THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1512151

Appellate Case No. 2018-000216

Donna Dozier, Claimant, Appellant

v.

Georgetown County School District, Employer, and
SC School Boards Insurance Trust, Carrier, Respondents

FINAL BRIEF OF RESPONDENTS

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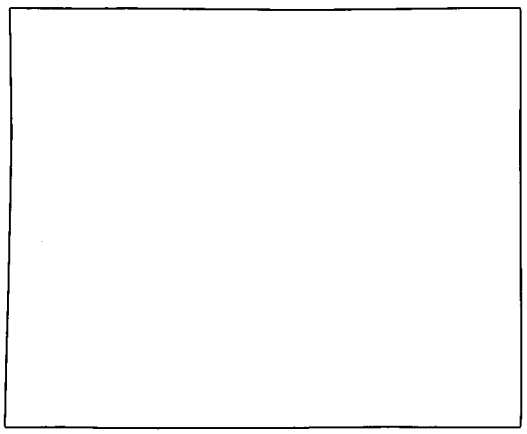

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STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. The matter initially involved an accepted right leg claim. After Appellant reached maximum medical improvement (MMI) for her right leg, Respondents filed a Form 21, requesting a hearing to terminate Temporary Total Disability benefits and to pay Permanent Partial Disability, if any should be due.

That case was heard by Commissioner Gene McCaskill on March 21, 2017. At the hearing, Respondents asserted Appellant had reached MMI insofar as her accepted right leg injury. Appellant denied that she was at MMI, and, further, she sought findings of compensability to her left knee, low back, and left hip. Also, raising the issue for the first time at the hearing, Appellant sought to challenge to Respondents' calculation of Appellant's Average Weekly Wage (AWW) and Compensation Rate (CR) as set forth on Respondents' Form 20. The Form 20 had been filed on September 16, 2015. ROA 168. Per Appellant's request, Commissioner McCaskill agreed to hold the record open to permit counsel for the parties to submit additional information relevant to the determination of Appellant's AWW.

The Order of the Full Commission Appellate Panel on January 12, 2018 is not a final agency decision that disposes of the whole subject matter of the Appellant's workers' compensation claim, and further proceedings are currently pending before the SCWCC. Appellant has, nonetheless, appealed the Full Commission Appellate Panel's Order by filing and serving her Notice of Appeal to this Court on February 9, 2018.

STANDARD OF REVIEW

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). "Whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy." *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). "In proceedings governed by the APA, a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Nucor Corp. v. S.C. Dept. of Employment and Workforce*, 410 S.C. 507, 514-15, 765 S.E.2d 558, 562 (2014). "An agency decision which does not decide the merits of a contested case but merely remands to the Department for further action is not a final agency decision subject to judicial review." *S.C. Baptist Hosp. v. S.C. Dept. of Health and Envt'l Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987).

"Whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy." *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). "In proceedings governed by the APA, a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to

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The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. *See* S.C. Code Ann. § 1- 23-380 (Supp. 2010); *See also 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 weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Stone v. Taylor 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. *See 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.*

STATEMENT OF FACTS

Appellant was hired by Respondent Georgetown County School District (Georgetown County) to work as a food service operator in the cafeteria at Waccamaw Intermediate School during the 2014 – 2015 school year. Appellant's written employment contract with Respondent

Georgetown County required Appellant to work for one 150 days, or 36 weeks, which represented the remaining portion of the 2014-2015 school year. ROA 197. Appellant's employment contract terminated on June 5, 2015. *Id.* Appellant elected to receive 24 equal bi-weekly payments over a 52-week period for the 150 days she was employed in 2014 and 2015. Appellant returned to work for Respondent Georgetown County on August 19, 2015, to begin the 2015-2016 school year. *Id.* On this day, Appellant sustained a compensable injury to her right leg while walking into the school. ROA 6.

Following the March 21, 2017 hearing, counsel for Appellant served a document production subpoena upon counsel for Respondent Georgetown County requesting documents that set forth Appellant's compensation rate and the number of weeks Appellant worked prior to her injury. ROA 171. Counsel for Respondent Georgetown County responded to the subpoena by producing adequate pay records. ROA 176-262.

