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**SC Court of Appeals**

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

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

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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**FINAL BRIEF OF APPELLANT**

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COURT SHOULD REVERSE THE APPELLATE PANEL'S CALCULATION OF CLAIMANT'S AVERAGE WEEKLY WAGE (AWW) AND REINSTATE THE DECISION OF THE SINGLE COMMISSIONER PURSUANT TO S.C. CODE ANN § 42-1-40?
- II. WHETHER THIS COURT SHOULD REVERSE THE APPELLATE PANEL'S AWARDED CREDIT FOR THE OVERPAYMENT OF TEMPORARY TOTAL DISABILITY (TTD)?

## 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 Michelle Davis's (Appellant's) average weekly wage and compensation rate and Respondent's entitlement to credit for the overpayment of temporary disability benefits. Respondent's requested calculation of Appellant's average weekly wage was based on the standard statutory method of considering her pre-accident earnings. Further, Respondent requested a credit for the overpayment of temporary compensation based on an incorrectly calculated compensation rate, submitted by Respondent's Form 20 on December 13, 2011. Appellant requested calculation of her average weekly wage based on her demonstrated history of weekly wages with the Respondent and denies Respondent's entitlement to a credit for the overpayment of temporary compensation benefits.

By Order dated March 1, 2016, the Hearing Commissioner, Susan Barden found that exceptional reasons existed to calculate Appellant's average weekly wage based on her wage earning history so that her average weekly wage would be \$711.23 and her compensation rate would be \$474.39. Commissioner Barden also found that it would be unfair to award a credit to Respondents 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 Order of Commissioner Barden was appealed within due time to the

Appellate Panel of the Full Commission, which on August 16, 2016, by letter instructions, granted a full reversal without the inclusion of any reasons, findings of fact or conclusions of law therein. The Order of the Appellate Panel was prepared by defense counsel using their own judgment and not that of the Commission, and submitted to the Appellate Panel, and issued by the Panel, as the Order of the Commission, reversing in its entirety, the Order of the Single Commissioner, which reduced Claimant's average weekly wage to \$487.56 and the corresponding compensation rate to \$325.05 and granting a full credit to the Respondents in a weekly amount of \$379.87 to be calculated from October 15, 2015 to the date of payments, to Claimant in the amount of \$704.92 with such credit to be deducted from a future award of permanency.

#### STATEMENT OF THE EVIDENCE

Michelle Davis, (Appellant) began working for the Fraenkische (Respondent) as a temporary employee approximately three months before being hired as a permanent employee on August 22, 2011. (R. pp. 83 - 84). Davis was injured on October 21, 2011, approximately nine weeks after her permanent hire date. (R. p. 84, lines 2 - 8). At the time of her injury, she was earning \$12.48 per hour. (R. p. 100, lines 18 - 24; p. 101, lines 1 - 3).

After initial conservative treatment, Davis had returned to her job with the Respondent and Michelle Davis 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 (R. p. 14) (R. pp. 85 - 90); 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 2<sup>nd</sup> surgery of the four surgeries she has now undergone. (R. pp. 96 - 98) Davis was terminated by the Respondent after her 2<sup>nd</sup> surgery. (R. p. 100)

Respondent paid 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 submitted by the Respondent, filed with the Commission by the Respondent on December 13, 2011 pursuant to R. 67-1603, and was repeatedly placed on Form 15's and other Commission filings by the Respondent. The payments were based on a mathematical error, (evidently, although no testimony or any evidence of the reason was provided) which produced an average weekly wage of \$1,281.54. The parties agree that Davis was paid weekly benefits in excess of her compensation rate; however, the parties disagree about how to calculate her compensation rate. Respondent filed an amended Form 20 on October 15, 2015 reflecting an average weekly wage and compensation rate based on Davis's pre-injury earnings. Davis then filed a Form 21 to address the issues set forth above.

#### STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. Carolinas Recycling

Grp. vs. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E. 2d 324 (Ct. App. 2012).

Under the scope of review established in the APA, the Court may not substitute its judgement for that of the Appellate Panel as to the weight of the evidence on questions of fact, but, may reverse or modify the Appellate Panel's decision if the Appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." See S.C. Code Ann. §1-23-380 (5)(3).

## ARGUMENT

### I. WHETHER THE COURT SHOULD REVERSE THE APPELLATE PANEL'S CALCULATION OF CLAIMANT'S AVERAGE WEEKLY WAGE (AWW) AND REINSTATE THE DECISION OF THE SINGLE COMMISSIONER PURSUANT TO S.C. CODE ANN §42-1-40?

