THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1406130

Billy Wayne Herndon, Employee, Claimant .....Appellant-Respondent,

v.

G & G Logging, Inc., Employer, and
Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier..... Respondents-Appellants.

RESPONDENTS-APPELLANTS' RESPONDENTS BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES, ACTS AND REGULATIONS

STATEMENT OF ISSUES ON APPEAL

I. DID THE COMMISSION PROPERLY DETERMINE THAT EXCEPTIONAL CIRCUMSTANCES EXIST IN THIS CASE AND CORRECTLY HOLD THAT CLAIMANT'S AVERAGE WEEKLY WAGE WAS $297.63 WITH A CORRESPONDING COMPENSATION RATE OF $198.47?

II. DID THE COMMISSION PROPERLY AWARD RESPONDENTS A CREDIT BASED ON OVERPAYMENT OF BENEFITS AT THE HIGHER COMPENSATION RATE?

STATEMENT OF THE CASE

Appellant-Respondent Billy Wayne Herndon, Claimant below, filed a Form 50 on June 9, 2014, alleging injury to "both shoulders, neck, back, chest, left hand" arising out of a work-related accident that occurred on May 12, 2014. (R. p. 53). His employer at the time of the accident, G&G Logging Company ("G&G Logging" or "Employer"), and their workers' compensation insurer, Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. (jointly referred to herein as "Respondents"), filed a Form 51 admitting that the Claimant was injured in a work-related accident but denying the nature and extent of his alleged causally-related injuries and permanent disability, if any. (R. p. 54). Respondents also filed a Form 20 based on the actual wages Claimant had earned from January 18, 2014 to May 9, 2014, with a resulting average weekly wage ("AWW") of $695.00 and a corresponding compensation rate of $463.36. (R. p. 52).

Claimant filed an Amended Form 50 on September 30, 2015, alleging that he had injured his left upper extremity in addition to the body parts alleged in his prior Form 50. Claimant sought entitlement to continuing medical treatment and to total and permanent disability benefits pursuant to Section 42-9-10. (R. p. 55). Respondents filed a Form 51, again admitting that Claimant had been involved in a work-related accident but denying the nature and extent of his injuries and/or that he was permanently disabled. (R. p. 56).

The parties filed Pre-Hearing Briefs and APA submissions. Among other things, Respondents sought a determination of whether they were entitled to a credit of overpayment of temporary total disability ("TTD") paid after the date Claimant reached MMI. (Supp. R. pp. 1-2). Included in Respondents' submission was a vocational assessment performed on February 2, 2016 by George H. Page of Page Rehabilitation Services, Inc. (R. pp. 286-291). Respondents

submitted an Amended Pre-Hearing Brief and Amended Notice of Witnesses and Written Medical Reports on April 28, 2016. In their Amended Pre-Hearing Brief, Respondents noted that they had not received requested copies of certain tax information from Claimant and employment records from Claimant's prior employer, Bootle Logging, and asserted that Claimant's AWW needed to be recalculated based on evidence received during discovery. (Supp. R. pp. 3-13).

The parties were heard by Single Commissioner Michael Campbell, II on May 3, 2016. In an Order dated July 26, 2016, the Single Commissioner found that Claimant sustained an admitted injury to his neck by accident arising out of and in the course of his employment; that the additional body parts of left shoulder, left arm, left hand and fingers were causally related to the admitted work injury; and that Claimant is totally and permanently disabled under Section 42-9-10(B). The Single Commissioner determined that the AWW as calculated on the August 7, 2014 Form 20 was correct and based Claimant's award on a compensation rate of $463.33. (Single Commissioner Decision and Order, dated July 26, 2016, R. pp. 1-26) ("Single Commissioner Decision").

Respondents timely appealed to the Full Commission asserting, among other things, that the Single Commissioner's determination of Claimant's AWW was in error. (R. pp. 57-60).[1] The parties filed briefs with the Commission. (Supp. R. pp. 14-39) (Supp. R. pp. 41-76).

