THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1302012

Juanita Jackson, Employee, ... Appellant,

vs.

SC DSN, Employer, and State Accident Fund, Insurer, ... Respondents.

INITIAL BRIEF

STEPHEN J. WUKELA
WUKELA LAW FIRM
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE SC 29504
843-669-5634
stephen@wukelalaw.com

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STATEMENT OF THE CASE

This is a Workers' Compensation case that arises from an admitted accident that occurred on March 1, 2013 when the Claimant, working as a nurse at the Department of Disabilities and Special Needs, was pushed by a patient and struck her head on a knob of a patient's room door. The Respondents also admitted that the Appellant was entitled to temporary total disability benefits, commenced those benefits, and continues to pay the same. The issue before this Court is the correct computation of the Appellant's average weekly wage.

The parties agree that the Appellant earned an average weekly wage from her employment with the Department of Disabilities and Special Needs of Seven Hundred Seven and 12/100 ($707.12) Dollars. The parties also agree that the Appellant earned an income through concurrent employment with the Florence Nursing Service, and that the Appellant is entitled to an addition to her average weekly wage commensurate with her average weekly earnings with Florence Nursing Service. The precise dispute between the parties is as to the amount of that additional average weekly wage attributable to earnings from Florence Nursing Service.

Pursuant to Workers' Compensation Regulation, R.1603(H), Florence Nursing Service completed a Workers' Compensation Commission Form 20 Statement of Earnings which reveals that the Appellant earned Seven Thousand Three Hundred Forty-Six and 00/100 ($7,346.00) Dollars with Florence Nursing Service in the four (4) quarters preceding the accident, and that during those four (4) quarters the Appellant worked twenty-eight (28) weeks, with a resulting average weekly wage of Two Hundred Sixty-Three and 35/100 ($263.35) Dollars. (APA No. 15).

At the hearing of January 18, 2017, the Single Commissioner found that the additional amount of Two Hundred Sixty-Three and 35/100 ($263.35) Dollars should be added to the average

weekly earnings from the Employer of Seven Hundred Seven and 12/100 ($707.12) Dollars to produce a resulting combined average weekly wage of Nine Hundred Sixty-Nine and 47/100 ($969.47) Dollars. (See Single Commissioner Order p. 14, ¶9).

The Respondents appealed to the Workers' Compensation Appellate Panel; arguing that the Claimant's additional earnings from Florence Nursing Service should be divided by fifty-two (52) weeks rather than by the actual number of weeks for which the wages were paid, i.e. twenty-eight (28) weeks.

The Commission Appellate Panel agreed and, by Order of August 24, 2018, the Appellate Panel found that the Claimant's earnings from Florence Nursing Service, Seven Thousand Three Hundred Forty-Six and 00/100 ($7,346.00) Dollars, should be divided by fifty-two (52) weeks, resulting in an additional average weekly wage of One Hundred Forty-One and 27 ($141.27) Dollars.

This appeal followed.

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ARGUMENT

I. THE COMMISSION ERRED IN FINDING THAT CLAIMANT'S ADDITIONAL AVERAGE WEEKLY WAGE MUST BE CALCULATED BY DIVIDING THE INCOME EARNED OVER THE YEAR PRECEDING HER INJURY BY FIFTY-TWO (52) WEEKS RATHER THAN BY DIVIDING THOSE WAGES BY THE ACTUAL NUMBER OF WEEKS FOR WHICH THE WAGES WERE PAID, I.E., TWENTY-EIGHT (28) WEEKS AS REQUIRED BY S.C. CODE ANN. §42-1-40, (1976, as amended).

S.C. Code §42-1-40 provides:

> **§42-1-40. "Average weekly wages" defined.**
>
> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States Government if the amount of the allowance is reported monthly by the trainee to his employer. **"Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contributions Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.** When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. Whenever allowances of any character made to an employee in lieu of wages are a specified part of a wage contract they are deemed a part of his earnings.
> S.C. Code §42-1-40 (emphasis added).

S.C. Code Ann. Regs 67-1603(H) provides:

> **67-1603. Calculating the Compensation Rate.**
>
> H. If the claimant alleges he or she worked for two or more employers when the injury occurred, the claimant may request the additional wages be included as part of his or her average weekly wage. **The claimant shall obtain a completed Form 20 from each of the other employers and file the Forms 20 with the Claims Department**. The claimant shall provide a copy of each Form 20 to the employer's representative. The Commission will calculate the new compensation rate and notify the parties. If the employer's representative does not agree to pay the new compensation rate, the claimant may request a hearing to determine the proper compensation rate by filing a Form 50 pursuant to R.67-207.
> S.C. Code Ann. Regs. 67-1603(H) (emphasis added).

