75 an hour, but for the fact that she had additional surgeries and disabilities. Therefore we submit that a fair and accurate approximation of Claimant's earnings would require that she be given credit and that her average weekly wage be based upon her overtime hours as set forth in the Exhibits, and her hourly rate of \$16.82 per hour. Any other means of calculation would be unfair to the Claimant and unfair pursuant to the provisions of S.C. Code §42-1-40.

Michelle Davis is entitled to compensation based upon an AWW of \$711.23 @ \$16.07 per hour. This is the amount she earned after she returned to work from February 15, 2013 until July 5, 2013. (See Exhibit C for all wages) The corresponding compensation rate would be the sum of \$474.39 (see Exhibit B). The employer's Form 20, dated 12/13/2011 (Exhibit A) was prepared and filed by the employer and the Claimant was paid by this filing which was the employer's own fault. Employer should not be allowed now to claim a credit based upon the fact that they have paid her at this rate which they calculated and paid since the date of the accident.

In the alternative, the Claimant should be entitled to a .75 cent per hour raise which she was denied because of her injury and that would have made her compensation \$16.82 per hour, if you take the same weekly period from February 15, 2013 to July 19, 2013. She worked an average of 38.22 hours and an additional 4.19 overtime hours. If you multiply this out, her (AWW) would be \$748.69 and her Compensation rate would be \$499.38. (See Exhibit B-1)

In all events, the Defendant's Form 20 filed with the Form 21 hearing request is unreasonable and unfair and should not be used to penalize the injured worker.

See also Pilgrim v. Eaton 703 S.E. 2d 241, Ct. App. 2010. The overriding goal of the Workers' Compensation Act is "to compensate workers for reductions in their earning power caused by work related injuries..." Stevenson v. Rice Services, Inc. 323 S.C. 113, 473 S.E. 2d 699 (1996).

SC Code Ann. §42-1-40 provides as follows:

... "When for exceptional reasons the foregoing would be unfair, either to the Employer or Employee. Such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured Employee would be earning were it not for his injury".

The statute provides a flexible approach with a view toward the ultimate objective of reflecting fairly a Claimant's probable future earning loss. Bennett v. Gary Smith Builders 271 SC 94, 98, 245 SE 2d 129, 131 (1978).

"The objective of wage calculation is to arrive at a fair approximation of the Claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss, as a result of injury must be thought of in terms of its impact on probable future earnings". *Id.* at 98, 99, 245 SE 2d at 131." See also Stokes v. First National Bank 306 SC 46, 410 SE 2d 248 (1991).

Our Court has reasoned that S.C. Code Ann. §42-1-40 provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a Claimant's probable future earning loss. See Sellers v. Pinedale Residential Center 564 SE 2d 694 (Ct. App. 2002). "Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the Claimant's probable future earning capacity." Elliott v. S.C.D.O.T. 607 SE 2d 90 (Ct. App. 2004).

Exceptional circumstances exist in this case in that Claimant has exerted herself to earn a fair wage, and should not be penalized to an amount that is not in keeping with her demonstrated earning capacity which was achieved even while coping with her acknowledged injury.

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.* Commissioners reserve the right to admit expert witnesses at hearings.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	
COUNTY OF ANDERSON	)	WORKER'S COMPENSATION COMMISSION
	)	W. C. C. File No. 1117221
Michelle Davis,	)	
	)	
Employee/Claimant,	)	NOTICE OF WITNESSES AND
vs.	)	WRITTEN MEDICAL REPORTS
	)	TO BE INTRODUCED ON
	)	BEHALF OF THE CLAIMANT
Fraenkische USA LP,	)	
	)	
Employer,	)	
and	)	
	)	
Maryland Casualty Ins. Co.,	)	
C/o Zurich North America,	)	
	)	
<u>Employer/Carrier.</u>	)	

TO: THE HONORABLE SUSAN B. BARDEN, JUDICIAL DEPARTMENT
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND
MARK A. ALLISON, MCANGUS GOUDELOCK & COURIE, LLC, ESQUIRE,
ATTORNEY FOR EMPLOYER.

YOU ARE HEREBY NOTIFIED THAT the Employee/Claimant pursuant
to the provisions of the South Carolina Workers' Compensation Act
and South Carolina Code Section 1-23-330 (1976, as amended),
herewith submits the following medical reports as direct evidence
on behalf of the Employee/Claimant, to wit:

EXHIBITS

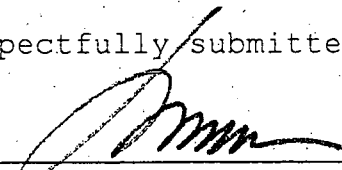
A.	Original Form 20 dated 12/13/2011	Pgs. 1 - 2
B.	Wage Calculations based on \$16.07	Pg. 3
B(1)	Wage Calculation based on \$16.82	Pg. 4
C.	Employee Earnings Report	Pgs. 5 - 17
D.	2011 - 2014 W-2's	Pgs. 18 - 21

YOU ARE FURTHER HEREBY NOTIFIED that you have the right of cross-examination; and should you desire to exercise said right, you are to forthwith schedule the depositions of any of the physicians, whose reports are submitted for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the Employee/Claimant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Employee/Claimant: Michelle Davis, and Mr. Jason Gwardiak, and any other witnesses that may be submitted at a later date who may have knowledge of this accident.

Respectfully submitted,



Michael F. Mullinax
MULLINAX LAW FIRM, PA
500 North McDuffie Street
Post Office Box 2665
Anderson, SC 29621
(864) 261-6242

Attorney for Claimant

Anderson, South Carolina
December 29, 2015

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: _____
Carrier File #: 2800077386
Carrier Code #: 0090
Employer FEIN #: 030449731000

Claimant's Name: Michelle L Davis SSN: 2-0512631
Address: 1101 Project Rd
City: Low State: SC Zip: 29003
Home Phone: (864) 570-0042 Work Phone: (864) 328-0021
Preparer's Name: John Rumsy

Employer's Name: FRAENKISCHE USA LP
Address: 110 AM Sullivan Rd
City: Anderson State: SC Zip: 29602
Insurance Carrier: Maryland Casualty Company
Preparer's Phone #: 864.328.0021 x.111

Date of Injury: 10-21-2011
month day year

A. Total Wages Paid

1. Check Applicable Method:

- ☐ Report of earnings of injured employee based on four completed quarters.
☒ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid	
1st		\$	
2nd		\$	
3rd	<u>09/25/11</u>	<u>\$2,698.88</u>	
4th	<u>12/04/11</u>	<u>\$4,990.44</u>	Total Paid 2. <u>\$ 7,689.24</u>

3. List total value of other allowances of any character made in lieu of wages during four quarters above.

4. Add lines 2 and 3.

TOTAL WAGES PAID:

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

3. \$ 0
4. \$ 7,689.24
5. 6

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).

AVERAGE WEEKLY WAGE:

6. \$ 1,281.54

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate.

7. \$ 854.40

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8.
☒ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. \$ 854.40

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803)737-5723.

WCC Form # 20
Rev. Date 3/97

20

STATEMENT OF EARNINGS
OF INJURED EMPLOYEE

Received Time Dec. 13, 2011 9:48AM No. 4651

10



DATE: 12-13-2011

TO: John Rumsy

RECIPIENT'S
FAX #: 18643280031

FROM: Beth Gregory

TELEPHONE #: (864) 654-7444 Ext: 000

OF PAGES INCLUDING THIS COVER SHEET: 2

RE: Claim #: 2800077386-001
Insured: FRAENKISCHE USA LP
Date of Loss: 10-21-2011
Claimant: Michelle L Davis

SUBJECT: Michelle Davis

MESSAGE: Please complete the enclosed Form 20 to reflect her wages from her 8/22/11 date of higher through 10/20/11 and return to me @ (704)551-3402. Thank you.

***** PLEASE NOTE *****

This Telefax/e-mail message and any documents accompanying this transmission may contain privileged and/or confidential information and is intended solely for the addressee(s) named above. If you are not the intended addressee/recipient, you are hereby notified that any use of, disclosure, copying, distribution, or reliance on the contents of this Telefax/e-mail information is strictly prohibited and may result in legal action against you. Please reply to the sender advising of the error in transmission and immediately delete/destroy the message and any accompanying documents. Thank you.

Zurich North America

Claims

PO Box 968080

Schaumburg, IL 60196-8080

Telephone (800) 808-6412

Fax (704) 551-3402

www.zurichna.com



Michelle Davis

Fraenkische USA LP

~~351 Liberty Road~~

~~Iva, South Carolina 29655~~

~~46 AM Ellison Road~~

~~Anderson, South Carolina 29624~~

Maryland Casualty Company c/o Zurich North America

Date of Injury: 10/21/2011

A. Total Wages Paid

1. Check Applicable Method:

- ☐ Report of earnings of injured employee based on four completed quarters.
- ☒ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
- ☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire date: _____
- ☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just (attach documentation to show how average weekly wage and compensation rate were calculated).

2. List total wages paid as reported to the Employment Security Commission on the Employer Quarterly Contribution and Age Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st	8/22/11 to 10/14/11	\$3,761.16
2nd		\$
3rd		\$
4th		\$

Total Paid 2. \$3,761.16

3. List total value of other allowances of any character made in lieu of wages during four quarters above.

3. \$0.00

4. Add lines 2 and 3.

TOTAL WAGES PAID:

4. \$3,761.16

5. List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred.

5. 7.7143

B. Average Weekly Wage

6. To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).

AVERAGE WEEKLY WAGE: 6. \$487.56

C. Compensation Rate

7. The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate.

7. \$325.05

8. The compensation rate is as follows (choose one):

- ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
- ☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
- ☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
- ☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8. _____
- ☒ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. \$325.05

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED, THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803) 737-5723.

AVERAGE WEEKLY WAGE COMPENSATION - BASED ON \$16.07

2/15/2013 to 7/19/13

1,390.06

1,558.79

1,414.16

1,394.07

1,424.21

1,449.29

1,446.31

1,454.34

1,299.66

1,458.36

1,357.91

$\$15,647.16 \div 22 \text{ weeks} = 711.23 \times .667 = \$474.39$

AWW: $711.23 \times .667 = \$474.39$

COMP RATE: \$474.39

AVERAGE WEEKLY WAGE COMPENSATION - BASED ON \$16.82

2/15/2013	80.50	4.0
	76.00	14.0
	76.00	8.0
	74.75	12.0
	76.25	8.25
	76.75	8.75
	76.50	9.00
	76.25	9.50
	66.25	9.75
	77.25	9.00
7/19/2013	84.50	
	841	4.19 OVERTIME x 25.23 = 105.71

22 WEEKS = $38.22 \times 16.82 = \$642.98$

+105.71

AWW: $\$748.69 \times .667 = \$499.38$

COMP RATE: \$499.38

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0001
Date:09/18/2015
Time:09:21 AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
09/02/2011	reg pto	24.00 16.00	12.48 12.48	299.52 199.68	499.20	0.00	20.97	7.24	SC	5.05	0.00	465.94	669
09/16/2011	reg ot holiday	72.25 0.50 8.00	12.48 18.72 12.48	901.68 9.36 99.84	1,010.88	28.01	42.46	14.66	SC	33.65	0.00	892.10	672
09/30/2011	reg ot pto	73.75 9.00 8.00	12.48 18.72 12.48	920.40 168.48 99.84	1,188.72	45.06	49.62	17.13	SC	45.58 pre tax dental uniforms	7.39 5.11	1,018.83	0.00 99999999
10/14/2011	reg ot pto	65.00 2.75 16.00	12.48 18.72 12.48	811.20 51.48 199.68	1,062.36	32.42	44.31	15.30	SC	36.73 pre tax dental uniforms	7.38 8.76	917.46	0.00 99999999
10/28/2011	reg ot	64.75 0.25	12.48 18.72	808.08 4.68	812.76	7.46	33.83	11.68	SC	20.62 pre tax dental uniforms	7.38 8.76	723.03	0.00 99999999
11/10/2011	reg ot	80.00 2.25	12.48 18.72	998.40 42.12	1,040.52	30.24	43.39	14.98	SC	35.20 pre tax dental uniforms	7.38 8.76	900.57	0.00 99999999
11/25/2011	reg ot	80.00 5.50	12.48 18.72	998.40 102.96	1,101.36	36.32	45.95	15.86	SC	39.46 pre tax dental	7.38	956.39	0.00 99999999
12/09/2011	reg holiday	62.00 16.00	12.48 12.48	773.76 199.68	973.44	23.53	40.57	14.01	SC	30.75 pre tax dental	7.38	857.20	0.00 99999999
12/23/2011	reg	8.25	12.48	102.96	102.96	0.00	4.01	1.39	SC	0.00 pre tax dental	7.38	90.18	0.00 99999999
9 - Checks					7,792.20	203.04	325.11	112.25			5,463.66	1,358.04	

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0001
Date:09/18/2015
Time:09:40AM
Pgm:Web

Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
01/06/2012	reg	40.00	12.48	499.20	826.80	6.94	34.42	11.88	SC	21.51			
	ot	1.50	18.72	28.08									
	holiday	24.00	12.48	299.52						pre tax dental	7.38	744.67	0.00 99999999
01/20/2012	reg	72.25	13.00	939.25	1,053.00	29.56	43.92	15.16	SC	36.08		920.90	0.00 99999999
	ot	0.50	19.50	9.75						pre tax dental	7.38		
	holiday	8.00	13.00	104.00									
02/03/2012	reg	64.00	13.00	832.00	945.75	18.84	39.41	13.61	SC	29.00		837.51	0.00 99999999
	ot	0.50	19.50	9.75						pre tax dental	7.38		
	pto	8.00	13.00	104.00									
02/17/2012	reg	72.50	13.00	942.50	1,046.50	28.91	43.64	15.07	SC	35.62		915.88	0.00 99999999
	pto	8.00	13.00	104.00						pre tax dental	7.38		
03/02/2012	reg	24.75	13.00	321.75	529.75	0.00	21.94	7.57	SC	5.88		486.98	0.00 99999999
	pto	16.00	13.00	208.00						pre tax dental	7.38		
03/16/2012	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00		0.00	0.00 0
										pre tax dental	7.38		
										pre tax dental	-7.38		
04/27/2012	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00		0.00	0.00 0
										pre tax dental	7.38		
										pre tax dental	7.38		
										pre tax dental	-14.76		
05/11/2012	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00		0.00	0.00 0
										pre tax dental	7.38		
										pre tax dental	14.76		
										pre tax dental	-22.14		
05/25/2012	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00		0.00	0.00 0
										pre tax dental	7.38		
										pre tax dental	22.14		
										pre tax dental	-29.52		
06/08/2012	reg	21.00	13.00	273.00	273.00	0.00	9.92	3.42	SC	0.00		222.76	0.00 99999999
										pre tax dental	7.38		
										pre tax dental	29.52		
06/22/2012	reg	49.25	13.00	640.25	640.25	0.00	26.58	9.18	SC	10.59		586.52	0.00 99999999
										pre tax dental	7.38		
07/06/2012	reg	69.75	13.00	906.75	906.75	14.94	37.77	13.04	SC	26.54		807.08	0.00 99999999
										pre tax dental	7.38		
07/20/2012	reg	40.00	13.00	520.00	520.00	0.00	21.53	7.43	SC	5.53		478.13	0.00 99999999
										pre tax dental	7.38		
08/03/2012	reg	56.00	13.00	728.00	1,040.00	28.26	43.37	14.97	SC	35.17		910.85	0.00 99999999
	pto	24.00	13.00	312.00						pre tax dental	7.38		
08/17/2012	reg	0.00	0.00	0.00	945.75	18.84	39.41	13.61	SC	29.00		837.51	0.00 99999999
	reg	72.75	13.00	945.75						pre tax dental	7.38		
08/31/2012	reg	80.00	13.35	1,068.00	1,268.25	51.09	52.96	18.28	SC	51.15		1,087.39	0.00 99999999
	ot	10.00	20.03	200.25						pre tax dental	7.38		
09/14/2012	reg	65.25	13.35	871.09	1,084.69	32.57	45.18	15.60	SC	38.18		944.14	0.00 99999999
	holiday	8.00	13.35	106.80						pre tax dental	7.77		

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L.

Page:0002
Date:09/18/2015
Time:09:40AM
Pgm:Web

Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
	pto	8.00	13.35	106.80						pre tax vision	1.25		
09/28/2012	reg ot	80.00 17.75	13.35 20.03	1,068.00 355.44	1,423.44	66.44	59.41	20.51	SC	61.89 pre tax dental pre tax vision	7.77 1.25	1,206.17	0.00 99999999
10/12/2012	reg ot	80.00 8.00	13.35 20.03	1,068.00 160.20	1,228.20	46.92	51.21	17.68	SC	48.23 pre tax dental pre tax vision	7.77 1.25	1,055.14	0.00 99999999
10/26/2012	reg pto	36.25 32.00	13.35 13.35	483.94 427.20	911.14	15.21	37.89	13.08	SC	26.72 pre tax dental pre tax vision	7.77 1.25	809.22	0.00 99999999
11/09/2012	reg ot	80.00 16.75	13.35 20.03	1,068.00 335.42	1,403.42	64.44	58.56	20.22	SC	60.49 pre tax dental pre tax vision	7.77 1.25	1,190.69	0.00 99999999
11/23/2012	reg ot	80.00 33.50	13.35 20.03	1,068.00 670.84	1,738.84	100.47	72.65	25.08	SC	77.89 pre tax dental pre tax vision 401k contribution	7.77 1.25 86.94	1,366.79	0.00 99999999
12/07/2012	reg ot	64.25 1.00	13.35 20.03	857.74 20.03	877.77	0.00	36.49	12.60	SC	0.00 pre tax dental pre tax vision 401k contribution	7.77 1.25 43.89	775.77	0.00 99999999
12/21/2012	reg ot	76.50 8.75	13.00 19.50	994.50 170.63	1,165.13	0.00	48.56	16.76	SC	5.76 pre tax dental pre tax vision 401k contribution	7.77 1.25 58.26	1,026.77	0.00 99999999

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0003
Date:09/18/2015
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Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
24 - Checks					19,828.43	523.43	824.82	284.75			17,210.87	0.00	

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L.

Page:0001
Date:09/18/2015
Time:09:41AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
01/04/2013	reg holiday	36.50	13.00	474.50	682.50	0.00	41.76	9.77	SC	0.00	587.82	0.00	99999999
		16.00	13.00	208.00						pre tax dental 7.77 pre tax vision 1.25 401k contribution 34.13			
01/18/2013	reg ot holiday	80.00	13.39	1,071.20	1,385.87	0.00	90.96	21.27	SC	23.57	1,261.96	0.00	99999999
		5.00	20.09	100.43						pre tax dental -69.93 pre tax vision -11.25 401k contribution 69.29			
		16.00	13.39	214.24									
02/01/2013	reg ot	54.50	13.39	729.76	895.46	0.00	55.52	12.98	SC	0.00	782.19	0.00	99999999
		8.25	20.09	165.70						401k contribution 44.77			
02/15/2013	reg ot pto	76.50	16.07	1,229.36	1,390.06	0.00	86.18	20.16	SC	18.17	1,196.05	0.00	99999999
		4.00	24.11	96.42						401k contribution 69.50			
		4.00	16.07	64.28									
03/01/2013	reg ot	76.00	16.07	1,221.32	1,558.79	0.00	96.64	22.60	SC	29.39	1,332.22	0.00	99999999
		14.00	24.11	337.47						401k contribution 77.94			
03/15/2013	reg ot	76.00	16.07	1,221.32	1,414.16	0.00	87.68	20.51	SC	19.77	1,215.49	0.00	99999999
		8.00	24.11	192.84						401k contribution 70.71			
03/29/2013	reg pto	74.75	16.07	1,201.23	1,394.07	0.00	86.43	20.21	SC	18.44	1,199.29	0.00	99999999
		12.00	16.07	192.84						401k contribution 69.70			

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0002
Date:09/18/2015
Time:09:41AM
Pgm:Web

Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
04/12/2013	reg ot	76.25 8.25	16.07 24.11	1,225.34 198.87	1,424.21	0.00	88.30	20.65	SC	20.44	1,223.61	0.00	99999999
										401k contribution	71.21		
04/26/2013	reg ot	76.75 8.75	16.07 24.11	1,233.37 210.92	1,444.29	0.00	89.55	20.94	SC	21.78	1,239.81	0.00	99999999
										401k contribution	72.21		
05/10/2013	reg ot	76.50 9.00	16.07 24.11	1,229.36 216.95	1,446.31	0.00	89.67	20.97	SC	21.91	1,241.44	0.00	99999999
										401k contribution	72.32		
05/24/2013	reg ot pto	52.25 9.50 24.00	16.07 24.11 16.07	839.66 229.00 385.68	1,454.34	0.00	90.17	21.09	SC	22.44	1,247.92	0.00	99999999
										401k contribution	72.72		
06/07/2013	reg ot holiday	58.25 9.75 8.00	16.07 24.11 16.07	936.08 235.02 128.56	1,299.66	0.00	80.58	18.85	SC	12.62	1,122.63	0.00	99999999
										401k contribution	64.98		
06/21/2013	reg ot	77.25 9.00	16.07 24.11	1,241.41 216.95	1,458.36	0.00	90.42	21.15	SC	22.71	1,251.16	0.00	99999999
										401k contribution	72.92		
07/05/2013	reg pto	29.75 54.75	16.07 16.07	478.08 879.83	1,357.91	0.00	84.19	19.69	SC	16.03	1,170.10	0.00	99999999
										401k contribution	67.90		

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0003
Date:09/18/2015
Time:09:41AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
07/19/2013	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
08/02/2013	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
08/16/2013	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
08/30/2013	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
09/13/2013	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
09/27/2013	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
10/11/2013	reg ot pto	79.50 1.00 1.00	10.30 15.45 10.30	818.85 15.45 10.30	844.60	0.00	52.37	12.25	SC	0.00	737.75	0.00	99999999

[illegible]

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0001
Date:09/18/2015
Time:09:43AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
01/03/2014	reg	37.25	10.30	383.68	383.68	0.00	23.79	5.56	SC	0.00	335.15	0.00	99999999
										401k contribution	19.18		
01/17/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
01/31/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
02/14/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
02/28/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
03/14/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
03/28/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0002
Date:09/18/2015
Time:09:43AM
Pgm:Web

Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
04/11/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
04/25/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
05/09/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
05/23/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
06/06/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
06/20/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
07/03/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0003
Date:09/18/2015
Time:09:43AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
07/18/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
08/01/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
08/15/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
08/29/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
09/12/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
09/26/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
10/10/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0004
Date:09/18/2015
Time:09:43AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
10/24/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
11/07/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
11/21/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
12/05/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
12/19/2014	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
26 - Checks					383.68	0.00	23.79	5.56			335.15	0.00	

Client: 1011
Empl No: 90162

Employee Earnings Report for Davis, Michelle L

Page:0001
Date:09/18/2015
Time:10:08AM
Pgm:Web

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Check Date	Type	Hours	Rate	Amount	Gross Pay	Federal	FICA	Medicare	State/Local	Deductions	Direct Deposit	Check Amount	Check#
01/02/2015	reg	0.00	0.00	0.00	0.00	0.00	0.00	0.00	SC	0.00	0.00	0.00	0
1 - Checks					0.00	0.00	0.00	0.00			0.00	0.00	

W2 2011Copy B to be filed with Employee's
Federal Income Tax Return

c Employer's name, address, and ZIP code Fraenkische USA LP 416 A.M. Ellison Road Anderson, SC 29621		1 Wages, tips, other compensation 7740.53		2 Federal income tax withheld 203.04	
		3 Social security wages 7740.53		4 Social security tax withheld 325.11	
		5 Medicare wages and tips 7740.53		6 Medicare tax withheld 112.25	
		7 Social security tips		8 Allocated tips	
b Employer's identification number 03-0449731		9 Advance EIC payment		10 Dependent care benefits	
e Employee's name and address MICHELLE L. DAVIS 1101 PROJECT ROAD IVA, SC 29655		11 Nonqualified plans		12a See instructions for box 12	
		13 Statutory employee ☐ Retirement plan ☐ Third-party sick pay ☐			
		14 Other PRE TAX DE 51.67			
		a Employee's social security number 249-51-2631			
d Control Number 1011-90162-A					
15 State & Employer's state ID SC 25447321-6	16 State wages, tips, etc. 7740.53	17 State income tax 247.04	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

W2 2012Copy B to be filed with Employee's
Federal Income Tax Return

c Employer's name, address, and ZIP code Fraenkische USA LP 416 A.M. Ellison Road Anderson, SC 29621		1 Wages, tips, other compensation 19449.10		2 Federal income tax withheld 523.43	
		3 Social security wages 19638.19		4 Social security tax withheld 824.82	
		5 Medicare wages and tips 19638.19		6 Medicare tax withheld 284.75	
		7 Social security tips		8 Allocated tips	
b Employer's identification number 03-0449731		9 Advance EIC payment		10 Dependent care benefits	
e Employee's name and address MICHELLE L. DAVIS 1101 PROJECT ROAD IVA, SC 29655		11 Nonqualified plans		12a See instructions for box 12 DD 5685.76 D 189.09	
		13 Statutory Retirement Third-party employee plan sick pay ☐ ☒ ☐		a Employee's social security number 249-51-2631	
		14 Other			
d Control Number 1011-90162-A					
15 State & Employer's state ID SC 25447321-6		16 State wages, tips, etc. 19449.10		17 State income tax 605.23	
		18 Local wages, tips, etc.		19 Local income tax	
				20 Locality name	

W2 2013Copy B to be filed with Employee's
Federal Income Tax Return

c Employer's name, address, and ZIP code Fraenkische USA LP 416 A.M. Ellison Road Anderson, SC 29621		1 Wages, tips, other compensation 22102.19		2 Federal income tax withheld	
		3 Social security wages 23261.66		4 Social security tax withheld 1442.23	
		5 Medicare wages and tips 23261.66		6 Medicare tax withheld 337.31	
		7 Social security tips		8 Allocated tips	
b Employer's identification number 03-0449731		9 Advance EIC payment		10 Dependent care benefits	
e Employee's name and address MICHELLE L. DAVIS 1101 PROJECT ROAD IVA, SC 29655		11 Nonqualified plans		12a See instructions for box 12	
		13 Statutory Retirement Third-party employee plan sick pay ☐ ☒ ☐		DD 6022.68 D 1159.47	
		14 Other			
d Control Number 1011-90162-A				a Employee's social security number 249-51-2631	
15 State & Employer's state ID SC 25447321-6	16 State wages, tips, etc. 22102.19	17 State income tax 247.27	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

W2 2014Copy B to be filed with Employee's
Federal Income Tax Return

c Employer's name, address, and ZIP code Fraenkische USA LP 416 A.M. Ellison Road Anderson, SC 29621		1 Wages, tips, other compensation 364.50		2 Federal income tax withheld	
		3 Social security wages 383.68		4 Social security tax withheld 23.79	
		5 Medicare wages and tips 383.68		6 Medicare tax withheld 5.56	
		7 Social security tips		8 Allocated tips	
b Employer's identification number 03-0449731		9 Advance EIC payment		10 Dependent care benefits	
e Employee's name and address MICHELLE L. DAVIS 351 LIBERTY ROAD IVA, SC 29655		11 Nonqualified plans		12a See instructions for box 12a DD 6335.68 D 19.18	
		13 Statutory employee ☐ Retirement plan ☒ Third-party sick pay ☐			
		14 Other			
d Control Number 1011-90162-T				a Employee's social security number 249-51-2631	
15 State & Employer's state ID SC 25447321-6	16 State wages, tips, etc. 364.50	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739 www.wcc.sc.gov



PRE-HEARING BRIEF
WCC File No: 1117221

Claimant's Name: Michelle Davis SSN: 9-5-243
551 Liberty Road
Address: Anderson, South Carolina 29655
Home Phone: (864) 570-0042 Work Phone: _____
Preparer's Name: Mark A. Allison

Employer's Name: Fraenkische USA LP
110 AM Ellison Road
Address: Anderson, South Carolina 29621
Carrier: Maryland Casualty Company c/o Zurich North America
Preparer's Phone #: (864) 242-1713

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Comp. Rate: \$325.05 2. AWW: \$ 487.56 Date of Injury: 10/21/11
3. Type of injury and body part(s): Claimant sustained admitted injury to her left ankle when she tripped over a safety mat.
4. Facts in controversy: Claimant's average weekly wage and compensation rate; whether Defendants are entitled to credit for temporary compensation overpayment due to improperly calculated compensation rate.
5. Legal issues involved: See No. 4 above.
6. Unusual aspects: None.
7. Witnesses (designate if expert): * John Rumsey may testify on behalf of Defendants.
8. Exhibits: Claimant's personnel file, to include wage records and documentation related to Claimant's compensation; Claimant's deposition transcript.
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
None.
10. Name, address, and specialty, if any, of the treating physician:
Kyle J. Jeray, M.D., University Medical Group, Department of Orthopaedics, 105 Doctors Drive, Greenville, South Carolina 29605
James Paul Behr, M.D., Orthopaedic Associates, PA, 1330 Boiling Springs Road, Suite 1600, Spartanburg, South Carolina 29303
11. Impairment rating(s); body part(s); physician and date of opinion: Premature.
12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-4803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Michael F. Mullinax, Mullinax Law Firm, PA

Post Office Box 2665

Address Anderson, South Carolina 29622

on the 23rd day of December 20 15

by ☒ first class postage ☐ certified mail ☐ personal service.

Signature: [Signature]

Email: mallison@mgclaw.com

Date of Hearing: January 8, 2016

Time needed for hearing: 30 minutes

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211, 67-211, and Regulations 67-601 through 67-615; as well as Reg. 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. *Commissioners reserve the right to admit expert witnesses at hearings.

WCC FORM # 58
Revised 7/13

58

PRE-HEARING BRIEF

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1117221

MICHELLE DAVIS,

Employee,

Claimant,

vs.

FRAENKISCHE USA LP,

Employer,

AND

MARYLAND CASUALTY COMPANY
C/O ZURICH NORTH AMERICA,

Carrier,

Defendants.

**NOTICE OF WITNESSES AND
WRITTEN MEDICAL REPORTS
TO BE INTRODUCED AS
DIRECT EVIDENCE ON BEHALF
OF DEFENDANT**

TO: COMMISSIONER SUSAN S. BARDEN, SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION AND MICHAEL F. MULLINAX:

YOU ARE NOTIFIED that the Defendants, pursuant to the provisions of the South Carolina Workers' Compensation Act and Section 1-23-330 of the South Carolina Code of Laws (Cum. Supp. 1988) submit the following medical records and other documents as evidence:

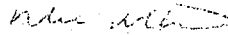
None.

YOU ARE FURTHER NOTIFIED that you have the right to cross-examine or otherwise oppose this evidence and, should you desire to exercise this right, you are to promptly schedule the deposition of any provider whose records are submitted, for the purposes of cross-examination, or otherwise promptly submit opposing medical records into evidence.

YOU ARE FURTHER NOTIFIED that these records, or photocopies of the same, will be

provided to the South Carolina Workers' Compensation Commission for insertion in their file and for consideration as evidence on behalf of the Defendants.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Defendants: John Rumsey may testify on behalf of Defendants.



MARK A. ALLISON
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 2980
55 East Camperdown Way, Suite 300
Greenville, South Carolina 29602
(864) 239-4000
Attorneys for the Employer/Carrier

Greenville, South Carolina
December 23, 2015

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Michelle Davis

Claimant

vs.

Fraenkische USA, LP

Employer,

and

Maryland Casualty Insurance Co.,
c/o Zurich North America

Carrier

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1117221

CLAIMANT'S HEARING BRIEF

The Workers' Compensation Act defines "average weekly wage" for the purposes of computing compensation and sets forth a primary method of calculation and three alternative methods. The primary method for calculating the average weekly wage is to take "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." § 42-1-40; *Pilgrim v. Eaton*, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct.App.2010). "The [Appellate Panel] must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." *Pilgrim*, 391 S.C. at 44-45, 703 S.E.2d at 244 (citing § 42-1-40). It would be impractical and unfair to use the primary method because claimant had only been employed for approximately seven weeks.

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 these

alternatives, the [Appellate Panel] must find, or the record must clearly show, that the necessary conditions, [as prescribed in the statute], exist." The first alternative method of wage calculation, 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. *Id.* at 46, 703 S.E.2d at 245.

Before the Commission may use any one of these alternatives, the [Commission must find, or the record must clearly show, that the necessary conditions exist." *Pilgrim v. Eaton*, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App.2010).

The first alternative to the primary method is to be used "[w]hen the employment ... extended over a period of less than fifty-two weeks...." *Id.* In such a situation, the commission must use "the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages...." *Id.* Section 42-1-40 states that "the method ... shall be followed, as long as results fair and just to both parties will be obtained." *Id.* The section also contains a requirement that this particular method be "practicable." *Id.* It is submitted that this method is not practicable nor is it fair based on the fact that the employee/claimant continued to work and progress in her employment after her initial injury and received wage increases.

