

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee..... Appellant/Respondent

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier..... Respondents/Appellants

RESPONDENTS' FINAL BRIEF

Respondents/Appellants

R. Daniel Addison
Hedrick, Gardner, Kincheloe & Garofalo, L.L.P.
P.O. Box 11267
Columbia, SC 29211
(803) 727-1200
Attorney for the Respondents

RECEIVED
FEB 19 2013
SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee..... Appellant/Respondent

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier..... Respondents/Appellants

RESPONDENTS' FINAL BRIEF

Respondents/Appellants

R. Daniel Addison
Hedrick, Gardner, Kincheloe & Garofalo, L.L.P.
P.O. Box 11267
Columbia, SC 29211
(803) 727-1200
Attorney for the Respondents

TABLE OF AUTHORITIES

Case Law

1. Berkeley County School Dist. v. South Carolina Dept. of Revenue, 383 S.C. 334, 679 S.E.2d 913 (2009).....8
2. Cabiness v. Town of James Island, 393 S.C. 176, 712 S.E.2d 416 (2011).....8
3. Edwards v. Edwards, 384 S.C. 179, 682 S.E.2d 37 (Ct. App. 2009).....7
4. Forrest v. A.S. Price Mech., 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007).....4
5. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).....4
6. Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010).....9
7. Pugh v. Piedmont Mechanical, 396 S.C. 31 719 S.E.2d 676 (Ct. App. 2011).....10
8. SCANA Corp. v. South Carolina Dept. of Revenue, 384 S.C. 388, 683 S.E.2d 468 (2009)....8
9. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000).....4
10. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006).....4
11. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999).....4

Statutes/Regulations

1. S.C. Code Ann. § 42-1-40.....7, 8, 9

STATEMENT OF ISSUES ON APPEAL

**WHETHER THE COMMISSION PROPERLY DETERMINED
CLAIMANT'S AVERAGE WEEKLY WAGE?**

STATEMENT OF THE CASE

This claim arises out of an accident occurring on March 11, 2011, while Gayla Ramey (“Claimant”) was working for Unihealth Post Acute Care (“Employer”). Subsequent to her alleged injury, and after she had been released to full duty, Claimant was terminated by Employer for falsifying paperwork in order to receive wages for time she was not at work. This claim was initially heard before Commissioner G. Bryan Lyndon on August 10, 2011, in Columbia, South Carolina. The Single Commissioner issued a Decision and Order on September 28, 2011, finding that Claimant sustained a compensable injury by accident on March 11, 2011, to her back and right upper extremity; was entitled to continuing temporary total disability compensation from March 24, 2011; and ordering the Employer to provide causally related medical treatment. An Appellate Panel of the South Carolina Workers’ Compensation Commission held a hearing on this matter on March 20, 2012, and issued a Decision and Order, dated May 23, 2012, affirming the Single Commissioner’s Findings of Fact and Rulings of Law in full and adopting the Single Commissioner’s September 28, 2011, Decision and Order as the Decision and Order of the Appellate Panel.

In the Single Commissioner’s September 28, 2011, as affirmed by the Full Commission, the Commissioner ordered Defendants to pay Claimant temporary total disability (“TTD”) benefits from the date of her termination to the present and continuing. The Commissioner found that Claimant’s compensation rate is \$671.58 based on an average weekly wage of \$1,007.32. The Commissioner based the calculation of Claimant’s compensation rate on Employer’s Form 20 which covered the last four quarters of Claimant’s employment. Claimant’s

entitlement to TTD benefits has been appealed by Defendants. Claimant has separately appealed the Commission's finding as to Claimant's average weekly wage.

STANDARD OF REVIEW

“The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers’ Compensation Commission.” Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981)). “In workers’ compensation cases, the [Appellate Panel] is the ultimate fact finder.” Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citation omitted). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). “Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact.” Forrest, 373 S.C. at 306, 644 S.E.2d at 785 (citing S.C. Code § 1-23-380(A)(5)). The appellate court may reverse or modify the Appellate Panel’s decision only if Claimant’s substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Id. at 306, 644 S.E.2d at 785-86. “Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached.” Shealy, 341 S.C. at 455, 535 S.E.2d at 442. The possibility of drawing two inconsistent conclusions does not prevent the Appellate Panel’s conclusions from being supported by substantial evidence. Tiller v. Nat’l Health Care Ctr., 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

STATEMENT OF THE FACTS

At the time of the hearing in this matter, Claimant was a 50 year old registered nurse that had worked for Employer for nine years. Claimant testified that she fell on some steps while at work on March 11, 2011. She testified that, immediately after her fall, she was sent to Doctor's Care for treatment. She testified that she had clocked-in that morning via hand-scanning device, but did not clock out when she was sent for treatment.

Claimant further testifies that she was given work restrictions by the providers at Doctor's Care on that first visit. She stated that she was told not to spend more than 30 minutes per hour on her feet; to limit the use of her back; no use of her right arm; no lifting greater than ten pounds; and no repetitive bending, twisting, stooping, squatting, or pushing. Claimant asserted that she continued working as normal and her restrictions were not accommodated. She asserted that she was required to walk all over the facility, do a great deal of paperwork, pull charts from overhead to file forms, and sometimes she had to push residents in wheelchairs. Claimant stated that she felt that the tasks she was doing were in violation of her restrictions, but that she was scared of losing her job.