The Workers' Compensation Act defines "average weekly wage" (AWW) 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). Davis only worked 9 weeks before her injury so the Appellate Panel committed an error of law by using the 9 week period to calculate her AWW. In addition it is an error of law and an abuse of discretion and it is both impractical and unfair to use the primary

method because Davis only been employed for approximately nine weeks and there exists additional work history which more clearly and conclusively demonstrate Davis's work potential and future earning capacity. Bennett v. Gary Smith Builders 271 S.C. 94, 98, 245 S.E. 2d 129, 131 (1978).

When the Commission determines the primary method of calculation is not permissible [as it should have in this case], 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 Davis continued to work (even though she was injured), and progressed 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 which 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 Respondent]. This method likewise, is not practical nor fair in that it does not take into account that the Davis 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 (R. p. 98); 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 Davis. The final alternative for calculating average weekly wage is to be employed when “exceptional reasons” exist that make it “unfair, either to the Employer/Respondent or the employee,” to use the alternatives set forth above. *Id.* In that event, S.C. Code Ann § 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.

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 probable future earning loss. Bennett v. Gary Smith Builders 271 S.C. 94, 98, 245 S.E. 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 S.E. 2d at 131.” See also Stokes v. First National Bank 306 S.C. 46, 410 S.E. 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 S.E. 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). This is exactly the method used by the Hearing Commissioner in this case.

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. (R. pp. 96 - 98). Davis should also be entitled to receive consideration of an average “overtime” which was exhibited and worked during her work history. (R. p. 13)

Taking all of this in consideration, the Commissioner Barden applied the Law in this State and found that “exceptional circumstances” existed and that Davis 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 (R. p. 13).

II. WHETHER THIS COURT SHOULD REVERSE THE APPELLATE PANEL’S AWARDING OF CREDIT FOR THE OVERPAYMENT OF TTD?

Appellant would state that any overpayment as determined by the Commission, was due to and solely caused by the Respondent in initially filing a Form 20 which was in error. The Respondent was and is mandated by Regulation 67-1603 to calculate the average weekly wage and the operative word of the Regulation is “shall”. The Respondent, through it’s 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 Respondent continued to pay benefits for over 100 weeks at the rate set out and calculated by it in its Form 20 dated October 2011. The erroneous payment was not due to or caused by any action on the part of Davis and, Davis should not be penalized at this time.

The Respondents are the party with all of the facts; the Respondents are the party with the means of discovering all of the facts, and the Respondents are the party that is charged by **LAW** with getting the facts right. Michelle Davis 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. The Appellant in this case testified that she had been led to believe that she was entitled to workers’ compensation and short or

long term disability. (R. pp. 102 - 103) She testified that she believed her check stubs were based on her injury and “short-term disability”.

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

A: Yes. (R. p. 109, 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. (R. p. 102, 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.” (R. p. 102, line 25; p. 103, lines 1 - 6)

The precedent in this state specifying that the Respondent is not entitled to “dollar” credit, is set forth in 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 “dollar” 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).

The Respondents have paid compensation each week and they are entitled to credit for each week’s payment; however, as cited above, they are not entitled to be reimbursed for the excess in dollars that was paid.

It would seem that based upon the affirmative conduct required of the Respondent by the Commission that “Laches” would be an additional 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 Respondents 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 Appellant at this time does not seem reasonable, fair or proper.

#### CONCLUSION

The Appellate Panel in this case has ignored the guiding principal underlying the Workers' Compensation system in this state and the only check and balance to the erroneous decisions of the administrative tribunal are the Courts.

“The guiding principle undergirding Workers' Compensation system [is] that the Act is to be liberally construed in favor of the Claimant.” Hutson v. S.C. State Ports Authority 399 S.C. 381, 732 S.E. 2d 500 (2012).

For the foregoing reasons, the Court should reverse the Decision and Order of the Appellate Panel in its entirety, as the Appellate Panel has committed error of law in its interpretation of S. C. Code Ann. §42-1-40, and in its application of credit for overpayment of TTD. Based upon case law and precedent in South Carolina as stated above, including Professor Larson, the entitlement to credit should be reversed in its entirety.

Respectfully submitted,



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**CERTIFICATE OF COUNSEL**

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

  
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