The second alternative requires the commission to consider "the average weekly amount which ... 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." *Id.* This method likewise, is not practical nor fair in that it does not take into account that the claimant continued to work and progress in her knowledge and skill at work.

It is clear from the record, that Michelle Davis was injured on the job a short time after her employment; however, she continued to work at her job even after her first surgery. In fact, she received a commendation as Employee of the Month in December 2012; and three separate

raises in her pay after her injury and would have received another salary boost had she been able to take the Team Leader position, but for the injury and remaining three surgeries which she was required to undergo to effect a rehabilitation of the severe injury to her leg and foot. These were sufficient extraordinary conditions to establish the criteria and conditions as set forth in James Pugh v. Piedmont Mechanical 396 S.C. 31, 719 S.E. 2d 676 (Ct. App. 2011).

It is submitted that neither of the first three alternatives above yield a calculation that is just and fair to both parties, but particularly to the Claimant.

The final alternative for calculating average weekly wage is to be employed when “exceptional reasons” exist that make it “unfair, either to the employer or the employee,” to use the alternatives set forth above. *Id.* In that event, section 42-1-40 provides that “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 alternative may be used by the commission when it makes factual findings that explain the “exceptional reasons” it finds the other methods are “unfair.” *Id.* See *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 308, 644 S.E.2d 784, 786-88 (Ct. App. 2007) (affirming the Commission's use of the “exceptional reasons” alternative based on specific findings which “justified deviation from the usual statutory method of ... computation”).

For that very reason, the legislature established by the last paragraph of the statute, the following language.

SC Code Ann. §42-1-40 provides as follows:

...“When for exceptional reasons the foregoing would be unfair, either to the Employer or Employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured Employee would be earning were it not for his injury”....

The statute provides a flexible approach with a view toward the ultimate objective of reflecting fairly a Claimant's probably future earning loss. *Bennett v. Gary Smith Builders*

271 SC 94, 98, 245 SE 2d 129, 131 (178).

“The objective of wage calculation is to arrive at a fair approximation of the Claimant’s probable future earning capacity. His disability reaches into the future, not the past; his loss, as a result of injury must be thought of in terms of its impact on probable future earnings”. *ID. at 98, 99, 245 SE 2d at 131.*” See also *Stokes v. First National Bank* 306 SC 46, 410 SE 2d 248 (1991).

Our Court has reasoned that S.C. Code Ann. §42-1-40 provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a Claimant’s probable future earning loss. See *Sellers v. Pinedale Residential Center* 564 SE 2d 694 (Ct. App. 2002). “Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the Claimant’s probable future earning capacity. The prevailing goal and policy of §42-1-40 is to use the method that will fairly compensate the employee “for reductions in their earning power caused by work-related injuries.” *Stephenson v. Rice Servs., Inc.*, 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). See *Foreman v. Jackson Minit Mkts., Inc.*, 265 S.C. 164, 170, 217 S.E.2d 214, 216-17 (1975).

Michelle had progressed from earning \$12.48 per hour in 2011; to \$13.00 in January 2012; to \$13.35 in August 2012; to \$16.07 in February 2013; and to be established by her testimony would have received an additional \$.75 raise had she not been injured and prevented from taking the lead operator position. Claimant should also be entitled to receive consideration of an average “overtime” which was exhibited and worked during her work history.

Taking all of this in consideration, the Claimant should be entitled to an average weekly wage of \$16.07 per hour which she earned in 2013 or \$16.82 an hour which she would have earned if her injury had not kept her from being promoted. This would equate to an Average Weekly Wage(40 hours + calculated overtime) of \$711.23 and a compensation rate of \$474.39 (Exhibit B); or in the alternative an Average Weekly Wage (40 hours + overtime) of \$748.69 and a compensation rate of \$499.38. (Exhibit B-1)

CREDIT FOR OVERPAYMENT

The Claimant would state that any overpayment as determined by the Commission, was due to and solely caused by the Carrier in initially filing a Form 20 which was in error. The Carrier, through its own actions paid more in "dollars" than required, but made each weekly payment of compensation as required by the Acts of the Legislature. The Carrier continued to pay benefits for over 100 weeks at the rate set in its Form 20 dated October 2011. The erroneous payment was not due to or caused by any action on the part of the Claimant and the Claimant should not be penalized at this time. See Brittle v. Raybestos - Manhattan, Inc. 241 S.C. 255, 127 S.E. 2d 884 (1962), In the Brittle case, the Court quoted from Larson's Workman's Compensation Law, Volume 2, page 24, section 57.47:

"The amount of the credit is not the amount of wages paid, but the amount of compensation due for the particular week. Thus, if the wage paid was \$30.00, and if the compensation due for the week was \$20.00, the credit is for \$20.00. In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability."

Therefore, the law as applied in Brittle and based upon Larson's, would allow credit where the amount paid was equal to the compensation rate due, but in this case, the Carrier overpaid each week and should not be entitled to any credit for the overpayment and the same should be considered gratuitous and not subject to being refunded by the Employee. See also §42-9-10; §42-9-260. See also Phillips Electronics v. Wright 348 Md. 209 (1997) , 703 Az 150 Md. Court of Appeals.

Therefore, there is no credit available due to the undisputed facts that Claimant has been entitled to a weekly compensation of Temporary Total Disability which has been paid, and Claimant has not reached MMI at this time.

In the alternative, the credit, if such is allowed to the Carrier, should only be assessed from the date and time of the stop-payment application, October 16, 2015.

The Claimant would further show to the Commission that if such credit is granted, that the same should be charged to the back of the award, once a permanent and total determination has been made.

In addition, the credit, if allowed, would necessarily be based on the total excess amount paid, (over and above the compensation rate), divided by the Claimant's compensation rate as determined by the Commission, to give the appropriate number of weeks of credit.

MULLINAX LAW FIRM, P.A.



Michael F. Mullinax
Post Office Box 2665
Anderson, SC 29622
(864) 261-6242
ATTORNEY FOR THE CLAIMANT

Anderson, South Carolina

January 7, 2016

TABLE OF AUTHORITIES

<u>Brittle v. Raybestos-Manhattan, Inc.</u> 241 S.C. 255, 127 S.E. 2d 884 (1962)	1
<u>Phillips Electronics North America v. Patricia Wright</u> 348 Md. 209, 703 A.2 150 (1997)	2
<u>Pilgrim v. Eaton</u> 391 S.C. 38, 703 S.E. 2d 241 (Ct. App. 2010)	3
<u>Pugh v. Piedmont Mechanical, Inc.</u> 396 S.C. 31, 719 S.E. 2d 676 (Ct. App. 2011)	4

241 S.C. 255
Supreme Court of South Carolina.

Mrs. Jessie **BRITTLE**,
Widow; Claimant, Respondent,
v.

RAYBESTOS-MANHATTAN, INC. and
United States, Casualty Company, Appellants.

No. 17975. | Oct. 22, 1962.

Workmen's compensation case. The Common Pleas Court of Charleston County, Thomas P. Bussey, J., affirmed an award of the Industrial Commission and the employer and its carrier appealed. The Supreme Court, Taylor, C. J., held that fact that voluntary payments made by employer to disabled employee were less than copensable rate afforded evidentiary basis for Industrial Commission's disallowance of deductions claimed therefor and that factor determining amount of death benefits where death is caused by occupational disease and noncompensable infirmity is relation or proportion which disability from occupational disease bears to entire disability and not proportion which occupational disease bears to cause of death.

Affirmed.

West Headnotes (4)

[1] **Workers' Compensation**

☞ In general: questions of law or fact

Industrial Commission's determination as to whether employer is entitled to credit for voluntary payments is binding on appeal unless there is absence of competent evidence in support thereof. Code 1952, § 72-172.

Cases that cite this headnote

[2] **Workers' Compensation**

☞ Wages and fringe benefits generally

Where credit is allowed employer for voluntary payments made to employee, amount of credit is not amount of wages paid but amount of

compensation due. Code 1952, §§ 72-261 et seq., 72-265.

2 Cases that cite this headnote

[3] **Workers' Compensation**

☞ Deductions and Offsets

Fact that voluntary payments made by employer to disabled employee were less than compensable rate afforded evidentiary basis for Industrial Commission's disallowance of credit claimed therefor. Code 1952, §§ 72-261 et seq., 72-265.

1 Cases that cite this headnote

[4] **Workers' Compensation**

☞ Particular cases in general

Factor determining amount of death benefits where death is caused by occupational disease and noncompensable infirmity is relation or proportion which disability from occupational disease bears to entire disability and not proportion which occupational disease bears to cause of death. Code 1952, § 72-258.

1 Cases that cite this headnote

Attorneys and Law Firms

*255 **884 Mitchell & Horlbeck, Sinkler, Gibbs & Simons, Charleston, for appellants.

*256 Paul N. Uricchio, Jr., Charleston, for respondent.

Opinion

TAYLOR, Chief Justice.

This is a Workmen's Compensation case.

Respondent claims as next of kin of George Brittle, deceased, against Raybestos-Manhattan, Inc., benefits allegedly due under the South Carolina Workmen's Compensation Act for his death from an occupational disease, contracted in the course of the employment of the deceased with that company. The Industrial Commission made an award in favor of Respondent. On appeal therefrom to the Circuit Court, it

was affirmed in all material respects. This appeal is by the employer and insurance carrier from the Order of the Circuit Court.

The deceased was employed continuously by Raybestos-Manhattan, Inc., from September 1, 1922 to March 2, 1951,

*257 at which time he ceased to work because of illness. He died on December 24, 1956, at the age of 63.

**885 Shortly after deceased quit work, the employer began making voluntary payments to him. From April 19, 1951, to July 1, 1951, these voluntary payments were in the amount of \$20.00 per week, and beginning July 2, 1951, until his death he was paid the sum of \$100.00 per month, amounting in the aggregate to \$6,820.00. It is agreed that the maximum recovery in this case, because of the date of death and the statutory limit then in effect, is \$6,000.00. The claim for credit against the award herein for the amounts voluntarily paid to the deceased prior to his death presents the first question for determination in this appeal. Such credit is claimed under the provisions of Section 72-172, Code of Laws of South Carolina, 1952, which is as follows:

'Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.'

[1] The claim for a deduction or offset against the award for the amount paid to the deceased during his lifetime was denied by the Industrial Commission. The approval of the Commission for such deduction is required by the foregoing section, and its conclusions thereabout are binding on appeal unless there is an absence of competent evidence to support them.

The payments contemplated by the foregoing section, for which credit may be allowed, are those made by the employer to the employee for disability, which by the terms of the Workmen's Compensation Act were not due and payable when made. The payments to be deductible must have

*258 been made, therefore with reference to liability under the provisions of the Act and intended to be in lieu of compensation. Larson's Workmen's Compensation Law, Vol. 2, P. 18, Section 57.40.

Since only those payments are deductible which are made in contemplation of the legal obligation of the employer to pay compensation to a disabled employee, the intent with which such payments are made becomes important. Indicative of that intent is the amount of the weekly payments made. The average weekly wages of the deceased was \$56.43, making the compensable rate at the time the sum of \$25.00 per week. The weekly payments made by the Appellant to the deceased during his lifetime, and for which credit is sought against the present award, were, therefore, less than the compensation which the employee would have been entitled had liability been accepted under the act.

[2] In those cases where credit is allowed for voluntary payments made by the employer to the employee, the rule is that the amount of credit is not the amount of wages paid, but the amount of compensation due for the particular week. See: Poole v. E. I. DuPont De Nemours & Co., 227 S.C. 232, 87 S.E.2d 640; Annen v. Standard Oil Co. of New Jersey, (La.App.) 28 So.2d 46; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N.W.2d 561; Mercury Aviation Co. v. Industrial Acc. Commission of California, 186 Cal. 375, 199 P. 508; Vanino v. Textile Machine Works, 183 Pa. Super. 181, 130 A.2d 203. Therefore, the fact that the voluntary payments made by the Appellant were less than the amount of compensation which would have been due is strong evidence that such payments were made gratuitously and without reference to the provisions of the Workmen's Compensation Act.

The rule in such cases, supported by reason and the authorities, is thus stated in Larson's Workmen's Compensation Law, Vol. 2, P. 24, Section 57.47:

'The amount of the credit is not the amount of wages paid, but the amount **886 of compensation due for the particular *259 week. Thus, if the wage paid was \$30, and if the compensation due for the week was \$20, the credit is for \$20 only. In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability.

'The credit rule has been applied only when the wages paid were at least equal to the compensation that was due for the week. This can be easily defended under the intention rule, since the employer cannot be ascribed an intention to make

certain payments in lieu of compensation when the payments are too small to be compensation benefits.'

[3] Further review of the facts in this regard is unnecessary. The fact that the payments made were less than the compensable rate affords ample evidentiary basis for the disallowance of the deductions claimed in this case.

Appellant also contends error on the part of the Industrial Commission in disregarding the medical report and findings of the Medical Board, appointed on motion of the Appellant pursuant to Section 72-261 et seq. of the 1952 Code of Laws.

Section 72-261 is as follows:

'The procedure for determining claims for benefits from an occupational disease shall be the same as that followed in determining other claims under this Title, save that if any medical question shall be in controversy the Commission may, upon its own motion, and shall, upon motion of either party to the proceeding, refer the question to the medical board as provided in this chapter for investigation and report. A medical question shall be deemed to include any issue concerning the existence, cause and duration of a disease or disability, the date of disablement, the degree of disability and the proportion thereof attributable to a noncompensable cause and any other matter necessarily pertinent thereto requiring the opinion of experts.'

Section 72-265 relates to the consideration to be given to a report of the Medical Board to which a medical question *260 has been referred under the provisions of Section 72-261, and is as follows:

'The decisions and award in the case shall conform to the findings and conclusions in such report in so far as restricted to medical questions, save that either party may, within ten days after receipt of a copy of the report, file written objection thereto with the Commission which shall remand the matter to the same or another board if it be proven that the conclusion of the board upon a medical

question be manifestly erroneous or unreasonable or due to fraud, undue influence, inadvertence or mistake of law or fact.'

A Medical Board was convened in this case for the sole purpose of determining the cause of death of the deceased. This Board determined that the employee died as a result of two diseases, namely: Pulmonary Asbestosis of long standing and Pulmonary Cancer of an estimated duration of 1 1/2 years, Pulmonary Asbestosis being 85% responsible for his death and Pulmonary Cancer 15% responsible therefor. Neither party filed any objections to the report of the Medical Board.

Thereafter, the Commission filed its award in which it found 'that the employee-claimant, George Brittle, did contract a pulmonary disease as a direct result of and arising out of his employment with the defendant company prior to March 2, 1951, as a result of which caused his death on December 24, 1956.' Award was then made for the full amount allowed by statute on the basis of the death of the deceased from a compensable disease. It is the contention of Appellant that the foregoing action of the Commission ignored the decision of the Medical Board, which it contends is binding **887 in this case since no exception was filed thereto, and failed to reduce the amount of the award by the percentage which pulmonary cancer was determined to have contributed to the employee's death, as required by Section 72-258 of the 1952 Code of Laws.

*261 Section 72-258 provides:

'When an occupational disease prolongs, accelerates or aggravates or is prolonged, accelerated or aggravated by any other cause or infirmity not otherwise compensable, the compensation payable for disability or death shall be limited to the disability which would have resulted solely from the occupational disease if there were no other such cause or infirmity and shall be computed by the proportion which the disability from occupational disease bears to the entire disability.'

The extent to which the Industrial Commission is bound by the findings of the Medical Board need not be considered, for no findings were made by the Board touching the fundamental

issue before the Commission. While the Board concluded that Pulmonary Cancer was 15% responsible for the employee's death, no finding was made as to the extent which such disease may have affected the disability of the employee.

[4] It is undisputed in this case that the employee was totally disabled from the occupational disease of asbestosis. The amount of compensation payable under Section 72-258 for either 'disability or death' is 'limited to the disability which would have resulted from the occupational disease if there were no other such cause or infirmity and shall be computed by the proportion which the disability from occupational disease bears to the entire disability.' Therefore, the factor determining the amount of death benefits, where death is caused by an occupational disease and a noncompensable infirmity, is the relation or proportion which the disability from occupational disease bears to the entire disability, and not the proportion which such occupational disease bears to the cause of death.

Appellant contends, however, that Section 72-258 should be read as meaning that, in cases where death is caused in part by an occupational disease and in part by a noncompensable infirmity, compensation 'shall be computed by the proportion which the disability or cause of death from occupational

*262 disease bears to the entire disability or death.' To so construe the statute would require this Court to write into its provisions conditions which the Legislature has not seen fit to do. The language of the foregoing statute is clear, unambiguous and in accord with the underlying principal governing the determination of questions relating to compensability in occupational disease cases, that is the fact and degree of disability from such disease. See: Drake v. Raybestos-Manhattan, Inc. et al., S.C., 127 S.E.2d 288, filed September 5, 1962. No inconsistency appears between the award of the Commission and the findings of the Medical Board.

For the foregoing reasons we are of opinion that the Order appealed from should be affirmed and it is so ordered. Affirmed.

MOSS, LEWIS and BRAILSFORD, JJ., and T. B. GRENEKER, Acting J., concur.

BUSSEY, J., not participating.

All Citations

241 S.C. 255, 127 S.E.2d 884

703 A.2d 150 (1997)

348 Md. 209

PHILIP ELECTRONICS NORTH AMERICA, et al.

v.

Patricia WRIGHT.

No. 12, Sept. Term, 1997.

Court of Appeals of Maryland.

December 12, 1997.

151 *151 Craig T. Walsworth, Campen & Walsworth, P.A., Easton, Donald S. Saiontz, Robert J. Zarbin, Saiontz & Kirk, P.A., Baltimore, on brief, for petitioner.

Robert J. Zarbin (Donald S. Saiontz, Saiontz & Kirk, P.A., on brief), Baltimore, for respondent.

Argued before BELL, C.J., ELDRIDGE, RODOWSKY, CHASANOW, RAKER and WILNER, JJ., and ROBERT L. KARWACKI, J. (retired), Specially Assigned.

RAKER, Judge.

We are called upon in this case to interpret the Workers' Compensation Act, Maryland Code (1991 Repl. Vol., 1997 Supp.), Title 9 of the Labor and Employment Article (hereinafter "Act").^[1] We must determine whether, after an award to a claimant is reduced pursuant to a petition for judicial review, the employer is entitled to a credit for the total amount of money paid to the claimant before the reduction of the original award, or whether the appropriate credit is the number of weeks the employer paid benefits prior to the reduction. We shall hold that a credit based upon the number of weeks the employer has paid benefits is proper.

I.

This case arose out of a knee injury suffered by claimant Patricia Wright ("Wright") on February 7, 1990 during the course of her employment. Subsequently, while attempting to rehabilitate her injured left knee, Wright developed an adverse psychological condition related to her physical injury. Pursuant to those injuries, Wright filed a claim for compensation with the Maryland Workers' Compensation Commission ("Commission") against her employer, Philip Electronics North America, and its insurer, Travelers Indemnity Company of Illinois (collectively "Philip Electronics").

152 On November 19, 1992, the Commission conducted a hearing to determine the amount of compensation due Wright under the Act. *152 By written order, on November 30, 1992, the Commission found that Wright had suffered a permanent partial disability loss of 50% of the use of her body as a whole, under "other cases," due to the injury to her knee and the resulting psychological condition.^[2] See § 9-627(k). Accordingly, the Commission ordered Philip Electronics to pay Wright permanent partial disability benefits at the rate of \$178 per week for 333 weeks pursuant to § 9-630.

Both Philip Electronics and Wright filed a petition for judicial review in the Circuit Court for Dorchester County. After hearing the evidence, on November 23, 1993, a jury returned a verdict finding that Wright had sustained a 40% loss of the use of her body as a whole as a consequence of the injuries arising out of her employment. Upon remand, on November 17, 1994, the Commission recalculated Wright's benefits, and found that she was entitled to \$144 per week for 200 weeks. Significantly, the Commission also gave Philip Electronics a credit for the amount of the monetary payments made under the Commission's original order of November 30, 1992.

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Aggrieved by the Commission's decision to allow Philip Electronics a credit for the total amount of monetary benefits paid under the Commission's original order, Wright filed a second petition for judicial review in the Circuit Court for Dorchester County. On September 22, 1995, the circuit court granted Philip Electronics' motion for summary judgment, also concluding that Philip Electronics was entitled to a credit for the total amount of monetary benefits already paid. Wright subsequently filed a timely notice of appeal to the Court of Special Appeals.

Rejecting the "total monetary" credit approach advocated by Philip Electronics, the intermediate appellate court reversed the judgment of the circuit court. See Wright v. Philip Electronics, 112 Md.App. 642, 685 A.2d 1216 (1996). This Court then granted Philip Electronics' petition for writ of certiorari to resolve the primary legal issue presented by this case. We now affirm.

II.

Before this Court, Philip Electronics argues that the Court of Special Appeals erred by holding that an employer is entitled only to credit for the number of weeks of benefits paid, rather than a credit for the total monetary sum expended, after an initial award by the Commission has been reduced by the circuit court. Philip Electronics' argument is primarily an equitable one: It is unjust for a claimant to receive benefits greater than the amount awarded by the trier of fact in a petition for judicial review at the circuit court. To illustrate, Philip Electronics cites the facts of this case. The jury found that Wright suffered a 40% loss of the use of her body as a whole as a consequence of her work-related injuries. Under the statutory framework, this finding translated into benefits of \$144 per week for 200 weeks, for a total of \$28,800. At the time of the filing of the petition for judicial review which is the subject of this appeal, Philip Electronics had paid Wright benefits totaling \$32,772; and should the Court of Special Appeals' holding be affirmed, with Philip Electronics consequently obligated to pay 53 more weeks in benefits, the end result would be payments totaling \$39,600^[3]—or \$10,800 more than the amount mandated by the jury verdict.

Philip Electronics contends this \$10,800 overpayment unfairly deprives it of rightful funds, as well as unjustly enriching Wright. Philip Electronics emphasizes it does not wish to "recover back" funds already paid to Wright, but rather wishes only an offset¹⁵³ against the debt owed to her consistent with the decision of the jury in this case.^[4]

In contrast, Wright argues the Court of Special Appeals correctly concluded that, after the reduction of an award by the circuit court, an employer's credit should be based upon the number of weeks that an employer has paid benefits. Wright contends the applicable provisions of the Act are written in terms of weeks of disability, thereby implying that this is the appropriate frame of reference to determine the proper credit. Wright also argues that an approach focusing only upon the total amount of money paid to a claimant is inconsistent with the purposes of the Act. We agree with Wright.

III.

The Maryland Workers Compensation Act was originally enacted in 1914 to compensate employees for the loss of earning capacity resulting from accidental injury, disease, or death occurring during the course of employment. DeBusk v. Johns Hopkins, 342 Md. 432, 437, 677 A.2d 73, 75 (1996). Under the Act, an employer is liable to an employee for such an injury regardless of fault. § 9-501(b); Great Atlantic Tea v. Imbraguglio, 346 Md. 573, 582, 697 A.2d 885, 889-90 (1997). Ordinarily, the compensation provided by the Act is the employee's exclusive remedy for a job-related injury. § 9-509; Hastings v. Mechalske, 336 Md. 663, 672, 650 A.2d 274, 278 (1994).

As we have repeatedly emphasized, the Act is remedial in nature and "should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes." Para v. Richards Group, 339 Md. 241, 251, 661 A.2d 737, 742 (1995) (quoting Howard Co. Ass'n Retard. Cit. v. Walls, 288 Md. 526, 530, 418 A.2d 1210, 1213 (1980)); see § 9-102(a). Thus, in interpreting the Act, we do not apply the canon of construction that a statute in derogation of the common law should be strictly construed. § 9-102(b). Moreover, all

sections of the Act must be read together, in conjunction with one another, to discern the true intent of the legislature. Vest v. Giant Food Stores, Inc., 329 Md. 461, 466-67, 620 A.2d 340, 342 (1993); Ryder Truck Lines v. Kennedy, 296 Md. 528, 537, 463 A.2d 850, 856 (1983). Of course, we seek to avoid an interpretation which would lead to an untenable or illogical outcome. Gréco v. State, 347 Md. 423, 429, 701 A.2d 419, 422 (1997); Waskiewicz v. General Motors Corp., 342 Md. 699, 708, 679 A.2d 1094, 1099 (1996); see also Superior Builders, Inc. v. Brown, 208 Md. 539, 543, 119 A.2d 376, 378 (1956) ("The Act should receive a practical construction, and should be so interpreted and construed as to effectuate its general purpose.").

In construing the Act, as in construing all statutes, the paramount objective is to ascertain and give effect to the intent of the legislature. Marriott Employees v. MVA, 346 Md. 437, 444, 697 A.2d 455, 458 (1997); Bowen v. Smith, 342 Md. 449, 454, 677 A.2d 81, 83 (1996). In interpreting the Act, we apply the following general principles. First, if the plain meaning of the statutory language is clear and unambiguous, and consistent with both the broad purposes of the legislation, and the specific purpose of the provision being interpreted, our inquiry is at an end. Marriott Employees, 346 Md. at 445, 697 A.2d at 458; Frank v. Baltimore County, 284 Md. 655, 661, 399 A.2d 250, 254 (1979); see Polomski v. Baltimore, 344 Md. 70, 75-76, 684 A.2d 1338, 1340 (1996). Second, when the meaning of the plain language is ambiguous or unclear, we seek to discern the intent of the legislature from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based. DeBusk, 342 Md. at 437, 677 A.2d at 75. Last, applying a canon of construction specific to the Act, if the intent of the legislature is *154 ambiguous or remains unclear, we resolve any uncertainty in favor of the claimant. Baltimore v. Cassidy, 338 Md. 88, 97, 656 A.2d 757, 761-62 (1995); Lovellette v. Baltimore, 297 Md. 271, 282, 465 A.2d 1141, 1147 (1983).

This Court, however, may not stifle the plain meaning of the Act, or exceed its purposes, so that the injured worker may prevail. Morris v. Board of Education, 339 Md. 374, 384, 663 A.2d 578, 583 (1995). Similarly, the Court may not create ambiguity or uncertainty in the Act's provisions where none exists so that a provision may be interpreted in favor of the injured claimant. R & T Construction v. Judge, 82 Md.App. 700, 709, 573 A.2d 96, 100 (1990), modified, 323 Md. 514, 594 A.2d 99 (1991). Bearing these principles in mind, we now turn to the case at hand.

IV.

This case presents a straightforward question of law. On November 17, 1994, the Commission recalculated the benefits due Wright at \$144 per week for 200 weeks, a total sum of \$28,800. As of that date, the payments by Philip Electronics to Wright far exceeded \$28,800. Yet Philip Electronics had only paid benefits to Wright for 147 weeks.^[9] Philip Electronics seeks to offset the total payments it has already made to Wright against the sum of \$28,800, thus satisfying the amount Philip Electronics owes to Wright pursuant to her claim under the Act. Conversely, Wright argues that under Maryland law, Philip Electronics is entitled to a credit for 147 weeks of benefits paid, thus entitling her to another 53 weeks of benefits at \$144 per week.

We conclude the language of § 9-627(k), as well as the language of § 9-629 and § 9-630, clearly and unambiguously demonstrate a legislative commitment to the payment of permanent partial disability benefits within a weekly framework. The purposes sought to be achieved by the Act further reinforce this legislative intent. In addition, Philip Electronics' argument that the payment to Wright of another 53 weeks of benefits is inequitable, and amounts to an unjust windfall to her, fails when analyzed within the circumstances surrounding the statutory history of the Act.

A.

Section 9-627(k) authorized Wright's award of permanent partial disability benefits in this case. That statutory provision states:

(k) *Other cases.*—(1) In all cases of permanent partial disability not listed in subsections (a) through (j) of this section, the Commission shall determine the percentage by which the industrial use of the covered employee's body was impaired as a result of the accidental personal injury or occupational disease.

(2) In making a determination under paragraph (1) of this subsection, the Commission shall consider factors including:

(i) the nature of the physical disability; and

(ii) the age, experience, occupation, and training of the disabled covered employee when the accidental personal injury or occupational disease occurred.

(3) The Commission shall award compensation to the covered employee in the proportion that the determined loss bears to 500 weeks.

(4) Compensation shall be paid to the covered employee at the rates listed for the period in §§ 9-628 through 9-630 of this Part IV of this subtitle.

As paragraph (4) of subsection (k) of § 9-627 indicates, the award of permanent partial disability benefits is governed by three independent sections of the Act. Section 9-628, not relevant here, authorizes compensation for less than 75 weeks. Section 9-630, which governs compensation to an injured worker for a period of greater than 250 weeks, authorized Wright's original award on November 30, 1992 by the Commission. When Wright's award was reduced to 155 200 weeks, *155 that award was granted pursuant to § 9-629, which covers compensation for a period equal to or greater than 75 weeks, but less than 250 weeks. The first specific statutory provision pertinent to this case, § 9-629, reads as follows:

§ 9-629. Compensation for period equal to or greater than 75 weeks but less than 250 weeks.

If a covered employee is awarded compensation for a period equal to or greater than 75 weeks but less than 250 weeks, the employer or its insurer shall pay the covered employee weekly compensation that equals two-thirds of the average weekly wage of the covered employee but does not exceed one-third of the State average weekly wage.

The other statutory provision relevant to the issue we resolve today, § 9-630, states in pertinent part:

§ 9-630. Serious disability—Compensation for 250 weeks or more.

(a) *In general.*—(1) Except as provided in paragraph (2) of this subsection, if a covered employee is given an award or a combination of awards resulting from 1 accidental personal injury or occupational disease for 250 weeks or more under § 9-627 of this subtitle:

(i) the Commission shall increase the award or awards by one-third the number of weeks in the award or awards, computed to the nearest whole number; and

(ii) the employer or its insurer shall pay the covered employee weekly compensation that equals two-thirds of the average weekly wage of the covered employee, but does not exceed 75% of the State average weekly wage.

(2) An award for disfigurement or mutilation under § 9-627(i) of this subtitle may not be used to make up the 250 weeks under paragraph (1) of this subsection.

These statutory provisions reflect the intent of the General Assembly that the payment of permanent partial disability benefits be based upon a weekly framework. Of greatest significance, the specific sections governing the payment of benefits, § 9-629 and § 9-630, are distinguished by the number of weeks of compensation awarded. The general

statutory provision, § 9-627(k)(3), also states that benefits shall be paid "in the proportion that the determined loss bears to 500 weeks." Again, the Act emphasizes the weekly nature of an award of benefits.

The language of the specific sections of the Act also reinforces the legislative focus upon the weekly nature of the payment scheme. Both § 9-629 and § 9-630(a)(1)(ii) expressly state that "the employer or its insurer shall pay the covered employee weekly compensation." Section 9-630(a)(1) speaks of a covered employee being awarded compensation "for 250 weeks or more," and § 9-630(a)(1)(i) mandates that "the Commission shall increase the award or awards by one-third the number of weeks." Finally, the Act states that "[a]n award for disfigurement or mutilation under § 9-627(i) of this subtitle may not be used to make up the 250 weeks under paragraph (1) of this subsection." § 9-630(a)(2) (emphasis added). It is telling that in barring an offset against an award from another subsection of the Act, the General Assembly chose to characterize an award under § 9-630(a) in terms of weeks, rather than as a monetary amount.

Writing for the Court of Special Appeals in this case, Judge Fischer correctly reached the identical conclusion:

The "weekly credit" approach is consistent with the Act's benefit structure. It follows naturally that if the compensation structure is expressed in terms of "weeks," then any credit for previous payments should also be expressed by "weeks."

Wright v. Philip Electronics, 112 Md.App. 642, 649-50, 685 A.2d 1216, 1219 (1996). The plain language of the Act leads us to conclude that the Legislature expressed a commitment to the payment of permanent partial disability benefits based on a weekly framework, rather than focusing upon the total monetary value of such an award. See *Sturgis v. International Paper Co.*, 525 So.2d 813, 815 (Miss.1988) ("[T]he credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability.") (internal quotation marks and citation omitted); *General Elect. Co. v. Morris*, 670 S.W.2d 854, 856 (Ky.1984) *156 ("By allowing full [dollar-for-dollar] credit, the claimant ... could be deprived of many future periodic payments."); see also 4 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 57.47, at 10-276—10-278 (1997).

A prior decision of this Court, *St. Paul Fire & Mar. Ins. v. Treadwell*, 263 Md. 430, 283 A.2d 601 (1971), supports this interpretation of the Act. *Treadwell* dealt with the analogous issue of whether an employer could "recover back" monies paid to a claimant after the original award to the worker was reduced by the circuit court. In analyzing the Act as it existed at that time, the Court observed that:

while the statute, Code (1964 Repl.Vol.), Art. 101, does not contain explicit language authorizing the recovery by an employer (or its insurer) of payments found on appeal to have been awarded erroneously, neither does it, in so many words, forbid the recovery of such payments.