An Appellate Panel of the Full Commission heard the parties on October 10, 2016, and issued a decision on February 23, 2017. In a unanimous decision, the Commission affirmed in part and reversed in part the Single Commissioner Decision, finding, among other things, that

[1] Respondents also challenged the Single Commissioner's basis for giving greater weight to Dr. Johnson's medical opinion, as well as the determinations that Claimant suffered compensable injuries to multiple body parts and was totally and permanently disabled. (R. pp. 57-60). Those issues are addressed in Respondents' Cross-Appellants Brief.

Claimant's alleged additional body parts including the left shoulder, left arm, left hand and fingers are causally related to the admitted neck injury, and that Claimant is entitled to total and permanent disability. However, the Commission revised Claimant's AWW, which was determined to be $297.63, with a corresponding compensation rate of $198.47, and allowed Respondents a credit for weekly compensation paid at the incorrect rate. In reaching its decision on the correct AWW, the Commission made certain factual findings including that: after Claimant voluntarily retired, he returned to the workforce working part-time to supplement his income, earning $7,780.00 in 2012 and $8,806.50 in 2013; Claimant was hired part-time at G&G Logging and earned $9,285.00; Claimant testified that he intended to limit his earnings in 2014 to the Social Security retirement offset cap of $15,480.00; Claimant advised George Page of his intention in a vocational assessment; and that "exceptional reasons exist in this case that require recalculation of Claimant's average weekly wage to obtain a result that is fair and just to both parties." (Appellate Panel Decision and Order, filed Feb. 23, 2017, R. pp. 27-51) ("Commission Decision").

Claimant timely appealed the wage issue to this Court.

FACTUAL BACKGROUND

Claimant, who was 64 years old at the time of his injury, lives in Walterboro, South Carolina. (R. p. 87, lines 6-19). Claimant testified that he retired in January 2012 after working for Bootle Logging for approximately 20 years, driving logging trucks. (R. p. 93, lines 1-10; p. 99, lines 14-16) (R. p. 327, line 19 – p. 328, line 16). After he retired voluntarily from Bootle in 2012, he began receiving Social Security Retirement benefits and was aware of the Social Security Retirement limit on how much he could make. (R. p. 117, lines 6-21). Although he testified that he could not recall "right off" what that limit was, when asked if $15,000 sounded

like "something that you may have said to somebody at some point in this claim," Claimant responded, "I could have." (R. p. 117, line 22 – p. 118, line 6). He worked for Bootle part-time "helping them when they needed." (R. p. 328, lines 4-7) (R. p. 99, line 14 – p. 100, line 4). Claimant agreed that, during the two years that he worked for Bootle after his retirement, he earned about $7,700 in 2012 and $8,800 in 2013. (R. p. 118, lines 7-13).

Claimant was hired by G&G Logging in January 2014 on a part-time basis. (R. p. 327, line 22 – p. 328, line 14). Although Claimant denied that, after he retired it was his intention to not exceed the Social Security Retirement limit on earnings, saying, "I just worked, you know, when he needed somebody to work. It wasn't really no limit on what I was going to work," (R. p. 118, line 23 – p. 119, line 4), he later was asked:

> Q: **And was it your intention in 2014 then to earn as much as you could without reducing your retirement benefits?**
>
> A: **Yes, sir.**

(R. p. 119, lines 19-22) (emphasis added).

When asked, Claimant explained that he had discussed the earnings limit with his Employer, saying:

> A: Me and Greg talked about what I could make and then what we would do after I made that. We would make that decision when we got to that point.
>
> Q: Okay. So y'all had a discussion about giving you work up to a certain point and that was about $15,000?
>
> A: And then we would discuss what we was going to do from then on.

(R. p. 120, lines 7-16). Claimant explained that he continued to receive his full Social Security Benefits while he was receiving TTD payments at the rate of $463.36 because "[t]hey told me that was not earned income and I didn't have to turn it in." (R. p. 120, line 22 – p. 121, line 10).

Mr. Page reported that, in the course of his January 22, 2016 interview with Claimant, Claimant told him that he had "retired at age 62 and began working part-time and revealed he

could make up to $15,000 per year. He noted he would work until he reached the $15,000 and not work the rest of the year. He noted G&G was aware." (R. p. 288). In fact, the jobs that Mr. Page recommended for Claimant "fit within [Claimant's] criteria of making no more than $15,000 per year due to his Social Security income." (R. p. 291).

