STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	2017CP 30- 573
COUNTY OF LAURENS)	C/A No.: 2010-CP-30-00710
)	WCC File No. 0701597
Annette B. Lee,)	
)	
Claimant,)	
)	
-vs-)	
)	
Action Staffing, Inc., Employer,)	
)	
and)	
)	
Liberty Mutual Insurance Co., Carrier,)	
)	
Defendants.)	
)	

ORDER

This is an appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (hereinafter "Appellate Panel"). Action Staffing is a staffing company that provides employee-labor to other "client" companies. Claimant was hired by Action Staffing (hereinafter "Defendant-Employer") on January 15, 2007 to work as a box-maker at Roechling Automotive for $10.75 per hour. Within one to three weeks of her hire, Claimant alleged repetitive trauma injuries to her right arm, right shoulder, and neck. The parties stipulate the accident date is "January, 2007." Defendants accepted the claim and provided appropriate medical treatment through maximum medical improvement.

This case was originally heard before Commissioner Lyndon on July 21, 2009. At the 2009 hearing, Claimant alleged her average weekly wage to be $1,153.35, with a corresponding compensation rate of $645.94 (maximum compensation rate for 2007). Claimant predicated this position on her 2006 earnings while employed by a previous employer, Dispoz-O-Products. Based on this contention, Claimant also alleged entitlement to underpayment of temporary disability benefits.

Defendants, on the other hand, contended at the 2009 hearing that Claimant's average weekly wage was best reflected by a similar employee. As such, Defendants contended Claimant's average weekly wage was $505.60, with a corresponding compensation rate of $337.08.

Commissioner Lyndon found, in relevant part, "Under S.C. Code Ann. § 42-1-40 and S.C. Code Reg. 67-1603, Claimant's average weekly wage is $937.43, for a corresponding compensation rate of $624.98, and she is entitled to all underpayments of disability benefits based on the miscalculation of her average weekly wage." (ROA – MM, Commissioner Lyndon's 2009 Decision and Order p. 15).

Both parties appealed the decision to the Appellate Panel, which issued an Order on June 2, 2010, reversing, in relevant part, the Single Commissioner's determination of Claimant's average weekly wage. The Appellate Panel found an average weekly wage of $505.60 with a corresponding compensation rate of $337.08. The Appellate Panel found that Claimant's contention of an average weekly wage of $937.43 was "grievously unfair" to Defendants and no exceptional reason existed in Claimant's case to increase her average weekly wage and corresponding compensation rate beyond the average weekly wage and compensation rate of a similar employee.

Claimant appealed the Appellate Panel's decision to the Circuit Court, where the matter was heard by Judge Addy on May 24, 2011. Judge Addy issued a Decision and Order, dated March 30, 2012 and filed April 2, 2012, wherein he reversed the Appellate Panel's decision regarding Claimant's average weekly wage and corresponding compensation rate. Judge Addy found "the panel's determination concerning the average weekly wage is based on a misapplication of the law and [I] reverse and remand that issue to the Commission for reconsideration." (ROA-AA, p. 4 dated March 30, 2012.) Judge Addy further wrote: "However, the similar employee Form

20 provided by defendants did not provide the wages of similar employee over 52 weeks prior to claimant's date of injury but rather provided wages of a similar employee over only a 12-week period. ... Such is clear error of law, as it is directly contrary to the plain language of the statute."

Judge Addy affirmed the other issues, including the Commission's decision as to permanent disability. He remanded the determination of Claimant's average weekly wage to the Single Commissioner to decide whether an exceptional reason exists to deviate from the standard method of computation. Judge Addy left the issue as to whether to allow the parties opportunity to present additional evidence as to Claimant's average weekly wage to the Single Commissioner to decide.

Both parties appealed Judge Addy's decision to the South Carolina Court of Appeals. The appeal was dismissed by the South Carolina Court of Appeals. The Court of Appeals cited *Bone v. U.S. Food Service*, 399 S.C 566, 733 S.E.2d 200 (2010) and *Long v. Sealed Air Corp.*, 391 S.C. 483, 485, 706 S.E.2d 34, 35 (Ct. App. 2011)(holding that a circuit court order remanding the case to the Commission was not a final judgment and not immediately appealable.)

This case was then heard before Commissioner Barden on May 26, 2016, on remand from the Circuit Court for a determination of Claimant's average weekly wage and corresponding compensation rate. Pursuant to Judge Addy's direction, Commissioner Barden allowed the parties to submit additional evidence and testimony at the May 26, 2016 hearing.

Commissioner Barden issued a Decision and Order, dated September 29, 2016. Commissioner Barden found that using wages from a separate, prior employer - at which Claimant worked in a position entirely dissimilar to her job at Action Staffing, and from which she had been separated from for approximately seven (7) months before accepting the job with Action Staffing - to calculate the average weekly wage would be grossly unfair to Defendants and result in a

heavily inflated compensation rate. Commissioner Barden held that Claimant's future earning capacity should be based on what Claimant would earn in the future while employed with the Defendant-Employer in the position she voluntarily accepted, rather than what Claimant earned while employed by a prior employer, in an entirely different position.