On August 16, 2017, Commissioner McCaskill issued an interim Order, denying Appellant's back and hip claims, but determining that Appellant's left knee is also a compensable body part. ROA 14. Therefore, per the Order, Appellant had not reached MMI, and she was entitled to receive further medical care and treatment for the injury to her left knee. The Decision and Order also determined Appellant's AWW and CR to be $200.77 and $133.85, respectively, as reflected on the Form 20. The Commissioner specifically found that these numbers reflect the directives of the Act and are the fairest to all parties. ROA 30-31. The interim Decision and Order did not dispose of the remaining issues in Appellant's workers' compensation claim.

Appellant timely filed a Form 30 Request for Full Commission Review challenging Commissioner McCaskill's determination of Appellant's AWW and compensation rate. ROA 34-36. The Full Commission Appellate Panel heard arguments on November 14, 2017. The Appellate

Panel issued a Final Order on January 12, 2018, affirming Commissioner McCaskill's determination of that Appellant had not yet reached MMI as well as affirming Appellant's AWW and compensation rate. ROA 1-12.

ARGUMENTS

1. **WHETHER THIS APPEAL SHOULD BE DISMISSED PURSUANT TO S.C. CODE ANN. § 1-23-380, BECAUSE THE ORDER ON APPEAL IS NOT A FINAL AGENCY DECISION AND SHE STILL RETAINS ADEQUATE REMEDIES?**

Appellant's appeal should be dismissed pursuant to S.C. Code Ann. § 1-23-380. An agency decision which does not enter a final award, decide the merits of a contested case, but provides an adequate remedy of review is not subject to judicial review. An order remanding the matter for further proceedings before entry of a final award is an intermediate judgement that does not dispose of the entirety of the action. *Bone v. U.S. Food Serv.*, 404 S.C. 67, 744 S.E.2d 552 (2013). "Whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy." *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). Circumstances that permit the immediate appeal of an interlocutory administrative decision under S.C. Code Ann. § 1-23-380 "are about as rare as the proverbial hens' teeth." *Id.* citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1959).

In *Bone*, the Court determined that an order requiring further proceedings in the Workers' Compensation Commission did not constitute a final order. *Bone*, 404 S.C. at 74, 744 S.E.2d at 556. In *Bone*, the Supreme Court confirmed a circuit court decision which reversed the Full Commissions Order denying benefits was appealed. *Bone,* at 72, 744 S.E.2d at 555. The circuit court decision required the Workers' Compensation Commission to determine a final order based upon compensability. *Id.* The Court determined that because the circuit court order did not fully

dispose of the workers' compensation action by issuing a final award, and because the claimant could still appeal a final award, it was not a final decision subject to judicial review. *Id.* at 74, 744 S.E.2d at 556.

In *Hilton*, the Court held that a party does not have to wait until a final agency decision to appeal an intermediate agency order that is extreme. *Hilton*, 418 S.C. at 252, 791 S.E.2d at 723. In *Hilton*, the Full Commission Appellate Panel ordered further litigation of the entire dispute without regard to the matters raised by the appealing party. *Id.* at 250, 791 S.E.2d at 722. The Court determined that requiring the appellant to wait until a final agency decision would not provide him an adequate remedy because the Panel's order was extreme and without explanation. *Id.*

The Appellate Panel effectively remanded the claim by determining Appellant required additional medical treatment as she was not yet at MMI. ROA 11. Absent settlement, either party would have to request another hearing before a single Commissioner (which Appellant, in fact, has now done) once she reaches MMI to receive a final award. Additionally, because Appellant had not reached MMI, the Appellate Panel was unable to enter a final award.

Appellant maintains an adequate remedy in review of the final agency decision and therefore is precluded from immediate review of the Appellate Panel's ruling. Appellant will not be harmed if she has to wait to appeal a Commissioner's final decision because she is currently receiving compensation for her injury. Further, because the Appellate Panel's decision was a matter of law, Appellant retains her adequate remedy of review.

Appellant readily admits in her Statement of the Case that the Appellate Panel's Order dated January 12, 2018, is not a final agency decision because it did not dispose of the whole subject matter of the claim. In addition to average weekly wage and compensation rate, the Appellate Panel's Order also determined Appellant was not yet at maximum medical

improvement. ROA 11. Because Appellant is not at MMI, the Appellate Panel was not permitted to enter a final award nor dispose of the case. Appellant further admits that she must still litigate her workers' compensation claim, and proceedings are currently pending before the SCWCC. Thus, because no final decision was made, the Order is not subject to judicial review.