Mr. Page confirmed this conversation at the Single Commissioner hearing:

> Q: And what did Mr. Herndon say about his retirement benefits and his plan to earn wages?
>
> A: In our conversation he indicated he had retired at age 62 and that he – he needed to work and that he could make up to $15,000 a year without being penalized.
>
> . . .
>
> A: Did Mr. Herndon have any plan for working for G&G Logging with regard to the … limitation on earnings?
>
> A: Yes.
>
> Q: And what is your understanding based on your conversation with Mr. Herndon as to his plan while working for G&G Logging?
>
> A: On page 3 of my report … I'll just read what I said. "Mr. Herndon retired at age 62 and began working part-time and revealed he could make up to $15,000 per year. He noted he would work until he reached $15,000 and not work the rest of the year. He noted G&G Logging was aware."

(R. p. 140, line 7 – p. 141, line 9).

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is governed by S.C. Code Ann. § 1-23-380 (Supp. 2014) of the Administrative Procedures Act (hereafter "the APA"); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a Commission decision should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5).

Review of the Commission's factual findings is governed by the substantial evidence standard. "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting* Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); *see also* S.C. Code Ann. § 1-23-380(A)(5)(e). "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 conclusion the administrative agency reached in order to justify its action." Frame v. Resort Services Inc., 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004).

Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). However, workers' compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

ARGUMENTS

I. The Commission properly determined that exceptional circumstances exist in this case and correctly held that Claimant's average weekly wage was $297.63 with a corresponding compensation rate of $198.47.

As noted above, the Single Commissioner adopted the Claimant's AWW as calculated on the Form 20, which simply divided Claimant's total wages by the 13 weeks that he worked for G&G Logging prior to his injury. This produced at an AWW of $695.00 with a corresponding compensation rate of $463.36. Because Claimant had worked fewer than 52 weeks for G&G Logging prior to his injury, this tracks the first alternative method under Section 42-1-40. The Commission reversed, finding exceptional circumstances exist in this case, given Claimant's voluntary retirement in 2012, his part-time employment in each of the years since his voluntary retirement, and his stated intent to work only up to the Social Security retirement offset limit. As a result, the Commission based Claimant's AWW, not on the amount he had earned prior to his injury, but on the amount he could have earned without exceeding the Social Security retirement cap. (Commission Decision, R. pp. 42-43, 48). On appeal, Claimant apparently argues that the first alternative should be applied, which would result in an AWW of $695.00. However, that alternative is impermissible under the facts of this case because it would not result in an AWW that is fair and just to both parties.

Section 42-1-40 provides a primary and three alternative methods of determining AWW Pilgrim v. Eaton, 392 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). In a majority of cases, AWW is "calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred ... 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.

However, Section 42-1-40 provides alternative methods of calculating AWW where employment prior to the injury was less than 52 weeks:

> 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.

S.C. Code Ann. § 42-1-40 (emphasis added).

Finally, "[w]hen 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." S.C. Code Ann. § 42-1-40 (emphasis added). In calculating AWW under this provision, the Commission exercises flexibility, always keeping in mind that the "objective of the AWW calculation is to arrive at a figure that is fair to both the employee and the employer." Bennett v. Gary Smith Builders, 271 S.C. 94, 99, 245 S.E.2d 129, 131 (1978).[2]

[2] Citing Hutson v. South Carolina State Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012), Claimant incorrectly implies that the *only* two principles that are applied to all workers' compensation cases are that "the Act is to be liberally construed in favor of the claimant," and that "an award may not rest upon surmise, conjecture, or speculation." 399 S.C. at 387, 732 S.E.2d at 503. In Hutson, the Supreme Court indicated that those were the "two principles which form the lens through which" it viewed the case before it at that time (which did not concern a dispute over AWW). Id. When analyzing the proper calculation of a claimant's AWW, it is equally important that the result be fair and just to both parties. Foreman v. Jackson Minit Markets, Inc., 265 S.C. 164, 170, 217 S.E.2d 214, 216 (1975) (Section 42-1-40 requires a result that is fair to both the employee and the employer).