Commissioner Barden ultimately found that S.C. Code Ann. § 42-1-40 gives the Commission broad discretion in exceptional circumstances to use a method that most nearly approximates Claimant's earnings but for her injury, and it must serve as the most fair and just method of calculation for both parties. Commissioner Barden determined the most appropriate "other method" for calculating Claimant's earnings was to use the wages of a similar employee who had worked as a box-maker for the Defendant-Employer without incident for 12 weeks. Commissioner Barden considered several factors in reaching her decision, including the fact that Defendant-Employer did not have a similar employee who had worked in a similar capacity for 52 weeks prior to Claimant's accident. Commissioner Barden reasoned this method is fair and just to Claimant because this method uses more weeks than the number of actual weeks Claimant worked, and it is fair to Defendant-Employer because it uses the actual wages of a similar employee. Therefore, Commissioner Barden held that Claimant's average weekly wage is $505.60, yielding a compensation rate of $337.08.

Claimant timely appealed Commissioner Barden's Decision and Order to the Appellate Panel. She maintained her average weekly wage should be $1,153.35. Defendants maintained Claimant's average weekly wage is $505.60, and Commissioner Barden's decision should be fully affirmed.

On January 23, 2017, the Appellate Panel heard oral arguments on the issue(s) raised in Claimant's appeal. By Decision and Order dated June 7, 2017, the Appellate Panel affirmed with

amendment the September 29, 2016 Decision and Order of the Single Commissioner. The Appellate Panel affirmed and adopted all findings except for Finding of Fact # 33, wherein the Panel found that the preponderance of the evidence showed the most appropriate "other method" to determine what Claimant would make as a box maker but for her injury was to utilize the wages of a similar employee who worked as a box maker for Defendant-Employer without incident for 32 weeks, since the method of using a similar employee who worked 52 weeks was not available. The Appellate Panel found that although the Single Commissioner found an average weekly wage of $505.60, yielding a corresponding compensation rate of $337.08 using the wages of a similar employee who had worked as a box-maker for Defendant-Employer without incident for 12 weeks; the wages of an employee serving in a similar position for 32 weeks most nearly approximates the amount which Claimant would be earning were it not for her injury. This similar employee worked for 32 weeks with an average weekly wage of $509.45 and a corresponding compensation rate of $339.65. Therefore, the Appellate Panel found Claimant's average weekly wage is $509.45, with a corresponding compensation rate of $339.65.

Claimant appealed the Appellate Panel's June 7, 2017 decision to this Honorable Court, and oral arguments were heard on November 1, 2017.

BURDEN OF PROOF AND STANDARD OF REVIEW

In an action for benefits under the Workers' Compensation Act, a claimant must set forth facts which will bring the injury within the scope of the Act, "and [an] award must not be based on surmise, conjecture, or speculation." *Clade v. Champion Laboratories*, 330 S.C. 8, 11(1998); *see also Lee v. Harborside Café*, 350 S.C. 74, 81 (Ct. App. 2002). In workers' compensation cases, the South Carolina Workers' Compensation Commission is the ultimate finder of fact. *Hunter v. Patrick Const. Co.*, 289 S.C. 46 (1986); *Ross v. American Red Cross*, 298 S.C. 490 (1989). This

Court's review of the Commission's findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. *See generally Lark v. Bi-Lo, Inc.*, 276 S.C. 130 (1981); *Howell v. Pacific Columbia Mills*, 291 S.C. 469 (1987). "Substantial evidence" necessary to support a decision of the Commission is

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 135-36, (quoting with approval *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620(1966).

This Court is prohibited from overturning Findings of Fact of the Commission unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. *Lowe v. Am-Can Trans. Svs., Inc.*, 283 S.C. 534(Ct. App. 1984)(emphasis added). This Court is also barred from re-weighing the evidence and substituting its own findings of fact for those of the Commission. *Brown v. Jordan Oil Co.*, 291 S.C. 272, 353 (1987).

ISSUE PRESENTED

In Claimant's *Notice of Appeal* from the South Carolina Workers' Compensation Commission, dated July 3, 2017, Claimant raised issues of fact and possible issues of law in her numerous exceptions/grounds for appeal. (ROA – A, pp. 1-19). However, the parties agree the ultimate issues before this court are:

1. Whether the Appellate Panel's finding that Claimant's average weekly wage is $509.45 with a corresponding compensation rate of $339.65 is supported by substantial evidence?

2. Whether the Appellate Panel committed an error of law in its determination that Claimant's average weekly wage is $509.45 with a corresponding compensation rate of $339.65.

ANALYSIS

I find the substantial weight of the evidence supports the Appellate Panel's determination that Claimant's average weekly wage is $509.45, which yields a corresponding compensation rate of $339.65. I also find no error of law in the Appellate Panel's decision. Therefore, I affirm the Appellate Panel's decision in full.