Pursuant to S.C. Code Ann. Regs. 67-1603(H) the concurrent Employer completed a Form 20 by calculating the Appellant's wages for the four (4) quarters preceding the accident and dividing them by the "actual number of weeks worked" pursuant to the Form 20 and S.C. Code Ann. §42-1-40 (1976, as amended). The Single Commissioner properly combined the two Form 20s to arrive at the combined average weekly wage of Nine Hundred Sixty-Nine and 47/100 ($969.47) Dollars..

The Appellate Panel departed from that primary statutory method of dividing the earnings "by the actual number of weeks for which wages were paid." By explanation, the Appellate Panel found:

> While the statute speaks to dividing wages by 52 or by the

> actual number of weeks which wages were paid, whichever is less, we believe that dividing by less than 52 weeks is only applicable when a claimant's employment does not extend over a 52-week period. (App. Panel Ord. p. 10, 08/24/18).

The Commission went on to find:

> Claimant's interpretation has the potential to lead to a plainly absurd result, particular in those situations where a claimant works part-time work in addition to her full-time employment and though she available [sic] to work over a 52-week period, for whatever reason she does not.
> (App. Panel Ord. 08/24/18, p. 11).
>
> * * *
>
> For whatever reason - be it her schedule, the nursing home's schedule, or some other reason - over the next 52 weeks, the Claimant earned $7,345.80 in her part-time wages. Under decision of the Hearing Commissioner, the Claimant's AWW/CR results in her making the equivalent of $13,642.20 a year and not the $7,345.80 the Claimant actually earned.
> (App. Panel Ord. 08/24/18, p. 11).
>
> * * *
>
> Finally, South Carolina Code section 42-1-40 gives the Commission the discretion to fashion any other method of computing the average weekly wage that will approximate the amount the injured employee would earn, but for the injury. See S.C. Code §42-1-40. ("When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury") We find such exceptional circumstances are present in the current.
> (App. Panel Ord. 08/24/18, p. 12).

In doing so, the Commission departed from the primary statutory method for calculating the average weekly wage and, instead, applied their own view of fairness. The Commission reasoned that S.C. Code §42-1-40 allows the Commission to depart from the traditional method of calculating

the average weekly wage "when for exceptional reasons the foregoing would be unfair, either to the employer or employee," The Commission cited as an exceptional reason, the fact that in the four (4) quarters preceding the accident the Appellant earned Seven Thousand Three Hundred Forty-Six and 00/100 ($7,346.00) Dollars from Florence Nursing Service. The Commission reasoned that dividing that amount by twenty-eight (28) weeks would result in an average weekly wage of Two Hundred Sixty-Two and 35/100 ($262.35) Dollars which would, (if then multiplied by fifty-two (52) weeks in a year), represent the equivalent of Thirteen Thousand Six Hundred Forty-Two and 20/100 ($13,642.20) Dollars a year; which the Commission found unfair, given that such amount is nearly twice the total amount the Claimant earned from Florence Nursing Service in the four (4) quarters preceding the accident.

The flaw in the Commission's exceptional reason justification is that the result is not exceptional at all. In fact, the same result is produced on every occasion in which an employee's earnings are divided by the "actual number of weeks worked" in the four (4) quarters prior to the accident rather than fifty-two (52) weeks.

The exception that the Commission draws would, in fact, swallow the rule; resulting in the legal conclusion that no claimant's earnings could ever, fairly, be divided by less than fifty-two (52) weeks, lest the claimant's average weekly wage produces the equivalent of a yearly income in excess of the claimant's actual yearly earnings for the year prior to the accident.

The Legislature could not have intended such an absurd result. If the Legislature intended that the average weekly wage should be computed by totaling the claimant's earnings for the four (4) quarters prior to the accident and dividing them by fifty-two (52) weeks, it could have said so. The Legislature did not. The Legislature could have used the average annual wages as the linch pin of

compensation, and arrived at those average annual wages by adding the wages from the four (4) quarters prior to the accident. It did not. Instead, the Legislature chose to use a weekly measure of income. It chose to arrive at that weekly measure by dividing income from four (4) quarters prior to the accident by "the actual number of weeks for which wages were paid."

The Legislature made other decisions in drawing the boundaries of compensation in the Workers' Compensation system. It chose to use two-thirds of the average weekly wage as the compensation rate, rather than one hundred percent, or seventy-five percent, or fifty percent. It chose to allow a maximum of five hundred weeks of compensation, rather than six hundred weeks, or four hundred weeks, or lifetime benefits.

The fairness of each of those legislative decisions can be debated, and was debated by the Legislature. Those decisions were the Legislature's to make. The Commission does not have the authority to read the exceptional reasons provision of the statute so broadly as to effectively write out the "actual number of weeks for which wages were paid" standard, as it has done so here.