Where, as is the case here, an employee has worked less than 52 weeks prior to his injury, the Commission "is required to consider which of the alternative methods for calculating the average weekly wage is most appropriate based on the facts." Pugh v. Piedmont Mech., 396 S.C. 31, 39, 719 S.E.2d 676, 680 (Ct. App. 2011). Before the Commission can use the first alternative method of computing the AWW, which is what Claimant is advocating here, the Commission must find that the first alternative method is practicable and that "the calculation ... yield[s] a result which is 'fair and just to both parties.'" Pilgrim, 391 S.C. at 46, 703 S.E.2d at 245. Here, the Commission properly found that using the first alternative method resulted in an AWW that was not fair to the employer. (Commission Decision, R. pp. 39-40 ("an average weekly wage based upon purported earnings 4.5 times greater than Claimant's history of earnings following his retirement is grossly unfair and unjust to the Defendants")).

The Commission also found, under the facts of this case, that exceptional reasons exist to calculate Claimant's AWW. (Commission Decision, R. pp. 39, 42). Although Claimant cites Elliott v. South Carolina Dep't of Transp., 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004) for the proposition that the determination of whether exceptional circumstances exist is a matter of law, the Commission's finding of exceptional circumstances has been upheld routinely where the other statutory methods resulted in an AWW that was unfair to either the employee or the employer. *See, e.g.*, Foreman, 265 S.C. at 168-169, 217 S.E.2d at 216 (exceptional circumstances existed where using any of the alternative methods of calculating AWW would have produced a result that was unfair to the claimant who worked two jobs for a total of 70 hours per week); Bennett, 271 S.C. at 99, 245 S.E.2d at 131 (finding exceptional circumstances existed where it would be "grossly unfair to the employer to require payments of almost twice" the amount the claimant admittedly planned to earn); Brunson v. Wal-Mart Stores, Inc., 344 S.C.

107, 542 S.E.2d 732 (Ct. App. 2001) (exceptional circumstances existed where calculating the claimant's AWW based on income from two jobs the claimant was working at the time he was injured was unfair to employer because he only intended to work both jobs for only a few more days); Booth v. Midland Trane Hearing & Air Cond., 298 S.C. 251, 254-255, 379 S.E.2d 730, 732 (Ct. App. 1989) (finding as a matter of law that the claimant's rapid wage increase over a short period of time constituted exceptional circumstances); *cf.* Pilgrim, 391 S.C. at 46, 703 S.E.2d at 245 (Ct. App. 2010) (proceeding under the first alternative requires findings that it is practicable to do so and that the calculation will "yield a result which is 'fair and just to both parties'"). This case fits squarely within the above-cited cases.

Furthermore, the Commission possesses "broad discretion in determining that exceptional circumstances exist[]." Forrest v. A.S. Price Mech., 373 S.C. 303, 309, 644 S.E.2d 784, 787 (Ct. App. 2007). In fact, "[t]he language of the statute indicates more concern with the unfair results from the use of the enumerated methods than to 'exceptional reasons' which cause the unfairness." Foreman, 265 S.C. at 170, 217 S.E.2d at 216; *cf.* Elliott, 362 S.C. at 238, 607 S.E.2d at 92 ("the objective of wage calculation is to arrive at a **fair** approximation of the claimant's probable future earning capacity") (emphasis added).

The facts of the instant case are not meaningfully distinguishable from those in Bennett. In Bennett, prior to his injury, the claimant had voluntarily retired and begun drawing social security benefits, as had Claimant here. In Bennett, the claimant worked part-time, earning less than the amount he could earn without penalty to his Social Security benefits, as did Claimant here. In Bennett, the Commission used what is now the first alternative method to calculate the claimant's AWW, as did the Single Commissioner in this case. The Supreme Court overruled the Commission in Bennett, explaining that it had before it "an employee who for reasons

satisfactory to himself, while fully capable of working, quit and withdrew his services from the labor market" except for part-time work. The Court pointed out that the claimant's "[f]ailure to receive any amount over and above [the Social Security cap] in the past or future is not attributable to the injury he has sustained, but rather is attributable to the pattern of work activity he has voluntarily assumed." 271 S.C. at 98, 245 S.E.2d at 131. The Court concluded that it would be "grossly unfair to the employer to require payments of almost twice" the amount to which the claimant agreed his earnings would be limited. The same is true here. Because the facts of this case are substantively similar to those in Bennett,[3] that case is controlling and the outcome should be the same in both cases.