The Full Commission Appellate Panel's Order is not a final decision regarding Appellant's workers' compensation claim and therefore is interlocutory in nature and not subject to judicial review by this Court.

2. WHETHER THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINED CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION AS $200.77 AND $133.86, RESPECTIVELY?

The Appellate Panel used a correct method to determine Appellant's average weekly wage, pursuant S.C. Code Ann. § 42-1-40. The result being an amount that is fair, just, and most nearly approximates the wages Claimant would be earning if not for the injury. In addition, no exceptional reasons exist which would warrant a different method of calculation. In this case, the circumstances require that Appellant's average weekly wage be calculated by dividing her total earnings by thirty-nine (39) weeks. The Appellate Panel correctly determined Appellant's average weekly wage and compensation rate to be $200.77 and $133.85 respectively, as shown on the Form 20.

The objective of the wage calculation is to fairly and justly approximate the employee's probable future earning capacity. *Elliott v. S.C. Dep't of Transp.*, 362 S.C. 234, 238, 607 S.E.2d 90, 92 (Ct. App. 2004). "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." *Pugh v. Piedmont Medical*, 396 S.C. 31, 39, 719 S.E.2d 676, 680 (Ct. App. 2011). S.C. Code Ann. §42-1-40 provides that "when

employment, prior to the injury, extended over a period less than fifty-two weeks, the method of dividing 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.*" (emphasis added). 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 first alternative method of wage calculation [dividing earnings during that period by number of weeks wages were earned] . . . is proper if two 'predicate conditions' exist: (1) it is 'practicable' to use the alternative method and (2) the calculation yields a result that is 'fair and just' to both parties." *Pugh*, 396 S.C. at 39, 719 S.E.2d at 680.

In *Pugh*, this Court held that when an alternative method is used to determine average weekly wage and the record establishes the result is fair and just to both parties, it will be upheld. *Id.* at 40, 719 S.E.2d at 681. Using one of the prescribed alternative methods, the Appellate Panel determined the claimant's average weekly wage based upon 17 weeks, and the wages earned therefrom. *Id.* at 37, 719 S.E.2d at 680. The claimant, who had worked for the company for over 30 years, had only worked 17 weeks prior to the injury because of another previous injury. *Id.* at 34, 719 S.E.2d at 678. The method of calculation resulted in a 37% decrease in average weekly wage between the two injuries. *Id.* This Court remanded the issue of average weekly wage because the Appellate Panel did not directly address in their order how the method was a fair and just result. *Id.*

Like the Appellate Panel in *Pugh*, the Appellate Panel here was required to use an alternative method because Appellant's employment prior to her injury extended less than fifty-two weeks. Unlike the claimant in *Pugh*, Appellant did not have an extensive work history with Respondent Georgetown County. Therefore, it was appropriate for the Appellate Panel to

determine her average weekly wage based upon her term of employment divided by her gross wages earned.

Unlike the average weekly wage calculations in *Pugh*, the differentiation of rates as requested in Appellant's brief and the rate as determined by the Commission is minimal, and it *should* not require that the order directly address why it is fair and just. That said, the Appellate Panel did address how and why they arrived at their average weekly wage, and why it was fair and just. ROA 3-5. This Appellant Panel went even further that what is required by this Court in *Pugh*, by explaining in detail why Appellant's calculations were not practicable nor fair and just to all parties. ROA 4-5. Appellant sought to use a method not enumerated in the statute by using a "daily compensation rate" and removing weeks for vacation from her total term of employment. ROA 4-5.

"Average *weekly* wage" means the *earnings* of the injured employee in the employment in which he was working at the time of the injury during the period fifty-two weeks immediately preceding the date of the injury. *See* S.C. Code Ann. § 42-1-40. Appellant, along with every other employee seeking benefits for a work injury under the South Carolina Workers' Compensation Act, is limited by S.C. Code Ann. § 42-1-40 to certain methods for which to calculate their AWW: (1) 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; (2) 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* during which the employee *earned* wages shall be followed . . . ; (3) Where by reason of shortness of time which the employee has been in the employment of his employer . . . 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.

