

STATE OF SOUTH CAROLINA  
In the Court of Appeal

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APPEAL FROM THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Jr., Commissioner  
R. Michael Campbell, II, Commissioner  
T. Scott Beck, Chair

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SCWCC File No. 1302012

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Appellate Case No. 2018-001681

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**RECEIVED**  
JAN 30 2019  
SC Court of Appeals

Juanita Jackson, Claimant.....Appellant

v.

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

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**INITIAL BRIEF OF THE RESPONDENTS**

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## STATEMENT OF ISSUES ON APPEAL

1. Absent compelling reasons, an appellate court will not overturn an administrative tribunal's interpretation of a statute it administers. The text of S.C. Code Ann. §42-1-40 does not address calculating AWW for a second, part-time job. In applying the statute to this situation, the Commission remained faithful to the intention of that statute, which is to approximate the amount the injured employee would be earning if not for the injury. Are there compelling reasons to overturn here?
2. S.C. Code Ann. §42-1-40 gives the Commission the discretion to fashion a method of computing AWW, when exceptional reasons make the primary statutory method unfair to either party. Whereas the primary statutory method of calculation gives Jackson an AWW more than six thousand dollars higher than what she could have actually earned, the Commission's method most nearly approximates the amount Jackson would be earning if not for the injury. Did the Commission abuse its discretion?

## STATEMENT OF THE CASE

Jackson's workers' compensation claim arose from an accident that occurred while working as a nurse for the South Carolina Department of Disability and Special Needs.<sup>1</sup> At the time she was working for SC DSN, Jackson had a concurrent, part-time job with Florence Nursing Service.<sup>2</sup> Jackson's average weekly wage (AWW) at SC DSN is \$707.12.<sup>3</sup> To determine Jackson's compensation rate (CR), the parties agree that Jackson's AWW at Florence Nursing should be added to her AWW at SC DSN; the parties disagree about what the her AWW at Florence Nursing is.

The disagreement is a dispute regarding how to calculate the AWW. The single Commissioner, on January 18, 2017, agreed with Jackson and ruled that Jackson's AWW at Florence Nursing should be calculated by dividing her total earnings by the total number of weeks worked.<sup>4</sup> Jackson worked 28 weeks at Florence Nursing during the four quarters preceding her accident.<sup>5</sup>

On appeal, the full Commission agreed with the State employer and insurer, determining that Jackson's total earnings over the four quarters prior to her injury should be divided by 52 weeks. The Commission gave two arguments in support of this decision, both based on S.C. Code Ann. §42-1-40.<sup>6</sup> The first argument, using a plain reading of the statute and case law, contended that statutory intent requires the Commission to divide Jackson's earnings by 52 weeks.<sup>7</sup> The second argument contended that the Commission has statutory discretion to fashion a method of

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<sup>1</sup> Full Commission Order, p. 1.

<sup>2</sup> *Id.*, p. 7-8.

<sup>3</sup> DSN Form 20.

<sup>4</sup> Full Commission Order, p. 8.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, pp. 8-13.

<sup>7</sup> *Id.*, pp. 9-12.

calculating a Claimant's AWW, when exceptional reasons make the primary statutory method of calculation unfair to either party.<sup>8</sup>

After the full Commission issued its order on August 24, 2018, Jackson timely appealed to this court. If the court upholds the Commission's order (which it should), Jackson's AWW at Florence Nursing remains \$141.27.<sup>9</sup> If the order were overturned, her AWW would be \$263.35.<sup>10</sup>

### STANDARD OF REVIEW

Although Jackson did not list the standard of review in her initial brief, the standards of review set forth in the Administrative Procedures Act apply to workers' compensation cases.<sup>11</sup> In this case, the specific standards of review are the following.

1. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because other error of law affects the administrative decision.<sup>12</sup>
2. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.<sup>13</sup>

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<sup>8</sup> Full Commission Order, pp. 12-13 (citing S.C. Code Ann. §42-1-40).

<sup>9</sup> *Id.*, p. 8.

<sup>10</sup> *Id.*

<sup>11</sup> *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304, 305 (1981).

<sup>12</sup> S.C. Code Ann. §1-23-380(5)(d).

<sup>13</sup> S.C. Code Ann. §1-23-380(5)(f).

## ARGUMENT

### I. The Commission correctly interpreted S.C. Code Ann. §42-1-40.

This case concerns a question of statutory interpretation, and “[s]tatutory interpretation is a question of law.”<sup>14</sup> Although appellate courts do not defer questions of law to administrative tribunals and “will interpret statutes according to principles of statutory construction,”<sup>15</sup> courts “will not [overrule the tribunal’s interpretation] absent compelling reasons.”<sup>16</sup>

The context of this case makes the Commission’s statutory interpretation of S.C. Code Ann. §42-1-40 correct. The context is an employee with a primary, full-time job (SC DSN) and a secondary, part-time job (Florence Nursing). S.C. Code Ann. §42-1-40 does not address this situation; the statute describes only how to calculate AWW for an employee with only one employer.