On March 18, 2011, Claimant had another appointment with Doctor's Care. Claimant asserted that she attempted to clock-out around 7:30 that morning using the hand scanner, but that the scanner would not work when she tried to use it. Claimant stated that she left without doing anything further to sign out because she needed to get to the appointment. She stated that she returned at 9:45 that morning, and was told to go home about 45 minutes later by her supervisor Tonya Shepherd because Ms. Shepherd wanted her to work the next two days. Claimant stated that when she returned from the doctor, she completed a Request for Missed Time form to note the time she missed that would not be reflected on the punch clock due to the scanner malfunction. She indicated on the form the time period of 7:00 a.m. to 10:30 a.m. and

asserted that was meant to reflect her time missed for the appointment. She stated that she got the form approved by her supervisors, Carrie Ray and Tonya Shepherd, and that both of those supervisors knew that she had an appointment that morning. Claimant testified that it was her understanding that she would be paid for work time that she missed for appointments related to her work injury and that no one had advised her any differently. Following this appointment, Claimant was released to full duty by Doctor's Care with no restrictions.

Claimant was terminated by Employer three days later on March 21, 2011 for falsifying records by submitting a time sheet for compensation that did not reflect her actual time spent at work. Following her termination, Claimant returned to Doctor's Care for additional treatment, and was placed back on work restrictions. Claimant has not yet been released at MMI.

Following the August 20, 2011 hearing of this matter, the Single Commissioner found the Claimant was entitled to temporary total disability benefits from March 24, 2011 "to the present and continuing." In his order, the Single Commissioner found Claimant's compensation rate to be \$671.58 based on an average weekly wage of \$1,007.32 per the Form 20 prepared by Employer. Claimant contends that her average weekly wage should be \$1,099.17 with a corresponding compensation rate of \$704.32. The Appellate Panel of the Full Commissioner affirmed the Single Commissioner's order, including the finding related to Claimant's comp rate.

ARGUMENTS

I. The Commission correctly determined Claimant's average weekly wage.

The calculation of average weekly wage is expressly governed by statute. Under S.C. Code Ann. § 42-1-40:

"Average weekly wages" . . . **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 Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.

(emphasis added). In accordance with the statutorily mandated formula, Defendant's prepared a Form 20, *Statement of Earnings of Injured Employee*. Based on the Form 20, Claimant's earnings for the four quarters immediately preceding the quarter in which the injury occurred was \$52,380.47. Dividing this amount by 52 in accordance with this statute results in an average weekly wage of \$1,007.32. Claimant, however, argues that a different formula should be applied in this case to come to a higher calculation of average weekly wage.

As an initial matter, Claimant's arguments are premised on her contention that the Commission should have made findings and conclusion based on facts that are not in evidence in this case. See Edwards v. Edwards, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). Claimant argues that calculating Claimant's average weekly wage by using the 52 weeks immediately preceding her injury would result in an average weekly wage of \$1,099.17. While Claimant asserts that "these figures are undisputedly correct," there is no credible evidence in the record upon which this amount can be based or verified. On this basis alone, Claimant's appeal on this issue is without merit and the Commission's determination as to Claimant's average weekly wage and corresponding compensation rate should be affirmed.

Despite the absence of any evidence to support Claimant's position, the determination by the Commission of Claimant's average weekly wage was based on the plain application of the statute and was without error. It is axiomatic that where a statute's language is clear, courts must enforce the plain and clear meaning of the words used. See e.g., Cabiness v. Town of James Island, 393 S.C. 176, 712 S.E.2d 416 (2011) ("However, if the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used."). In order to avoid the application of the plain language in Section 42-1-40, Claimant attempts to create

contradictions in the statute where none exist. Claimant correctly notes that Section 42-1-40 defines “average weekly wages” 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...” This section goes to provide for various ways in which to calculate this amount depending on the duration and nature of employment. In this case, the formula dictated by the statute is the formula relied upon by the Commission in this case to arrive at the \$1,007.32 average weekly wage.

Furthermore, Claimant raises the novel suggestion that the only way to reconcile the perceived “contradictions” in the statute is to outright ignore the mandatory calculation method directed by the General Assembly and “treat the reference to the previous four quarters reported to the Department of Employment and Workforce as a means of authenticating the payroll records.” In essence, Claimant argues that the plain language of that statute should be ignored in favor of a calculation method that, in this particular instance, benefits Claimant in some respect. This contradicts the core principles of statutory construction. Berkeley County School Dist. v. South Carolina Dept. of Revenue, 383 S.C. 334, 679 S.E.2d 913 (2009) (“The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.”); SCANA Corp. v. South Carolina Dept. of Revenue, 384 S.C. 388, 683 S.E.2d 468 (2009) (“Where a statute’s language is plain and unambiguous, and conveys a clear and definite meaning ... the court has no right to impose another meaning.”).