It is clear in the language of the statute that a *week* is the only constant metric of time throughout the three methods. The statute requires all methods of calculation use a *week* as the common divisor to arrive at AWW. It is also clear that only wages *paid* or *earned* during a *week* can be used as the sum to be divided in each method. Nowhere in the statute's definition or three methods do the terms "hourly rate," "daily rate," or "actually worked" as used by Appellant in her calculation for AWW appear. ROA 4.

The Appellate Panel, by way of the evidence, established that Appellant worked fewer than 52 weeks as a food service employee for Respondents prior to her injury on August 19, 2015. ROA 9-10. The Appellate Panel correctly took note of this by bypassing the primary method for calculating average weekly wage and, instead, using the first alternative method. The Form 20 shows that Appellant earned wages of: (1) $2,728.36 for the period ending June 30, 2015; (2) $2,373.67 for the period ending March 31, 2015; and (3) $2,728.26 for the period ending December 31, 2014. The sum of these figures represents the $7,830.19 in wages Appellant was paid during her contractual employment with Respondents prior to the injury. The Appellate Panel then divided the $7,830.19 in wages by the thirty-nine (39) weeks representing the school year, resulting in an average weekly wage of $200.77 and compensation rate of $133.85.

In her brief, Appellant cites the case of *Breeland v. Colleton County, et. al.*, 216 S.C. 147, 57 S.E.2d 63 (1950) in support of her calculation. Brief of Appellant p. 20-21. Unfortunately, Appellant's interpretation of the case is incorrect, because the Court in *Breeland* specifically held otherwise.

In *Breeland*, the Court held that is improper to remove weeks representing vacation and school breaks from the average weekly wage calculation. *Breeland v. Colleton County, et. al., 216 S.C. 147, 150, 57 S.E.2d 63, 64 (1950)*. That claimant, a school bus driver, was paid on a monthly basis for nine (9) months, i.e. 39 weeks. *Id.* at 149, 57 S.E.2d 64. His employment prior to his injury extended over a period of less than fifty-two (52) weeks, so the method of dividing his earnings during that period by the number of weeks during which he earned wages was used to calculate his AWW. *Id.* The Industrial Commission improperly calculated claimant's AWW and CR using thirty-six (36) weeks as the divisor, deducting three (3) weeks from the nine (9) calendar months for holidays and teachers' meetings during which the claimant did not have to drive. *Id.* The Court overruled this calculation, as the Commission failed to show exceptional reasons for excluding those three (3) weeks. *Id.* at 150, 57 S.E.2d at 64. The Court specifically noted that deducting Saturdays, Sundays, and Christmas vacation would have *artificially increased the average weekly wage*. *Id.* Thus, the Court in *Breeland* divided claimant's gross wages by thirty-nine (39) weeks, representing the entire school year. *See Breeland*, 216 S.C. 147, 57 S.E.2d 63 (1950).

Appellant attempts to argue against the very holding in *Breeland.* In her Brief, It is her proposition that her total number of weeks earning wages should be reduced because of three (3) weeks of vacation days. Initial Brief of Appellant p. 20-22. Appellant fails to not only acknowledge that the holding in *Breeland* stands for the opposite position, but also fails to acknowledge that she received payment during these weeks.

Appellant's initial argument that her average weekly wage and compensation rate should be based on her total annual salary divided by the number of work days in her contract is not represented by precedent, nor by statute. S.C. Code Ann. § 42-1-40 specifically uses *weeks* as the

metric of computation for the average weekly wage. Nowhere in the history of the South Carolina Workers Compensation Commission has an average weekly wage been calculated based upon a "daily rate."

As noted by the court in *Breeland*, calculating the average weekly wage based on the Appellant's method leads to a highly inflated and preposterous result. To wit, Appellant now demands an average weekly wage of $237.28 based on her gross wages in the amount of $7,830.19 divided by thirty-three (33) weeks. Calculating the rates in a manner contrary to *Breeland*, Appellant arrives at the thirty-three (33) week divisor by subtracting three (3) weeks for the school vacation days and three (3) weeks for the time she missed by starting the school year late. The resulting average weekly wage of $237.28 would result in a salary seven percent (7%) higher than the salary she actually earned. This result is neither fair or just.