Id. at 431, 283 A.2d at 602. The Court in *Treadwell* found the existence of the anti-stay provision of the Act determinative to the resolution of the issue presented by that case. See § 9-741.¹⁶¹ Our predecessors reasoned that:

[W]hen the Legislature enacted the "no stay" provision in [Maryland Code (1964 Repl.Vol.), Art. 101,] § 56(a) it must have foreseen the possibility, and as well the probability, that payments would be made to claimants whose awards subsequently would be vacated on appeal. That it made no provision for the restitution of those payments suggests to us that restitution was considered and rejected, and that, in lieu thereof, the disposition of appeals was expedited by giving them precedence over all cases except criminal cases. Surely this can hardly be said to serve any purpose other than the mitigation of the employer's obligation to pay as ordered until the appeal has been decided.

Id. at 437-38, 283 A.2d at 605. The *Treadwell* Court concluded that "the language of our statute ... reflects a legislative intent to preclude 'recovery back' upon any theory, except fraud perhaps." *Id.* at 439, 283 A.2d at 606.

The rationale of *Treadwell* strongly suggests the result we reach today. Currently, under the Act, the reduction of an award by the circuit court under § 9-627(k) from 50% or greater impairment, to a degree of impairment less than that

percentage, both reduces the number of weeks of compensation and the monetary amount of that weekly benefit. In this case, for instance, Wright's benefits were reduced from \$178 to \$144 per week. The General Assembly must have foreseen the reasonable possibility that after the filing of a petition for judicial review and the reduction of an award, the employer might have already paid benefits pursuant to the Commission's original award in excess of the gross amount of the recalculated benefits.

We find the reasoning of the *Treadwell* court persuasive in this case. The fair inference is that the General Assembly, having made no provision allowing an employer to offset payments made prior to the reduction of an award against subsequent, recalculated benefits, considered and rejected such a possibility. See *Treadwell*, 263 Md. at 437-38, 283 A.2d at 605; see also *Montgomery County v. Lake*, 68 Md.App. 269, 275, 511 A.2d 541, 544 (1986) ("[S]ince the compensation statute does not provide a procedure to offset separate claims when overpayment results, the Legislature did not intend to permit this procedure."). We note that courts from other jurisdictions, in construing analogous provisions of their respective workers' compensation statutes, have drawn the similar conclusion that the absence of legislative authority to grant an employer a credit for previous payments to a claimant indicates that such authority does not exist. *Ransier v. State Indus. Ins. System*, 104 Nev. 742, 766 P.2d 274, 277 (1988); *Georgia-Pacific v. Piwowar*, 305 Or. 494, 753 P.2d 948, 954 (1988); *Kerans v. Industrial Comm'n of Utah*, 713 P.2d 49, 55 (Utah 1986); *In re Johner*, 643 P.2d 932, 935 (Wyo. 1982); *American Mut. Ins. Cos. v. Murray*, 420 A.2d 251, 251-52 (Me. 1980); *A T & T Network Systems v. Broussard*, 885 P.2d 684, 686 (Okla. Ct.App. 1994); see *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066-67 (Alaska 1991); see also *Petroleum Helicopters v. Nancy T. Garrett, L.P. T.*, 23 F.3d 107, 109-10 (5th Cir. 1994) (concluding that under the federal Longshore and Harbor Workers' Compensation Act, the only method for an employer to seek reimbursement of past payments is through offset provisions specifically mandated by statute); *Stevedoring Servs. of America, Inc. v. Eggert*, 953 F.2d 552, 555-57 (9th Cir. 1992) (same).

In support of its contention that Maryland law supports a dollar credit in this case, rather than a credit for the number of weeks benefits have been paid, Philip Electronics cites *Stapleford v. Hyatt*, 330 Md. 388, 624 A.2d 526 (1993). Rather than aiding Philip Electronics' argument, our decision in that case actually lends support to the result we reach today. In *Stapleford*, a worker reopened a previous claim under the Act,^[7] and was awarded additional compensation due to the worsening of his condition. *Id.* at 390, 624 A.2d at 526-27. The statutory provision at issue in *Stapleford* was current § 9-630(d),^[8] and the primary issue presented was the correct application of that statutory provision in a case where the compensation awarded originally was paid prior to the reopening of a claim. *Id.*

The Court in *Stapleford* concluded by setting forth the proper method for calculating serious disability benefits after a claimant's condition has worsened and his or her claim has been reopened:

The number of weeks of compensation paid and payable under the revised disability assessment should be augmented by one-third, that number of weeks should be reduced by the weeks of compensation actually paid to the claimant under any previous order of the Commission, and the balance of weeks of compensation should be awarded to the claimant at the "serious disability" rate.

Id. at 402, 624 A.2d at 532. Not surprisingly, the parties in this case interpret the passage differently. Wright focuses on the language mandating "that [the] number of weeks should be reduced by the weeks of compensation actually paid," as well as the language stating that "the balance of weeks of compensation should be awarded." According to Wright, this focus on compensation awarded as a number or balance of weeks supports the argument that a weekly credit is appropriate in this case. By contrast, Philip Electronics seizes on the "actually paid" language of *Stapleford* in support of its contention that this passage reflects a determination that an employer should be given credit for 'all prior monies actually paid.'

As previously discussed, we agree with Wright's interpretation that in drafting § 9-630, the General Assembly established a payment framework based upon weekly benefits, rather than a strict monetary equation, and the quoted passage from *Stapleford* implicitly embraces this conclusion as well. More importantly, *Stapleford* dealt with a statutory provision specific to the primary issue in that case. Section 9-630(d) reads:

(d) *Reopening*. —If a covered employee receives additional compensation for a disability on a petition to reopen for serious disability, the additional compensation may not increase the amount of compensation previously awarded and paid.

158 *158 By use of the phrase "amount of compensation," the General Assembly intended this subsection of the Act to limit the total monetary amount awarded. To the extent the "actually paid" language of *Stapleford* reflects a credit based upon the total amount of money actually paid to a claimant, rather than the number of weeks of compensation, this result is expressly contemplated by § 9-630(d). See *Polomski v. Baltimore*, 344 Md. 70, 82, 684 A.2d 1338, 1344 (1996) ("It is ... reasonable to conclude that because the two statutes say different things, they mean different things...."). Taken together, *Treadwell*, *Stapleford*, and the plain language of the Act stand for the proposition that the General Assembly intended that an employer's credit for the payment of permanent partial disability benefits be based upon the number of weeks of compensation previously paid, absent clear legislative expression to the contrary. Accordingly, we hold that when a claimant's initial award by the Commission is reduced pursuant to a petition for judicial review, an employer shall be entitled to a credit for the number of weeks of benefits actually paid in accordance with the original order, rather than a credit based upon the amount of money previously paid to the worker.

B.

Our holding today comports with several basic purposes served by the Act. An award of benefits under the Act does not represent a civil judgment for an amount of lost wages. *Bowen v. Smith*, 342 Md. 449, 455 n. 3, 677 A.2d 81, 84 n. 3 (1996).^[9] Instead, the primary purpose of the Act is to protect workers and their families from hardships resulting from work-related injuries by providing compensation to workers for loss of earning capacity. *Victor v. Proctor & Gamble*, 318 Md. 624, 628, 569 A.2d 697, 699 (1990). The Act also benefits the taxpayers of the State of Maryland in helping to prevent the State from having to assume the financial responsibility of caring for injured workers and their dependents. *Id.*; see also *Belcher v. T. Rowe Price*, 329 Md. 709, 737, 621 A.2d 872, 886 (1993) ("The needs and expectations of society, in addition to those of the work force, come into play.").

The result we reach today furthers both of these purposes. In this case, Wright will continue to receive the weekly payment of benefits for the allotted number of weeks, albeit reduced to accurately reflect the degree of her injury as determined by a jury. By contrast, the result advocated by Philip Electronics would immediately sever such weekly support, in direct contravention of one purpose of the Act. See *Bayshore Industries v. Ziats*, 229 Md. 69, 76-77, 181 A.2d 652, 656 (1962) (recognizing "the general policy which the prohibition against stay by reason of an appeal has been held ... to serve— that of affording day to day support to injured employees"). Moreover, in ensuring continued weekly support to an injured claimant whose award has been reduced, the citizens of this State are protected from having to care for workers, suddenly bereft of income, who had been unable or unwilling to appreciate the risk of their eventual lack of success before the circuit court. *Polomski*, 344 Md. at 76-77, 684 A.2d at 1341; see *Triangle Insulation v. Stratemeyer*, 782 S.W.2d 628, 630 (Ky.1990) ("An employee who has received an overpayment of income benefits should not be deprived of future income as a result of any such overpayment."); *Ransier*, 766 P.2d at 277 ("[S]uch a construction [of the statute] would place Ransier in the untenable position of using the benefits paid to him at the risk of having to repay them at a point when his family resources were even more greatly stressed."); see also *Benedict v. Office of Workers' Comp.*, 29 F.3d 1140, 1142 (7th Cir.1994) (noting that under federal law "recovery of an overpayment defeats the purpose of the Act where it would 'deprive a person of income required for ordinary and necessary living expenses'" (quoting 20 C.F.R. § 410.561c(a))) (footnote omitted).

159 *159 Finally, we address Philip Electronics' argument that applying a credit based on the number of weeks an employer has paid benefits is somehow unjust or inequitable because the claimant will eventually be paid more in benefits than the amount awarded by the jury. We have already noted the initial flaw in this argument. The jury does not determine the amount of benefits, but instead finds only the percentage of disability to the body as a whole. The circuit court then remands the case to the Commission for a recalculation of the weekly award.

In addition, the employer in *Treadwell* made the same argument based on equitable considerations that Philip Electronics raises in this case. Although finding the argument that Treadwell had been unjustly enriched appealing, this Court nevertheless rejected it on the grounds that the Act reflects a legislative intent to preclude "recovery back." A similar rationale applies in this case. Philip Electronics' argument that the overpayment to Wright is unjust or inequitable must be considered in light of the operation of the Act as a whole. See *Polomski*, 344 Md. at 76, 684 A.2d at 1340 ("[T]he Act has gone through several revisions, reflecting ... changes in societal attitudes, workplace realities, and, of course, political compromises.") (footnote omitted). A single transaction does not represent the appropriate focal point to determine the fairness or equity of the application of the Act. See *Waskiewicz v. General Motors Corp.*, 342 Md. 699, 712, 679 A.2d 1094, 1101 (1996) ("That the result in a particular case seems harsh is thus not enough to overcome the bar on reopening a claim after five years."); 1 LARSON, *supra*, § 2.20, at 1-5 (noting that the equity of a workers' compensation statute must be determined from a group as well as an individual perspective).

As this Court has noted in the past, the Act reflects the Legislature's considered judgment as to the appropriate allocation of resources between employers, employees, and the taxpayers of this State. *Polomski*, 344 Md. at 76-77, 684 A.2d at 1340-41. Significantly, Philip Electronics, as a party to this political equation, receives a valuable benefit in that they are relieved "from the vagaries of tort liability." *Id.* at 77, 684 A.2d at 1341. For instance, unlike a tort recovery, benefits paid pursuant to the Act compensate only for loss of earning capacity, and do not seek to return a claimant to his or her pre-disability state. 1 LARSON, *supra*, § 2.50, at 1-9.

Compensation awarded on [a] fault-free basis under the statutory plan substitutes for an employee's common law right to bring a fault-based tort suit against an employer for damages resulting from the employee's injury or disablement on the job....

Employers who purchase workers' compensation insurance and otherwise comply with the law of workers compensation can... count on avoiding a negligence lawsuit.

DeBusk v. Johns Hopkins, 342 Md. 432, 438, 677 A.2d 73, 75-76 (1996); see *Queen v. Queen*, 308 Md. 574, 585, 521 A.2d 320, 326 (1987); RICHARD P. GILBERT & ROBERT L. HUMPHREYS, JR., MARYLAND WORKERS' COMPENSATION HANDBOOK § 15.0, at 304 (2nd ed.1993).

Such a sensitive balancing of respective interests is properly within the province of the General Assembly, absent a constitutional provision to the contrary. *Bowen*, 342 Md. at 459 n. 6, 677 A.2d at 86 n. 6; *Paul v. Glidden Co.*, 184 Md. 114, 119, 39 A.2d 544, 546 (1944). In recognizing that the legislature is the appropriate forum to balance the equity or fairness of a particular statutory provision in a workers compensation scheme, the Supreme Judicial Court of Maine cogently observed:

To attempt to resolve this question by engrafting upon the statutory scheme judicially created doctrines of restitution would involve us in the establishment of broad social policy in a field of law created by the legislature in response to legislative dissatisfaction with judicial solutions to the problems of compensation for workers injured in industrial accidents.

Murray, 420 A.2d at 252 (emphasis added); see *Christensen v. Oshkosh Truck Corp.*, 12 F.3d 980, 987 (10th Cir.1993) (applying Utah law and reasoning that it is not within the *160 prerogative of courts to fashion common law exceptions to the statute "because the workers' compensation statutes provide the exclusive remedy for work-related injuries").

In this case, the Commission's order of November 17, 1994 gave Philip Electronics credit for the total monetary amount of compensation previously paid to Wright, and offset that amount against her recalculated benefits. The Circuit Court for Dorchester County agreed with that decision. As the Court of Special Appeals correctly held, Philip Electronics was entitled to a credit only for the number of weeks of benefits actually paid pursuant to the Commission's original order.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY PETITIONERS.

[1] Unless otherwise indicated, all statutory references hereinafter are to Maryland Code (1991 Repl.Vol., 1997 Supp.), Labor and Employment Article.

[2] In addition to the permanent partial disability benefits awarded, the Commission awarded Wright temporary total disability benefits amounting to \$4,988.00. These benefits were paid at the rate of \$266.80 per week from February 10, 1990 to April 30, 1990; from April 12, 1991 to June 9, 1991; and from June 18, 1991 to September 17, 1991. The Commission also awarded Wright advanced benefits through August 11, 1992.

[3] These monetary figures are taken from Philip Electronics' brief before this Court. Assuming the employer has already paid \$32,772, then 53 additional weeks at \$144 per week yields a total of \$40,404. This discrepancy is neither explained in Philip Electronics' brief, nor readily apparent from the record.

[4] Philip Electronics also argues at length that affirming the judgment of the Court of Special Appeals would be detrimental to claimants if the reasoning of the intermediate appellate court were applied to cases where an award is *increased* after the filing of a petition for judicial review, and the Commission must then determine whether to retroactively increase the award based on the number of weeks of benefits previously paid by the employer, or based on the total amount of monetary benefits previously received by the claimant. The issue is not presented in this case, and we express no opinion on that scenario. See Md. Rule 8-131(a).

[5] The total of 147 weeks of benefits paid by Philip Electronics to Wright is comprised of 118 weeks paid under the original order of November 30, 1992, and 29 weeks as a credit for monies advanced to Wright while she was awaiting the original hearing of November 19, 1992.

[6] The anti-stay provision of the Act, currently codified as § 9-741, states:

§ 9-741. Appeal is not a stay.

An appeal is not a stay of:

- (1) an order of the Commission requiring payment of compensation; or
- (2) an order or supplemental order of the Commission requiring the provision of medical treatment.

Although the Act refers to an action for judicial review as an "appeal," it is not actually an appeal. Rather, the filing of a petition for judicial review is an original action in the circuit court. Colao v. County Council, 346 Md. 342, 359, 697 A.2d 96, 104 (1997); Gisriel v. Ocean City Elections Board, 345 Md. 477, 495-96, 693 A.2d 757, 766 (1997).

[7] The claimant in Stapleford v. Hyatt, 330 Md. 388, 390, 624 A.2d 526, 526-27 (1993), reopened his claim pursuant to Maryland Code (1957, 1985 Repl.Vol., 1990 Supp.), Art. 101, § 40(b). That provision has been recodified, with only minor stylistic changes, as § 9-736(a).

[8] When Stapleford was decided, current § 9-630(d) was then codified as part of Maryland Code (1957, 1985 Repl.Vol., 1990 Supp.), Art. 101, § 36(3)(a)(iii). See Stapleford, 330 Md. at 390 n. 1, 624 A.2d at 527 n. 1. Except for stylistic changes, the two provisions are substantively equivalent.

[9] The procedural framework under the Act highlights this principle. In an action for judicial review by the circuit court, the trier of fact makes no determination as to lost wages. Rather, the only issues presented for resolution are whether the claimant has suffered permanent partial disability; and, if so, the percentage of such disability. Bethlehem-Sparrows Point Shipyard v. Damasiewicz, 187 Md. 474, 478, 50 A.2d 799, 801 (1947).

391 S.C. 38
Court of Appeals of South Carolina.

Danny R. **PILGRIM**, Respondent,
v.

Billy **EATON** and Rufus Revis, and
S.C. Workers Compensation Uninsured
Employers' Fund, Defendants,
of whom Billy **Eaton** and
Rufus Revis are Appellants,
and
S.C. Workers Compensation Uninsured
Employers' Fund is also Respondent.

No. 4767. | Heard May 19,
2010. | Decided Dec. 15, 2010.

Synopsis

Background: Contractors sought review of decision of the workers' compensation commission, which awarded claimant temporary total disability benefits. The Circuit Court, Anderson County, J.C. Buddy Nicholson, Jr., J., affirmed. Contractors appealed.

[Holding:] The Court of Appeals, Few, C.J., held that commission's calculation of claimant's average weekly wage amounted to an error of law that resulted in an average weekly wage that was clearly erroneous.

Affirmed in part, reversed in part, and remanded.

West Headnotes (5)

[1] **Workers' Compensation**

⚡ **Statutory employers**

Workers' Compensation

⚡ **Sufficiency of Evidence in Support**

The question of whether contractor is workers' compensation claimant's statutory employer is considered jurisdictional because its answer determines the jurisdiction of the commission under the Workers' Compensation Act; as to these jurisdictional facts, an appellate court

must make its own findings according to the preponderance of the evidence after a thorough review of the entire record. Code 1976, § 42-1-410.

4 Cases that cite this headnote

[2] **Workers' Compensation**

⚡ **Simultaneous and successive employers of same employee**

Contractor remained an owner and operator of garage building business after he sold his interest in business to other operator at least until the time of claimant's injury, and thus, contractor was jointly liable with other operator of business to claimant as his statutory employer for purposes of workers' compensation claim; because contractor was a licensed contractor, and other operator was not licensed, contractor was required to stay involved in the business so that operator could obtain necessary building permits, and the building permit for garage that claimant was working on bore contractor's name. Code 1976, §§ 40-11-20(8, 9), 42-1-410.

Cases that cite this headnote

[3] **Workers' Compensation**

⚡ **Weekly wages; number of days included**

Workers' compensation commission's calculation of claimant's average weekly wage by multiplying \$18, which was the hourly rate of pay at the time of his injury, by a 40-hour week amounted to an error of law that resulted in an average weekly wage that was clearly erroneous, where claimant had only been working for employers for 29.5 hours before he was injured. Code 1976, §§ 1-23-380(5), 42-1-40.

5 Cases that cite this headnote

[4] **Workers' Compensation**

⚡ **Choice between methods of computation**

Use of first alternative way to calculate average weekly wage for purposes of workers' compensation claim when a claimant had less than 52 weeks of wage data, which calculation

involved dividing claimant's earnings by the number of weeks and parts thereof during which the claimant earned wages, was not practicable in situation where claimant only worked for employer for 29.5 hours; 29.5 hours of wage data could not yield a reasonably accurate calculation of an average that was designed to be based on a year of data. Code 1976, § 42-1-40.

5 Cases that cite this headnote

[5] **Workers' Compensation**

Choice between methods of computation

Alternative to calculating average weekly wage for purposes of workers' compensation, which allows some other method of computing average weekly wages as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, can only be used by the workers' compensation commission when it makes factual findings that explain the exceptional reasons it finds the other methods are unfair. Code 1976, § 42-1-40.

5 Cases that cite this headnote

Attorneys and Law Firms

****242** Thomas Bailey Smith, of Mt. Pleasant, for Appellants.

Amy V. Cofield, of Lexington; Ernest Caskey Trammell, of Anderson, for Respondents.

Opinion

FEW, C.J.

***40** This appeal presents two questions related to workers' compensation. The first is the factual question of whether Rufus Revis is the statutory employer of the claimant, Danny Pilgrim. The answer to this question determines the jurisdiction of the workers' compensation commission. The second is whether the commission committed an error of law in its method of calculating Pilgrim's average weekly wage. We affirm the commission on the first question, but reverse and remand on the second.

I. Facts and Procedural History

Danny Pilgrim worked for years as a maintenance worker at an apartment complex but lost that job in January, 2005.

***41** On January 25, 2005, Pilgrim began working for Sean Kern. Kern had contracted with Billy Eaton to provide carpenters for Eaton's unincorporated business Just Garages Plus. Pilgrim's first job assignment for Kern was to work on the roof of a garage Eaton was building for a customer.¹ On January 28, Pilgrim fell from the roof and seriously injured his back. The commission determined that Pilgrim sustained a work-related injury and awarded him temporary total disability benefits.

¹ Kern is not a party to this claim. The commission found he was not subject to liability under the Workers' Compensation Act.

The commission found that both Eaton and Rufus Revis were Pilgrim's statutory employers. Revis had been the sole owner and operator of the garage business until selling an interest in it to Eaton in 2002. Revis contends that he sold the entire business to Eaton, and therefore he is insulated from workers' compensation liability. The commission found that Eaton and Revis continued to operate the business together as a "joint effort," and that both are liable to Pilgrim as his statutory employers. Revis appeals this finding. As to the second question, both Eaton and Revis argue the commission erred in its calculation of Pilgrim's average weekly wage. The circuit court affirmed the commission on both issues. We affirm the finding that Revis was Pilgrim's statutory employer. We reverse the determination of average weekly wage, and remand to the commission. On remand, the commission shall calculate Pilgrim's average weekly wage in compliance with section 42-1-40 of the South Carolina Code (Supp.2009), and set the compensation rate for his benefits accordingly.

II. Statutory Employer Determination

[1] The question of whether Revis is Pilgrim's statutory employer is considered "jurisdictional" because its answer determines the jurisdiction of the commission under the Workers' Compensation Act. See Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997). The commission's finding that Revis is a statutory employer means that Pilgrim's claim against him is subject to the exclusivity provision of the Act. See Glass, 325 S.C. at 201, 482 S.E.2d at 50 n. 1.² ***42** As to these jurisdictional facts, an appellate court must make its own findings according to

the preponderance of the evidence after a thorough review of the entire record. Glass, 325 S.C. at 202, 482 S.E.2d at 51.

² The exclusivity provision of the Act is found in section 42-1-540 of the South Carolina Code (1985). The statutory employer liability of "contractors" such as **Eaton** and **Revis** is governed by section 42-1-410 (1985). When the commission determines that a "contractor" qualifies as a statutory employer pursuant to section 42-1-410, the exclusivity provision of section 42-1-540 applies to claims made against that contractor.

[2] The parties do not dispute that Just Garages Plus qualifies as **Pilgrim's** statutory employer under section 42-1-410 of the South Carolina Code (1985). **Eaton** concedes that he is an owner³ and operator of the **243 business, and is thus liable for benefits as determined by the commission. We agree with the commission that **Revis** is also liable to **Pilgrim**. We find that **Revis** remained an owner and operator of Just Garages Plus at least until the time of **Pilgrim's** injury, and is therefore jointly liable with **Eaton** to **Pilgrim** as his statutory employer.

³ The use of the term "owner" here refers only to **Eaton's** status as owner of Just Garages Plus, and not to his status as a statutory employer. **Eaton** is a statutory employer as a "contractor" under section 42-1-410. The statute relating to the statutory employer status of an "owner" is section 42-1-400 of the South Carolina Code (1985), and is not at issue in this appeal.

Revis was the sole owner and operator of Just Garages until 2002 when he sold an interest in the business to **Eaton**, and the name was changed to Just Garages Plus. Because **Revis** was a licensed contractor, and **Eaton** was not licensed, **Revis** was required to stay involved in the business. South Carolina law requires that contracting work, such as the work performed by Just Garages Plus, be performed only by licensed contractors. S.C.Code Ann. § 40-11-30 (2001). A person who is not a licensed contractor may not even obtain a building permit for such work. See S.C.Code Ann. § 40-11-370(A)(B) (2001 & Supp.2009). It would have been unlawful for any person other than **Revis** to do the work of Just Garages Plus. S.C.Code Ann. § 40-11-370(B) (Supp.2009) ("It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter."). Therefore, in order for the business to *43 function after **Eaton** became involved, **Revis** had to continue to act as the general contractor.

Moreover, **Revis's** financial interest in the sale to **Eaton** was the monthly installment payments he received from **Eaton**. **Eaton** was unable to make those payments without income from jobs for which **Revis** acted as the contractor and obtained the required permits. Thus, both **Revis** and **Eaton** depended on **Revis's** integral participation in the work of Just Garages Plus. Further, at least as late as April 2, 2003, **Revis** admitted he still operated the business. On that date, he signed an agreement with the commission under the name "Rufus Revis d/b/a Just Garages, Respondent." The agreement states "from June 22, 2002 ..., the Respondent was operating and continues to operate...." Finally, when **Revis** eventually quit obtaining building permits for Just Garages Plus, **Eaton** stopped building garages.

Eaton, doing business as Just Garages Plus, contracted to build a garage in January, 2005. The building permit required for the job bears the name "Rufus Revis" as "Contractor." While there is some uncertainty about whether **Revis** actually obtained this particular permit, we find that he did.⁴ **Revis** was therefore the general contractor for the job. S.C.Code Ann. §§ 40-11-30, 40-11-20(8)-(9) (2001). On January 28, 2005, **Pilgrim** fell from the roof of the garage and was injured. As the general contractor and the only person allowed under the law to "engage in construction" on that job, **Revis** was doing business as Just Garages Plus. We affirm the commission's decision that **Revis** was **Pilgrim's** statutory employer.

⁴ **Eaton** testified that **Revis** was the only person to obtain permits for Just Garages Plus at the time of **Pilgrim's** injury. **Revis** was equivocal on the subject. We find his testimony is evasive and not credible. At one point **Revis** testified he did not obtain the permit. He later testified he did not know whether he did and that he would "have to go back ... to the courthouse and find that out." He admitted the permit "shows [his] name printed by someone."

Our holding in this case has no impact on the liability of a seller of a business for workers' compensation benefits owed to employees of the business injured after the sale. On these unique facts, we hold that **Revis** did not sell the business. Rather, he remained one of its owners and operators. Just *44 like **Eaton**, **Revis** was acting in his individual capacity, doing business as Just Garages Plus.

III. Average Weekly Wage Calculation

In making its award of temporary total disability benefits to **Pilgrim**, the commission set a compensation rate based on its calculation that **Pilgrim's** average weekly wage was \$720. **Eaton** and **Pilgrim** appeal this calculation. As to this calculation, an appellate court may not reverse the commission's decision unless substantial rights of the appellant have been prejudiced because the decision is **244 affected by an error of law, or because the factual findings are clearly erroneous in view of the reliable, probative, and substantial evidence. S.C.Code Ann. § 1-23-380(5) (Supp.2009). See Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785-86 (Ct.App.2007).

[3] When **Pilgrim** was injured on January 28, 2005, he had worked only 29.5 hours for Kern, all on the job for **Eaton** and **Revis**. He was paid for this time at the rate of \$18 an hour. Other than this, neither party presented any direct evidence for the commission to use in calculating average weekly wage. The commission calculated **Pilgrim's** average weekly wage by multiplying \$18 by a forty-hour week. We believe the commission's calculation of average weekly wage amounts to an error of law and resulted in an average weekly wage that is clearly erroneous. Because we find these errors have prejudiced substantial rights of the appellant, we reverse.

The Workers' Compensation Act defines average weekly wages precisely: " '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 (Supp.2009). The section sets forth four alternative methods for the commission to use to calculate the average wage. Forrest, 373 S.C. at 308, 644 S.E.2d at 786. The primary method of calculation requires that "[a]verage weekly wage" must be 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." S.C.Code Ann. § 42-1-40. The *45 commission must use this method unless "the employment, prior to the injury, extended over a period of less than fifty-two weeks," or unless "for exceptional reasons" it would be unfair to do so. *Id.* ⁵

⁵ The "exceptional reasons" alternative, which is discussed below, is based on the following paragraph from section 42-1-40:

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages

may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

In this case, the record shows that **Pilgrim** had been working at the job for Kern for less than one week. Therefore, it was not permissible for the commission to use the primary method of calculating **Pilgrim's** average weekly wage. Under this circumstance, the commission is required to consider which of the alternative methods for calculating average weekly wage it will use. Each alternative is preceded by a description of the conditions under which the commission may use the alternative. *Id.* Before the commission may use any one of these alternatives, the commission must find, or the record must clearly show, that the necessary conditions exist.

The commission failed to comply with section 42-1-40 in two important respects. First, it failed to make any factual findings showing which of the alternatives in the section was appropriate to use for calculating **Pilgrim's** average weekly wage. Second, it used a method of calculation which is not permitted under any scenario. ⁶ The commission found:

⁶ It is conceivable that the method used by the commission could have been employed under the "exceptional reasons" alternative, but only if the commission made the requisite factual findings.

At the time of the accident, Claimant was earning \$18 an hour.... The amount yields an average weekly wage of \$720.00 per week and a compensation rate of \$480.24. Although he worked for only a short period of time, several days, it is reasonable to conclude that is the amount he would be earning were it not for the accident.

[4] To illustrate that this calculation is an error of law, we consider each of the alternatives available under the section in light of the facts of this case. The first alternative to the primary method is to be used "[w]hen the employment ... *46 extended over a period of less than fifty-two weeks...." *Id.* In such a situation, the commission must use "the method of dividing the earnings during that **245 period by the number of weeks and parts thereof during which the employee earned wages...." *Id.* Section 42-1-40 states that "the method ... shall be followed, as long as results fair and just to both parties will be obtained." *Id.* The section also contains a requirement that this particular method be "practicable." *Id.* ⁷

7 This requirement is found in the provision that the third alternative method of calculation may not be used unless the first or second methods are "impracticable." *Id.*

Therefore, in order for the commission to use the first alternative to the primary method, two predicate conditions must exist. First, it must be "practicable" to use the first alternative method. Second, the calculation must yield a result which is "fair and just to both parties." Ordinarily, the commission should make factual findings of these two predicate conditions. In some situations, however, it may be clear from the record that both of the two predicate conditions exist. In this case, neither of them exists.

The "practicable" requirement is not met simply because 29.5 hours of wage data cannot yield a reasonably accurate calculation of an average that is designed to be based on a year of data. The "fair and just" requirement is not met for the same reason, and because **Pilgrim's** own testimony establishes that the commission's calculation is clearly erroneous. On cross-examination, **Pilgrim** testified that he earned \$29 in 2005. Assuming the \$29 was earned in a week separate from the week of his injury, in which he earned \$531, his average weekly wage for January 2005 would have been \$280.⁸ Neither side offered any other direct evidence of previous or subsequent earnings. The circumstantial evidence that was offered would have reduced the calculation of **Pilgrim's** average weekly wage even lower. When asked how much he earned in 2004 and in 2003, **Pilgrim** responded "I don't know." *47 He also testified that since at least 1997 he filed no income tax returns and he paid no social security taxes.

8 Making the calculation using only two work weeks results in the highest possible average. Total January earnings of \$560 divided by two weeks yields an average of \$280 per week. We use this calculation merely to illustrate the commission's error, not to suggest the outcome of the calculation the commission must make on remand.

Because the primary and first alternative methods of calculating average weekly wage were not available to the commission, it should have considered using the second alternative method.² This second alternative requires the commission to consider "the average weekly amount which ... 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." *Id.* Because neither of the parties mentioned the possibility of presenting such evidence, and the commission did not inquire of its availability, we cannot

determine whether this would have been the appropriate way to calculate the average weekly wage.

2 Section 42-1-40 provides this method is to be used "[w]here, 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...." *Id.*

[5] The final alternative for calculating average weekly wage is to be employed when "exceptional reasons" exist that make it "unfair, either to the employer or the employee," to use the alternatives set forth above. *Id.* In that event, section 42-1-40 provides that "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 alternative may be used by the commission when it makes factual findings that explain the "exceptional reasons" it finds the other methods are "unfair." *Id.* See *Forrest*, 373 S.C. at 308-11, 644 S.E.2d at 786-88 (affirming the commission's use of the "exceptional reasons" alternative based on specific findings which "justified deviation from the usual statutory method of ... computation"). In this case, the commission did not make any findings to justify using the "exceptional reasons" alternative.

246 Appellants contend that this appeal should be resolved based on the burden of proof. Appellants argue that **Pilgrim has the burden to prove average weekly wage, and thus compensation rate. They argue the lack of sufficient evidence *48 of wages should penalize **Pilgrim**. We believe, however, that the question of which side bears the burden of proof as to this specific issue is not properly before us. First, neither party raised the burden of proof to the commission; and the commission did not rule on it. Second, we need not reach the question of the burden of proof because our ruling already requires the commission to recalculate the average on remand. Third, it is not clear that there is a burden of proof on the issue of average weekly wage. We address the existence of a burden of proof on the question of average weekly wage. However, we do not answer the question.