The South Carolina Workers' Compensation Act generally defines average weekly wage as "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 (2007). Pursuant to S.C. Code Ann. § 42-1-40 there are four ways to calculate an injured employee's average weekly wage. The fourth method of average weekly wage calculation pursuant to § 42-1-40 states, "When for exceptional reasons the foregoing [three methods] 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." *Id.* (emphasis added.)

In the case at hand, it is undisputed that the first three methods of calculating the average weekly wage are inapplicable. Therefore, the parties agree that "exceptional reasons" exist to deviate from the standard methods of calculation, and that the "fourth method," or "other method" found in §42-1-40, is the appropriate method for calculation of Claimant's average weekly wage. The "other method" the Appellate Panel utilized to calculate Claimant's average weekly wage was to use the wages from a similarly employed box-maker who worked as a box-maker for Defendant-Employer for 32 weeks because this method most nearly approximated the amount which the

injured employee would have earned as a box-maker for Defendant-Employer, but for her injury. The Claimant disputes the "other method" used by the Appellate Panel to calculate her average weekly wage, and contends that the substantial weight of the evidence shows that the best "other method" for calculating her average weekly wage that most nearly approximates the amount which she would earn but for her injury would be to include the wages she earned as a Human Resource Manager working for her previous employer, Dispoz-O-Products. Although Dispoz-O-Products terminated her position seven months prior to her employment as a box-maker with Defendant-Employer, Claimant contends the evidence shows that her Dispoz-O-Products wages most nearly approximate the amount which she would be earning but for her work injury because Claimant aspired to return to administrative work.

I disagree with Claimant's argument, and find that the substantial weight of the evidence supports the Appellate Panel's findings. Specifically that:

> Claimant had no promise, assurance, or reasonable expectation of an administrative job with Defendant-Employer. Claimant by her own admission, was unable to obtain administrative work after she left her previous Defendant-Employer... On the date of the injury, Claimant was not working in administration, was not a trainee in administration, had no offer to work in administration, and had no administrative job for which to apply. If administrative jobs had been available at Claimant's time of hire or even afterward, the decision in the case might be different; however we cannot rely on facts not in existence.

(ROA – B, pp. 20-22, Finding of Fact #26).

Claimant further contends that the Appellate Panel reached its conclusions by erroneously finding that it "could not" look back to Claimant's previous employment with Dispoz-O-Products when calculating her average wage. Claimant alleges this is an error of law and in contravention to the Court of Appeals holding in *Forrest v. A.S. Price Mechanical*, 373 S.C. 303 (Ct. App. 2007). In support of her contention that the Appellate Panel erroneously interpreted S.C. Code Ann. § 42-

1-40 (2007) in light of *Forrest*, Claimant notes the Appellate Panel's Finding of Fact #28 which states:

> 42-1-40 defines average weekly wages as the earning of the injured employee in the employment in which he was working at the time of the injury. The plain language of the statute is that the General Assembly did not intend to include wages earned from a previous employment. Subscribing to Claimant's theory would not only result in an undeserved windfall to Claimant (as she would have never earned human resource manager wages as a box-maker), but would result in the situation where any employee injured during his first year of employment could claim that his prior, higher earnings should be included in an average weekly wage calculation even for an entirely different field of employment; We decline to effect such a sweeping change to the law, and leave that to the purview of the General Assembly.

(ROA – B, pp. 21, Finding of Fact #28).

The Appellate Panel's Findings of Fact show that *it did* consider Claimant's previous employment with Dispoz-O-Products. After considering the evidence relating to Claimant's previous employment with Dispoz-O-Products in conjunction with the evidence (or lack thereof) pertaining to Claimant's future possibility of obtaining administrative employment, the Appellate Panel *declined* to "reach back" to include Claimant's wages from her previous employment when calculating her average weekly wage because it did not most nearly approximate the Claimant's average weekly wage but for her injury.

The record shows that Claimant did not and could not identify a specific future employer for whom she intended to work. Rather the record clearly shows the type of work that Claimant desired was not available, thus after a seven month stint of unemployment, she chose to work as a box-maker for Defendants. At the time of her injuries, Claimant was not a continuous employee of Dispoz-O-Products as her position no longer existed and Claimant did not have any pending offers for an administrative job. The Commission specifically considered this as noted in Finding of Fact 26 which states "if administrative jobs had been available at Claimant's time of hire or

even afterward, the decision in this case might be different; however, ***we cannot rely on facts not in existence***." (ROA – B, pp. 20-22, Finding of Fact #26)(emphasis added).

After considering the record on appeal and the oral arguments of the parties, I find the substantial weight of the evidence supports the methodology utilized by the Appellate Panel, and the substantial weight of the evidence in the record supports the Appellate Panel's finding that Claimant's average weekly wage is $509.45, with a corresponding compensation rate of $339.65. I also find that the Appellate Panel committed no error of law in its decision. Therefore, the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission is hereby AFFIRMED IN FULL.

IT IS SO ORDERED.

Eugene C. Griffith, Jr.
Judge, Eighth Judicial Circuit

Dated: February 9, 2018