With this fact in mind, the objective of the method of calculation provided by S.C. Code Ann. §42-1-40 is “to arrive at a fair approximation...[of] the amount which the injured employee would be earning were it not for the injury.”<sup>17</sup> Jackson did not work more than 28 weeks at Florence Nursing during 2012. Jackson presented no evidence to suggest she could have worked more often during the four quarters preceding her injury or earned more during the four quarters preceding her injury.<sup>18</sup> If her earnings from Florence Nursing were divided by 28, the actual number of weeks she worked, the result would be an AWW of \$969.47 and yearly earning capacity

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<sup>14</sup> *Bessinger v. R-N-M Builders & Assocs., LLC*, 421 S.C. 349, 356, 806 S.E.2d 73, 734 (Ct. App. 2017) (internal citation omitted).

<sup>15</sup> Jean Hoefler Toal, *et al.*, *Appellate Practice in South Carolina*, 3<sup>rd</sup> ed., p. 97 (citing among other cases *Paschal v. State Election Comm’n*, 317 S.C. 434, 454 S.E.2d 890 (1995)).

<sup>16</sup> *Id.* (citing among other cases *Dunton v. S.C. Bd. of Exam’rs in Optometry*, 291 S.C. 221, 353 S.E.2d 132 (1987)).

<sup>17</sup> Full Commission Order, p. 12 (citing *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

<sup>18</sup> Full Commission Order, p. 11.

of \$50,412.44. That result is more than six thousand dollars higher than what she actually did earn during the four quarters preceding her injury.<sup>19</sup> Because this inflated figure is not a fair approximation of what she earned at her second job, the Commission divided her total earnings during the four quarters preceding her injury by 52 weeks. Therefore, when an employee has two jobs, the second of which is a part-time job and employs her for less than 52 weeks during the preceding four quarters and no evidence suggests the employee could have worked more often and therefore earned more money, the Commission will divide the employee's total earnings at their primary and secondary job by 52 weeks.

The Commission applied S.C. Code Ann. §42-1-40 to a situation not contemplated by its text. In doing so, it remained faithful to the statutory intent, which is to approximate the amount the injured employee would be earning if not for the injury. There are no compelling reasons to overturn the Commission's decision. This court should uphold it.

In arguing otherwise, Jackson claims the Commission's decision "result[s] in the legal conclusion that no claimant's earnings could ever, fairly, be divided by less than fifty-two [] 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."<sup>20</sup> This, of course, is not what the Commission decided. If an employee were working at one job for 51 weeks, to give just one example, the Commission would of course divide that employee's earnings by 51 weeks rather than 52. The Commission did not decide that "no claimant's earnings could ever, fairly, be divided by less than fifty-two [] weeks..."<sup>21</sup> What the Commission decided is that, when an employee is

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<sup>19</sup> Full Commission Order, p. 11; DSN Form 20 (Total Wages Earned \$36,770.16); Florence Nursing Form 20 (Total Wages Earned: \$7,346.00).

<sup>20</sup> Appellant's Brief, p. 7.

<sup>21</sup> *Id.*

working two jobs, and the second employs her for less than 52 weeks during the preceding four quarters and no evidence suggests she could have worked more often and therefore earned more money, the Commission will divide her total earnings from both jobs by 52 weeks (the period the earnings were accumulated). Jackson's argument to the contrary is spurious.

**II. The Commission did not abuse its discretion.**

This court can reverse the Commission's decision if it is characterized by an abuse of discretion. "An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support."<sup>22</sup>

Even if the Commission's interpretation of S.C. Code Ann. §42-1-40 is incorrect (though it's not), the Commission still has the authority and discretion to fashion a method of calculating AWW, when exceptional reasons make the primary statutory method of calculation unfair to either party. S.C. Code Ann. §42-1-40 states,

When for exceptional reasons the [method of dividing the employee's earned wages by 52 or the number of weeks actually worked] would be unfair, either to the employer or the employee, *such other method of computing [AWW] may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.*<sup>23</sup>

In 2012, the four quarters prior to Jackson's injury, Jackson earned \$36,770.16 from SC DSN. During the four quarters of 2012 Jackson worked part-time for Florence Nursing, she earned a total of \$7,346.00. Jackson's total earnings in 2012 were \$44,116.16. Jackson asked the Commission to calculate her AWW in a manner yielding an AWW of \$969.47 and a total yearly earning capacity of \$50,412.44. There is no evidence in the record supporting Jackson has a yearly

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<sup>22</sup> Jean Hoefler Toal, *et al.*, *Appellate Practice in South Carolina*, 3<sup>rd</sup> ed., p. 99 (citing *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)).