Our courts have frequently stated that the burden of proof is on the claimant to prove facts which will bring the injury under the coverage of the Workers' Compensation Act. See, e.g., *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); *Bartley v. Allendale County Sch. Dist.*, 381 S.C. 262, 272, 672 S.E.2d 809, 814 (Ct.App.2009).

These cases generally place the burden on a claimant to prove the injury is compensable. For example, in *Clade*, the supreme court placed the burden of proof on the claimant to prove her injury arose out of the scope and course of her employment. 330 S.C. at 11, 496 S.E.2d at 857. Similarly, our courts have held that the burden of proving causation is on the claimant. See *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1967) ("The burden of proving causation rested upon claimant.").¹⁰ However, the Act does not place the burden of proof on the claimant as to all issues. For example, S.C.Code Ann. § 42-9-60 (Supp.2009) specifically places the burden on the employer when asserting the defenses of intoxication or willful injury. On jurisdictional questions, our courts have stated the burden is on the claimant, and have made statements indicating the burden of proof as to jurisdictional facts may not be on the claimant.¹¹ Compare *Marlow v. E.L. Jones & Son, Inc.*, 248 S.C. 568, 570, 151 S.E.2d 747, 748 (1966) ("[T]he burden of proving the relationship of employer and *49 employee is upon the claimants."); with *Chavis v. Watkins*, 256 S.C. 30, 34, 180 S.E.2d 648, 650 (1971) ("The burden rested upon the [employer] to show that a change in the identity of his employer was made known to [the employee].")¹² and *Shuler v. Tri-County Elec. Co-op., Inc.*, 385 S.C. 470, 473, 684 S.E.2d 765, 767 (2009) ("It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion."); *Hill v. Eagle Motor Lines*, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007) ("In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion."). Therefore, the burden of proof may vary depending on the issue before the commission.

¹⁰ But see *Tiller v. Nat'l. Health Care Ctr. of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999) (arguably calls the burden of proof on causation into question).

¹¹ We need not decide this question either, as our factual findings on the jurisdictional facts in this case would be the same regardless of who bears the burden.

¹² The *Chavis* court specifically stated the issue was jurisdictional. 256 S.C. at 32, 180 S.E.2d at 649.

On the question of a burden of proof for the amount of compensation due for a compensable injury, the Workers' Compensation Act is silent, and our courts have hardly spoken. In one case, however, this court cited the regulations of the commission and stated "the claimant has the burden of

proving wages earned from jobs other than the one where the accident occurred." *Steele v. Self Serve, Inc.*, 335 S.C. 323, 327, 516 S.E.2d 674, 676 (Ct.App.1999). The reasoning of *Steele*, if applicable here, would actually place the burden of proving the average weekly wage from a single employer on the employer, not the claimant. *Steele* cited former regulation 67-1603(B),¹³ which required a **247 claimant to file a completed Form 20 for "each additional job" other than the one for whom the claimant was working at the moment of injury. 335 S.C. at 327, 516 S.E.2d at 676. From the requirement of filing a completed Form 20, this court imposed the burden of proof on the claimant as to that issue. *Id.* As to a single employer, however, the same regulation places the requirement of filing a Form 20 on the employer: "The employer's representative shall calculate the claimant's compensation rate by completing a Form 20, Statement of Earnings of Injured Employee." S.C.Code Ann. Regs. § 67-1603(A) (Supp.2009). The regulation *50 goes on to require that "[w]age information shall be provided by the employer." *Id.* § 67-1603(B). The regulation also addresses what the commission may do if the employer fails to file a proper Form 20. "Failure to file and/or serve the Form 20 as set forth above may result in ... the commissioner ... determining the average weekly wage and compensation rate from information in the Commission's file and statements or evidence presented at the hearing...." *Id.* § 67-1603(G).¹⁴ Thus, applying the reasoning of *Steele*, the burden of proof as to the average weekly wage would be on the employer.

¹³ S.C.Code Ann. Regs. § 67-1603(B) (1990). The regulation was amended in 1997, and a modified version of the same requirement now is found at S.C.Code Ann. Regs. § 67-1603(H) (Supp.2009).

¹⁴ The commission might have applied this regulation in making its decision as to *Pilgrim's* average weekly wage. However, the commission's written decision says nothing about doing so, or even about the regulation. The Record on Appeal does not contain a Form 20, and there no indication as to whether a Form 20 was filed by the employer. Neither party addressed a Form 20 or this regulation in their briefs.

The overriding goal of the Workers' Compensation Act "is to compensate workers for reductions in their earning power caused by work-related injuries...." *Stephenson v. Rice Servs., Inc.*, 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). This statement from *Stephenson* was made in the context of explaining the "economic," or "earning impairment theory" of workers' compensation law in South Carolina. 323 S.C. at

116, 473 S.E.2d at 701. The starting point for determining compensation under this earning impairment theory is the commission's calculation of the average weekly wage under section 42-1-40. The specific goal of section 42-1-40 is for the commission to calculate an average weekly wage that is fair to both the worker and the employer. Applying an older version of the section, our supreme court stated "[t]he objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity." Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). Citing Bennett, this court has stated that section 42-1-40 "provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct.App.2002). With these general objectives in mind, however, we note the Workers' Compensation Act sets forth a framework of statutory *51 requirements which must be specifically followed. We hold the commission's failure to correctly apply section 42-1-40 was an error of law that prejudiced substantial rights of Appellants. We reverse the calculation of average weekly wage and remand to the commission.

On remand, the commission must determine whether to allow the parties to present additional evidence, or to make the calculation based on the evidence already in the record. The commission must then comply with section 42-1-40 of the South Carolina Code. The commission must first determine which method to use in calculating **Pilgrim's** average weekly wage, and make factual findings on the existence of the conditions that warrant the use of the method chosen. The commission must then apply the method to the wage data before it. If the commission makes its decision on remand pursuant to regulation 67-1603, it must make that clear in its written decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS and PIEPER, JJ., concur.

All Citations

391 S.C. 38, 703 S.E.2d 241

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396 S.C. 31
Court of Appeals of South Carolina.

James PUGH, Appellant,
v.

PIEDMONT MECHANICAL and
Zurich Insurance, Respondents.

No. 4896. | Heard Sept. 14,
2011. | Decided Oct. 19, 2011.

Synopsis

Background: Claimant appealed from decision by Appellate Panel of the Workers' Compensation Commission (WCC), challenging WCC's calculation of his average weekly wage prior to his second work-related knee injury and WCC's failure to award temporary total disability (TTD) for a particular period.

Holdings: The Court of Appeals, Konduros, J., held that:

[1] record did not establish that calculating claimant's average weekly wage for second injury based on 17-week period that he worked prior to that injury after returning to work following first injury was fair and just to both parties, and therefore matter would be remanded for reconsideration and clarification of the method used; and

[2] matter would also be remanded for specific factual findings as to reasonableness of claimant's understanding during a particular period that driving restrictions imposed by treating orthopedist prevented claimant from driving to employer's office.

Reversed and remanded.

West Headnotes (9)

[1] **Workers' Compensation**

☞ In general: questions of law or fact

Workers' Compensation

☞ Weight of evidence and credibility of witnesses

Under the substantial evidence standard of review, the Court of Appeals may not substitute its judgment for that of the Appellate Panel of Workers' Compensation Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Code 1976, § 1-23-380.

Cases that cite this headnote

[2] **Workers' Compensation**

☞ Questions of law or fact and findings

In workers' compensation cases, the Appellate Panel of the Workers' Compensation Commission (WCC) is the ultimate fact finder.

Cases that cite this headnote

[3] **Workers' Compensation**

☞ Questions of law or fact and findings

The Appellate Panel of the Workers' Compensation Commission (WCC) is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence.

Cases that cite this headnote

[4] **Workers' Compensation**

☞ Choice between methods of computation

Workers' Compensation

☞ Instructions on remand

Record did not establish that calculating claimant's average weekly wage for second work-related knee injury based on 17-week period that he worked prior to that injury after returning to work following first injury was fair and just to both parties, and therefore matter would be remanded to Appellate Panel of Workers' Compensation Commission to reconsider and clarify its method of calculation; method used by Appellate Panel resulted in 37 percent decrease from average weekly wage for first injury to the average weekly wage for second injury, and natural variance in available work in pipe-fitting industry made capturing the ebb and flow of work in a 17-week period difficult. Code 1976, § 42-1-40.

1 Cases that cite this headnote

[5] **Workers' Compensation**

☛ Choice between methods of computation

When Appellate Panel of the Workers' Compensation Commission (WCC) determines the primary method of calculating average weekly wage, as set forth in Workers' Compensation Act (WCA), 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. Code 1976, § 42-1-40.

1 Cases that cite this headnote

[6] **Workers' Compensation**

☛ Choice between methods of computation

Before the Appellate Panel of Workers' Compensation Commission (WCC) may use any one of the alternatives to primary method of calculating average weekly wage, the Appellate Panel must find, or the record must clearly show, that the necessary conditions, as prescribed in Workers' Compensation Act (WCA), exist. Code 1976, § 42-1-40.

Cases that cite this headnote

[7] **Workers' Compensation**

☛ Choice between methods of computation

Alternative method of calculating in workers' compensation proceeding the claimant's average weekly wage, which divides annual salary by the actual number of weeks worked versus 52 weeks, 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. Code 1976, § 42-1-40.

1 Cases that cite this headnote

[8] **Workers' Compensation**

☛ Choice between methods of computation

The prevailing goal and policy of statute setting out primary and alternative methods for calculating workers' compensation claimant's

average weekly wage is to use the method that will fairly compensate the employee for reductions in their earning power caused by work-related injuries. Code 1976, § 42-1-40.

Cases that cite this headnote

[9] **Workers' Compensation**

☛ Earnings and impairment of earning capacity

Workers' Compensation

☛ Instructions on remand

Matter would be remanded to Appellate Panel of Workers' Compensation Commission, which denied temporary total disability (TTD) benefits for a particular period, to make specific factual findings as to reasonableness of claimant's understanding during that period that driving restrictions imposed by treating orthopedist prevented claimant from driving the 90 minutes to employer's office, as Court of Appeals could not determine without such findings whether Appellate Panel erred in its decision.

Cases that cite this headnote

Attorneys and Law Firms

****678** Emmette J. Saleeby, of Spartanburg, for Appellant.

Errol Anne Y. Hodges and Amanda L.C. Bradley, both of Columbia, for Respondents.

Opinion

KONDUROS, J.

***34** This is an appeal of a workers' compensation case arising from James Pugh's consolidated request for medical treatment for two injuries to his right knee. He contends the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred in failing to fairly and justly determine his average weekly wage and in ignoring the existence of exceptional circumstances, making it unfair to calculate his average weekly wage for his 2007 injury based on a seventeen-week period. Pugh also argues the Appellate Panel erred by failing to award temporary total disability for a three-month period. ¹ We reverse and remand.

¹ Pugh originally argued that if the court affirmed his issue regarding the average weekly wage, the award of twenty percent permanent partial disability to his right leg is an error as a matter of law because substantial evidence does not support the disability rating. This issue was resolved with Amerisure, and the appeal was withdrawn.

FACTS

Pugh began working for Piedmont Mechanical in 1978 and by 2006 was earning eighteen dollars per hour as a certified pipefitter. He routinely worked forty hours per week with occasional overtime depending on the project to which he was assigned. On July 31, 2006, while working for Piedmont, *35 Pugh was carrying pipes when he stepped on a bottle, causing him to fall and suffer an injury to his right knee. The claim was admitted by Piedmont's carrier, Amerisure Mutual Insurance Company (Amerisure). Pugh was treated by Dr. John dePerczel, an orthopedist, and he underwent arthroscopic surgery and chondroplasty to his right knee.

Pugh was out of work for thirty weeks and paid temporary total disability benefits of \$568.89 per week based on an average weekly wage of \$853.28. Pugh's average weekly wage was calculated based on his earnings during the four quarters preceding the 2006 injury.

Dr. dePerczel determined Pugh reached maximum medical improvement for the 2006 injury on July 16, 2007, with a fifteen percent impairment rating to the right leg. The doctor assigned permanent work restrictions of (1) only occasional climbing or squatting and (2) no lifting over fifty pounds. Pugh returned to work for Piedmont in March 2007.

On October 19, 2007, Pugh reinjured his right knee getting off of a forklift at Piedmont. Pugh testified that while descending the forklift, he twisted his right knee and felt a pop, which caused severe pain and swelling to his right knee. Dr. dePerczel examined Pugh's knee and noted swelling, tenderness under the kneecap, and medial femoral condyle. Dr. dePerczel maintained the only option for permanent relief would be a total knee replacement. Dr. dePerczel, at this examination, placed Pugh on sedentary work.

Pugh lived about ninety minutes from Piedmont's office and felt commuting three to four hours every day from his home in Hickory, North Carolina to Piedmont's home office **679 in Spartanburg, South Carolina was aggravating his

right knee.² Pugh opted to stay out of work for a month without pay and workers' compensation benefits to see if his knee would improve with rest. Pugh's pain did not subside, and he returned to Dr. dePerczel on November 26, 2007. Dr. dePerczel recommended Pugh have a magnetic resonance imaging (MRI) to *36 determine the amount of cartilage damage in the right knee. At this visit, Dr. dePerczel instructed Pugh to limit his work to sitting work only and not to drive more than one hour at a time. Pugh believed this limitation kept him from driving the ninety minutes to Piedmont's office.

² Prior to the 2006 injury, Pugh worked remotely for Piedmont, requiring him to travel to Piedmont project sites throughout the country. Following his return to work in March 2007, Pugh performed light duty work in Piedmont's home office located in Spartanburg, South Carolina.

Amerisure sought clarification of Dr. dePerczel's driving restrictions in January 2008. Dr. dePerczel determined Pugh could drive forty-five minutes to an hour followed by a fifteen to thirty minute break, which would then allow him to drive the remaining thirty to forty-five minutes to Piedmont. Following the clarification, Pugh was notified by letter that Piedmont was unable to provide Pugh with any sedentary work.

Between the 2006 injury and the 2007 injury, Piedmont changed its workers' compensation provider from Amerisure to Zurich American Insurance (Zurich). Neither carrier would approve Dr. dePerczel's order for an MRI, further medical treatment, or temporary total disability following the new work restrictions outlined by Dr. dePerczel.

Pugh requested a hearing to determine whether he had sustained a new on-the-job injury and a determination of which carrier would be responsible for his workers' compensation benefits following the second injury. The single commissioner entered his order June 11, 2009, and the Appellate Panel affirmed the order in pertinent part, finding (1) Pugh sustained a second injury with Piedmont Mechanical on October 19, 2007; (2) Zurich was responsible for the 2007 claim; (3) Pugh had reached maximum medical improvement for the 2006 injury; (4) the average weekly wage for the 2006 injury was \$852.20 with a compensation rate of \$568.89 per week; (5) Pugh sustained a permanent partial disability of twenty percent; and (6) the average weekly wage for the 2007 injury was \$537.20 with a compensation rate of \$358.15. Pugh's average weekly wage for the 2007 claim was

calculated based on the seventeen-week period Pugh worked following his return to Piedmont after the 2006 injury. The Appellant Panel ordered Zurich to authorize a MRI of Pugh's right leg with the results to be reviewed by Dr. dePerczel to develop an appropriate treatment plan. This appeal followed.

*37 STANDARD OF REVIEW

[1] [2] [3] The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S.C.Code Ann. § 1-23-380 (Supp.2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not "substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its actions." Broughton v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct.App.1999). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. Id.

LAW/ANALYSIS

I. Average Weekly Wage Calculation

[4] The Appellate Panel calculated Pugh's average weekly wage for the 2007 **680 injury as \$537.20 based on the seventeen-week period Pugh worked prior to the injury. Pugh appeals this method of calculation, contending the Appellate Panel erred in failing to fairly and justly determine his average weekly wage and in ignoring the existence of exceptional reasons to justify a deviation from the Appellate Panel's chosen method of wage calculation. He argues the Appellate Panel should have calculated his wage by the alternative method of finding exceptional reasons to recognize his years of employment, earning capacity, and age because the calculation based on the seventeen-week period is a misleading snapshot of his average earnings.

The Workers' Compensation Act defines "average weekly wage" for the purposes of computing compensation and sets *38 forth a primary method of calculation and four alternative methods.³ The primary method for calculating the average weekly wage is to take "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." § 42-1-40; Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct.App.2010). "The [Appellate Panel] must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." Pilgrim, 391 S.C. at 44-45, 703 S.E.2d at 244 (citing § 42-1-40).

3

Section 42-1-40 of the South Carolina Code (Supp.2010) provides as follows:

"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,.... "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. 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.

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate

the amount which the injured employee would be earning were it not for the injury.
(emphasis added).

[5] [6] [7] In this case, Pugh had been working for less than four quarters since his return from the 2006 injury, thus the primary method of calculation was not appropriate. The Appellate Panel calculated Pugh's average weekly wage based on Zurich's Form 20 in which it "divided the annual salary by the actual number of weeks worked versus [fifty-two] weeks." *39 When the Appellate Panel 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. *Id.* "Before the [Appellate Panel] may use any one of these alternatives, the [Appellate Panel] must find, or the record must clearly show, that the necessary conditions [, as prescribed in the statute,] exist." *Id.* The first alternative method of wage calculation, used by Zurich and adopted by the Appellate Panel's order, 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. *Id.* at 46, 703 S.E.2d at 245.

We believe the Appellate Panel failed to satisfy the second predicate condition, therefore making the use of the first alternative method of calculation an error of law. The first condition of practicability is established both in the Appellate Panel's order and in the record based on Pugh working less than fifty-two weeks prior to his second injury. The second condition of fairness was not **681 specifically addressed in the Appellate Panel's order, nor does the record reflect that the alternative method of calculation was a fair and just result for both Piedmont and Pugh, as statutorily required. This is particularly bothersome in light of the significant decrease in an average weekly wage for a thirty-year veteran of the company.

[8] The record suggests a frequent fluctuation between projects and the hours available for employees to work depending on the projects Piedmont was undertaking. The natural variance in available work in this industry makes capturing the ebb and flow of work in a seventeen-week period difficult. The only evidence presented regarding Pugh's pay and hours worked was Pugh's testimony and the earnings outlined in Form 20. The prevailing goal and policy of section 42-1-40 is to use the method that will fairly compensate the employee "for reductions in their earning power caused by work-related injuries." *Stephenson v. Rice Servs., Inc.*, 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996).

See *Foreman v. Jackson Minit Mkts., Inc.*, 265 S.C. 164, 170, 217 S.E.2d 214, 216-17 (1975). In this case, the Appellate Panel had the *40 ability to see an extended and continual work history and average earnings for a thirty-year period.

The Appellate Panel's chosen method of calculation resulting in a thirty-seven percent decrease in Pugh's average weekly wage for the 2007 injury is drastic and should have been directly addressed by the order to comply with the statutory obligation. The record alone does not properly establish the calculation provided a fair and just result. Therefore, we remand this issue to the Appellate Panel for the purpose of reconsidering and clarifying the method of calculation in light of the Appellate Panel's requirement to select a method of calculation that is fair and just to both parties. While we leave the selection of the alternative method of calculation to the Appellate Panel, we recognize section 42-1-40 has been interpreted to provide "an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 309, 644 S.E.2d 784, 787 (2007) (quoting *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct.App.2002)).

II. Temporary Total Disability

[9] Pugh contends the Appellate Panel erred in failing to award temporary total disability benefits for the period from November 26, 2007, to February 29, 2008, because substantial evidence shows he is entitled to benefits during this period. Pugh specifically argues he is entitled to temporary total disability for the ten-week period from November 26, 2007, to February 4, 2008, because he was not informed until February 4, 2008, of Dr. dePerczel's clarification of his driving restrictions, which he had been following pursuant to the requirements of the Workers' Compensation Act. Additionally, he maintains he is entitled to temporary total disability for the three-and-a-half-week period between February 5, 2008, to February 28, 2008, because Piedmont was unable to arrange a sedentary job that complied with his work restrictions.

The Appellate Panel's order fails to make specific findings of fact on whether Pugh is entitled to temporary total disability during the thirteen-and-a-half-week period. Without specific findings upon the evidence regarding the material fact of *41 whether Pugh's understanding of the restrictions were warranted, this court cannot determine whether the general finding or conclusion was proper. See *Baldwin v. James River Corp.*, 304 S.C. 485, 486, 405 S.E.2d 421, 423 (Ct.App.1991).

Thus, we remand this case to the Appellate Panel to make specific findings on Pugh's understanding of the restrictions and his entitlement to temporary total disability for the thirteen-and-a-half-week period.

CONCLUSION

For the foregoing reasons, this case is reversed and remanded to the Appellate Panel for the purpose of amending its award in keeping with the views expressed herein.

REVERSED and REMANDED.

FEW, C.J., and THOMAS, J., concur.

All Citations

396 S.C. 31, 719 S.E.2d 676

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1117221

MICHELLE DAVIS,

Employee,

Claimant,

vs.

FRAENKISCHE USA LP,

Employer,

AND

MARYLAND CASUALTY COMPANY C/O
ZURICH NORTH AMERICA

Carrier,

Defendants.

**DEFENDANTS' LEGAL
MEMORANDUM IN SUPPORT OF
CREDIT FOR OVERPAYMENT OF
TEMPORARY DISABILITY
BENEFITS**

TO: SUSAN BARDEN, SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION AND MICHAEL F. MULLINAX, ESQUIRE:

Defendants paid Claimant temporary total disability benefits in lieu of compensation pursuant to the Workers' Compensation Act in the amount of \$704.92 per week. The parties agreed that Claimant was paid weekly benefits in excess of her compensation rate; however, the parties disagreed about how to calculate her compensation rate. At a hearing before the Honorable Commissioner Barden, Claimant's attorney relied on post-accident wages to support a proposed compensation rate of \$499.38. In the alternative, Claimant's attorney proposed a compensation rate of \$474.39. Defendants proposed a compensation rate of \$325.05 based on Claimant's pre-accident earnings. The Honorable Commissioner found Claimant's compensation rate to be \$474.39. Therefore, at the time of the hearing, Defendants had overpaid

Claimant \$230.53 for each week of temporary benefits paid. Defendants respectfully request a credit for overpayment be applied to any permanent disability award Claimant receives.

The South Carolina Workers' Compensation Act allows any payments made by an employer to an injured employee during the period of his disability, which were not due and payable, to be deducted from the amount to be paid as compensation, subject to the approval of the Commission. S.C. Code Ann. § 42-9-210. The deductions shall be applied by shortening the period during which compensation must be made. *Id.* Further, South Carolina Workers' Compensation Regulation 67-1603(C)(3) addresses the payment of temporary compensation based on an incorrect compensation rate. When the corrected compensation rate is less than previously reported on the Form 15 and paid to a claimant, and the claimant agrees to the reduction, the employer may deduct up to twenty-five percent from the weekly payments to recover the overpayment. Reg. 67-1603(C)(3)(b)(i). However, when the claimant does not agree to the reduction, and the first one hundred fifty days have passed, the employer shall continue paying the compensation rate reported on the Form 15 and request a reduction in compensation by filing a Form 21. Reg. 67-1603(C)(3)(b)(iii).

The South Carolina Workers' Compensation Commission has repeatedly held that an employer is entitled to credit for the overpayment of temporary total disability benefits based on an incorrect compensation rate. *See McPherson v. Express Teller Services, Inc.*, W.C.C. File No. 0719102, 2012 S.C. Wrk. Comp. LEXIS 496, *aff'd*, 2013 S.C. Wrk. Comp. LEXIS 170; *Ayoub v. Select Comfort Corp.*, W.C.C. File No. 0526870, 2007 S.C. Wrk. Comp. LEXIS 904, *aff'd*, 2008 S.C. Wrk Comp. LEXIS 377; *Fields v. Shoney's of Hardeeville*, W.C.C. No. 0322719 & 0030955, 2006 S.C. Wrk. Comp. LEXIS 191; *Brown v. Defender Services, Inc.*, W.C.C. File No. 0010786, 2001 S.C. Wrk. Comp. LEXIS 189. In *Fields, supra*, an Appellate

Panel of the South Carolina Workers' Compensation Commission held that the employer was entitled to a credit for the substantial overpayment of temporary benefits to the claimant based on an inadvertent miscalculation of the claimant's compensation rate. The Panel affirmed that the award of a credit to the employer against the claimant's permanent disability award was appropriate under the Act, as it merely "shorten[ed] the period during which compensation must be paid." *Id.*

Additionally, in *McPherson, supra*, an Appellate Panel of the Workers' Compensation Commission held that the credit the defendants were entitled to for the overpayment of temporary benefits was to be determined in the form of dollars paid, and not based on a number of weeks paid. The Commission held that to not grant credit to the defendants for payments already made in the form of temporary disability benefits, merely based on an erroneous compensation rate would be unfair to the defendants and contrary to the Act. *Id.*

The case cited by Claimant in asserting Defendants are not entitled to a credit, *Brittle v. Raybestos-Manhattan, Inc.*, does not address the overpayment of temporary disability benefits based on an incorrect compensation rate. Rather, that case addresses an employer's payments made to the claimant voluntarily, and not due and payable under the Workers' Compensation Act. *Id.* Therefore, the cited authority does not address the issue before you.

Defendants assert Claimant would receive an unjust windfall if they were not provided a credit on the overpayment of benefits. Claimant did not alert her Employer that she was receiving temporary disability benefits in excess of the gross amount she earned prior to the injury. During her period of temporary disability, Claimant was incorrectly paid \$704.92 per week in compensation benefits. The Honorable Commissioner Barden determined Claimant's compensation rate to be \$474.39. Although Claimant argued that her compensation rate was

\$499.38, that is still substantially less than what she was being paid in temporary benefits. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 310 S.E.2d 440 (Ct. App. 1983). It would be unjust to allow Claimant to receive a significant windfall due to an incorrect compensation rate, of which Claimant was aware and failed to address, and would provide Claimant with benefits not contemplated in the Workers' Compensation Act.

Defendants request that the overpayment of weekly benefits be applied as a credit to Claimant's permanent award, pursuant to S.C. Code § 42-9-210 and Regulation 67-1603. The Workers' Compensation Commission has repeatedly awarded credit for the overpayment of temporary benefits based on an incorrectly paid compensation rate. *See, e.g., Fields, supra*. Accordingly, Defendants request a credit for all funds paid in excess of Claimant's compensation rate, and request that the credit be applied to any permanent disability award Claimant receives. Defendants have chosen to request that the credit be applied to any permanent award Claimant receives, rather than to apply such deductions by shortening the period during which temporary benefits shall be paid, in order to avoid any potential prejudice against Claimant. The Workers' Compensation Act expressly allows for these payments to be applied to a final award, upon approval of the Commission, and such application does not prejudice Claimant. Therefore, Defendants respectfully request that you deem all benefits paid in excess of Claimant's compensation rate an overpayment and allow Defendants a credit in that amount to be applied to any permanent disability award Claimant receives, pursuant to your authority, as provided herein.

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MARK A. ALLISON
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 2980
55 East Camperdown Way, Suite 300
Greenville, South Carolina 29602
(864) 239-4000
Attorneys for the Employer/Carrier

Greenville, South Carolina
January 27, 2016

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1117221

EMPLOYEE/CLAIMANT: MICHELLE L. DAVIS

EMPLOYER: FRAENKISCHE USA, L.P.

CARRIER: MARYLAND CASUALTY COMPANY



SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 8TH DAY OF
JANUARY, 2016, COMMENCING AT THE HOUR OF 11:28 A.M., IN
ANDERSON, SOUTH CAROLINA, BEFORE THE HONORABLE SUSAN BARDEN,
ATTENDED BY COUNSEL AS FOLLOWS:

JAN L. WHITWORTH
VERBATIM REPORTER

JAN L. WHITWORTH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, S.C. 29376
(864) 494-2705

APPEARANCES

MICHAEL F. MULLINAX, ESQUIRE, OF THE FIRM
MULLINAX LAW FIRM, P.A.
POST OFFICE BOX 2665
ANDERSON, SOUTH CAROLINA 29622

ATTORNEY FOR THE EMPLOYEE/CLAIMANT,

MARK A. ALLISON, ESQUIRE, OF THE FIRM
MCANGUS, GOUDELOCK & COURIE, L.L.C.
POST OFFICE BOX 2980
GREENVILLE, SOUTH CAROLINA 29602

ATTORNEY FOR THE EMPLOYER/INSURER.

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1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN ANDERSON,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * *

6 **BY COMMISSIONER BARDEN:**

7 TODAY'S DATE IS JANUARY 8TH, 2016. THIS IS
8 SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION FILE
9 NUMBER 1117221. THIS IS THE CASE OF THE CLAIMANT
10 MS. MICHELLE DAVIS WHO IS PRESENT TODAY AND
11 REPRESENTED BY ATTORNEY MIKE MULLINAX VERSUS THE
12 EMPLOYER -- I FORGOT TO REQUEST THE PRONUNCIATION OF
13 THE EMPLOYER'S NAME.

14 **BY MR. MULLINAX:**

15 I THINK IT'S FRAENKISCHE IS WHAT WE UNDERSTAND.

16 **BY THE CLAIMANT:**

17 EVERYBODY PRONOUNCES IT DIFFERENT.

18 FRAENKISCHE.

19 **BY COMMISSIONER BARDEN:**

20 FRAENKISCHE?

21 **BY MR. ALLISON:**

22 YES, THAT'S RIGHT.

23 **BY COMMISSIONER BARDEN:**

24 ALL RIGHT. THANK YOU. AND ITS CARRIER
25 MARYLAND CASUALTY, BOTH OF WHICH ARE REPRESENTED BY

1 ATTORNEY MARK ALLISON. THE PURPOSE OF TODAY'S
2 HEARING IS TO DETERMINE ISSUES RAISED IN THE
3 DEFENDANTS' FORM 21 REQUEST FOR REDUCTION IN
4 TEMPORARY BENEFITS. THE MAIN PURPOSE OF TODAY'S
5 HEARING IS TO DETERMINE WHAT THE AVERAGE WEEKLY WAGE
6 AND COMPENSATION RATE ARE, AND THE PARTIES DO NOT
7 AGREE AS TO THE CORRECT AND APPROPRIATE AVERAGE
8 WEEKLY WAGE. THE CLAIMANT WOULD POINT TO THE
9 ORIGINAL FORM 20, WHICH WAS SUBMITTED BY -- FIRST OF
10 ALL BY THE EMPLOYER, WHICH SHOWS THAT SHE HAS BEEN
11 PAID THE MAX COMP RATE FOR 2011. THE DEFENDANTS
12 WOULD CONTEND THAT THE FORM 20 WAS WRONG, THAT IT
13 INCLUDED POST INJURY WAGES. IT ACTUALLY USED THE
14 WAGES OF THE CALENDAR YEAR OF THE INJURY, AND IN
15 ADDITION TO THAT, THE CLAIMANT HAD WORKED 14 WEEKS
16 DURING THAT PERIOD, BUT INSTEAD A DIVISOR OF SIX WAS
17 USED, SO THE DEFENDANTS WOULD CONTEND THAT THE FORM
18 20 IS OBVIOUSLY FLAWED, SIGNIFICANTLY FLAWED, AND
19 THAT THE CLAIMANT ACTUALLY RECEIVED MORE IN
20 TEMPORARY BENEFITS THAN SHE HAD EARNED IN GROSS
21 WAGES. AS FAR AS DETERMINING WHAT THE CORRECT AND
22 APPROPRIATE AVERAGE WEEKLY WAGE IS, THE DEFENDANTS
23 WOULD CONTEND THAT THOSE FIGURES SHOULD BE MORE
24 APPROPRIATELY \$487.56 FOR AN AVERAGE WEEKLY WAGE
25 YIELDING A COMPENSATION RATE OF \$325.05. THE

1 DEFENDANTS DO NOT BELIEVE THAT ANY CIRCUMSTANCES --
2 OR THERE ARE ANY EXCEPTIONAL CIRCUMSTANCES
3 WARRANTING A DEVIATION FROM THE ORDINARY
4 CALCULATION; HOWEVER, IF I DO FIND THAT THE
5 CLAIMANT'S INCREASED WAGES AFTER THE DATE OF THE
6 INJURY SHOULD BE TAKEN INTO ACCOUNT, THAT I ALSO
7 TAKE INTO ACCOUNT THAT THE CLAIMANT'S WAGES WERE
8 SIGNIFICANTLY LESS THAN WHAT SHE EARNED ON THE DATE
9 OF THE ACCIDENT. I BELIEVE ON THE DATE OF THE
10 ACCIDENT, SHE WAS EARNING \$12.48, AND DURING THIS
11 PERIOD IN QUESTION, SHE EARNED \$10.30 TO \$16.07.
12 THOSE WAGES FLUCTUATED. AS FAR AS THE \$10.00 IS
13 CONCERNED, THE DEFENDANTS WOULD POINT TO MY
14 ATTENTION THE FACT THAT -- OR EXCUSE ME, THAT THEY
15 THINK I SHOULD INCLUDE -- IF I'M GOING TO INCLUDE
16 INCREASES, THAT I NEED TO INCLUDE DECREASES AS WELL.
17 AS FAR AS ANY INCREASES ARE CONCERNED THOUGH, THE
18 DEFENDANTS WOULD CONTEND THAT THE CLAIMANT WAS NOT
19 BEING PROMOTED AND RISING TO A GREATER POSITION BUT
20 RATHER JUST THE FACT THAT THE JOBS THAT WERE
21 OFFERED, THE WAGES FLUCTUATED SOME TO HER BENEFIT,
22 SOME NOT. BUT THE DEFENDANTS CONTEND THAT THE
23 ACTUAL AVERAGE WAGE SHOULD BE \$487.56 YIELDING A
24 COMPENSATION RATE OF \$325.05. BOTH PARTIES AGREE
25 THAT THE CLAIMANT HAS NOT REACHED MAXIMUM MEDICAL

1 IMPROVEMENT. SHE IS AWAITING THE IMPLEMENTATION OR
2 IMPLANTATION OF A SPINAL CORD STIMULATOR, AND SO
3 THEREFORE THAT IS NOT AN ISSUE TODAY, AND ANY OTHER
4 BODY PARTS OR CONDITIONS ARE HELD IN ABEYANCE OTHER
5 THAN THE ONE THAT IS ADMITTED IS THE LEFT ANKLE.