3. WHETHER, PER S.C. CODE ANN § 1-23-380(3), THE DOCUMENTS WITH WHICH APPEALLANT WISHES TO SUPPLEMENT THE RECORD SHOULD BE EXCLUDED FROM THE RECORD?

A. Failure to Produce.

Appellant's contention that this matter be remanded based on newly discovered evidence is inappropriate. Under S.C. Code Ann. § 1-23-380(3), the court may allow the record to be supplemented by additional evidence as a long as it is material and there is a good reason for failure to initially present it. The evidence for which Appellant bases this appeal is immaterial and in no way affects the method or data used by Appellate Panel in the calculating her average weekly wage.

As explained in the paragraphs above, Appellant's belief that some handwritten timesheets and a computer screenshot have a drastic effect on her average weekly wage calculation is ill-gotten. Based upon application of § 42-1-40 and *Breeland*, the fact that her timesheets show that

she received paid leave for sick days and holidays has no import. Appellant was already in possession of every document needed to properly calculate her average weekly wage under S.C. Code Ann. § 42-1-40. ROA 176-262.

In addition, claiming relevance based upon the Fair Labor Standards Act is errant. As further explained below, the FLSA's calculations do not translate and cannot be applied to an average weekly wage as they are mutually exclusive. What one calculation requires, the other forbids.

B. FLSA Argument.

The Appellant's argument that Respondents have in some way violated the Fair Labor Standards Act of 1938 (29 U.S.C. §201, *et. seq.*) in the calculation of Appellant's AWW is a red herring and fails in two aspects. There are distinct and separate functions behind each Act, as well as the mutually exclusive methods of calculation used by each Act.

As the United States Supreme Court wrote: "In enacting the FLSA, Congress intended 'to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, (1981). In short, minimum wage within the context of the FLSA ensures only that employees who are physically present and working receive a minimum threshold amount of pay, calculated in terms of an hourly rate, for their services. On the other hand, the SCWCA provides compensation benefits to employees injured on the job and is calculated in terms of a weekly rate. The test for minimum wage per the FLSA is not triggered unless the employee working and engaged in commerce, and the method for calculating the employee's wage does not include paid leave. On the other hand, workers' compensation benefits are paid where the employee is not working and require a calculation which may include compensation where the employee was not providing a service to their employer.

The statutory calculations used to arrive at an employee's rate of pay for purposes of the FLSA and the statutory calculations used to arrive at AWW for the South Carolina Workers' Compensation Act are mutually exclusive. The FLSA wage calculation is based upon actual physically present hours worked in a specific *single* week divided by total compensation for that specific *single* week and expressed in dollars and cents. Whereas, the AWW calculation for this state is based upon the *average* of the wages earned by/paid to the employee during the total number of weeks she was *employed* and is expressed in terms of a *week*. Appellant's arguments are undoubtedly based upon intuition rather than law, as evidenced by her blatant lack of implementation or citation of the statutorily required methods for computing these different figures. Of course, an issue is deemed abandoned and will not be considered on appeal if the argument in the brief is unsupported by authority. *See Bryson v. Bryson*, 662 S.E.2d 611, 378 S.C. 502 (Ct. App. 2008). Therefore, this issue should be deemed abandoned and this Court should not consider it.

Nevertheless, "[i]n enacting the FLSA, Congress intended to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). An employee must be engaged in commerce on behalf of his/her employer to trigger the minimum wage calculation. *See* 29 U.S.C. § 206(a). An employer is in violation of the FLSA if the employee's "regular rate" falls below the stated minimum wage. *See Id.* As of July 24, 2009, the federal minimum wage for all employees is $7.25 per hour. *Id.* An employee's "regular rate" for purposes of the FLSA is a rate per hour. 29 CFR § 778.109. The regular hourly rate of pay of an employee is determined by dividing [her] total remuneration for employment [sic] in any workweek by the total number of hours actually worked by [her] in that workweek for which such compensation was paid. *Id.* An employee's "regular rate" calculation

shall not include payments made for occasional work periods when no work is performed because of vacation, holiday, illness. *See* 29 U.S.C § 207(e) – (e)(2). Additionally, "the Act takes a *single* workweek as its standard and *does not* permit the averaging of hours over 2 or more weeks." 29 CFR § 778.104.