<sup>23</sup> S.C. Code Ann. §42-1-40 (emphasis added).

earning capacity in excess of \$44,116.16. Furthermore, there is no evidence in the record suggesting Jackson could have worked more often or earned more money.<sup>24</sup> Therefore, the Commission determined that exceptional circumstances justifying deviation from the primary statutory method of calculation existed in this case.<sup>25</sup>

In addition, the Supreme Court has made clear that “concurrent employment is one such exceptional reason”<sup>26</sup> that warrants deviation from the primary statutory method of calculating AWW under S.C. Code Ann. §42-1-40. Jackson has concurrent employment, so the Commission was well within its discretionary authority when it decided to deviate from the primary statutory method of calculating AWW.

The Commission used its discretionary authority<sup>27</sup> to fashion a computation method that most nearly approximated the total amount which Jackson would be earning at SC DSN and Florence Nursing if not for the injury. The Commission divided Jackson’s total earnings of 2012 (\$44,116.16)<sup>28</sup> by 52 weeks yielding an AWW of \$848.39.

The Commission did not commit an error of law by utilizing the discretion granted to it by statute; and Jackson has not actually argued that an error of law was committed or that the

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<sup>24</sup> “[W]hen the Commission 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.’” *Swilling v. Pride Masonry of Gaffney*, 401 S.C. 178, 736 S.E.2d 672, 676 (Ct. App. 2012) (internal citation omitted).

<sup>25</sup> Full Commission Order, pp. 12-13; *see also Pugh v. Piedmont Mech. & Zurich Ins.*, 396 S.C. 31, 719 S.E.2d 676, 681 (Ct. App. 2011) (“[S]ection 42-1-40 has been interpreted to provide an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant’s probable future earning loss.”) (internal citations and quotations omitted).

<sup>26</sup> *Smith v. Barnwell County*, 384 S.C. 520, 682 S.E.2d 828, 830 (2009) (citing *Forman v. Jackson Minit Markets, Inc.*, 265 S.C. 164, 217 S.E.2d 214 (1975)).

<sup>27</sup> *Id.*

<sup>28</sup> DSN Form 20 (Total Wages Earned \$36,770.16); Florence Nursing Form 20 (Total Wages Earned: \$7,346.00).

Commission lacked evidentiary support to exercise its discretion.<sup>29</sup> Instead, she first contends that, if the Commission's ruling stands, an employee's earnings could never be divided by 52 and "the exception [in the statute] would [therefore] swallow the rule."<sup>30</sup> Next, she contends that, "The Commission does not have the authority to read the exceptional provision of the statute so broadly as to effectively write out the [primary statutory method of calculation]."<sup>31</sup>

Jackson's contentions are without merit and insufficient to overturn the Commission's order. First, the Commission does have the discretionary authority to deviate from the primary statutory method of calculation when an employee has concurrent employment.<sup>32</sup> Second, the Commission's discretionary decision in this case does not mean it must decide on all similar situations in future cases the same way. That's why the decision is described as discretionary, not mandatory. Third, even if this discretionary decision did have mandatory application in future cases (though it does not), the Commission still did not make a decision that requires it to divide an employee's earnings by 52 in every conceivable situation. Rather, when an employee is working two jobs, and the second (part-time job) employs her for less than 52 weeks during the four quarters preceding her injury and no evidence suggests she could have worked more often and therefore earned more money, the Commission will, in this unique circumstance, divide her total earnings over the four quarters preceding the injury by 52 weeks. That is the extent of the future applicability of the Commission's decision.

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<sup>29</sup> Appellant's Brief, pp. 7-10.

<sup>30</sup> *Id.*, p. 9 and p. 7 ("the exception the Commission draws would, in fact, swallow the rule...").

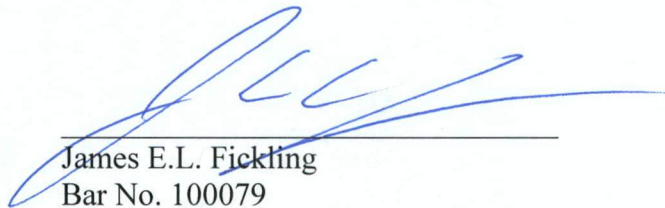
<sup>31</sup> *Id.*, p. 8.

<sup>32</sup> See n. 26.

## CONCLUSION

Jackson has not given any compelling reasons to overturn the Commission's interpretation of S.C. Code Ann. §42-1-40. In addition, the statute gives the Commission discretion to fashion a method of calculating the claimant's AWW which is fair to both parties. That discretion was not abused in this case. Dividing by 28 weeks would have resulted in an inflated AWW and yielded earnings more than six thousand dollars higher than her actual yearly earning capacity. No evidence supports that higher earning capacity. The Commission's decision is correct. This court should affirm the full Commission.

Respectfully submitted,



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**PROOF OF SERVICE**

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I certify that I have served the Carrier's Initial Brief, Designation of Matter, and Certification on Juanita Jackson by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2019 addressed to her attorney, Stephen J. Wukela, PO Box 13057, Florence, SC 29504.

[Signature block is on the next page]

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