6 CONVERSELY, IT IS THE POSITION OF THE CLAIMANT
7 THAT THE CORRECT AND APPROPRIATE AVERAGE WEEKLY WAGE
8 IS \$748.69 YIELDING A COMPENSATION RATE OF \$499.38.
9 THE CLAIMANT WOULD BASE THIS ON THE FACT THAT AFTER
10 SHE WAS INJURED, SHE DID IN FACT RECEIVE INCREASES
11 SUCH THAT EXCEPTIONAL CIRCUMSTANCES DO EXIST SUCH
12 THAT HER LAST WAGE THAT SHE ACTUALLY EARNED WAS --
13 EXCUSE ME, I MISSPOKE. THE \$748.69/\$499.38 IS BASED
14 UPON A \$16.82 WAGE THAT WAS OFFERED TO THE CLAIMANT,
15 HER LAST WAGE OFFERED TO HER, BUT SHE WAS UNABLE TO
16 TAKE IT BECAUSE OF HER ANKLE CONDITION BECAUSE OF
17 THE SECOND SURGERY THAT SHE UNDERWENT. SO, THE
18 CLAIMANT WOULD CONTEND THAT BUT FOR HER INJURY AND
19 THE FACT SHE HAD TO UNDERGO THAT SECOND SURGERY AND
20 OTHER SURGERIES THAT SHE WAS UNABLE TO ACCEPT THAT
21 OFFER TO HER, BUT THAT SHOULD BE THE BASIS FOR HER
22 AVERAGE WEEKLY WAGE AND COMPENSATION RATE. HER
23 ALTERNATE OR BACKUP POSITION WOULD BE THAT THE LAST
24 WAGES SHE EARNED WERE ACTUALLY \$16.07, AND THAT
25 WOULD YIELD AN AVERAGE WEEKLY WAGE OF \$711.23

1 YIELDING A COMPENSATION RATE OF \$474.39. AS FAR AS
2 THE TEN DOLLARS IS CONCERNED, THE CLAIMANT WOULD
3 CONTEND THAT THAT SHOULDN'T BE FACTORED IN OR
4 CONCERNED AT ALL; THAT THAT WAS WHEN SHE WAS LIMITED
5 TO SIT-DOWN DUTY, AND THAT IS ALL THAT SHE COULD
6 EARN. THAT WAS ALL THAT WAS OFFERED TO HER. SO,
7 THAT IS NOT -- SHOULD NOT FACTOR IN IF I CONSIDER A
8 RANGE OF HER VARIOUS WAGES THAT SHE HAS EARNED. AS
9 I ALLUDED TO EARLIER, SHE EARNED \$12.48 ON THE DATE
10 OF THE ACCIDENT, AND SHE ACTUALLY EARNED, THE LAST
11 JOB THAT SHE PERFORMED \$16.87 PER HOUR. AS FAR AS
12 RECEIVING MORE THAN HER GROSS WAGES IN TERMS OF
13 TEMPORARY BENEFITS, THE CLAIMANT BELIEVED THAT SHE
14 WAS RECEIVING BOTH SHORT-TERM DISABILITY AND
15 TEMPORARY BENEFITS, DIDN'T THINK TOO MUCH ABOUT IT.
16 SO, THEREFORE, THAT IS WHY SHE DIDN'T ALERT ANYONE
17 TO THE FACT THAT SHE WAS RECEIVING MORE IN TEMPORARY
18 BENEFITS THAN SHE RECEIVED IN GROSS WAGES, BECAUSE
19 SHE BELIEVED THAT IT WAS THE COMBINATION OF THOSE
20 TWO THINGS. AS FAR AS THE FORM 20 IS CONCERNED, THE
21 CLAIMANT WOULD CONTEND THAT IT WOULD BE UNFAIR FOR
22 THE DEFENDANTS TO RECEIVE SUCH AN OVERPAYMENT -- A
23 CREDIT FOR OVERPAYMENT, AND THAT THEY WERE IN
24 CONTROL OF PRODUCING THE FORM 20, AND THE CLAIMANT
25 HAD NO INVOLVEMENT IN THAT WHATSOEVER, AND THE

1 DEFENDANTS WOULD CONCEDE OR AS FAR AS A CONCESSION,
2 THEY WOULD BE WILLING TO HAVE ANY CREDIT APPLIED TO
3 THE PERMANENCY AWARD RATHER THAN REDUCING THE
4 CLAIMANT'S TEMPORARY BENEFITS AS SHE CURRENTLY
5 RECEIVES THEM.

6 ALL RIGHT, GENTLEMEN, I HAVE NOT READ ANY OF
7 THIS YOU HAVE GIVEN ME, AND I HAVE CERTAINLY TRIED
8 TO TAKE COPIOUS NOTES, BUT IF I HAVE MISSTATED AS
9 FAR AS YOUR RESPECTIVE POSITIONS OR ANY FIGURES THAT
10 I MAY HAVE MISSTATED, I CERTAINLY WOULD ENTERTAIN
11 ANY CORRECTIONS OR CLARIFICATIONS. YOU BOTH SAID IT
12 A LOT BETTER THAN I DID. SO, I WILL HEAR FROM YOU
13 UNLESS YOU ARE SATISFIED WITH THE SUMMARY.

14 **BY MR. ALLISON:**

15 I AM SATISFIED WITH YOUR SUMMARY.

16 **BY COMMISSIONER BARDEN:**

17 MR. MULLINAX.

18 **BY MR. MULLINAX:**

19 YOUR HONOR, IT'S FINE.

20 **BY COMMISSIONER BARDEN:**

21 OKAY. THANK YOU VERY MUCH. ALL RIGHT, MR.
22 ALLISON, YOU'RE RELYING ON YOUR BRIEF. YOU DIDN'T
23 SUBMIT ANY APAs, BECAUSE WE'RE NOT DETERMINING
24 PERMANENCY HERE. PERMANENT AND TOTAL DISABILITY IS
25 BEING ALLEGED, SO OBVIOUSLY THIS CASE PURSUANT TO

1 REGULATION 67-18-02 IS GOING TO GO TO MANDATORY
2 MEDIATION. SO, YOU ARE HERE TO CROSS EXAMINE THE
3 CLAIMANT AND PRESENT ANY REBUTTAL WITNESSES; IS THAT
4 CORRECT?

5 **BY MR. ALLISON:**

6 YES -- YES, MA'AM.

7 **BY COMMISSIONER BARDEN:**

8 ALL RIGHT. AND, MR. MULLINAX, YOUR FIRST AND
9 ONLY WITNESS IS MS. DAVIS; IS THAT RIGHT?

10 **BY MR. MULLINAX:**

11 YES, YOUR HONOR.

12 **BY COMMISSIONER BARDEN:**

13 ALL RIGHT. MS. DAVIS, IF YOU WILL RAISE YOUR
14 RIGHT HAND, PLEASE.

15 * * * * *

16 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
17 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
18 MATTER HEREIN:

19 **MICHELLE L. DAVIS**

20 BEING FIRST DULY SWORN, TESTIFIED ON HER OATH AS FOLLOWS:

21 **BY COMMISSIONER BARDEN:**

22 PLEASE STATE YOUR FULL NAME FOR THE RECORD.

23 **BY THE CLAIMANT:**

24 MICHELLE LEE DAVIS.

25 **BY COMMISSIONER BARDEN:**

LEE, L-E-E OR ---

BY THE CLAIMANT:

L-E-E.

BY COMMISSIONER BARDEN:

THANK YOU SO MUCH. PLEASE ANSWER ANY QUESTIONS
YOUR LAWYER HAS FOR YOU.

BY MR. MULLINAX:

THANK YOU, COMMISSIONER. I'M GOING TO TRY TO
KEEP THIS TESTIMONY STRAIGHT AND TO THE POINT ---

BY COMMISSIONER BARDEN:

YES, SIR.

BY MR. MULLINAX:

--- SO WE WON'T STRAY INTO OTHER AREAS.

BY COMMISSIONER BARDEN:

THANK YOU.

DIRECT EXAMINATION BY MR. MULLINAX:

Q. MICHELLE, YOU BEGAN WORKING IN 2011 FOR FRAENKISCHE;
IS THAT CORRECT?

A. YES.

Q. YOUR FIRST POSITION WITH THEM CAME AS A RESULT OF
YOUR EMPLOYMENT WITH WHOM?

A. PHILLIPS STAFFING.

Q. AND YOU WERE A TEMPORARY EMPLOYEE?

A. I WAS.

Q. AND FOR HOW LONG DID YOU WORK FOR PHILLIPS STAFFING

1 AT FRAENKISCHE?

2 A. NINETY DAYS, THREE MONTHS.

3 Q. AT THE END OF THAT TIME, WAS THAT SOME KIND OF
4 PROBATIONARY PERIOD?

5 A. IT WAS.

6 Q. OKAY. DID YOU BECOME FULL-TIME EMPLOYED WITH
7 FRAENKISCHE AT THAT TIME?

8 A. YES.

9 Q. AND MY UNDERSTANDING IS THAT BASED UPON YOUR
10 EMPLOYMENT RECORDS, WHICH ARE A PART OF THE APAs,
11 YOUR INITIAL SALARY WAS \$12.48 AN HOUR. IS THAT
12 RIGHT?

13 A. YES.

14 Q. AND WHAT DID YOU DO, OR WHAT WAS YOUR JOB? ..

15 A. I WAS A LINE OPERATOR. I BASICALLY WATCHED THE
16 PARTS AS THEY CAME OFF THE LINE, MADE SURE THE
17 MATERIAL DIDN'T RUN OUT, DO CHECKS EVERY 30 MINUTES
18 TO AN HOUR, PACKED OUT PARTS, MADE BOXES, KEPT THE
19 AREA CLEAN. JUST THERE WAS A LOT OF, YOU KNOW,
20 DUTIES THAT WENT WITH THAT OTHER JUST WATCHING THE
21 MACHINE.

22 Q. OKAY. AND HOW DID YOU FEEL ABOUT YOUR JOB?

23 A. I LOVED MY JOB.

24 Q. OKAY. AND WERE YOU GOOD AT WHAT YOU DID?

25 A. I WAS REALLY GOOD.

1 Q. OKAY. SHORTLY THEREAFTER, YOU RECEIVED AN INCREASE
2 IN PAY I BELIEVE -- ACTUALLY, YOU GOT HURT IN
3 AUGUST, IS THAT -- IN OCTOBER, I'M SORRY.

4 A. OCTOBER.

5 BY COMMISSIONER BARDEN:

6 DO YOU KNOW THE DATE YOU STARTED WITH THEM IN
7 2011?

8 BY THE CLAIMANT:

9 WITH FRAENKISCHE OR PHILLIPS?

10 BY COMMISSIONER BARDEN:

11 WITH ---

12 BY MR. MULLINAX:

13 SHE BEGAN 8/22/11.

14 BY COMMISSIONER BARDEN:

15 8/22/11.

16 BY MR. MULLINAX:

17 AS A FULL-TIME EMPLOYEE.

18 BY COMMISSIONER BARDEN:

19 OKAY, THANK YOU. THAT'S GOOD.

20 BY MR. MULLINAX:

21 AND THE THREE MONTHS PROBATIONARY PERIOD ---

22 BY COMMISSIONER BARDEN:

23 RIGHT.

24 BY MR. MULLINAX:

25 --- WAS PRIOR TO THAT, JUST PRIOR TO THAT.

1 BY COMMISSIONER BARDEN:

2 OKAY. SO, GO AHEAD.

3 DIRECT EXAMINATION RESUMED BY MR. MULLINAX:

4 Q. OCTOBER 21ST, 2011, YOU WERE INJURED?

5 A. YES.

6 Q. OKAY. AFTER THAT INJURY, YOU CAME BACK TO WORK?

7 A. I DID.

8 Q. AND DID YOU RECEIVE AN INCREASE IN PAY AT THAT TIME?

9 A. WHEN -- RIGHT WHEN I CAME BACK?

10 Q. NO, ANYTIME AFTER THAT.

11 A. I GOT A PROMOTION AFTER I CAME BACK, YES.

12 Q. OKAY. WHAT WAS THAT PROMOTION TO?

13 A. TO SET-UP OPERATOR.

14 Q. AND WHAT WAS THE DIFFERENCE IN THE JOB BETWEEN SET-
15 UP OPERATOR AND LINE OPERATOR?

16 A. OH, GOODNESS. I CHANGED OVER THE LINE TO RUN A
17 DIFFERENT PART. THAT INVOLVED CHANGING THE WHOLE
18 MACHINE OVER, MOLD BLOCKS, SETTING -- RESETTING THE
19 COMPUTER, CHANGING THE MATERIAL OVER, CHANGING THE
20 DRYERS, EVERYTHING TO SET UP TO RUN A DIFFERENT
21 PART. I HAD TO CHANGE THE CUTTERS OVER, THE SPARK
22 TESTERS, THE TESTERS THAT THEY RUN INTO. IT WAS A
23 LOT OF DUTIES THAT WENT WITH THAT. IT WAS MORE
24 PHYSICAL.

25 Q. OKAY. AND HOW DID YOU HANDLE THAT JOB?

1 A. I WAS GOOD AT IT. I WAS REALLY GOOD AT IT.

2 Q. AND MY UNDERSTANDING FROM YOUR PAY RECORDS, JANUARY
3 OF 2012, YOU RECEIVED \$13 AN HOUR; IS THAT RIGHT?

4 A. YES.

5 Q. AND MY UNDERSTANDING IS IN AUGUST OF 2012 FROM YOUR
6 PAY RECORDS THAT WE LOOKED AT AND THE COMMISSIONER
7 HAS, THERE WAS A DIFFERENTIAL FROM 13 TO 13.35, AND
8 I UNDERSTAND THAT WAS BECAUSE YOU WERE UNDER ANOTHER
9 SHIFT RATHER THAN FIRST SHIFT; IS THAT RIGHT?

10 A. I WORKED SECOND SHIFT FOR A WHILE, YES.

11 **BY COMMISSIONER BARDEN:**

12 WAS THAT A TEMPORARY THING THAT YOU WENT TO THE
13 OTHER SHIFT OR WAS THAT ---

14 **BY THE CLAIMANT:**

15 IT WAS. FIRST SHIFT IS SENIORITY.

16 **BY COMMISSIONER BARDEN:**

17 OKAY.

18 **BY THE CLAIMANT:**

19 BUT THEY WENT THROUGH SO MANY EMPLOYEES SO
20 FAST. I WENT RIGHT PRETTY MUCH -- MAYBE A YEAR --
21 AFTER A YEAR, I WENT BACK TO FIRST SHIFT.

22 **BY COMMISSIONER BARDEN:**

23 OKAY.

24 **DIRECT EXAMINATION RESUMED BY MR. MULLINAX:**

25 Q. AFTER YOUR INITIAL SURGERY FEBRUARY OF 2012, YOU

1 RETURNED TO WORK; IS THAT CORRECT?

2 A. YES.

3 Q. OKAY. AND YOU CONTINUED TO WORK THROUGHOUT THAT
4 YEAR AND ON INTO 2013?

5 A. YES.

6 Q. SO, IN 2013, SPECIFICALLY IN FEBRUARY, YOU WERE
7 GIVEN A RAISE TO \$16.07 PER HOUR, AND WHAT WAS THAT
8 FOR?

9 A. THAT WAS THE SET-UP OPERATOR POSITION.

10 Q. AND THAT'S WHEN YOU WERE PROMOTED TO SET-UP
11 OPERATOR?

12 A. YES.

13 Q. OKAY.

14 BY COMMISSIONER BARDEN:

15 OKAY. I THOUGHT YOU WERE PROMOTED TO SET-UP
16 OPERATOR WHEN YOU GOT THE \$13 AN HOUR. THAT'S WHAT
17 YOU HAD TESTIFIED ---

18 BY THE CLAIMANT:

19 OH, I'M SORRY; I WAS MISTAKEN. THAT WAS -- NO.

20 BY COMMISSIONER BARDEN:

21 YOU CAME BACK ---

22 BY THE CLAIMANT:

23 THE \$13 AN HOUR ---

24 BY COMMISSIONER BARDEN:

25 --- AND YOU GOT AN INCREASE, AND YOU SAID IT

1 WAS A PROMOTION TO SET-UP OPERATOR WHEN YOU CAME
2 BACK ---

3 BY THE CLAIMANT:

4 THAT WAS WHEN ---

5 BY COMMISSIONER BARDEN:

6 --- AND YOU GOT \$13 AN HOUR. SO, WE NEED TO
7 START OVER.

8 BY THE CLAIMANT:

9 WHEN I WENT TO \$13 AN HOUR, THAT'S WHEN I WENT
10 TO SECOND SHIFT. I'M SORRY.

11 BY COMMISSIONER BARDEN:

12 OKAY.

13 DIRECT EXAMINATION RESUMED BY MR. MULLINAX:

14 Q. THAT WAS JANUARY 2012?

15 A. YES. I'M SORRY.

16 Q. THEN ON AUGUST 31ST, 2012, YOU WENT ---

17 BY COMMISSIONER BARDEN:

18 SO, THE SET-UP OPERATOR WAS THE \$16.07?

19 BY THE CLAIMANT:

20 YES, MA'AM. I'M SORRY.

21 BY COMMISSIONER BARDEN:

22 OKAY. SO, THAT WAS THE PROMOTION. NO, THAT'S
23 FINE.

24 BY THE CLAIMANT:

25 YES, MA'AM.

1 BY COMMISSIONER BARDEN:

2 I JUST WANT TO MAKE SURE I UNDERSTAND. THE
3 PROMOTION WAS TO THE SET-UP OPERATOR, \$16.07?

4 BY THE CLAIMANT:

5 YES, MA'AM.

6 BY COMMISSIONER BARDEN:

7 I GOTCHA. THANK YOU SO MUCH.

8 DIRECT EXAMINATION RESUMED BY MR. MULLINAX:

9 Q. AND THE SET-UP OPERATOR JOB YOU JUST DESCRIBED,
10 CORRECT?

11 A. YES.

12 Q. AND THAT PROMOTION WAS \$16.07 AN HOUR?

13 A. YES.

14 Q. AND YOU WORKED IN THAT POSITION FROM FEBRUARY ---

15 BY COMMISSIONER BARDEN:

16 WELL, I'VE GOT TO BACK YOU UP. WHAT WAS THE
17 \$13.35 FOR? IF THE \$13.00 WAS FOR THE OTHER SHIFT,
18 WHAT'S THE \$13.35 FOR?

19 BY THE CLAIMANT:

20 THAT WAS THE -- I BELIEVE THAT WAS THE COST OF
21 LIVING RAISE. EVERY YEAR, WE GOT THE COST OF LIVING
22 RAISE. I BELIEVE IT WAS 50 CENTS.

23 BY COMMISSIONER BARDEN:

24 ALL RIGHT.

25 BY MR. ALLISON:

1 COMMISSIONER, I DON'T WANT TO MAKE THIS ANY
2 MORE CHALLENGING THAN IT IS, BUT I THINK MS. DAVIS
3 HAS SOME RECORDS IN FRONT OF HER, AND I DON'T KNOW
4 WHAT THEY ARE.

5 BY THE CLAIMANT:

6 IT'S JUST ALL OF THESE DATES, SO I CAN KEEP UP
7 WITH THEM.

8 BY MR. MULLINAX:

9 HE CAN SEE THEM.

10 BY THE CLAIMANT:

11 YOU'RE WELCOME TO LOOK AT THEM.

12 BY MR. ALLISON:

13 I'M GOING TO OBJECT TO HER BEING ABLE TO
14 TESTIFY FROM ---

15 BY COMMISSIONER BARDEN:

16 YEAH. I MEAN, AS BEST YOU CAN.

17 BY THE CLAIMANT:

18 IT'S JUST THE DATES.

19 BY COMMISSIONER BARDEN:

20 I MEAN, THE RECORDS SAY WHAT THEY SAY. YOU
21 CERTAINLY CAN TESTIFY -- YOU KNOW, YOU KNOW WHAT
22 YOUR PROMOTION WAS FOR AND ---

23 BY THE CLAIMANT:

24 YES, MA'AM.

25 BY COMMISSIONER BARDEN:

1 --- BASICALLY WHEN YOU GOT IT. SO, WE'LL JUST
2 TRY TO DO WITHOUT THAT IF YOU CAN.

3 BY THE CLAIMANT:

4 OKAY, THAT'S FINE.

5 BY COMMISSIONER BARDEN:

6 I'M SURE THE RECORDS REFLECT -- OR MAYBE THEY
7 DON'T. I HAVEN'T HAD A CHANCE TO REVIEW WHAT'S BEEN
8 HANDED UP TO ME, SO I DON'T KNOW.

9 DIRECT EXAMINATION RESUMED BY MR. MULLINAX:

10 Q. MICHELLE, I'M GOING TO SHOW YOU APA PAGE ---

11 BY COMMISSIONER BARDEN:

12 WAIT ONE SECOND. LET HIM DEAL WITH THAT. HE
13 MAY NOT OBJECT TO IT.

14 BY MR. ALLISON:

15 THIS IS FINE. I'M NOT UPSET. I JUST -- I
16 HAVEN'T SEEN IT, AND SHE WAS CLEARLY READING FROM
17 IT. SO, I JUST -- I NEEDED TO SEE IT.

18 BY COMMISSIONER BARDEN:

19 AND I DIDN'T -- I'M TOO BUSY TAKING NOTES TO
20 HAVE OBSERVED THAT.

21 BY MR. ALLISON:

22 I'M FINE.

23 BY COMMISSIONER BARDEN:

24 NO OBJECTION?

25 BY MR. ALLISON:

1 I DON'T SEE ANYTHING ON THAT.

2 **BY COMMISSIONER BARDEN:**

3 OKAY, OBJECTION WITHDRAWN. THANK YOU.

4 **BY MR. MULLINAX:**

5 IT'S JUST THE DATES, YOUR HONOR.

6 **BY THE CLAIMANT:**

7 IT'S JUST SO MANY DATES HERE FROM WHEN I WAS
8 OUT, WHEN I WENT BACK AND THE PAY RAISES AND ALL. I
9 CAN'T -- IT'S HARD FOR ME TO KEEP TRACK. IT'S BEEN
10 ALMOST FIVE YEARS.

11 **BY COMMISSIONER BARDEN:**

12 WAS IT 2013 YOU GOT SET-UP OPERATOR -- THE SET-
13 UP OPERATOR JOB?

14 **BY THE CLAIMANT:**

15 IT WAS -- YES.

16 **BY COMMISSIONER BARDEN:**

17 OKAY. I THINK I'M WITH YOU. THE \$13 WAS FOR
18 THE SECOND SHIFT. THE \$13.35 WAS FOR A COST OF
19 LIVING INCREASE; I DON'T KNOW WHEN THAT WAS. WAS
20 THAT AUGUST 2012?

21 **BY THE CLAIMANT:**

22 THAT SHOULD HAVE BEEN JANUARY. ONE WAS A COST
23 OF LIVING, AND ONE WAS THE RAISE, THE SHIFT
24 DIFFERENTIAL.

25 **BY COMMISSIONER BARDEN:**

1 I DON'T KNOW THEN. MY NOTES ARE WRONG, BECAUSE
2 I WROTE DOWN AUGUST 12TH WAS THE 13.35. I DON'T
3 KNOW.

4 BY MR. MULLINAX:

5 THAT'S WHAT THE APA REFLECTS.

6 BY THE CLAIMANT:

7 THAT'S ---

8 BY COMMISSIONER BARDEN:

9 OKAY.

10 BY THE CLAIMANT:

11 THE 35 IS GOING TO BE THE SHIFT, ME GOING TO
12 SECOND SHIFT.

13 BY COMMISSIONER BARDEN:

14 NO, 13 WAS SECOND SHIFT. 13.35 YOU JUST SAID
15 WAS COST OF LIVING. I DON'T KNOW.

16 BY MR. MULLINAX:

17 I DON'T KNOW EITHER.

18 BY THE CLAIMANT:

19 I KNOW IT WAS 35 CENTS TO GO TO SECOND SHIFT.

20 I DO KNOW THAT.

21 BY MR. MULLINAX:

22 THE APAS REFLECT ---

23 BY THE CLAIMANT:

24 I MAYBE HAD THAT WRONG.

25 BY MR. MULLINAX:

1 --- THAT THAT WAS THE TIME THAT THEY WERE PUT
2 INTO PLACE. THAT'S ALL I KNOW.

3 **BY COMMISSIONER BARDEN:**

4 OKAY. BECAUSE JUST ABOUT THREE MINUTES AGO,
5 SHE SAID THE \$13 WAS FOR THE SECOND SHIFT AND THE
6 \$13.35 WAS FOR THE COST OF LIVING. NOW, IS THAT NOT
7 CORRECT?

8 **BY THE CLAIMANT:**

9 I THINK I HAD THAT BACKWARDS. I THINK THE 50 -
10 - THE 50 CENTS IS THE COST OF LIVING.

11 **BY COMMISSIONER BARDEN:**

12 OKAY.

13 **BY THE CLAIMANT:**

14 AND THE 35 CENTS -- BECAUSE I KNOW IT'S 35
15 CENTS TO GO TO SECOND SHIFT. I THINK I GOT THAT
16 MIXED UP. I'M SORRY.

17 **BY COMMISSIONER BARDEN:**

18 OKAY. NO, THAT'S OKAY. SO, THE SHIFT CHANGE
19 WAS THE \$13.35. THE \$13.00 IS THE COST OF LIVING?

20 **BY THE CLAIMANT:**

21 YES, MA'AM.

22 **BY COMMISSIONER BARDEN:**

23 OKAY. WE'VE GOT IT NOW. ALL RIGHT. AND THE
24 SET-UP OPERATOR IN 2013 WAS \$16.07?

25 **BY THE CLAIMANT:**

1 YES, MA'AM.

2 BY COMMISSIONER BARDEN:

3 ALL RIGHT.

4 BY THE CLAIMANT:

5 NOW, WE'RE STRAIGHT.

6 BY COMMISSIONER BARDEN:

7 OKAY. MR. MULLINAX.

8 DIRECT EXAMINATION RESUMED BY MR. MULLINAX:

9 Q. OKAY. WAS THAT IN FACT A RAISE WHEN YOU BECAME SET-
10 UP OPERATOR?

11 A. YES.

12 Q. OKAY. AND YOU CONTINUED TO EARN THAT UP UNTIL JULY
13 OF 2013; IS THAT RIGHT?

14 A. YES.

15 Q. AND WHO WAS THE PERSON THAT YOU REPORTED TO?

16 A. YOU MEAN SHIFT SUPERVISOR?

17 Q. YEAH.

18 A. JASON.

19 Q. OKAY. HOW ABOUT WHO IS MR. JOHN RUMSEY?

20 A. JOHN RUMSEY IS H.R., HUMAN RESOURCES.

21 Q. OKAY. AND DID YOU HAVE A CONVERSATION WITH MR. JOHN
22 RUMSEY IN JULY -- OR JUST BEFORE JULY OF 2013?

23 A. I DID.

24 Q. AND TELL THE COMMISSIONER WHAT THAT CONVERSATION
25 WAS.

1 A. IT WAS THE END OF THE DAY, AND HE -- WHERE I WAS
2 WORKING AT WAS RIGHT BESIDE THE TEAM LEADER'S
3 OFFICE. HE CALLED ME IN THERE AND ASKED ME IF I
4 WOULD BE WILLING TO TAKE A TEAM LEADER POSITION ON
5 ANOTHER SHIFT, BECAUSE HE KNOWS HOW I LOVE FIRST
6 SHIFT, AND I TOLD HIM I WOULD CONSIDER IT BUT THERE
7 WAS NO NEED EVEN TALKING ABOUT IT BECAUSE I WAS
8 GETTING READY TO GO OUT FOR SURGERY AGAIN. HE'S
9 LIKE "GOSH, THAT'S RIGHT," AND OF COURSE, I'VE NEVER
10 COME BACK TO TAKE THAT POSITION. SO...

11 Q. OKAY. AND DID YOU BELIEVE YOU WERE QUALIFIED TO BE
12 A TEAM LEADER?

13 A. OH, YES, I WOULD HAVE DEFINITELY GOT THE JOB.

14 Q. AND WHY WAS THAT?

15 A. I WAS JUST A LEADER AT WORK. I DID MY JOB AND THEN
16 SOME.

17 Q. AND TELL THE COMMISSIONER WHAT "THEN SOME" MEANS.

18 A. IT WAS KIND OF LIKE A JOKE BETWEEN THE OTHER
19 OPERATORS THAT I WAS ALREADY TEAM LEAD, BECAUSE I
20 JUST LED. IF I SEEN SOMETHING THAT NEEDED TO BE
21 DONE, I WOULD BE LIKE "OKAY, Y'ALL, COME ON LET'S GO
22 AHEAD AND CLEAN OUT BEHIND THE DRYERS," OR I JUST
23 WANTED TO STAY BUSY AND I WANTED EVERYBODY TO STAY
24 BUSY.

25 Q. OKAY. SO, IF YOU HAD NOT GONE OUT FOR SURGERY, WAS

1 IT YOUR IMPRESSION THAT YOU WOULD HAVE BEEN GIVEN
2 THAT RAISE?

3 A. NO DOUBT.

4 Q. I'M GOING TO SHOW YOU A DOCUMENT DATED FROM YOUR
5 PERSONNEL FILE DECEMBER OF 2012 AND ASK YOU IF YOU
6 CAN IDENTIFY THAT.

7 A. YES.

8 Q. AND WHAT IS THAT?

9 A. THAT'S EMPLOYEE OF THE MONTH.

10 Q. AND THAT WAS GIVEN TO YOU IN DECEMBER 2012?

11 A. YES.

12 Q. THAT'S WHILE YOU WERE WORKING FOR FRAENKISCHE?

13 A. YES.

14 **BY MR. MULLINAX:**

15 YOUR HONOR, I WOULD ASK THAT THIS BE MARKED AND
16 ADMITTED.

17 **BY COMMISSIONER BARDEN:**

18 ANY OBJECTION?

19 **BY MR. ALLISON:**

20 IT'S NOT LISTED, BUT I WON'T OBJECT TO IT.

21 **BY COMMISSIONER BARDEN:**

22 ALL RIGHT. CLAIMANT'S NUMBER ONE. IF YOU WILL
23 GIVE MS. WHITWORTH A CHANCE.

24 (COURT REPORTER MARKS DOCUMENT CLAIMANT'S EXHIBIT ONE,
25 RETAINED IN THE COMMISSION FILE)

1 BY COMMISSIONER BARDEN:

2 SHE'S ALREADY AHEAD OF THE GAME. THANK YOU.

3 ALL RIGHT. MR. MULLINAX.

4 DIRECT EXAMINATION RESUMED BY MR. MULLINAX:

5 Q. MICHELLE, YOU HAD YOUR SECOND SURGERY IN JULY OF
6 2013, RIGHT?

7 A. YES.

8 Q. THEN YOU WENT BACK TO WORK AFTER THAT.

9 A. RIGHT.

10 Q. THEN IN SEPTEMBER OF 2013, YOU WORKED THERE ON LIGHT
11 DUTY UP UNTIL DECEMBER OF 2013?

12 A. YES.

13 Q. AND WHY WERE YOU WORKING LIGHT DUTY?

14 A. I HAD A CAST ON.

15 Q. AND WHAT WAS YOUR JOB WITH A CAST ON YOUR LEG?

16 A. INSPECTOR.

17 Q. AND HOW MUCH DID THEY PAY YOU DURING THAT PERIOD OF
18 TIME?

19 A. TEN-SOMETHING, I'M NOT SURE OF THE EXACT CHANGE. IT
20 WAS TEN DOLLARS AND SOME CHANGE.

21 Q. WAS THAT A DEMOTION?

22 A. OH, YES.

23 Q. AND WAS THAT BECAUSE OF THE FACT YOU WEREN'T DOING A
24 GOOD JOB, OR WHY DID THAT SALARY -- WAS THAT PAID TO
25 YOU?