In support, the Commission points to the case of Bennett v. Gary Smith Builders, 271 S.C. 94 (1978), in which a claimant worked each year for their employer until he received the maximum he was permitted to earn without a penalty while drawing Social Security. He would then quit and not work the rest of the year. His working time amounted to some three to four months a year, during which time he earned about $2,500.00. The Supreme Court in Bennett found that exceptional reasons existed not to divide the actual income by the actual weeks worked. They reasoned:

> Factually analyzed, we have an employee who for reasons satisfactory to himself, while fully capable of working, quit and withdrew his services from the labor market except for three or four months in the year. Disability has caused him to lose approximately $2,500.00 per year. Failure to receive any amount over and above that figure in the

> past or future is not attributable to the injury he has sustained, but rather is attributable to the pattern or work activity he has voluntarily assumed.
> Bennett v. Gary Smith Builders, 271 S.C. 94 (1978).

Bennett is inopposite to the facts of this case. In Bennett the Supreme Court found it determinative that the employee, for reasons satisfactory to himself, while fully capable of working, withdrew himself from the market except for three to four months in the year.

The Appellant's situation is quite the opposite. At the time of her injury, she was working two (2) jobs, and her earnings with her second job, Florence Nursing Service, spread over the four (4) quarters of the year. There was no evidence or suggestion in the record that the Appellant withdrew her services from the market. However, the Commission read Bennett to stand for the proposition that if, when divided by the actual number of weeks worked, the Appellant's average weekly wage, if multiplied by fifty-two (52), would result in more earnings than the Appellant earned in the four (4) quarters prior to the accident, the result would be grossly unfair to the employer and qualify as an exceptional reason to depart from the primary statutory method of computing the average weekly wage and, instead, divide the claimant's earnings by fifty-two (52) weeks.

Of course, if that is what the Bennett case stands for, there would never be a permissible circumstance under which a claimant's earnings should be divided by the actual number of the weeks worked, rather than fifty-two (52) weeks. In each instance, as a mathematical certainty, the resulting average weekly wage, if multiplied by fifty-two (52) weeks, would result in an annual income in excess of the total earnings for the four (4) quarters before the accident. In each instance, therefore, the result would be exceptional, and allow the Commission to depart from the primary rule and, instead, divide by fifty-two (52) weeks. Thus, the exception would swallow the rule. Such is not

what the statute provides, was error of law, and should be reversed.

CONCLUSION

The Workers' Compensation Act mandates that the primary method for calculating the average weekly wage is to divide the earnings for the four (4) quarters preceding the accident by "the actual number of weeks for which wages were paid." As a matter of mathematics, in this case and in every instance, dividing by the actual number of weeks for which wages were paid results in an average weekly wage that, if multiplied by fifty-two (52) weeks, results in a yearly equivalent wage that exceeds that wage actually received by the Claimant in the year preceding the accident. The Commission found this result exceptional and departed from the primary method; dividing the earnings, instead, by fifty-two (52) weeks to avoid the result of the primary method which the Commission found unfair. If allowed to stand, the Commission's exception would swallow the primary statutory rule.

Therefore, the Commission's holding should be reversed.

Respectfully submitted,

WUKELA LAW FIRM

BY: _____
STEPHEN J. WUKELA
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE, SC 29504
843-669-5634
stephen@wukelalaw.com

Florence, South Carolina

January 2nd, 2019

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WCC File No. 1302012

Juanita Jackson, Claimant, ... Appellant,

vs.

SC DSN, Employer, and State Accident Fund,
Insurer, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 2nd, 2019 addressed to Eddie Fickling, Esquire, Speed, Seta, Martin, Trivett, & Stubley, LLC, PO Box 11669, Columbia, SC 29211; and Page P. Hilton, Attorney at Law, State Accident Fund, PO Box 102100, Columbia SC 29221.

WUKELA LAW FIRM

BY: _____
STEPHEN J. WUKELA
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE SC 29504
843-669-5634

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
Frank C. Swaggard

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

(843) 669-5634
FAX (843) 669-5150

January 2, 2019

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Juanita Jackson vs. SC DSN and State Accident Fund
Appellate Case No. 2018-001681

Dear Ms. Kitchings:

Enclosed for filing please find the original Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal in the above case.

By copy of this letter, I am serving Eddie Fickling, Esquire, Attorney at Law, Speed, Seta, Martin, Trivett, & Stubley, LLC, PO Box 11669, Columbia, SC 29211; and Page P. Hilton, Attorney at Law, State Accident Fund, PO Box 102100, Columbia, SC 29221, with the Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:jpb

Enclosures

cc: James E. L. Fickling

Page P. Hilton

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WUKELA LAW FIRM
403 SECOND LOOP ROAD
P.O. BOX 13057
FLORENCE, SC 29504

To:
Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

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