Finally, Section 42-1-40 does provide for alternative methods of calculating average weekly wages. Under this section:

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.

Claimant argues that it is patently unfair for her where, as she alleges occurred here, she was injured in a quarter in which her earnings were higher than the year before. Other than the difference in the final calculation of her average weekly wage, the record is devoid of any facts upon which the Commission could have found “exceptional reasons” for deviating from the statutory calculation method. As noted by this court, “[t]he specific goal of section 42-1-40 is for the commission to calculate an average weekly wage that is *fair to both the worker and the employer.*” Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010)(emphasis added). Claimant argues that the Commission’s ruling results in a “windfall” for Employer. Likewise, it would not be fair to Employer to pay a higher compensation rate where, as here, there is no evidence in the record upon which to based Claimant’s desired calculation and no evidence in the record to justify the higher figure as an estimation of future earnings potential. Claimant had not received any raise or promotion immediately prior to her injury and Claimant has not cited to any fact in evidence that would support a finding of “exceptional reasons.”

Under the established precedent of this court, the Commission must apply the statutory method unless specific conditions are met.

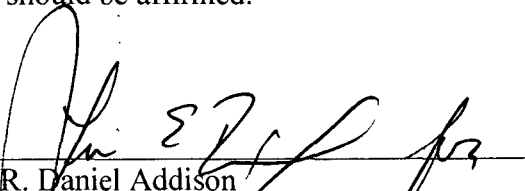
The Workers’ Compensation Act defines “average weekly wage” for the purposes of computing compensation and sets forth a primary method of calculation and four alternative methods. The primary method for calculating the average weekly wage is to take “the total wages paid for the last four quarters divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.” “The [Appellate Panel] must use this method unless ‘the employment, prior to the injury, extended over a period of less than fifty-two weeks,’ or unless ‘for exceptional reasons’ it would be unfair to do so.”

Pugh v. Piedmont Mechanical, 396 S.C. 31, 37-38, 719 S.E.2d 676, 680 (Ct. App. 2011) (internal citations omitted) (emphasis added). In this case, none of the conditions justifying deviation from

the “primary method for calculating the average weekly wage” are present. Consequently, the method used by the Commission in this case was only method available to it.

As set forth above, the Commission based its determination of average weekly wage on a Form 20 submitted in this case that was calculated using the formula expressly set forth in the Workers’ Compensation Act. There is no credible evidence in the record to support the finding that Claimant argues should have reached by the Commission. Moreover, the applicable statute is plain in its meaning and the intent of the General Assembly is clear from the unambiguous language in the statute. There is no evidence in the record upon which the Commission could have justified application of any alternative methods of calculation. For these reasons, the findings and conclusions of the Commission with respect to Claimant’s average weekly wage and corresponding compensation rate should be affirmed.

February 4, 2013



R. Daniel Addison
Hedrick Gardner Kincheloe & Garofalo, LLP
Post Office Box 11267
Columbia, South Carolina 29211
(803) 727-1200
Attorney for the Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee..... Appellant/Respondent

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier..... Respondents/Appellants

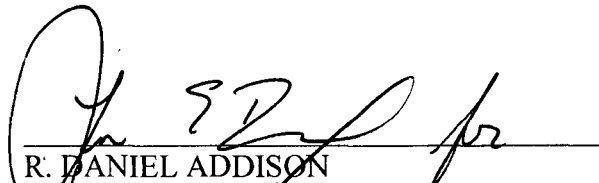
CERTIFICATE OF COMPLIANCE

RECEIVED

FEB 19 2013

The undersigned certified that Respondents' Final Brief complies with Rule 211(b).

SC Court of Appeals



R. DANIEL ADDISON
Hedrick, Gardner, Kincheloe & Garofalo, L.L.P.
P.O. Box 11267
Columbia, SC 29211
(803) 727-1200
Attorney for the Respondents

Columbia, South Carolina
February 4, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee..... Appellant/Respondent

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier..... Respondents/Appellants

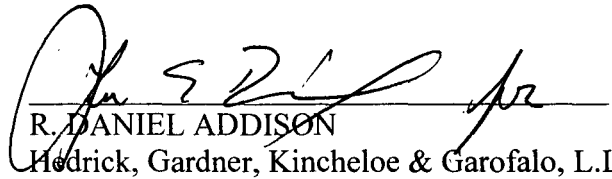
PROOF OF SERVICE

This is to certify that a copy of the foregoing **Respondents' Final Brief** has been served upon the flowing by placing the same in the United States mail, first-class postage pre-paid, addressed as shown below on the 4th day of February, 2013.

Virginia Crocker
S.C. Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, SC 29201

Mark R. Calhoun
Mark R. Calhoun, Attorney At Law
714 East Main Street
Lexington, SC 29072

RECEIVED
FEB 19 2013
SC Court of Appeals

A handwritten signature in black ink, appearing to read "R. Daniel Addison", is written over a horizontal line.

R. DANIEL ADDISON

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P.

P.O. Box 11267

Columbia, SC 29211

(803) 727-1200

Attorney for the Respondents