1 A. IT'S JUST WHAT THAT JOB PAID.

2 Q. OKAY. AND THE ONLY REASON YOU HAD THAT JOB WAS WHY?

3 A. BECAUSE I COULDN'T DO MY JOB.

4 Q. DID YOUR DOCTOR PUT RESTRICTIONS ON YOU?

5 A. YES.

6 Q. OKAY. AND AFTER THAT PERIOD, YOU DID NOT RETURN TO
7 WORK AT ALL BECAUSE THEY TERMINATED YOU?

8 A. YES.

9 **BY MR. MULLINAX:**

10 THAT'S ALL THE QUESTIONS I HAVE.

11 **BY COMMISSIONER BARDEN:**

12 THANK YOU, MR. MULLINAX. MR. ALLISON.

13 **BY MR. ALLISON:**

14 THANK YOU, COMMISSIONER.

15 **CROSS EXAMINATION BY MR. ALLISON:**

16 Q. GOOD MORNING, MS. DAVIS.

17 A. GOOD MORNING.

18 Q. AT THE TIME OF YOUR ACCIDENT, YOU WERE EARNING
19 \$12.48 PER HOUR; IS THAT RIGHT?

20 A. YES.

21 Q. AND YOUR AVERAGE WEEKLY WAGE BEFORE TAXES AT THAT
22 TIME WAS A LITTLE LESS THAN \$500; IS THAT RIGHT?

23 A. YES, GIVE OR TAKE, YES.

24 Q. OKAY. AND SPECIFICALLY ACCORDING TO YOUR ACTUAL
25 EARNINGS AND DOING THE CALCULATIONS, YOU WERE

1 EARNING ABOUT \$487 A WEEK FROM AUGUST UNTIL YOU GOT
2 HURT IN OCTOBER, CORRECT?

3 A. YES.

4 Q. OKAY. AND THEN WHEN YOU WENT OUT ON WORKERS' COMP,
5 YOU STARTED RECEIVING CHECKS IN THE AMOUNT OF
6 \$704.92, CORRECT?

7 A. YES.

8 Q. SO, YOU WERE RECEIVING CHECKS THAT WERE
9 APPROXIMATELY \$217 MORE THAN YOU HAD EVEN EARNED
10 BEFORE TAXES WERE TAKEN OUT, CORRECT?

11 A. YES.

12 Q. ALL RIGHT. NOW, HAD YOU ALSO APPLIED FOR SHORT-TERM
13 DISABILITY BENEFITS?

14 A. YES.

15 Q. DID YOU EVER RECEIVE SHORT-TERM DISABILITY?

16 A. YOU MEAN THROUGH WORKMAN'S COMP, WERE THEY PAYING ME
17 SHORT TERM?

18 Q. NO.

19 A. I DON'T UNDERSTAND WHAT THAT...

20 Q. AND THANK YOU FOR CLARIFYING THAT. JUST SO YOU'LL
21 UNDERSTAND WHAT I'M TALKING ABOUT, SHORT-TERM
22 DISABILITY BENEFITS WOULD BE THOSE THAT ARE OFFERED
23 THROUGH YOUR EMPLOYER WHEN YOU HAVE A DISABILITY AND
24 THEY ARE NOT RELATED TO WORKERS' COMP AT ALL.

25 A. NO.

1 Q. AND THEN SEPARATE FROM THAT, THERE'S THE NOTION OF
2 THE WORKERS' COMP INSURANCE COMPANY PAYING YOU WHEN
3 YOU ARE OUT OF WORK BECAUSE OF A WORK ACCIDENT.

4 A. I WASN'T RECEIVING ANY MONEY FROM ANYBODY BUT
5 WORKMAN'S COMP.

6 Q. OKAY. AND DID YOU EVER PURSUE OR CLAIM SHORT-TERM
7 DISABILITY BENEFITS THROUGH YOUR EMPLOYER?

8 A. NO.

9 Q. SO, YOU NEVER WENT TO H.R. AND SAID "WHAT BENEFITS
10 ARE AVAILABLE TO ME OTHER THAN WORKERS' COMP"?

11 A. NO.

12 Q. OKAY. SO, EXPLAIN TO ME WHEN YOU BEGAN RECEIVING
13 CHECKS IN THE AMOUNT OF OVER \$700 A WEEK, DID THAT
14 SEEM UNUSUAL TO YOU WHERE YOU HAD ONLY NOT EVEN
15 EARNED \$500 A WEEK BEFORE YOUR ACCIDENT?

16 A. IT DID. SOMETIMES I WOULD GET MORE THAN THAT. IT
17 WAS OVERTIME. IT DID SEEM A LITTLE EXCESSIVE TO ME,
18 BUT WITH THE QUESTIONS I WOULD ASK HERE AND THERE, I
19 KNEW I WAS GETTING PAID A PERCENTAGE OF WHAT I WAS
20 MAKING, AND THEN THE SHORT-TERM DISABILITY. SO, I
21 DIDN'T HAVE ANYTHING TO BASE THAT ON. SO, I DIDN'T
22 -- I MEAN, I JUST ASSUMED IT WAS RIGHT. I'VE NEVER
23 HAD ANY -- ANY DEALINGS WITH WORKMAN'S COMP OR
24 ANYTHING LIKE THAT.

25 Q. WHAT DO YOU MEAN BY YOU KNEW THAT YOU WOULD RECEIVE

1 A PERCENTAGE OF WHAT YOU MADE AND SHORT-TERM
2 DISABILITY IF YOU HAD NOT EVER ASKED FOR OR APPLIED
3 FOR SHORT-TERM DISABILITY?

4 A. WELL, THAT WAS WHAT WAS LISTED ON THE CHECK STUB, ON
5 WORKMAN'S COMP, THE CHECK. IT SAID "SHORT-TERM
6 DISABILITY."

7 Q. DO YOU KNOW OR HAVE ANY IDEA HOW LONG SHORT-TERM
8 DISABILITY BENEFITS WOULD LAST ---

9 A. NO.

10 Q. --- IF YOU DID RECEIVE THEM?

11 A. NO.

12 **BY MR. ALLISON:**

13 THAT'S ALL THE QUESTIONS I HAVE.

14 **BY COMMISSIONER BARDEN:**

15 OKAY. ANYTHING ELSE?

16 **RE-DIRECT EXAMINATION BY MR. MULLINAX:**

17 Q. YOU MENTIONED -- DID YOU WORK OVERTIME?

18 A. YES.

19 Q. HOW OFTEN?

20 A. MAYBE FOUR TO TEN HOURS A WEEK.

21 Q. WAS THAT A NORMAL OCCURRENCE FOR YOU?

22 A. YES.

23 Q. DID THAT OVERTIME OCCUR BEFORE YOU WERE HURT AS WELL
24 AS AFTER YOU WERE HURT?

25 A. YES.

1 Q. WHY DID YOU WORK OVERTIME?

2 A. WELL, IT WAS -- LIKE IF SOMEBODY ON ANOTHER SHIFT
3 NEEDED TO HAVE TO COME IN A HALF A DAY LATE, OR WE
4 JUST WANTED -- IF THEY NEEDED EXTRA HELP, THEY WOULD
5 COME TO THE ONES THAT WERE QUALIFIED AND THEY WOULD
6 ASK YOU, OR THEY WOULD CALL IN AND SAY "CAN YOU
7 COVER ME FOR A HALF A SHIFT?" SO.

8 Q. WHY WERE YOU WILLING TO DO THAT?

9 A. BECAUSE I WANTED TO LEARN, AND THAT'S WHERE I
10 LEARNED A LOT OF THE SET-UP OPERATING WAS WORKING
11 OVER.

12 BY MR. MULLINAX:

13 OKAY. THAT'S ALL I HAVE, YOUR HONOR.

14 BY COMMISSIONER BARDEN:

15 THANK YOU. ANYTHING ELSE, MR. ALLISON?

16 BY MR. ALLISON:

17 NO, MA'AM. THANK YOU.

18 BY COMMISSIONER BARDEN:

19 ANY REBUTTAL WITNESSES?

20 BY MR. ALLISON:

21 NO -- NO WITNESSES.

22 BY COMMISSIONER BARDEN:

23 ALL RIGHT. THAT CONCLUDES THIS PROCEEDING.

24 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS
25 CONCLUDED AT THE HOUR OF 12:00 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1117221

EMPLOYEE/CLAIMANT: MICHELLE L. DAVIS

EMPLOYER: FRAENKISCHE USA, L.P.

CARRIER: MARYLAND CASUALTY COMPANY

I, JAN L. WHITWORTH, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING **32** PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF **MICHELLE L. DAVIS** TAKEN ON THE 8TH DAY OF JANUARY, 2016.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND THIS 25TH DAY OF FEBRUARY, 2016.

JAN L. WHITWORTH
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2-04-2024

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

**DECISION AND ORDER
OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

W.C.C. FILE NO.: 1117221

Michelle Davis,)
)
Employee/Claimant,)
)
vs.)
)
Fraenkische USA LP,)
)
Employer,)
and)
)
Maryland Casualty Ins. Co.,)
c/o Zurich North America,)
)
Employer/Carrier.)

HEARING: Held in Anderson County, South Carolina on
January 8, 2016

APPEARANCES: Claimant was represented by MICHAEL F. MULLINAX
of Mullinax Law Firm, P.A., and V. LANIEL CHAPMAN of
Chapman and Yon, L.L.P., Anderson, South Carolina

Employer and Carrier were represented by MARK A.
ALLISON of McAngus, Goudelock and Courie, L.L.C., of
Greenville, South Carolina

COURT REPORTER: Jan Whitworth

PURPOSE OF HEARING: To determine issues as set forth in the Form 21 and
Form 22; and to determine Claimant's Average Weekly
Wage and Compensation Rate; and to determine
Whether Defendants are entitled to credit for
temporary compensation overpayment due to improperly
calculated compensation rate.

DECISION AND ORDER: By the Honorable Susan S. Barden

DATE: March 1, 2016

STATEMENT OF THE CASE

Claimant was injured on October 21, 2011, when her left foot and ankle were caught in a pallet causing a fall onto the floor and popping in the ankle and foot, with pain to the left foot/ankle/leg. She currently remains disabled and is awaiting a spinal cord stimulator implant. Claimant has undergone four surgeries prior to the date of the hearing, to wit: 2/20/2012; 7/1/2013; 12/31/2013 and 11/24/2014.

Claimant contends that she is entitled to have her average weekly wage calculated on her earnings after the date of the injury and in addition, is entitled to an average weekly based on what she would have been entitled to had she been promoted, and that the average weekly wage and compensation rate should be calculated pursuant to the last paragraph set forth in S.C. Code §42-1-40.

The Carrier and Employer contend that Plaintiff's average weekly wage should be calculated based upon the revised Form 20 filed October 15, 2015 which indicated an average weekly wage of \$487.56 and a compensation rate of \$325.05. Claimant has been paid since the date of her injury based upon an average weekly wage computed by the Carrier and Employer and filed with the Commission on December 15, 2011 showing an average weekly wage of \$1,281.54 and a compensation rate of \$854.40.

Claimant has been paid since the accident at the maximum compensation rate for 2011 which was \$704.92 per week.

The purpose of the hearing is to determine the average weekly wage and corresponding compensation rate and whether the Carrier/Employer is entitled to a credit.

STATEMENT OF THE EVIDENCE

Claimant had worked for the Employer for a three month period as a temporary employee prior to being hired on August 22, 2011. She worked as an operator on an assembly

line.

The Claimant testified as to her education and work history and confirmed that when she first became employed, her rate of pay was \$12.48 per hour and that she worked numerous overtime hours (APA Exb. C, p. 5 - 17). After she was initially injured on October 21, 2011, she was treated conservatively and returned to work where she received a pay increase to \$13.00 per hour and then due to a shift change, her pay increased to \$13.35 per hour, and confirmed that on February 15, 2013 she was continuing to work and progress in her skills and that she received a pay raise to \$16.07 per hour and continued to work both normal and overtime hours up until July 1, 2013 when she had to have her second surgery on her foot (Exb. B-1, p. 4). Claimant also testified that in her conversation with John Rumsey, that he had offered her a promotion to team leader, which would have allowed her an additional .75 per hour, making her rate of pay \$16.82 per hour but that she was unable to take the promotion due to the fact that she had to undergo her second surgery and was never able to return to work thereafter and was terminated by the Employer. The Employer/Carrier insists that the Claimant's average weekly wage should be calculated based upon her rate of pay for the seven weeks that she worked up to the date of the injury which would have yielded an average weekly wage of \$487.56 and a compensation rate of \$325.05.

The Employer/Carrier offered no testimony in rebuttal.

The Workers' Compensation Act defines "average weekly wage" for the purposes of computing compensation and sets forth a primary method of calculation and three alternative methods. The primary method for calculating the average weekly wage is to take "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." S. C. Code Ann. §42-1-40; Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct.App.2010). "The [Appellate Panel] must use this method unless 'the

employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." Pilgrim, 391 S.C. at 44-45, 703 S.E.2d at 244 (citing § 42-1-40). I find that it would be impractical and unfair to use the primary method because Claimant had only been employed for approximately seven weeks.

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 these alternatives, the [Appellate Panel] must find, or the record must clearly show, that the necessary conditions , [as prescribed in the statute], exist." The first alternative method of wage calculation, 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. Id. at 46, 703 S.E.2d at 245.

Before the Commission may use any one of these alternatives, the [Commission] must find, or the record must clearly show, that the necessary conditions exist." Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App.2010). The first alternative to the primary method is to be used "[w]hen the employment ... extended over a period of less than fifty-two weeks...." Id. In such a situation, the commission must use "the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages...." Id. Section 42-1-40 states that "the method ... shall be followed, as long as results fair and just to both parties will be obtained." Id. The section also contains a requirement that this particular method be "practicable." Id.

I find that this method is not practicable nor is it fair based on the fact that the employee/claimant continued to work and progress in her employment after her initial injury and received wage increases.

The second alternative requires the commission to consider "the average weekly amount which ... 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." Id. I find that this method was not addressed and not necessary due to the facts of the case.

It is clear from the record that Michelle Davis was injured on the job a short time after her initial employment; however, she continued to work at her job both before and after her first surgery. In fact, she received a commendation as Employee of the Month in December 2012, and two separate increases in her pay after her injury. These were sufficient extraordinary conditions to establish the criteria and conditions as set forth in James Pugh v. Piedmont Mechanical 396 S.C. 31, 719 S.E. 2d 676 (Ct. App. 2011).

I find that neither of the first three alternatives above yield a calculation that is just and fair to both parties, but particularly to the Claimant. The final alternative for calculating average weekly wage is to be employed when "exceptional reasons" exist that make it "unfair, either to the employer or the employee," to use the alternatives set forth above. Id. In that event, section 42-1-40 provides that "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 alternative may be used by the commission when it makes factual findings that explain the "exceptional reasons" it finds the other methods are "unfair." Id. See Forrest v. A.S. Price Mech., 373 S.C. 303, 308, 644 S.E.2d 784, 786-88 (Ct. App. 2007) (affirming the Commission's use of the "exceptional reasons" alternative based on specific findings which "justified deviation from the usual statutory method of ... computation"). S.C. Code Ann. §42-1-40 provides as follows:

... "When for exceptional reasons the foregoing would be unfair, either to the Employer or Employee, such other method of computing average weekly wages

may be resorted to as will most nearly approximate the amount which the injured Employee would be earning were it not for his injury”....

The statute provides a flexible approach with a view toward the ultimate objective of reflecting fairly a Claimant's probably future earning loss. Bennett v. Gary Smith Builders 271 SC 94, 98, 245 SE 2d 129, 131 (1978).

“The objective of wage calculation is to arrive at a fair approximation of the Claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss, as a result of injury must be thought of in terms of its impact on probable future earnings”. *ID. at 98, 99, 245 SE 2d at 131.* See also Stokes v. First National Bank 306 SC 46, 410 SE 2d 248 (1991).

Our Court has reasoned that S.C. Code Ann. §42-1-40 provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a Claimant's probable future earning loss. See Sellers v. Pinedale Residential Center 564 SE 2d 694 (Ct. App. 2002). “Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the Claimant's probable future earning capacity. The prevailing goal and policy of §42-1-40 is to use the method that will fairly compensate the employee “for reductions in their earning power caused by work-related injuries.” Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). See Foreman v. Jackson Minit Mkts., Inc., 265 S.C. 164, 170, 217 S.E.2d 214, 216-17 (1975).

I find that the Claimant had progressed from earning \$12.48 per hour in 2011; to \$13.00 in January 2012; to \$13.35 in August 2012; to \$16.07 in February 2013. Claimant should also be entitled to receive consideration of an average “overtime” which was exhibited and worked during her work history [See APA Exb. B, page 3].

Taking all of this in consideration, it is my finding and conclusion that the Claimant should be entitled to an average weekly wage of \$16.07 per hour which she earned from February 1 to July 1, 2013, or, a period of 22 weeks, including overtime as set forth on

Claimant's APA, Exb. B, page 3. This would equate to an Average Weekly Wage (40 hours + calculated overtime) of \$711.23 and a compensation rate of \$474.39.

FINDINGS OF FACT

1. I find that Michelle Davis, on October 21, 2011, sustained a compensable injury by accident.
2. I find that the Employer/Carrier calculated and filed a Form 20 on December 13, 2011 showing an AWW of \$1,281.54 and a compensation rate of \$854.40; and that Michelle Davis has been paid at the maximum comp rate, \$704.40 since that time, based upon the Form 20 prepared and filed by the Employer/Carrier. The Carrier continued to file reports with the Commission confirming this rate.
3. I find that after her initial injury, Michelle Davis returned to and was paid an initial pay rate of \$12.48 per hour but received a shift change pay raise to \$13.00 per hour and that she continued to work both overtime and regular hours at her place of employment. It appears that she did receive an additional pay increase, which, according to her testimony, was based upon a shift change, to \$13.35 per hour on or about August 31, 2012.
4. I find however, that on February 15, 2013, as she continued to work after her injury, she received a promotion and a pay raise to \$16.07 per hour and that she worked both regular and overtime hours at that rate of pay until July 1, 2013 when she left employment for her second surgery.
5. I find that as set forth above in §42-1-40 that exceptional reasons exist in the case before me to find that the average weekly wage for the Claimant should reflect the sum of \$16.07 per hour times 40 hours per week as is set forth on APA Exhibit B, page 3, so that her average

weekly wage would be \$711.23 and her compensation rate would be \$474.39. Based upon her work habits and work history, it would be unfair to her to resort to her initial rate of compensation as her work history demonstrates conclusively and factually that this is the amount which would most nearly approximate the amount which she would be earning at this time, were it not for her injury.

6. I further find that it is unfair to the Claimant to award a credit to the Carrier/Employer from the date of the accident as the Defendant Carrier/Employer unilaterally had control of the completion and filing of the Form 20 immediately after Claimant's injury, and have continuously, without any objection, paid Claimant based on that calculation, up until the filing of the revised Form 21 in this case on October 16, 2015. Claimant testified that she was under the impression that the compensation that she was receiving was based on not only what she should get from workers' compensation benefits, but also, she believed that she had a short or long term disability policy that would be added to what she received for her injury and therefore, based upon this belief, she did not question the amount, as this calculation had been determined by the Employer and paid from the beginning. The Defendants contend that Claimant would receive a "windfall" in the event the Commission fails to grant a credit back to the date of the accident. The Claimant argues that the insurance carrier had the sole responsibility under the Act, for the authorization, calculation and payment of compensation, and that the erroneous payment made by the Defendant was not due to or caused by any action on the part of the Claimant. See Brittle v. Raybestos-Manhattan, Inc. 241 S.C. 255, 127 S.C. 2d 884 (1962). Claimant also contends that it would constitute a hardship to her as she has not reached MMI, and the compensation under the Act is her sole income. S.C. Code Ann. §42-9-210 gives the Commission discretion on whether to deduct payments the Carrier/Employer made for temporary disability benefits before the Claimant reached MMI.

Claimant has not reached MMI at this time. After careful consideration of the facts of this case, and the relevant case law as set forth in the briefs of the Claimant and that of the Defendant on the issue, I conclude and find as a fact that the Carrier, without satisfactory explanation, calculated incorrectly the average weekly wage and compensation due to the Claimant and paid that for a period of over three years without taking any action to correct same.

7. I find that pursuant to the provisions of S.C. Code Ann. §42-9-210, that it would be unfair and unjust to award a credit for the overpayment of temporary total disability benefits from the time of the accident, but that the Employer/Carrier will be entitled to credit to be deducted from any final permanency award granted to the Claimant to be calculated from the date of filing of the Amended Form 20, to wit: October 15, 2015.

CONCLUSIONS OF LAW

Based upon the foregoing, it is concluded as a matter of law:

1. S.C. Code §42-1-40 defines "average weekly wages".
2. S.C. Code §42-1-100 defines "compensation".
3. S.C. Code §42-9-210 defines "deduction from compensation payments made by Employer when not due and payable".
4. Reg. 67-603 defines "calculating the compensation rate".

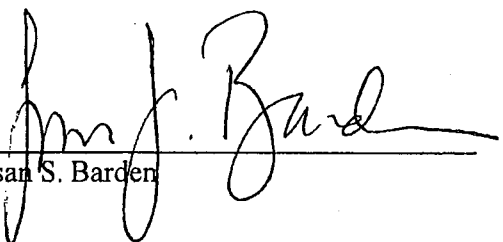
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law it is ordered that:

1. Michelle Davis, Employee/Claimant, sustained a compensable injury by accident on October 21, 2011, while in the employment of Fraenkische USA, LP and is entitled to workers' compensation benefits to be provided by Employer/Carrier, pursuant to Title 42 in this Order. Claimant's average weekly wage is calculated to be paid at the rate of \$16.07 per hour and the average weekly wage therefore is \$711.23 per week, with a corresponding compensation rate of

\$474.39 [See Claimant's APA, Exb B, page 3].

2. The Employer/Carrier is entitled to a credit from October 15, 2015, the date of the filing of the Amended Form 20 in this case, which amounts to the difference between the compensation rate now being paid of \$704.92 and the compensation rate which I find to be proper, \$474.39, which would result in a credit of \$230.53 per week. This credit shall be computed and deducted from any final permanent award to which Claimant is found to be entitled. See for example, Brittle v. Raybestos-Manhattan, Inc. 241 S.C. 255, 127 S.E. 2d 884 (1962) where Carrier was denied credit for overpayment citing Lawson's Workman's Compensation Law, Volume 2, page 24, Section 57.47.
3. The Claimant shall be paid the compensation rate of \$474.39 beginning with the first payment due after the date of this Order.
4. No hearing costs are assessed.



Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).
March 1, 2016

By: Kristi Love, Administrative Assistant to Commissioner Barden

South Carolina Workers' Compensation

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1117221
Carrier File #: 2800077386-001
Carrier Code #:
Employer FEIN #:

Claimant's Name: Michelle Davis SSN: 249-51-2631 Employer's Name: Fraenkische USA LP
Address: 351 Liberty Road 416 AM Ellison Road
Iva, South Carolina 29655 Anderson, South Carolina 29621
Home Phone: (864) 570-0042 Work Phone: Insurance Carrier: Maryland Casualty Company c/o Zurich
Preparer's Name: Mark A. Allison Law Firm: McAngus Goudelock & Courie North America
Preparer's Phone Number: (864) 242-1713

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: October 21, 2011

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation
☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Michael F. Mullinax, Mullinax Law Firm, PA
Post Office Box 2665 on the 14th day of March 20 16 .
address Anderson, South Carolina 29622
by ☒ first class postage ☐ certified mail ☐ personal service.

Preparer's Signature: [Signature] Attorney for Employer/Carrier: mallison@mgclaw.com Title: March 14, 2016 Date:

Check this box if you are not represented by an attorney. ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov. If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

GROUNDS FOR REVIEW

RE: Michelle Davis v. Fraenkische USA LP and Maryland Casualty Company c/o
Zurich North American Insurance
Date of Accident: October 21, 2011
Claim No.: 2800077386-001
WCC File No.: 1117221
Our File No.: 20216.15027

1. Did the Commissioner err in finding as fact and concluding as a matter of law that exceptional reasons exist to deviate from the standard statutory method of calculating an employee's average weekly wage where the standard method of computation results in an average weekly wage that is both fair and reasonable?
2. Did the Hearing Commissioner err in finding as fact and concluding as a matter of law that Defendants are not entitled to a credit for overpayment of past temporary compensation where credit for overpayment is established by both statutory and case law and is not a matter of equity or discretion?
3. Did the Hearing Commissioner err in finding as fact that Claimant testified that she believed that she had a short or long term disability policy that would be added to her weekly workers' compensation benefits where Claimant did not offer such testimony?
4. Did the Hearing Commissioner err in finding as fact and concluding as a matter of law that the carrier's explanation for initially miscalculating the average weekly wage is unsatisfactory where Defendants demonstrated that the calculation was simply a mathematical error?
5. Did the Hearing Commissioner err in finding as fact and concluding as a matter of law that South Carolina Code Ann. §42-9-2010 supports a finding that Defendants are only entitled to credit from the date of filing of the Amended Form 20 where statutory and case law supports credit for all overpayment of compensation?
6. Did the Hearing Commissioner err in failing to find that Claimant has an average weekly wage of \$487.56 and a corresponding compensation rate of \$325.05, where Claimant's wage records support such a finding and exceptional circumstances to deviate from Claimant's pre-accident wage do not exist?

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1117221

MICHELLE DAVIS,

Employee,

Claimant,

vs.

FRAENKISCHE USA LP,

Employer,

AND

MARYLAND CASUALTY COMPANY
C/O ZURICH NORTH AMERICA

Carrier,

Defendants.

**DEFENDANTS'/APPELLANTS'
BRIEF**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND
MICHAEL F. MULLINAX, ESQUIRE:

STATEMENT OF THE CASE

A hearing in this matter was held on January 8, 2016 before Commissioner Susan Barden to determine the issues as set forth on Forms 21 and 22, including the determination of Claimant's average weekly wage and compensation rate and Defendants' entitlement to credit for the overpayment of temporary disability benefits. Defendants seek calculation of Claimant's average weekly wage based on the standard statutory method of considering her pre-accident earnings. Further, Defendants seek a credit for the overpayment of temporary compensation based on an incorrectly calculated compensation rate. Claimant seeks calculation of her average

weekly wage based on her post-accident earnings and denies Defendants' entitlement to a credit for the overpayment of temporary compensation benefits.

In an Order dated March 1, 2016, the Hearing Commissioner found that exceptional reasons existed to calculate Claimant's average weekly wage based on post-accident earnings so that her average weekly wage would be \$711.23 and her compensation rate would be \$474.39. The Commissioner also found that it would be unfair to award a credit to Defendants for the overpayment of temporary disability benefits from the date of the accident but did award a credit to be calculated from the date of filing of the Amended Form 20, October 15, 2015, to be deducted from any final permanency award. This appeal follows.

STATEMENT OF THE EVIDENCE

Claimant began working for the Employer as a temporary employee approximately three months before being hired as a permanent employee on August 22, 2011. (Hrg. Tr. pp. 11-12). Claimant was injured on October 21, 2011, approximately nine weeks after her permanent hire date. (Hrg. Tr. p. 12, ll. 2-8). At the time of her injury, she was earning \$12.48 per hour. (Hrg. Tr. p. 28, ll. 18-24; p. 29, ll. 1-3). After conservative treatment, Claimant returned to work and subsequently received various pay increases. (Hrg. Tr. pp. 13-18). Claimant no longer works for the Employer.

Defendants paid Claimant temporary total disability benefits pursuant to the South Carolina Workers' Compensation Act in the amount of \$704.92 per week, the maximum compensation rate for that time. The payments were based on a mathematical error, which produced an average weekly wage of \$1,281.54. The parties agree that Claimant was paid weekly benefits in excess of her compensation rate; however, the parties disagree about how to calculate her compensation rate. Defendants filed an amended Form 20 on October 15, 2015,

reflecting an average weekly wage and compensation rate based on Claimant's pre-injury earnings. Defendants then filed a Form 21 to address the issues set forth above.

STATEMENT OF ISSUES ON APPEAL

- I. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT EXCEPTIONAL REASONS EXIST TO DEVIATE FROM THE STANDARD STATUTORY METHOD OF CALCULATING AN EMPLOYEE'S AVERAGE WEEKLY WAGE WHERE THE STANDARD METHOD OF COMPUTATION RESULTS IN AN AVERAGE WEEKLY WAGE THAT IS BOTH FAIR AND REASONABLE AND NO EXCEPTIONAL CIRCUMSTANCES EXIST TO DEVIATE FROM THIS METHOD?
- II. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT DEFENDANTS ARE NOT ENTITLED TO A CREDIT FOR OVERPAYMENT OF PAST TEMPORARY COMPENSATION PAID PRIOR TO THE DATE OF FILING OF THE AMENDED FORM 20 WHERE CREDIT FOR OVERPAYMENT OF ALL COMPENSATION IS ESTABLISHED BY BOTH STATUTORY LAW AND CASE LAW?
- III. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT THAT CLAIMANT TESTIFIED THAT SHE BELIEVED THAT SHE HAD A SHORT OR LONG TERM DISABILITY POLICY THAT WOULD BE ADDED TO HER WEEKLY WORKERS' COMPENSATION BENEFITS WHERE CLAIMANT DID NOT OFFER SUCH TESTIMONY?
- IV. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT THE CARRIER'S EXPLANATION FOR INITIALLY MISCALCULATING THE AVERAGE WEEKLY WAGE IS UNSATISFACTORY WHERE DEFENDANTS DEMONSTRATED THAT THE CALCULATION WAS SIMPLY A MATHEMATICAL ERROR?

ARGUMENTS AND AUTHORITIES

- I. THE HEARING COMMISSIONER ERRED IN FINDING THAT EXCEPTIONAL REASONS EXIST TO DEVIATE FROM THE STANDARD METHOD OF CALCULATING AN EMPLOYEE'S AVERAGE WEEKLY WAGE WHERE THE STANDARD METHOD OF COMPUTATION RESULTS IN AN AVERAGE WEEKLY WAGE THAT IS BOTH FAIR AND REASONABLE.

Claimant began working for the Employer as a temporary employee through Phillips Staffing Agency in 2011. (Hrg. Tr. p. 11, ll. 17-24). After working as a temporary employee for

ninety days, Claimant was hired by the Employer as a full-time assembly line worker on August 22, 2011. (Hrg. Tr. p. 12, ll. 2-8). At the time of Claimant's injury on October 21, 2011, Claimant was earning \$12.48 per hour, and her average weekly was \$487.56. (Hrg. Tr. p. 28, ll. 18-24; p. 29, ll. 1-3). Claimant testified at the hearing that after her injury, she received temporary total disability checks that were approximately \$217.00 more per week than she had ever earned, even before taxes were deducted. (Hrg. Tr. p. 29, ll. 8-11). Claimant admitted that the weekly checks paying \$704.92 were unusual and "seem[ed] a little excessive." (Hrg. Tr. p. 30, ll. 12-17). However, Claimant did not advise Defendants of the excessive payments.

Defendants assert an average weekly wage of \$487.56 and a compensation rate of \$325.05 based on the standard method of calculating an employee's wages. (Hrg. Tr. p. 6, ll. 22-24). Defendants deny that exceptional reasons exist to deviate from the standard method of calculation for determining a claimant's average weekly wage and compensation rate.

The South Carolina Workers' Compensation Act defines "average weekly wage" as the earnings of an injured worker during the period of fifty-two weeks immediately preceding the date of the injury. S.C. Code Ann. § 42-1-40. If a worker is employed by the Employer for less than fifty-two weeks preceding the injury, the earnings are to be divided during the period worked by the number of weeks and parts thereof, so long as the results are fair and just to both parties. *Id.* Unless it is impracticable to use the standard method of calculating wages, one of the above methods is to be used. *Id.* If it is impracticable to use the standard method, then the proper alternative is to consider a similar employee in the same locality. S.C. Code Ann. § 42-1-40.

In this case, we are able to follow the standard statutory method of calculating Claimant's average weekly wage and corresponding compensation rate. There exists no exceptional reason

why Claimant's actual wages earned prior to the date of injury should not be utilized in calculating her average weekly wage. See *Roberts v. McNair Law Firm*, 366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005) (holding a workers' compensation claimant's post-injury merit increases did not justify deviating from the statutory method of average weekly wage calculation). In *Roberts, supra*, the Court of Appeals upheld the single commissioner's finding that "salary increases subsequent to an injury by accident do not provide exceptional reasons to justify departure from the method of average weekly wage calculation prescribed under section 42-1-40 as such an argument could be made in almost every workers' compensation case."