Although Claimant now points to testimony that he worked whenever he was needed and that he did not have a plan to not exceed the $15,000 threshold, (R. p. 119, lines 2-9), that testimony is plainly contradicted by his following testimony where he agreed that it was his "intention in 2014 then to earn as much as [he] could without reducing [his] retirement benefits." (R. p. 119, lines 19-22; *see also* p. 140, line 7 – p. 141, line 9) (R. p. 288 (Claimant reported to Mr. Page that "he could make up to $15,000 per year. [Claimant] noted he would work until he reached the $15,000 and not work the rest of the year"). Given this conflict in the evidence, and since there is substantial evidence (in the form of Claimant's own testimony and that of Mr. Page) to support the Commission's determination that it was Claimant's "plan to limit his

[3] Before the Commission, Claimant speculated that the claimant in Bennett may have had more leverage with his employer than did Claimant with G&G Logging because he had worked there for 16 to 18 years and was "a skilled carpenter and valued employee," and that "Bennett may have controlled the employment relationship and dictated the terms of his employment." (Supp. R. p. 62; *see also* R. p. 176, lines 2-11). He also speculated that, "[m]aybe [Claimant] wanted to work more than $7,000.00 and $8,000.00 a year which Bootle provided and that's the reason he left to go to G&G." (R. p. 172, lines 2-8; *see also* Supp. R. p. 66 ("[m]aybe [Claimant] left Bootle to earn more money"). The Commission properly rejected these arguments, which are no more than unsubstantiated speculation and conjecture.

earnings to the Social Security retirement offset amount of $15,000," that finding of fact must be upheld on appeal. *See, e.g.*, Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (the Commission's resolution of conflict between different witnesses or the testimony of the same witness must be upheld on appeal); Sharpe, 336 S.C. at 160, 519 S.E.2d at 105 ("[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence").

Claimant argues that it is "surmise, conjecture, and speculation" to find that he was going to cease working once he reached the Social Security earnings limit. However, he both told Mr. Page exactly that and he testified to precisely that intent:

> Q: **And was it your intention in 2014 then to earn as much as you could without reducing your retirement benefits?**
>
> A: **Yes, sir.**

(R. p. 119, lines 19-22) (emphasis added) (*see also* R. p. 140, line 7 – p. 141, line 9) (R. p. 288). As noted above, although Claimant may have provided some conflicting testimony, it is the Commission's prerogative to believe part and reject other parts of a witness's testimony. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528. Furthermore, Claimant's track record since he voluntarily retired at the age of 62 supports the Commission's finding that he intended to earn, at most, up to the Social Security cap. (R. p. 117, line 6 – p. 118, line 22). Finally, Claimant did not testify that he would earn over the $15,000 social security cap – he simply said he and his employer had agreed to address the issue at some point. He never testified that he intended to work full-time or to work the full year.

As to Claimant's assertion that Respondents failed to provide evidence that the standard wage calculation would be unfair to it, there is no burden on the employer to "prove" unfairness.

An artificially inflated AWW is inherently unfair to an employer just as an artificially low AWW that does not account for a claimant's proven wages would be inherently unfair to a claimant.

Claimant's current arguments regarding the technical implications of the tax code and I.R.S. regulations are little more than a smoke-screen intended to throw confusion on what is a fairly straight-forward issue based on the evidence in this case. There is no testimony or evidence anywhere in the record that Claimant intended to base his future earning decision on 42 U.S.C. §§ 402-403, the Senior Citizens Freedom to Work Act (2000), or 20 C.F.R. §§ 404.401 *et seq.*[4] Claimant was not asked about any of these provisions and there is no evidence to support his speculation on appeal that any of these federal tax provisions would have changed his stated "intention in 2014 then to earn as much as [he] could without reducing [his] retirement benefits." (R. p. 119, lines 19-22; p. 140, line 7 – p. 141, line 9) (R. p. 288).[5] Claimant's counsel could have but did not ask Claimant whether he intended to earn over the $15,400.00 cap once he reached full retirement age. As a result, there is no evidence on that issue in this case; instead, the undisputed evidence shows a pattern of Claimant earning well below the earnings cap and includes his stated intention to continue to earn less than the $15,400.00 cap. In short, Claimant failed to provide any evidence that "the temporary nature of the earnings limitation" controlled his earning decision, or that he even was aware of the provisions cited by his counsel. As a result, his arguments on appeal regarding the tax code are mere speculation and insufficient to