Applying the requirements set forth in the FLSA above to Appellant, she was contracted to be *employed* for 150 days and received remuneration at a rate of $10.61 per hour for each hour *worked* during 2014-2015 school year. ROA 176-262. Although she was contracted to be *employed* six hours a day for 150 days, totaling 900 working hours, she only actually was present and provided a service to Respondents for 137 days, totaling 809 hours. ROA 178-184. This shortage of actual days and hours worked is because of sick days, snow days, and school breaks. The records produced to Appellant show that she did in fact receive compensation for ten (10) sick days and fifteen (15) school break days. The mere fact that Appellant was paid over the course of twelve (12) months for work she completed during nine (9) months has no effect on her "regular rate"/minimum wage computation as it is based upon the hours worked for each specific week and payment thereof, regardless of when she actually receives the full payment. Thus, it is clear that Respondent Georgetown County did not subject Appellant to substandard pay or oppressive working conditions, and therefore has not violated the minimum wage standards set forth in the FLSA.

"Average *weekly* wage" means the *earnings* of the injured employee in the employment in which he was working at the time of the injury during the period fifty-two weeks immediately preceding the date of the injury. *See* S.C. Code Ann. § 42-1-40. It is clear in the language of the statute that a *week* is the only constant metric of time throughout the three methods. The statute requires all methods of calculation use a *week* as the common divisor to arrive at AWW. It is also

clear that only wages *paid* or *earned* during a *week* can be used as the sum to be divided in each method. Nowhere in the statute's definition or three methods do the terms "hourly rate," "daily rate," or "actually worked" as used by Appellant in her calculation for AWW appear.

Based upon the language of S.C. Code Ann. § 42-1-40, Appellant is barred from even applying the minimum wage test. Per the statute, AWW represents gross wages either paid without regard for hours worked. Therefore, Appellant's AWW represents wages that are wholly different from wages for the purpose of the FLSA. It follows that it is incompatible for Appellant to apply her minimum wage calculation to her AWW figure.

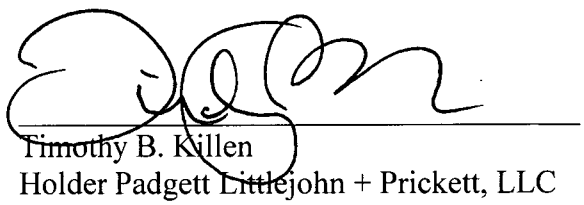
Appellant's minimum wage calculation violates the statutory requirements of the FLSA and has no bearing on the Workers' Compensation Act, so it is therefore unlawful. Appellant incorrectly uses figures based upon her "normal" work schedule, while the FLSA requires the use of actual hours worked for each *specific* work week. In calculating her regular rate, Appellant uses a flat, generalized, 30 hours as her "hours worked" in her calculation. Appellant's contract required her to work 30 hours per week, but in actuality worked a wide range of hours a week, often much less than 30, as evidenced by her payroll history. Appellant also incorrectly uses her gross wages ($7,830.19) in her calculation. Not only are Appellant's gross wages for a *specific* workweek, they also represent wages she was paid for sick leave and vacation time. In accordance with Georgetown County School District policy, Appellant received pay for ten (10) sick days and three weeks of school holidays. Thus, Appellant's calculation of minimum wage fails, as it is both inaccurate and unlawful.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondents respectfully request that this Honorable Court dismiss this appeal as it is interlocutory and not subject to review.

Alternatively, Respondents respectfully request that this Honorable Court affirm the Full Commission Appellate Panel's determination that Appellant's average weekly wage is $200.77 for the reasons stated herein.

RESPECTFULLY SUBMITTED,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1512151

Appellate Case No. 2018-000216

Donna Dozier, Claimant, Appellant

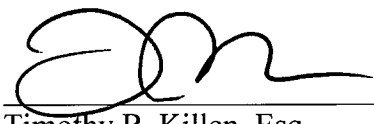
v.

Georgetown County School District, Employer, and
SC School Boards Insurance Trust, Carrier, Respondents

CERTIFICATE OF COUNSEL

I hereby certify on this 27th day of September, 2018, that the Respondents' Final Brief complies with requirements of Rule 211(b), SCACR.

September 27, 2018



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