Accordingly, Defendants assert the Hearing Commissioner erred in her determination of the method to be used in calculating Claimant's average weekly wage by finding that exceptional circumstances existed to deviate from the standard method of calculation. Claimant's pay increases awarded subsequent to her injury do not provide exceptional reasons to justify departure from the standard method of calculating a claimant's average weekly wage. In the event that an exceptional reason exists to depart from the standard method of calculation, the proper method of calculation is not to consider Claimant's post-injury wages, but rather to consider the wages of a similar employee in the same locality. See S.C. Code Ann. § 42-1-40. Defendants assert the hearing commissioner incorrectly found exceptional circumstances exist to deviate from the standard method of calculation and used an improper alternative method of calculation. Defendants assert Claimant's average weekly wage may be practically calculated based on her actual pre-injury wages and equates to \$487.56 with a corresponding compensation rate of \$325.05.

II. THE HEARING COMMISSIONER ERRED IN FINDING THAT DEFENDANTS ARE NOT ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY COMPENSATION PAID PRIOR TO THE DATE OF FILING THE AMENDED FORM 20, WHERE CREDIT FOR OVERPAYMENT OF ALL COMPENSATION IS ESTABLISHED BY BOTH STATUTORY LAW AND CASE LAW.

Defendants paid Claimant temporary total disability benefits pursuant to the Workers' Compensation Act in the amount of \$704.92 per week. The parties agree that Claimant was paid weekly benefits in excess of her compensation rate based on Defendants' miscalculation of earnings. The Hearing Commissioner found Claimant's compensation rate to be \$474.39. As reflected herein, Defendants continue to assert that Claimant's compensation rate is \$325.05. At the time of the hearing, Defendants had overpaid Claimant \$379.87 for each week of temporary benefits paid. Defendants respectfully seek a credit for overpayment of all wages be applied against any future permanent disability award.

The South Carolina Workers' Compensation Act allows any payments made by an employer to an injured employee during the period of his disability, which were not due and payable, to be deducted from the amount to be paid as compensation, subject to the approval of the Commission. S.C. Code Ann. § 42-9-210. The deductions shall be applied by shortening the period during which compensation must be paid. *Id.* Further, South Carolina Workers' Compensation Regulation 67-1603(C)(3) addresses the payment of temporary compensation based on an incorrect compensation rate. When the corrected compensation rate is less than previously reported on the Form 15 and paid to a claimant, and the claimant agrees to the reduction, the employer may deduct up to twenty-five percent from the weekly payments to recover the overpayment. Reg. 67-1603(C)(3)(b)(i). However, when the claimant does not agree to the reduction, and the first one hundred fifty days have passed, the employer shall

continue paying the compensation rate reported on the Form 15 and request a reduction in compensation by filing a Form 21. Reg. 67-1603(C)(3)(b)(iii).

The South Carolina Workers' Compensation Commission has repeatedly held that an employer is entitled to credit for the overpayment of temporary disability benefits based on an incorrect compensation rate. See *McPherson v. Express Teller Services, Inc.*, W.C.C. File No. 0719102, 2012 S.C. Wrk. Comp. LEXIS 496, *aff'd*, 2013 S.C. Wrk. Comp. LEXIS 170; *Ayoub v. Select Comfort Corp.*, W.C.C. File No. 0526870, 2007 S.C. Wrk. Comp. LEXIS 904, *aff'd*, 2008 S.C. Wrk. Comp. LEXIS 377; *Fields v. Shoney's of Hardeeville*, W.C.C. No. 0322719 & 0030955, 2006 S.C. Wrk. Comp. LEXIS 191; *Brown v. Defender Services, Inc.*, W.C.C. File No. 0010786, 2001 S.C. Wrk. Comp. LEXIS 189. In *Fields, supra*, an Appellate Panel of the South Carolina Workers' Compensation Commission held that the employer was entitled to a credit for the substantial overpayment of temporary benefits to the claimant based on an inadvertent miscalculation of the claimant's compensation rate. The Panel affirmed that the award of a credit to the employer against the claimant's permanent disability award was appropriate under the Act, as it merely "shorten[ed] the period during which compensation must be paid." *Id.*

Additionally, in *McPherson, supra*, an Appellate Panel of the Workers' Compensation Commission held that the credit to which the defendants were entitled to for the overpayment of temporary benefits was to be determined in the form of dollars paid, and not based on a number of weeks paid. The Commission held that to not grant credit to the defendants for payments already made in the form of temporary disability benefits, merely based on an erroneous compensation rate would be unfair to the defendants and contrary to the Act. *Id.*

Claimant cites *Brittle v. Raybestos-Manhattan, Inc.*, for their position that Defendants are not entitled to credit for overpayment. However, that opinion does not address the overpayment

of temporary disability benefits based on an incorrect compensation rate. Rather, that case addresses an employer's payments made to the claimant voluntarily, and not due and payable under the Workers' Compensation Act. *Id.* Therefore, the cited authority does not address the issue before you.

Defendants assert Claimant would receive an unjust windfall if they were not provided a credit on the overpayment of benefits. Claimant did not alert her Employer that she was receiving temporary disability benefits in excess of the gross amount she earned prior to the injury. During a period of temporary disability, Claimant was incorrectly paid \$704.92 per week in compensation benefits. The Hearing Commissioner determined Claimant's compensation rate to be \$474.39. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 310 S.E.2d 440 (Ct. App. 1983). It would be unjust to allow Claimant to receive a significant windfall due to an incorrect compensation rate based on a mathematical error, of which Claimant was aware and failed to address, and would provide Claimant with benefits not contemplated in the Workers' Compensation Act.

Defendants request that the overpayment of weekly benefits be applied as a credit to Claimant's permanent award pursuant to S.C. Code § 42-9-210 and Regulation 67-1603. The Workers' Compensation Commission has repeatedly awarded credit for the overpayment of temporary benefits based on an incorrectly paid compensation rate. *See, e.g., Fields, supra.* Accordingly, Defendants request a credit for all funds paid in excess of Claimant's compensation rate, and request that the credit be applied to any permanent disability award Claimant receives. Defendants have stipulated that the credit be applied to any permanent award Claimant receives, rather than to apply such deductions by shortening the period during which temporary benefits

shall be paid, in order to avoid any potential prejudice against Claimant. The Workers' Compensation Act expressly allows for these payments to be applied to a final award, upon approval of the Commission, and such application does not prejudice Claimant. Therefore, Defendants respectfully request that you deem all benefits paid in excess of Claimant's compensation rate an overpayment and allow Defendants a credit in that amount to be applied to any permanent disability award Claimant receives, pursuant to your authority, as provided herein.

III. THE HEARING COMMISSIONER ERRED IN FINDING THAT CLAIMANT TESTIFIED THAT SHE BELIEVED SHE HAD A SHORT OR LONG TERM DISABILITY POLICY THAT WOULD BE ADDED TO HER WEEKLY WORKERS' COMPENSATION BENEFITS WHERE CLAIMANT DID NOT OFFER SUCH TESTIMONY.

The Hearing Commissioner found that "Claimant testified that she was under the impression that the compensation she was receiving was based on not only what she should get from workers' compensation benefits, but also, she believed that she had a short or long term disability policy that would be added to what she received for her injury and therefore, based upon this belief, she did not question that amount, as this calculation had been determined by the Employer and paid from the beginning." (Order, p. 8). The finding implies that Claimant was justified in a belief that she was receiving weekly benefits that exceeded her gross earnings. However, Claimant actually testified at the hearing that she never pursued, claimed, or received short-term disability benefits. (Hrg. Tr. p. 30). She testified that the only compensation she received was from "workman's comp." (Hrg. Tr. p. 30, ll. 4-5). Accordingly, the Hearing Commissioner erred in finding that Claimant testified that she believed she had a short or long term disability policy that would be added to her weekly workers' compensation benefits. The finding should be removed from the order.

IV. THE HEARING COMMISSIONER ERRED IN FINDING THAT THE CARRIER'S EXPLANATION FOR INITIALLY MISCALCULATING THE AVERAGE WEEKLY WAGE IS UNSATISFACTORY WHERE DEFENDANTS DEMONSTRATED THAT THE CALCULATION WAS SIMPLY A MATHEMATICAL ERROR.

The Hearing Commissioner denied Defendants' request for credit for the overpayment of temporary benefits dating back to the inception of payments. In doing so, the Commissioner found that Defendants' explanation that the calculation was simply a mathematical error was unsatisfactory to justify awarding complete credit and that it would be unfair and unjust to do so. However, the issue of credit for overpayment is not based in equity or fairness. Both statutory and case law unequivocally provides that credit shall be applied for temporary compensation overpayment in this instance.

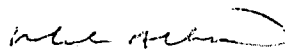
Even if an equity standard was wrongly applied to this issue, Defendants assert that the honest error made in calculating Claimant's average weekly wage should not prohibit a credit for the overpayment of compensation where the error was not uncommon. The error at issue occurred when Defendant Employer incorrectly calculated the number of weeks worked by Claimant when completing the Form 20. Claimant was paid wages every two weeks, but Defendant Employer mistakenly completed the Form 20 as if she had been paid weekly, thus reducing the number of weeks worked by one-half. This honest mistake doubled her average weekly wage.

Furthermore, credit for the entire overpayment of benefits to be deducted from any final permanency award is fair, just, and appropriate where Claimant cannot demonstrate any prejudice and Defendants are significantly prejudiced by paying benefits to which Claimant was not entitled. Accordingly, Defendants respectfully request a finding that equity principles are not relevant and do not preclude credit for the entire overpayment to be deducted from any final permanency award granted to Claimant.

CONCLUSION

The standard statutory method of calculating Claimant's average weekly wage should be applied to derive a compensation rate of \$325.05. Exceptional circumstances do not exist to deviate from this standard. Additionally, Defendants are entitled to a credit for the overpayment of all past temporary compensation. The Hearing Commissioner incorrectly found Claimant testified that she believed a short or long term disability policy would be added to her weekly workers' compensation benefits and that finding should be removed from the Decision and Order. The Hearing Commissioner's finding that Defendants' explanation for miscalculating Claimant's average weekly wage is unsatisfactory should also be removed from the Decision and Order, where such finding is both irrelevant to the legal analysis of the issues in dispute and incorrect

For these reasons, Defendants respectfully submit that the Full Commission reverse the Hearing Commissioner's findings noted herein.



MARK A. ALLISON
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 2980
55 East Camperdown Way, Suite 300
Greenville, South Carolina 29602
(864) 239-4000
Attorneys for the Employer/Carrier

Greenville, South Carolina
May 19, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Michelle Davis)

Claimant)

vs.)

Fraenkische USA, LP)

Employer,)

and)

Maryland Casualty Insurance Co.,)
c/o Zurich North America)

Carrier)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1117221

CLAIMANT'S/RESPONDENT'S BRIEF

STATEMENT OF THE CASE

A hearing in this matter was held on January 8, 2016 before Commissioner Susan Barden to determine the issues as set forth on Forms 21 and 22, including the determination of Claimant's average weekly wage and compensation rate and Defendants' entitlement to credit for the overpayment of temporary disability benefits. Defendants seek calculation of Claimant's average weekly wage based on the standard statutory method of considering her pre-accident earnings. Further, Defendants seek a credit for the overpayment of temporary compensation based on an incorrectly calculated compensation rate, submitted by Defendant's Form 20 on December 13, 2011. Claimant seeks calculation of her average weekly wage based on her post-accident earnings with the Employer and denies Defendants' entitlement to a credit for the overpayment of temporary compensation benefits.

In an Order dated March 1, 2016, the Hearing Commissioner found that exceptional reasons existed to calculate Claimant's average weekly wage based on post-accident earnings so that her average weekly wage would be \$711.23 and her compensation rate would be \$474.39. The Commissioner also found that it would be unfair to award a credit to Defendants for the overpayment of temporary disability benefits

from the date of the accident but did award a credit to be calculated from the date of filing of the Amended Form 20, October 15, 2015, to be deducted from any final permanency award. The Defendants began paying at the rate determined by the Commissioner but filed their Appeal.

STATEMENT OF THE EVIDENCE

Claimant began working for the Employer as a temporary employee approximately three months before being hired as a permanent employee on August 22, 2011. (Hrg. Tr. pp. 11-12). Claimant was injured on October 21, 2011, approximately nine weeks after her permanent hire date. (Hrg. Tr. p. 12, 11. 2-8). At the time of her injury, she was earning \$12.48 per hour. (Hrg. Tr. p. 28, 11. 18-24; p. 29, 11. 1-3).

After initial conservative treatment, Claimant had returned to her job with the Employer and Michelle soon received a pay increase to \$13.00 per hour and then due to a shift change, her pay increased to \$13.35 per hour, and she confirmed that on February 15, 2013 she was continuing to work and progress in her skills and that she received a pay raise to \$16.07 per hour and continued to work both normal and overtime hours up until July 1, 2013 when she had to have the second surgery on her foot (Exb. B-1, p. 4) (Hrg. Tr. pp. 13-18); therefore, she progressed from earning \$12.48 per hour in 2011; to \$13.00 in January 2012; to \$13.35 in August 2012; to \$16.07 in February 2013; and by her testimony would have received an additional \$.75 raise had she not been injured and prevented from taking the lead operator position just before her 2nd surgery of the four surgeries she has now undergone. (Hrg Tr. pp. 24-26) Claimant was terminated by the Employer after her 2nd surgery. (Hrg. Tr. p. 28)

Defendants paid Claimant temporary total disability benefits pursuant to the South Carolina Workers' Compensation Act in the amount of \$704.92 per week, the maximum compensation rate for that time. This calculation was performed by the Defendants, filed with the Commission by the Defendants on December 13, 2011 pursuant to R. 67-1603, and was repeatedly placed on Form 15's and other Commission filings by the Defendant's. The payments were based on a mathematical error, (evidently, although no testimony was provided) which produced an average weekly wage of \$1,281.54. The parties agree that Claimant was paid weekly benefits in excess of her compensation rate; however, the

parties disagree about how to calculate her compensation rate. Defendants filed an amended Form 20 on October 15, 2015 reflecting an average weekly wage and compensation rate based on Claimant's pre-injury earnings. Defendants then filed a Form 21 to address the issues set forth above.

STATEMENT OF ISSUES ON APPEAL

- I. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT EXCEPTIONAL REASONS EXIST TO CALCULATE THE AVERAGE WEEKLY WAGE PURSUANT TO THE PROVISIONS OF SC CODE ANN. § 42-1-20?

The Workers' Compensation Act defines "average weekly wage" for the purposes of computing compensation and sets forth a primary method of calculation and three alternative methods. The primary method for calculating the average weekly wage is to take "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." § 42-1-40; Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App. 2010). "The [Appellate Panel] must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so." Pilgrim, 391 S.C. at 44-45, 703 S.E.2d at 244 (citing § 42-1-40). It would be impractical and unfair to use the primary method because Claimant had only been employed for approximately nine weeks and there exists additional work history.

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 these alternatives, the [Appellate Panel] must find, or the record must clearly show, that the necessary conditions, [as prescribed in the statute], exist." The first alternative method of wage calculation, 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. *Id.* at 46, 703 S.E.2d at 245.

Before the Commission may use any one of these alternatives, the [Commission must find,

or the record must clearly show, that the necessary conditions exist.” Pilgrim v. Eaton, 391 S.C. 38, 45, 703 S.E.2d 241, 244 (Ct. App.2010).

The first alternative to the primary method is to be used “[w]hen the employment ... extended over a period of less than fifty-two weeks....” *Id.* In such a situation, the commission must use “the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages....” *Id.* Section 42-1-40 states that “the method ... shall be followed, as long as results fair and just to both parties will be obtained.” *Id.* The section also contains a requirement that this particular method be “practicable.” *Id.*

It is submitted that this method is not practicable nor is it fair based on the fact that the employee/claimant continued to work and progress in her employment after her initial injury and received wage increases. She demonstrated (even with an injured leg) her competency and ability to earn wages much in excess of that which she earned initially and such truly and factually demonstrates her earning capacity.

The second alternative requires the commission to consider “the average weekly amount which ... 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.” *Id.* [No testimony or evidence was introduced by the Defendant/Appellant]. This method likewise, is not practical nor fair in that it does not take into account that the claimant continued to work and progress in her knowledge and skill at work.

It is clear from the record, that Michelle Davis was injured on the job a short time after her employment; however, she continued to work at her job even after her first surgery. In fact, she received a commendation as Employee of the Month in December 2012 [Hrg Tr. P.26]; and three separate raises in her pay after her injury and would have received another salary boost had she been able to take the Team Leader position, but for the injury and remaining three surgeries which she was required to undergo to effect a rehabilitation of the severe injury to her leg and foot. These were sufficient extraordinary conditions to establish the criteria and conditions as set forth in

James Pugh v. Piedmont Mechanical 396 S.C. 31, 719 S.E. 2d 676 (Ct. App. 2011), and Pilgrim supra; and more recently in Swilling v. Pride Masonry 401 S.C. 178, 736 S.E. 2d 672 (Ct. App. 2012).

It is submitted that neither of the first two alternatives above yield a calculation that is just and fair to both parties, but particularly to the Claimant.

The final alternative for calculating average weekly wage is to be employed when “exceptional reasons” exist that make it “unfair, either to the employer or the employee,” to use the alternatives set forth above. *Id.* In that event, § 42-1-40 provides that “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 alternative may be used by the commission when it makes factual findings that explain the “exceptional reasons” it finds the other methods are “unfair.” *Id.* See Forrest v. A.S. Price Mech., 373 S.C. 303, 308, 644 S.E.2d 784, 786-88 (Ct. App.2007) (affirming the Commission's use of the “exceptional reasons” alternative based on specific findings which “justified deviation from the usual statutory method of ... computation”).

For that very reason, the legislature established by the last paragraph of the statute, the following language.

SC Code Ann. §42-1-40 provides as follows:

...“When for exceptional reasons the foregoing would be unfair, either to the Employer or Employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured Employee would be earning were it not for his injury”....

The statute provides a flexible approach with a view toward the ultimate objective of reflecting fairly a Claimant’s probably future earning loss. Bennett v. Gary Smith Builders 271 SC 94, 98, 245 SE 2d 129, 131 (178).

“The objective of wage calculation is to arrive at a fair approximation of the Claimant’s

probable future earning capacity. His disability reaches into the future, not the past; his loss, as a result of injury must be thought of in terms of its impact on probable future earnings". ID. at 98, 99, 245 SE 2d at 131." See also Stokes v. First National Bank 306 SC 46, 410 SE 2d 248 (1991).

Our Court has reasoned that S.C. Code Ann. §42-1-40 provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a Claimant's probable future earning loss. See Sellers v. Pinedale Residential Center 564 SE 2d 694 (Ct. App. 2002). "Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the Claimant's probable future earning capacity. The prevailing goal and policy of §42-1-40 is to use the method that will fairly compensate the employee "for reductions in their earning power caused by work-related injuries." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). See Foreman v. Jackson Minit Mkts., Inc., 265 S.C. 164, 170, 217 S.E.2d 214, 216-17 (1975). See also Swilling v. Pride Masonry 401 S.C. 178, 736 S.E. 2d 672 (Ct. App. 2012).

Michelle had progressed from earning \$12.48 per hour in 2011; to \$13.00 in January 2012; to \$13.35 in August 2012; to \$16.07 in February 2013; and as established by her testimony would have received an additional \$.75 raise had she not been injured and prevented from taking the lead operator position. (Hrg Tr. pp 24-26). Claimant should also be entitled to receive consideration of an average "overtime" which was exhibited and worked during her work history. (APA Ex. B)

Taking all of this in consideration, the Commissioner Barden found that "exceptional circumstances" existed and that Claimant should be entitled to an average weekly wage of \$16.07 per hour which she earned in 2013. This would equate to an Average Weekly Wage(40 hours + calculated overtime) of \$711.23 and a compensation rate of \$474.39 (APA Ex. B).

II. DID THE HEARING COMMISSIONER PROPERLY FIND AS FACT AND CONCLUDE AS A MATTER OF LAW THAT DEFENDANTS ARE ENTITLED TO A CREDIT FOR OVERPAYMENT OF PAST TEMPORARY COMPENSATION PAID ONLY AS OF THE DATE OF FILING OF THE AMENDED FORM 20?

CREDIT FOR OVERPAYMENT

The Claimant would state that any overpayment as determined by the Commission, was due to and solely caused by the Carrier in initially filing a Form 20 which was in error. The Carrier was and is mandated by Regulation 67-1603 to calculate the average weekly wage and the operative word of the Regulation is "shall". The Carrier, through its own affirmative actions paid more in "dollars" than required, but made each weekly payment of compensation as required by the Acts of the Legislature. The Carrier continued to pay benefits for over 100 weeks at the rate set in its Form 20 dated October 2011. The erroneous payment was not due to or caused by any action on the part of the Claimant and the Claimant should not be penalized at this time.

It would seem that based upon the affirmative conduct required of the Defendants by the Commission that "Laches" is an equitable defense to their claim for credit.

"Laches is an equitable doctrine that our courts have defined as "neglect from an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done". Historic Charleston Holdings, LLC v. Mallon 381 S.C. 417, 432, 673, S.E. 2d 448, 456 (2009).

"[T]o establish Laches as a defense, a party must show that the Complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of Laches. "ID"

It would seem reasonable to expect the Defendants to recognize their error immediately upon the initial filing after the date of injury and to at least recognize it when they filed their Form 15. To penalize the Claimant at this time does not seem reasonable, fair or proper.

In addition, it is submitted that the Defendants should be estopped to claim credit to be awarded to them from the date of the accident, but more reasonable to allow them credit from the date of the filing of their amended Form 20, based upon the defense of estoppel.

The essential elements of estoppel are:

(1) Lack of knowledge or the means of acquiring with reasonable diligence, knowledge of the

true facts;

(2) Reasonable reliance on the other parties' conduct; and

(3) Prejudicial change in position.

Provident Life and Accident Insurance Co. v. Driver 317 S.C. 471, 451 S.E. 2nd 924 (Ct. App. 1994).

The Claimant in this case testified that she had been lead to believe that she was entitled to workers' compensation and short or long term disability. (Hearing Transcript pp. 30 - 31).

The Defendants are the party with all of the facts; the Defendants are the party with the means of discovering all of the facts, and the Defendants are the party that is charged by law with getting the facts right.

The poor Claimant in this case has no obligation and in fact, was under the impression that what she was receiving was correct and therefore, she should not now be penalized.

See also, Brittle v. Raybestos - Manhattan, Inc. 241 S.C. 255, 127 S.E. 2d 884 (1962), In the Brittle case, the Court quoted from Larson's Workman's Compensation Law, Volume 2, page 24, section 57.47:

"The amount of the credit is not the amount of wages paid, but the amount of compensation due for the particular week. Thus, if the wage paid was \$30.00, and if the compensation due for the week was \$20.00, the credit is for \$20.00. In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability."

Therefore, the law as applied in Brittle and based upon Larson's, would allow credit where the amount paid was equal to the compensation rate due, but in this case, the Carrier overpaid each week and should not be entitled to any credit for the overpayment and the same should be considered gratuitous and not subject to being refunded by the Employee. See also §42-9-10; §42-9-260. See also Phillips Electronics v. Wright 348 Md. 209, 703 A.2 150 (1997 Maryland Court of Appeals).

Therefore, in the alternative, it is submitted that Commission Barden was correct in her award of the credit to the Defendant/Appellant only from the date of filing of the Form 21.

III. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT THAT CLAIMANT TESTIFIED THAT SHE BELIEVED THAT SHE HAD A SHORT OR LONG TERM DISABILITY POLICY THAT WOULD BE ADDED TO HER WEEKLY WORKERS' COMPENSATION BENEFITS WHERE CLAIMANT DID NOT OFFER SUCH TESTIMONY?

Contrary to the statements made in the Appellant's Brief, Claimant testified as follows:

Q: All right. Now, had you also applied for short term disability benefits?

A: Yes (Hearing Transcript page 29, lines 12 - 14).

Q. Ok, so, explain to me when you began receiving checks in the amount of over \$700.00 a week, the debts seem unusual to you where you had only not even earned \$500.00 before your accident?

A. It did. Sometimes I would get more than that. It was overtime. It did seem a little excessive to me, but with the questions I would ask here and there, I know I was getting paid a percentage of what I was making, and then the short term disability. So, I didn't have anything to base that on. So, I didn't - I mean, I just assumed it was right. I've never had any - any dealings with workers' comp or anything like that. (Hearing Transcript, page 30, lines 12 - 24).

Q. What do you mean by you knew that you would receive a percentage of what you made and short term disability if you had not ever asked for or applied for short term disability?

A. Well, that was what was listed on the check stub, on workers' comp, the check. It said "short term disability." (Hearing Transcript, page 30, line 25; page 31, lines 1 - 6.

IV. DID THE HEARING COMMISSIONER ERR IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT THE CARRIER'S EXPLANATION FOR INITIALLY MISCALCULATING THE AVERAGE WEEKLY WAGE IS UNSATISFACTORY?

The Hearing Commissioner was perfectly willing to allow a credit from the date of the filing of the Amended Form 20 by the Defendants. The Defendants were guilty of Laches and based upon the cases cited about, should be estopped from claiming credit. However, the Single Commissioner awarded the credit based upon the date when the Defendant finally corrected its voluntary error. The Defendants never offered testimony as to the reason for the error; the Defendants never provided any evidence or testimony to Commissioner Barden as to the reason for the error, nor for the long delayed response in trying to correct the error. There was no testimony, no evidence, and no satisfactory explanation provided in the hearing before Commissioner Barden. She made her decision based upon the requirements of Reg. 67-1603, and Code Section 42-9-210.

CONCLUSION

The Order of Commissioner Susan S. Barden dated March 1, 2016 should be upheld in its entirety.

Respectfully submitted,

MULLINAX LAW FIRM, P.A.



Michael F. Mullinax
Post Office Box 2665
Anderson, SC 29622
(864) 261-6242
ATTORNEY FOR THE CLAIMANT/
RESPONDENT

Anderson, South Carolina

June 3, 2016

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1117221

Michelle Davis,)
)
Claimant,)
)
v.)
)
Fraenkische USA LP)
)
Employer,)
)
and)
)
Maryland Casualty Company)
c/o Zurich North America,)
)
Carrier/Defendants.)
-----)

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FULL COMMISSION PANEL HEARING

Monday, June 20, 2016
2:05 p.m. - 2:32 p.m.

The full commission panel hearing was held before the South Carolina Workers' Compensation Commission, 1333 Main Street, 5th Floor, Columbia, South Carolina, on the 20th day of June, 2016 before Barbara S. Ham, Court Reporter and Notary Public in and for the State of South Carolina.



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APPEARANCES

COMMISSION PANEL:
 Melody James, Chair
 T. Scott Beck
 Aisha Taylor

Mark A. Allison, Esquire
 McAngus Goudelock & Courie LLC
 55 East Camperdown Way, Suite 300
 Post Office Box 2980
 Greenville, South Carolina 29602
 Attorney for the Defendants

Michael F. Mullinax, Esquire
 Mullinax Law Firm
 509 North McDuffie Street
 Anderson, South Carolina 29622
 Attorney for the Claimant

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Certificate 24



1 **COURT REPORTER:** Today is June 20, 2016. This is
2 South Carolina Workers' Compensation Case
3 Number 1117221. This is the case of Michelle
4 Davis, Claimant vs. Fraenkische USA LP,
5 Employer and Maryland Casualty, Carrier. The
6 Appellant is the Defendant represented by Mark
7 A. Allison. The Respondent is represented by
8 Michael F. Mullinax. Each side is allowed ten
9 minutes for oral argument and the Appellant
10 three minutes in reply. You are requested to
11 argue the grounds of exception and stay within
12 the record.

13 **MS. JAMES:** Mr. Allison.

14 **MR. ALLISON:** Thank you, Madam Commissioner. May it
15 please the court. I am here this afternoon on
16 behalf of Fraenkische and Zurich, their
17 workers' compensation insurance carrier, and we
18 have appealed the order of the Hearing
19 Commissioner with regard to -- primarily two
20 findings that she made with regard to the
21 calculation of the Claimant's average weekly
22 wage and also the application of an overpayment
23 credit. I am just going to focus on those two
24 issues, four grounds of appeal were listed but
25 again I am just going to stick to those two



1 issues. First is the determination of average
2 weekly wage. In this claim Ms. Davis' average
3 weekly wage was started by a Form 20 that was
4 improperly completed by the employer. Someone
5 in Human Resources looked at her wages,
6 properly added up the amount of wages that she
7 earned but put in the wrong number of weeks
8 that she was worked. And what they did was an
9 honest and understandable mistake insofar as it
10 appears that what they did is look at the
11 number of checks that were received and they
12 wrote that number into the Form 20. Well Ms.
13 Davis was paid every two weeks so each check
14 that she was paid represented two weeks of
15 payment instead of one. The result or the
16 affect of that was an average weekly wage that
17 was essentially twice as much as what she had
18 actually earned. Unfortunately this mistake
19 wasn't identified until well into the claim and
20 after the taking of Ms. Davis' deposition where
21 she testified about her hourly rate and the
22 amount of time that she worked and it became
23 clear that she was significantly being overpaid
24 temporary compensation. After her deposition
25 we filed an amended or a revised Form 20 to



1 correct it and then we requested a hearing to
2 address setting an appropriate average weekly
3 wage as well as to try to obtain credit for the
4 overpayment of compensation from the genesis of
5 her claim. So argument number one or issue
6 number one with the order is the determination
7 of average weekly wage. It's important to
8 understand that the parties agree that the
9 average weekly wage reflected by the original
10 Form 20 is improper. That she has been
11 overpaid. Ms. Davis did not dispute that.
12 However, what she did do is claim that instead
13 of her average weekly wage being essentially
14 reduced by half that credit should be given or
15 that the count should be taken of post-hire
16 wage increases or merit based hourly rate
17 increases that she earned after the accident.
18 At the time of her accident she was earning
19 \$12.48 per hour. After the accident and she
20 came back and worked some brief periods of both
21 regular duty and light duty and during that
22 post-accident employment she received I believe
23 three merit based increases that would bump her
24 hourly rate. Ultimately her rate was bumped to
25 a rate of \$16.07 per hour which was about \$3.50



1 more than her hourly rate at the time of the
2 accident. So what the Hearing Commissioner did
3 is while she reduced the average weekly wage
4 from what was reflected in the original Form
5 20, she did increase the average weekly wage or
6 I'm sorry, yeah, the average weekly wage by
7 nearly \$200.00 from what her pre-accident
8 earnings would have been and she did that based
9 on those increases. This concept of increasing
10 an average weekly wage for post-accident
11 increases' has already been addressed by our
12 appeal courts in South Carolina in the *Roberts*
13 *vs. McNair Law Firm* case which is a 2005 South
14 Carolina Court of Appeals Opinion. Ms. Roberts
15 who was a paralegal at McNair made essentially
16 the same argument. She returned to work after
17 a work accident and after a period of temporary
18 disability and she enjoyed merit increases or
19 salary bumps during that time. She argued that
20 those should be considered as an exceptional
21 circumstance as identified by Section 42-1-40.
22 She also relied on the *Sellers vs. Pinedale*
23 decision under the proposition that where there
24 were increases -- well in trying to determine
25 an average weekly wage the court should look to



1 what the future earnings capacity would be.
2 The Court of Appeals unanimously in a three to
3 nothing vote rejected that notion and rejected
4 that argument. What they said was essentially
5 that if that were the standard then this would
6 apply to almost every workers' compensation
7 case for an injured worker to have merit
8 increases is not unusual and is in fact a
9 common and typical occurrence. It is certainly
10 not an exceptional occurrence for an employee
11 to have wage increases as they continue to work
12 and do well over time. And so the court
13 rejected that notion and said that that is not
14 what the legislature contemplates when they are
15 trying to determine whether exceptional
16 circumstances exist to deviate from the
17 statutory method. The court went on to explain
18 and give an example of what -- of when an
19 exceptional circumstance would apply and they
20 talked about, they mention the case in which --
21 in the *Pinedale* case that the employee was a
22 part time 16 year old who was earning \$100.00
23 per week. And they said that in this instance
24 where he had shown an aptitude for electric
25 work being performed and could demonstrate that



1 his average weekly wages would likely
2 significantly exceed \$100.00 a week including
3 not just working part time but being able to
4 work full time that that would be the type of
5 exceptional circumstance that would be
6 contemplated by the statute and so in this case
7 we simply don't have that. We don't have any
8 exceptional circumstance that would say under
9 these facts we should deviate from her pre-
10 injury earnings. And so it is our position
11 that her average weekly wage should be that
12 that is reflected by her pre-injury earnings of
13 \$487.56. The second issue on appeal is so what
14 do we do with this overpayment that has
15 occurred in light of the more than two years of
16 temporary compensation overpay. There are --
17 both the statute and regulation address the
18 concept of overpayment when compensation is
19 paid that is not in fact due and so because
20 there will be a finding that there is an
21 overpayment in this case regardless of the
22 amount that you fix the average weekly wage and
23 compensation rate we know that there will be an
24 overpayment. And what the statute and the
25 regulation provide for is the procedure for



1 obtaining that credit. Nowhere in the statute
2 or regulation does it say or state or imply or
3 suggest that this is a discretionary credit to
4 be applied but it simply lays forth the process
5 for doing so. The Regulation 67-1603 provides
6 that where the parties cannot agree then the
7 procedure is to file a new Form 15, file the
8 new Form 20 and request a hearing to address
9 the credit.