[4] Argument of counsel does not constitute evidence. *See, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

[5] Furthermore, Claimant's argument on appeal is undercut by his counsel's argument to the Commission. *See* (Supp. R. p. 62 (arguing that a critical distinction between this case and Bennett is that, there, the claimant continued to earn below the Social Security threshold even though he "could have returned to full-time work with no penalty offset against his social security, at least under current rules").

overturn the Commission decision, which is fully supported by substantial evidence in the record.

This Court should affirm the Commission's determination that exceptional circumstances exist and that Claimant's AWW is $297.63 with a corresponding compensation rate of $198.47.

II. The Commission properly awarded Respondents a credit based on overpayment of benefits at the higher compensation rate.

Claimant argues that the Commission erred in awarding Respondents a credit for overpayment of TTD based on the higher erroneous AWW and compensation rate. Claimant's argument appears to be that, because G&G Logging was aware that Claimant was planning to limit his income, the Commission abused its discretion in awarding Respondents a credit. However, the decision to allow a credit is within the Commission's discretion and the Commission's "conclusions thereabout are binding on appeal unless there is an absence of competent evidence to support them." Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 257, 127 S.E.2d 884, 885 (1962); *see also* Muir v. C.R. Bard, Inc., 336 S.C. 266, 298, 519 S.E.2d 583, 599 (Ct. App. 1999) (Commission's decisions to award or deny a credit is binding on appeal "unless there is an absence of competent evidence to support them"). Claimant does not argue that there is a lack of evidence to support the Commission's award of a credit, just that Respondents could and should have requested a hearing earlier to address his AWW.

Claimant relies on his own testimony that he discussed the earnings cap issue with his employer. While arguing with respect to the proper AWW that this conversation indicated that he did not intend to limit his earnings in 2014, Claimant now argues that that is evidence that G&G Logging knew he intended to limit his earnings. At the Full Commission, Claimant's counsel asserted that, despite the conversation with G&G Logging, any decision to limit his

income "had not been made at that time." (R. p. 174, lines 3-9).[6] If the decision to limit his income had not been made at the time Claimant discussed it with G&G Logging, the latter could not have known precisely what Claimant intended to do regarding the amount of his earnings.

Claimant also points to Mr. Page's vocational report, while at the same time insisting that the Commission's finding that G&G Logging did not know about the overpayment until discovery is incorrect. Claimant began working for G&G Logging in January 2014. (R. p. 327, lines 19-21). It was during the course of investigating Claimant's claim in response to his Form 50 that Respondents engaged Mr. Page – in other words, during investigation of this claim. Mr. Page's interview with Claimant was on January 22, and his report, in which he reported Claimant's stated intention to only "work until he reached the $15,000 and not work the rest of the year," is dated February 2, 2016. (R. pp. 286-291).

Finally, Claimant's argument on this point is brief and he cites no legal support for his position. The only statutory provision cited by Claimant is the provision that provides the Commission with discretionary authority to award a credit. S.C. Code Ann. § 42-9-210. As a result, this argument is cursory and unsupported and should be disregarded by the Court. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal).

This Court should affirm the grant of a credit to Respondents for overpayment of TTD.

[6] Parties are bound by the statements and concessions made on the record and in briefs filed by their counsel. *See, e.g.*, JASDIP Props SC, LLC v. Estate of Stewart Richardson, 395 S.C. 633, 641, 720 S.E.2d 485, 489 (Ct. App. 2011).

CONCLUSION

Respondents respectfully request that this Court uphold the Commission's determination of Claimant's average weekly wage and grant of a credit to Respondents for overpayment of TTD.

Respectfully submitted,

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December 6, 2017

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Hunter & Associates, Inc., Carrier..... Respondents-Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents-Appellants' Respondents Brief of G&G Logging, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents-Appellants' Respondents Brief complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

December 6, 2017

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