10 **COMMISSIONER BECK:** In this case there wasn't a
11 disagreement y'all told them what it was.
12 Y'all filed the 20, they weren't disagreeing
13 with it.

14 **MR. ALLISON:** They did disagree with the Form 20
15 that we filed.

16 **COMMISSIONER BECK:** During ---

17 **MR. ALLISON:** Yes.

18 **COMMISSIONER BECK:** Not the original?

19 **MR. ALLISON:** That's correct. They did not disagree
20 with the original Form 20. And so what we did
21 in an effort to -- what we offered to the
22 employee in an effort to avoid any prejudice to
23 her in terms of the overpayment is that in lieu
24 of reducing weekly benefits and which by the
25 way again Regulation 67-1603, if there had been.



1 an agreement would have allowed for a reduction
2 of up to 25 percent per week. There was no
3 agreement and so that was not in play but in
4 lieu of asking the hearing commissioner to
5 reduce future payments by up to 25 percent we
6 said we won't even ask for credit, for
7 overpayment to come out of your ongoing weekly
8 checks. What we will do is have that credit
9 applied out of a permanent disability award so
10 you are not prejudiced in any manner
11 whatsoever, you are not facing a situation
12 where instead of getting \$325.00 a week, you
13 are going to be faced with getting \$240.00 a
14 week. You will still get the entire amount of
15 your compensation rate as set "by the
16 commissioner, we will simply deduct the
17 overpayment just like we would a TTD overpay
18 credit in a permanency case. And that offer
19 was rejected and so it left us with a situation
20 where we were unable to reach an agreement as
21 to the overpayment.

22 **COMMISSIONER BECK:** Mr. Allison, even in a TTD issue
23 the commission still has discretion on how far
24 we take that credit back if at all. For
25 example, the typical rule of thumb that I think



1 is pretty universally, you file a 21 within 60
2 days of MMI. This we are talking from 2011 to
3 2015. I mean your client had four years to
4 correct that error and didn't do anything
5 probably until it came time for a hearing I
6 suspect.

7 **MR. ALLISON:** Yes until it was discovered and then
8 it was immediately rectified as soon as the
9 mathematical error was discovered.

10 **COMMISSIONER BECK:** What's the value of your credit?

11 **MR. ALLISON:** Well it depends on ---

12 **COMMISSIONER BECK:** In total?

13 **MR. ALLISON:** It depends on what the average weekly
14 wage is. If the average weekly wage is ---

15 **COMMISSIONER BECK:** Well you're saying \$486.57.

16 **MR. ALLISON:** Yes, sir. And under that scenario the
17 credit exceeds \$30,000.00. If the average
18 weekly wage were applied that was found by the
19 Hearing Commissioner it would be less than that
20 and I apologize I don't have the calculations
21 in front of me. It would still be significant
22 but I don't know what the dollar amount would
23 be. And just to, I know I'm out of time but in
24 conclusion to tag onto the concept of offering
25 for it to come off of the back end as opposed



1 to come out of future checks as actually
2 outlined by the statute.

3 **MS. TAYLOR:** Yeah the statute says you stop the
4 checks essentially until the credit is
5 consumed.

6 **MR. ALLISON:** Correct and we are trying to avoid an
7 undue hardship ---

8 **MS. TAYLOR:** Right.

9 **MR. ALLISON:** --- in doing that. In agreeing to --
10 for it to come off of the back end we are
11 acknowledging that she has significant
12 permanent disability. This is not a situation
13 where we anticipate that the overpayment of
14 benefits would exceed any permanent partial
15 disability award and put her in a situation
16 where somehow she is -- would owe more in
17 credit than she would be entitled to in future
18 permanent disability benefits and also they are
19 taking a chance by doing that because until she
20 reaches maximum medical improvement arguably
21 she may not ever be entitled to permanent
22 disability benefits and this credit would
23 potentially evaporate completely. But again
24 what we are trying to fashion as a way that she
25 doesn't suffer any hardship by having a reduced



1 amount of ongoing benefits until she is at MMI
2 while still not allowing her to enjoy the
3 benefit of a complete windfall that was based
4 on a pure mathematical error.

5 **MS. JAMES:** All right. Does anybody have any other
6 questions? All right, Mr. Mullinax.

7 **MR. ALLISON:** Thank you.

8 **MR. MULLINAX:** Thank you, Madam Chairman. Members
9 of the panel, this case wouldn't be here today
10 if the carrier and the employer hadn't made the
11 mistake. Regulation 67-1603 puts the burden on
12 the carrier on the employer to compute the
13 wages and file the Form 20. 67-1603 says shall
14 it doesn't say may it says shall. They had all
15 the facts. The carrier and the employer are
16 charged by law with discovering all the facts
17 and the carrier and the employer are charged
18 with getting it right and filing it correctly.
19 They filed -- the date of accident was 10-21-
20 2011 and contrary to what Mr. Allison says Ms.
21 Davis had only worked at that time eight weeks
22 and three days approximately nine weeks. She
23 wasn't qualified under the first provisions of
24 the Code Section 42-1-40 and Commissioner
25 Barden after listening to the testimony and



1 looking at the briefs that were filed with the
2 Commission made a determination that because
3 she had only worked that short period of time
4 that it would not be proper to use her pre-
5 injury wages. Then -- this is a lady who had
6 undergone by the time we got to this hearing
7 three years later or two and a half years later
8 this poor lady had had four surgeries but even
9 during that first and just prior to the second
10 surgery she goes back to work and she
11 progresses in her learning and she progresses
12 in her abilities and the job that she was in
13 and she took her wages from \$12.48 an hour up
14 to \$16.07 an hour and Commissioner Barden even
15 did not raise it even higher which we contend
16 she could have if she chose to do so because
17 she, Michelle Davis, was to have gotten a raise
18 but she could not take the job because she had
19 to have another surgery. These are
20 extraordinary and unusual circumstances. It
21 does exactly or Commissioner Barden did exactly
22 what the cases have said and they are cited in
23 my brief, *Bennett vs. Jerry Smith Builders* a
24 flexible approach with a view toward the
25 ultimate objection -- objective of reflecting



1 fairly a claimants probable future earning loss
2 is to arrive at a fair approximation of a
3 claimant's probable earning capacity. Fairly
4 compensate the employee for work related
5 injuries. *Stevenson vs. Rice Services* and so
6 forth. We have a record. We didn't have a
7 record when she got hurt because she had only
8 been working for eight weeks. We do have a
9 record after she went back as to what she was
10 capable of and what she had demonstrated that
11 she was due as a fair wage and Commissioner
12 Barden found that that was a fair wage and
13 therefore that's why she found the average
14 weekly wage to be \$711.23 a week and the comp
15 rate of \$474.39 which they have been paying
16 since Commissioner Barden's order. The facts
17 of the matter are we didn't cause this problem.
18 We being the claimant. The Defendant has the
19 means and ability to not have a problem like
20 this. They have a duty to file with the
21 Commission documents which are fair. Documents
22 which are true and documents which reflect the
23 facts. Now the bottom line on all of this is
24 they didn't produce any evidence. There is
25 zero evidence in the record of anything that



1 they did. Now they tell you and their attorney
2 makes the argument that oh it was as
3 inadvertent miscalculation and oh they mis-
4 added here and mis-added there. There is no
5 evidence in the record of anything.

6 **MS. JAMES:** Mr. Mullinax, let me ask you a question.

7 Let's say this was a social security matter or
8 some other matter. I mean the amount of money
9 that she was receiving was greater than any
10 wages and I understand there is some question
11 in the record with regards to short term
12 disability that she never applied for. But I
13 mean why -- tell me why she would be prejudiced
14 in having to give the money back. I noticed
15 and of course I don't say anything, "I don't
16 know if it was brought up in the record, I will
17 have to look at it. But I don't know of
18 anything that was brought up with regards to
19 lashes. I saw it in your brief but I don't
20 know how far that actually went in the
21 transcript.

22 **MR. MULLINAX:** Well Commissioner she understood that
23 she was receiving workers' compensation and
24 short term disability in one check.

25 **MS. JAMES:** But she had never applied for the short



1 term disability.

2 **MR. MULLINAX:** But her testimony says that she
3 thought she had and that the check that she
4 received from workers' compensation had short
5 term disability on it.

6 **MS. JAMES:** But if I get something that is not due
7 to me how am I prejudiced for having to pay it
8 back?

9 **MR. MULLINAX:** Because in this case the carrier has
10 the obligation and the duty to file documents
11 with the Commission and be right. It's not up
12 to the claimant to straighten it out. Now it's
13 outside the record but the paralegal in this
14 case, my paralegal, tried to call the adjuster
15 about fifteen times to figure out what was
16 going on and the adjuster never would call
17 back. But that's not in the record
18 Commissioner.

19 **MS. JAMES:** Right. It's not.

20 **MR. MULLINAX:** So we tried to straighten it out but
21 it didn't get done. Now if you allow this to
22 go on with carriers ---

23 **MS. JAMES:** But if you know it's wrong you also can
24 sit it aside.

25 **MR. MULLINAX:** Ma'am ---



1 MS. JAMES: If you're saying at some point outside
2 the record it was known that it was wrong which
3 we don't have any of that in front of us. So
4 I mean if I know I'm getting a check that is
5 beyond what I am supposed to have ---

6 MR. MULLINAX: Well she didn't know that. She
7 testified to that on page 31 of the transcript.
8 That she understood that she knew it was more
9 than she was making but she thought it was a
10 combination of short term disability and
11 compensation benefits. She had never filed a
12 claim ever. She testified to that. I think
13 it's on the next page in the transcript. She
14 was a babe in the woods. She got hurt and she
15 thought they were paying her what they were
16 supposed to. She didn't know. So that's the
17 only explanation that she gave and she's not a
18 college graduate Commissioner and she should
19 have known better but she thought that she was
20 being paid what she was due. Now once
21 Commissioner Barden heard all the facts to --
22 about what she was making she decided on a wage
23 which fairly reflected what this lady had lost.

24 MS. JAMES: And I'm not talking about the wage. I'm
25 talking about the credit right now. I just



1 we're -- when we have to make certain
2 calculations and we have to follow a certain
3 structure what you're basically asking us to do
4 is to go into equity and say well it's not
5 fair. So I'm asking you to give me the basis
6 of the equity.

7 MR. MULLINAX: Well what I'm saying ---

8 MS. JAMES: It has to be, I mean ---

9 MR. MULLINAX: I'm sorry.

10 MS. JAMES: --- and because we are structured around
11 statutes so I saw laches in your brief so I'm
12 just asking you how she's prejudiced?

13 MR. MULLINAX: Well she's prejuduced by the fact
14 that she received this money over that period
15 of time and I'm not saying that it should not
16 be -- well let me see. I found a case, the
17 Brittle case which is cited in my brief and it
18 says they are entitled to credit for the weeks
19 that they have paid but they are not entitled
20 to the excess monies. And that case is a South
21 Carolina case, *Brittle vs. Raybestos-Manhattan*.
22 So therefore there would be no credit under
23 that case and how it was applied to the facts.
24 The facts in that case are different from the
25 facts in this case but the concept of paying



1 more than you are supposed to is the same
2 concept and it's *B-R-I-T-T-L-E v. Raybestos* and
3 it's on page eight of my brief. They delayed
4 for a period of over 100 weeks before they did
5 anything about this. The equity is that the
6 people and there is no evidence in the record
7 whatsoever as to why they did it. They are
8 giving you an explanation today but that's not
9 in the record. There is no testimony. There
10 is no evidence whatsoever. If they can do this
11 they can do anything and then you are not going
12 to punish them. That's not fair. Especially
13 since there is no evidence in the record. Now
14 we could -- we don't know why it was calculated
15 the way it was. Nobody knows because that's
16 not in the record. The *Brittle* case says that
17 you do give them credit for the weeks but they
18 don't get credit for the excess monies but I
19 didn't appeal that ruling by Commissioner
20 Barden where she gave them credit. So that's
21 not necessarily before you but that was a part
22 of the argument and I accepted that because I
23 believe that once the Commissioner ruled she
24 ruled on the basis that they have a duty. They
25 failed to comply with that duty and she gave



1 them credit from the time she filed -- they
2 filed the 20. Amended 20, I'm sorry, in 2011.
3 I'm sorry, in 2015, the amended 20. So the
4 equity is that they should be punished for not
5 doing what they should have done correctly the
6 first time. They get credit. If I had my way
7 it would be credit for the weeks and not the
8 amount of money but the Commissioner didn't
9 rule that way and I did not appeal it so.

10 **MS. JAMES:** Thank you, sir.

11 **MR. MULLINAX:** Thank you.

12 **MS. JAMES:** Mr. Allison.

13 **MR. ALLISON:** Thank you, Madam Commissioner. Very
14 briefly with regard to counsel's contention
15 that there is no evidence in the record
16 regarding the reason or the changing of the
17 Form 20. The original Form 20 is in the record
18 and it reflects the wages that were earned over
19 a period of weeks that were not worked. And
20 that evidence in terms of the amount of time
21 that she worked is very much in the record
22 because she testified to it. Also in the
23 record is the Form 20, revised Form 20,
24 indicating the same amount of dollars earned
25 over the period of her employment but with



1 twice the number of weeks there as the divisor.
2 So it is clear from the evidence in the record
3 and from her testimony that the difference
4 between the two Form 20s was simply the number
5 of weeks that she worked. There's not any, I'm
6 not aware of any dispute about that. That
7 certainly wasn't a dispute in the underlying
8 hearing. Furthermore, what we are proposing
9 here today is something that does not create an
10 unnecessary hardship for the employee. We are
11 not trying to reduce her compensation rate to
12 a point that may cause financial difficulty.
13 What we are asking the Full Commission to do is
14 to allow for a credit for money that she was
15 never entitled to in the first place to simply
16 come out of her future permanent disability
17 award. And so we respectfully request a
18 finding that her average weekly wage is \$487.56
19 and that exceptional circumstances do not exist
20 in conformity with the *Roberts vs. McNair Law*
21 *Firm* case and that credit be applied to her
22 future permanent disability award. Thank you.

23 **MS. JAMES:** Thank you. That concludes this hearing.

24 **MR. MULLINAX:** Thank you very much.

25 **MR. ALLISON:** Thank you. Have a great day. Thank



1 you, Mike.

2 **MR. MULLINAX:** Thank you.

3 (There being no further questions, the hearing
4 concluded at 2:32 p.m.)

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CERTIFICATE

This is to certify that the hearing consisting of twenty-three (23) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on July 19, 2016.

Barbara S. Ham

Barbara S. Ham
Court Reporter

Notary Public for South Carolina
My Commission Expires: April 13, 2026



Michael Mullinax

From: Hollmon, Eugenia [EHollmon@wcc.sc.gov]
Sent: Friday, July 08, 2016 12:28 PM
To: Mark Allison (MAllison@mgclaw.com); mikemullinax@charter.net
Cc: TAYLOR.GRIFFIS@MGCLAW.COM
Subject: Davis

Below is a request for a proposed decision and order

**SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
REQUEST FOR A PROPOSED DECISION AND ORDER**

This document is not a Decision and Order. It is a request for a proposed order. The Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order.

**Michelle Davis v Fraenkische USA LP
SCWCC: 1117221
Commission Panel: Beck, Taylor, James; Chair
Order Assigned to Commissioner: Beck
Court Reporter – Barbara Ham – Creel Court Reporting**

Mark A. Allison
Michael F. Mullinax

Defendants/Appellants
Claimant/Respondent

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and issue a **Full Reversal** of the Single Commissioner's Decision and Order. Aww is \$487.56 and CR is \$ 325.05. Defendants entitled to credit for overpayment back to filing of amended Form 20. Credit to be deducted from the permanency award, if any.

Mr. Allison please prepare a proposed order and submit to the Judicial Department within thirty (30) days of this notice. The proposed order shall be submitted in Word format to appeals@wcc.sc.gov and shared with each Party. Please make sure the Appellate Panel Decision and Order recites the specific Finds of Fact and Rulings of Law of the Single Commissioner's Decision and Order and reflects any comments requested by a Commissioner.

The signature page shall include a signature line for each Commissioner and the first signature should be the name of the Commissioner assigned the case as indicated above.

If you have any questions, please do not hesitate to email me at ehollmon@wcc.sc.gov or call at 803.737.5737

Judicial

Transmitted via email this 8 July 2016

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 1117221

Michelle Davis

**EMPLOYEE,
CLAIMANT/RESPONDENT,**

VS.

Fraenkische USA LP

EMPLOYER,

AND

Maryland Casualty Company c/o Zurich North
America

**CARRIER,
DEFENDANTS/APPELLANTS.**

Appellate Panel Review held in Columbia, South
Carolina, on June 20, 2016 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

August 10th, 2016

APPEARANCES: Claimant/Respondent represented by Michael F. Mullinax, Esquire
Defendants/Appellants represented by Mark A. Allison, Esquire

STATEMENT OF THE CASE

This matter was originally heard before Commissioner Susan Barden on January 8, 2016 to determine the issues as set forth on Forms 21 and 22, including the determination of Claimant's average weekly wage and compensation rate, as well as Defendants' entitlement to credit for the overpayment of temporary disability benefits.

Following Claimant's admitted work accident, Defendants paid her temporary total disability benefits in the amount of \$704.92 per week, the maximum compensation rate for 2011. The compensation rate paid was based on a mathematical error, which produced an average weekly wage of \$1,281.54. The original calculation of wages was based on Claimant having worked one-half of the weeks she actually worked, resulting in a compensation rate that was twice the amount of her actual pre-accident earnings. The parties agreed that Defendants paid weekly benefits in excess of Claimant's compensation rate; however, the parties disagreed about how to calculate her compensation rate and whether Defendants were entitled to a credit for the overpayment of benefits as a result of the mathematical error.

Defendants filed an amended Form 20 on October 15, 2015 reflecting an average weekly wage and compensation rate based on Claimant's pre-injury earnings. Defendants then filed a Form 21 to address the calculation of Claimant's average weekly wage and compensation rate and to seek credit for the overpayment of temporary compensation. Claimant sought calculation of her average weekly wage based on her post-accident earnings and what she would have earned had she been promoted. Further, Claimant denied Defendants' entitlement to a credit for the overpayment of temporary compensation benefits.

STATEMENT OF EVIDENCE

Claimant testified at the Single Commissioner hearing that she began working for the Employer as a temporary employee through Phillips Staffing Agency in 2011, approximately three months before being hired as a permanent, full-time assembly line worker on August 22, 2011. (Hrg. Tr. pp. 11-12). Claimant was injured on October 21, 2011, approximately nine weeks after her permanent hire date. (Hrg. Tr. p. 12, ll. 2-8). At the time of her injury, she was earning \$12.48 per hour. (Hrg. Tr. p. 28, ll. 18-24; p. 29, ll. 1-3). Based on her pre-injury

wages, Claimant's average weekly wage was \$487.56 with a corresponding compensation rate of \$325.05.

After conservative treatment, Claimant returned to work and subsequently received various pay increases. (Hrg. Tr. pp. 13-18). She first earned a pay increase to \$13.00 per hour, followed by an increase to \$16.07 per hour. (Hrg. Tr. p. 14, ll. 8-13, p. 15, ll. 2-4, p. 16, ll. 6-9). Claimant no longer works for the Employer.

Claimant testified at the hearing that after her injury, she received temporary total disability checks that were approximately \$217.00 more per week than she had ever earned, even before taxes were deducted. (Hrg. Tr. p. 29, ll. 8-11). Claimant admitted that the weekly checks paying \$704.92 were unusual and "seem[ed] a little excessive." (Hrg. Tr. p. 30, ll. 12-17). However, Claimant did not advise Defendants of the excessive payments.

Claimant first testified that she had applied for short-term disability benefits, but after seeking clarification from her attorney, she confirmed that she was only receiving payments from the workers' compensation carrier. (Hrg. Tr. p. 29, ll. 15-25, p. 30, ll. 1-5). She admitted that she never pursued or claimed short-term disability benefits through her employer. (Hrg. Tr. p. 30, ll. 6-8).

Single Commissioner Decision and Order

By Decision and Order dated March 1, 2016, the Hearing Commissioner issued a Decision and Order.

FINDINGS OF FACT

1. I find that Michelle Davis, on October 21, 2011, sustained a compensable injury by accident.
2. I find that the Employer/Carrier calculated and filed a Form 20 on December 13, 2011 showing an AWW of \$1,281.54 and a compensation rate of \$854.40; and that Michelle Davis has been paid at the maximum comp rate, \$704.40 since that time, based upon the Form 20

prepared and filed by the Employer/Carrier. The Carrier continued to file reports with the Commission confirming this rate.

3. I find that after her initial injury, Michelle Davis returned to and was paid an initial pay rate of \$12.48 per hour but received a shift change pay raise to \$13.00 per hour and that she continued to work both overtime and regular hours at her place of employment. It appears that she did receive an additional pay increase, which, according to her testimony, was based upon a shift change, to \$13.35 per hour on or about August 31, 2012.

4. I find however, that on February 15, 2013, as she continued to work after her injury, she received a promotion and a pay raise to \$16.07 per hour and that she worked both regular and overtime hours at that rate of pay until July 1, 2013 when she left employment for her second surgery.

5. I find that as set forth above in § 42-1-40 that exceptional reasons exist in the case before me to find that the average weekly wage for the Claimant should reflect the sum of \$16.07 per hour times 40 hours per week as is set forth on APA Exhibit B, page 3, so that her average weekly wage would be \$711.23 and her compensation rate would be \$474.39. Based upon her work habits and work history, it would be unfair to her to resort to her initial rate of compensation as her work history demonstrates conclusively and factually that this is the amount which would most nearly approximate the amount which she would be earning at this time, were it not for her injury.

6. I further find that it is unfair to the Claimant to award a credit to the Carrier/Employer from the date of the accident as the Defendant Carrier/Employer unilaterally had control of the completion and filing of the Form 20 immediately after Claimant's injury, and have continuously, without any objection, paid Claimant based on that calculation, up until the filing of the revised Form 21 in this case on October 16, 2015. Claimant testified that she was under the impression that the compensation that she was receiving was based on not only what she should get from workers' compensation benefits, but also, she believed that she had a short or long term disability policy that would be added to what she received for her injury and therefore, based upon this belief, she did not question the amount, as this calculation had been determined by the Employer and paid from the beginning. The Defendants contend that Claimant would receive a "windfall" in the event the Commission fails to grant a credit back to the date of the accident. The Claimant argues that the insurance carrier had the sole responsibility under the Act, for the authorization, calculation, and payment of compensation, and that the erroneous payment made by the Defendant was not due to or caused by any action on the part of the Claimant. *See Brittle v. Raybestos-Manhattan*, 241 S.C. 255, 127 S.C.2d. 884 (1962). Claimant also contends that it would constitute a hardship to her as she has not reached MMI, and the compensation under the Act is her sole income. S.C. Code Ann. § 42-9-210 gives the Commission discretion on whether to deduct payments the Carrier/Employer made for temporary disability benefits before the Claimant reached MMI. Claimant has not reached MMI at this time. After careful consideration of the facts of this case, and the relevant case law as set forth in the briefs of the Claimant and that of the Defendant on the issue, I conclude and find as a fact that the Carrier, without satisfactory explanation, calculated incorrectly the average weekly wage and compensation due to the Claimant and paid that for a period of over three years

without taking any action to correct same.

7. I find that pursuant to the provisions of S.C. Code Ann. § 42-9-210, that it would be unfair and unjust to award a credit for the overpayment of temporary total disability benefits from the time of the accident, but that the Employer/Carrier will be entitled to be deducted from any final permanency award granted to the Claimant to be calculated from the date of filing of the Amended Form 20, to wit: October 15, 2015.

CONCLUSIONS OF LAW

1. S.C. Code § 42-1-40 defines "average weekly wages."
2. S.C. Code § 42-1-100 defines "compensation."
3. S.C. Code § 42-9-210 defines "deduction from compensation payments made by Employer when note due and payable."
4. Reg. 67-603 defines "calculating the compensation rate."

ORDER

1. Michelle Davis, Employee/Claimant, sustained a compensable injury by accident on October 21, 2011, while in the employment of Fraenkische USA, LP and is entitled to workers' compensation benefits to be provided by Employer/Carrier, pursuant to Title 42 in this Order. Claimant's average weekly wage is calculated to be paid at the rate of \$16.07 per hour and the average weekly wage therefore is \$711.23 per week, with a corresponding compensation rate of \$474.39. [See Claimant's APA, Exb B, page 3].

2. The Employer/Carrier is entitled to a credit from October 15, 2015, the date of the filing of the Amended Form 20 in this case, which amounts to the difference between the compensation rate now being paid of \$704.92 and the compensation rate which I find to be proper, \$474.39, which would result in a credit of \$230.53 per week. This credit shall be computed and deducted from any final permanent award to which Claimant is found to be entitled. See for example, Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 127 S.E.2d 884 (1962) where Carrier was denied credit for overpayment citing Lawson's Workman's Compensation Law, Volume 2, page 24, Section 57.47

3. The Claimant shall be paid the compensation rate of \$474.39 beginning with the first payment due after the date of this Order.

4. No hearing costs are assessed.

Within the statutory period, Defendants/Appellants filed an Application for Review setting forth the reasons for appeal, copies of which were furnished to all interested parties prior

to oral arguments which took place before the Appellate Panel on June 20, 2016.

STANDARD OF REVIEW

Under S.C. Code Ann. § 42-17-50, an Appellate Panel is empowered to review an appealed award, weigh the evidence as presented at the initial hearing, and, if good grounds are shown, make its own factual findings and legal conclusions consistent with or inconsistent with the Hearing Commissioner.

Based upon its review of all the evidence in the record in this case, the Panel hereby reverses the Order of the Hearing Commissioner in full. Accordingly, the Panel makes the following Findings of Fact:

FINDINGS OF FACT

1. Defendants calculated and filed a Form 20 on December 13, 2011 reflecting an average weekly wage of \$1,281.54 and a compensation rate of \$854.40. Claimant was paid temporary total disability benefits at the maximum compensation rate of \$704.92 from that time forward. Defendants calculated this rate based on one-half of the number of weeks Claimant had actually worked, mistakenly viewing the biweekly checks as weekly checks. Accordingly, a mathematical error resulted in these calculations.

2. Upon discovering the error, Defendants filed an amended Form 20 on October 15, 2015 reflecting an average weekly wage and compensation rate based on Claimant's properly calculated pre-injury earnings. This Form reflected an average weekly wage of \$487.56 and a corresponding compensation rate of \$325.05.

3. Claimant's average weekly wage and compensation rate are to be calculated using the standard statutory method outlined in S.C. Code Ann. § 42-1-40. Exceptional circumstances do not exist to deviate from this standard. *See Roberts v. McNair*, 366 S.C. 50, 54, 619 S.E.2d 453,

456 (Ct. App. 2005) (holding post-injury pay increases do not justify deviating from the method of average weekly wage calculation prescribed under S.C. Code Ann. § 42-1-40, as such an argument could be made in nearly each and every workers' compensation claim).

4. The Hearing Commissioner erred in finding that exceptional reasons exist to deviate from the standard method of calculation and to use an alternative method of calculation.

5. The Hearing Commissioner erred in calculating Claimant's average weekly wage and compensation rate based on the post-injury wage of \$16.07 per hour based on a 40 hour work week.

6. Based on the standard statutory method of calculating Claimant's pre-injury wages pursuant to S.C. Code Ann. § 42-1-40, Claimant's average weekly wage is \$487.56 with a corresponding compensation rate of \$325.05.

7. The Hearing Commissioner erred in finding that Defendants are only entitled to a credit which amounts to the difference between the compensation rate of \$704.92 and \$474.39, for a total credit of \$230.53 per week.

8. Defendants are entitled to a weekly credit of \$379.87, representing the difference between the paid compensation rate of \$704.92 and the proper compensation rate of \$325.05, for each week an overpayment of benefits was made from the date of the filing of the amended Form 20 on October 15, 2015 to the date weekly payments began in the amount of \$325.05. Pursuant to S.C. Code Ann. § 42-9-210 and Reg. 67-1603, Defendants' credit is to be computed and deducted from any final permanent award to which Claimant is found to be entitled, if any.

9. The Hearing Commissioner erred in finding that Claimant testified that she believed that she had a short term or long term disability policy that would be added to her weekly workers' compensation benefits and that, based upon this belief, she did not question the amount of the

weekly checks. Claimant testified at the hearing that she never pursued, claimed, or received short-term disability benefits. She testified that the only compensation she received was from "workman's comp." Accordingly, the Hearing Commissioner's finding as it references Claimant's belief regarding short term or long term disability policies is vacated.

10. The Hearing Commissioner erred in finding that Defendants failed to provide a "satisfactory explanation" regarding the miscalculation of Claimant's average weekly wage and compensation rate. Defendants' entitlement to credit for the overpayment of benefits is not based in equity or fairness. Accordingly, the Hearing Commissioner's finding is vacated.

CONCLUSIONS OF LAW

1. Pursuant to South Carolina Code Annotated § 42-1-40, Claimant's average weekly wage and compensation rate are to be calculated based on the standard method as set forth in the statute by considering her pre-injury wages. Claimant's average weekly wage is \$487.56 and the corresponding compensation rate is \$325.05. The amended Form 20 filed on October 15, 2015 reflects the proper calculation.

2. Pursuant to *Roberts v. McNair*, 366 S.C. 50, 54, 619 S.E.2d 453, 456 (Ct. App. 2005), Claimant's post-injury pay increases do not justify deviating from the method of average weekly wage calculation prescribed by South Carolina Code Annotated § 42-1-40. Accordingly, no exceptional circumstances exist to justify a deviation from the standard method of calculation.

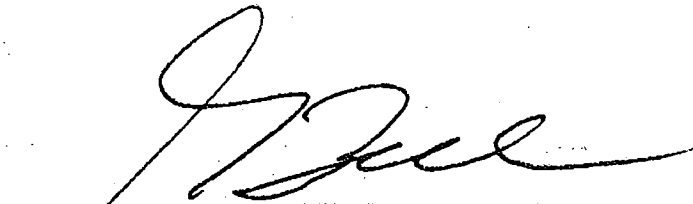
3. Pursuant to South Carolina Code Annotated § 42-9-210 and Regulation 67-1603, Defendants are entitled to credit for overpayment of temporary disability benefits back to the filing of the amended Form 20 on October 15, 2015. Defendants are entitled to a weekly credit of \$379.87 dating back to October 15, 2015 through the date payments are paid at the proper compensation rate of \$325.05. This credit shall be deducted from a future award of permanency,

if any.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Single Commissioner's Order is **REVERSED IN FULL**.

IT IS SO ORDERED.



Commissioner T. Scott Beck
For the Appellate Panel

WE CONCUR:



Commissioner Aisha Taylor



Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on August 16, 2016

RECEIVED

AUG 30 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Commissioners T. Scott Beck, Aisha Taylor, and Melody L. James

W.C.C. FILE NO. 1117221

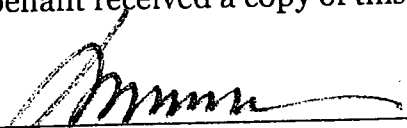
Michelle M. Davis
Employee/Clamant Appellant

vs.

Fraenkische USA, LP
Employer, and
Zurich North America,
Carrier Respondents

NOTICE OF APPEAL

Michelle M. Davis appeals the decision of the Workers' Compensation Commission Appellate Panel, Commissioners T. Scott Beck, Aisha Taylor and Melody L. James, dated August 16, 2016. Appellant received a copy of this decision on August 16, 2016.


Michael F. Mullinax (S.C. Bar No. 4133)
Mullinax Law Firm, P.A.
Post Office Box 2665
Anderson, South Carolina 29621
(864) 261-6242
(864) 261-6680 (fax)
Attorney for the Appellant

Other Counsel of Record:
Mark A. Allison
McAngus, Goudelock & Courie, LLC
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000
Attorney for the Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Commissioners T. Scott Beck, Aisha Taylor, and Melody L. James

W.C.C. File No: 1117221
Appellate Case No.: 2016-001788

Michelle Davis
Employee/Clamant Appellant

vs.

Fraenkische USA, LP
Employer, and
Maryland Casualty Company
c/o Zurich North America
Carrier Respondents

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 4, 2016


Michael F. Mullinax (S.C. Bar No. 4133)
Mullinax Law Firm, P.A.
Post Office Box 2665
Anderson, South Carolina 29621
(864) 261-6242
• (864) 261-6680 (fax)
Attorney for the Appellant