THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Appellate Case No. 2012-212689

W.C.C. File No. 1105986

Pamela E. Proud, Claimant, ... Appellant,

v.

Palmetto Health Richland, Employer, and
Key Risk Management Services, Inc., Carrier, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant Pamela E. Proud ("Proud") filed a Form 50 on May 26, 2011, in which she alleged injury to her left ankle, left foot, left knee and right knee as a result of a work related accident that occurred on May 5, 2011. (Form 50) She sought causally related medical treatment and temporary total disability benefits from the day after the accident to the present and continuing. Palmetto Health Richland ("Employer") and Key Risk Management Services ("Carrier") (collectively "Respondents") denied an injury arising out of and in the course of employment and asserted Proud's injury was idiopathic given Proud injured her ankle on a level surface. (Form 51)

After a hearing held August 17, 2011, the single commissioner filed an Order on November 29, 2011, in which he concluded Proud sustained a left leg (ankle) injury arising out of and in the course and scope of her employment. (November 29, 2011 Decision and Order) The single commissioner also determined Proud was entitled to additional medical treatment under § 42-15-60 as necessary to lessen her period of disability until she reaches maximum medical improvement, and Respondents were ordered to pay temporary total disability benefits from May 6, 2011, until Proud reaches maximum medical improvement. The single commissioner held Proud's average weekly wage was $585.04 with a compensation rate of $390.05. Both parties timely appealed to the appellate panel of the Full Commission. (Forms 30)

Following oral argument on April 16, 2012, the appellate panel issued its July 13, 2012 Decision and Order affirming the single commissioner's order in its entirety. Specifically, the Appellate Panel ordered Respondents to pay all causally related medical treatment, mileage, and prescription reimbursements . . . [as well as] temporary total

benefits from May 6, 2011, and ***continuing until Claimant reaches maximum medical improvement or is otherwise allowed to suspend or terminate pursuant to the act or regulations***." (July 13, 2012 Decision and Order, p. 10-11) (emphasis added) Proud filed a notice of appeal in this Court on August 2, 2012.

STATEMENT OF THE FACTS

Proud has worked as a nurse for over twenty years. (August 17, 2011 Hrg. Tr., p. 9, line 6). Proud worked for Palmetto Health Baptist beginning in 2010 and in 2011 transferred to Palmetto Health Richland, where she was required to attend nursing orientation. (*Id.*, p. 9, lines 15-24) Claimant was paid $26.00 per hour by Palmetto Health Baptist, and she was to receive $31.40 per hour when she began working as a nurse for Palmetto Health Richland. (Clmt. APA Exhibit B) Proud's transfer had an effective date of April 17, 2011. (*Id.*) However, Proud did not start the orientation required to begin working at Palmetto Health Richland until the week of May 2, 2011. (August 17, 2011 Hrg. Tr., p. 10, lines 1-4) During a break between glucose meter training and meeting with a supervisor regarding her work schedule on May 5, 2011, Proud turned and missed part of a step or curb and fell forward onto both knees and twisted her left ankle after coming off the elevator in the parking garage. (*Id.*, p. 10, lines 5-13; p. 12, lines 1-8)

ARGUMENT

I. PROUD'S APPEAL TO THE COURT OF APPEALS SHOULD BE DISMISSED AS A NON-FINAL, INTERLOCUTORY ORDER THAT IS NOT SUBJECT TO IMMEDIATE APPELLATE REVIEW.

Proud's underlying workers' compensation claim remains pending before the Commission; therefore, this appeal is interlocutory and should not be considered until a final judgment disposing of all issues has been rendered. The only issues addressed by the single commissioner and the appellate panel of the Full Commission were Proud's compensation rate and whether she suffered a compensable injury. The Commission has yet to address, among other things, whether Proud has reached maximum medical improvement or whether she is entitled to any permanent disability impairment rating and compensation benefits.[1] In addition, as Respondents are now required to provide causally related medical treatment, it is likely that issues regarding authorized treatment will arise. As the orders determining Proud's compensation rate are interlocutory and do not constitute a final adjudication of all issues in this case, the appeal is interlocutory and should be dismissed.[2]

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[1] In fact, Proud filed a hearing request on October 4, 2012, well after she filed her Notice of Appeal in this Court. (Form 50) A Consent Order was issued by Commissioner Susan Barden on March 1, 2013, wherein she allowed Proud to withdraw her October 2012 hearing request, constituting Proud's first withdrawal pursuant to Regulation 67-609. The single commissioner further ordered Proud may request another hearing in the future without prejudice.

[2] At a minimum, the Court should stay these proceedings pending resolution of the rehearing in *Bone v. U.S. Foodservice,* 399 S.C. 566, 733 S.E.2d 200 (2012), *rehr'g granted* 2012 S.C. LEXIS 187 (Sept. 14, 2012). *See, e.g.*, April 2, 2013 Order holding appeal in abeyance in *Dublin v. Luther B. Hicks Logging*, Appellate Case No. 2012-213625; March 11, 2013 Order in *Morrett v. Capital City Ambulance of GA, Ltd.*, No. 2012-212972 (same).

South Carolina and the Workers' Compensation Commission "adhere to the final judgment rule. Accordingly, subject to certain exceptions, an appeal lies only from a final judgment." *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005), *reh'g denied* (Jan. 19, 2006), *citing Hagood v. Sommerville*, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 1-23-380, -390; Rule 201(a), SCACR. "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709 (2005) (*citing Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002)).

The issue on appeal in the instant case is not a final order and does not prevent a final judgment. A "final judgment" is an order that must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done but to enforce what already has been determined. *Bone*, 399 S.C. at 570, 733 S.E.2d at 202 (*citing Charlotte-Mecklenburg Hop. Auth. v. S.C. Dep't. of Health and Environmental Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010); *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011)). The orders of the single commissioner and the appellate panel are limited to Proud's compensation rate and the issue of whether her claim is compensable. All other benefits to which Proud may be entitled are not addressed in these orders, including whether Proud has reached maximum medical improvement, the course of medical treatment that might be necessary to lessen the period of her disability, and whether she is entitled to any permanent disability compensation. In fact,

Commissioner Barden even noted in a recent Consent Order on March 1, 2013 that Claimant has the right to file Form 50 requests for hearing in the future without prejudice.

Since no final judgment has been rendered, this appeal should be dismissed as interlocutory and remanded to the Commission for further proceedings consistent with the orders of the single commissioner and the appellate panel. Pursuant to the holdings of *Long, Charlotte-Mecklenburg*, and *Bone*, dismissal and remand will preserve judicial resources and prevent piecemeal appeal of the various issues presented (and not yet decided) in this case. In the alternative, this Court should stay further proceedings in this case pending resolution in *Bone*.

II. THE COMMISSION DID NOT ERR AS A MATTER OF LAW IN FINDING PROUD'S AVERAGE WEEKLY WAGE TO BE $585.04 WITH A COMPENSATION RATE OF $390.05.

The Commission correctly concluded Proud is entitled to an average weekly wage and compensation rate based on her earnings for the period immediately preceding the accident. "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...." S.C. Code Ann. § 42-1-40. The [Commission] 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, 38, 719 S.E.2d 676, 680 (Ct. App. 2011) (*citing* § 42-1-40; *Pilgrim v. Eaton*, 391 S.C. 38, 44-45, 703 S.E.2d 241, 244 (Ct. App. 2010)). There are three alternatives to the main method of calculating an employee's average weekly wage. The first alternative applies when the employment is over a period of less than fifty-two weeks, and is not applicable to the

instant case. The second alternative requires the commission to consider "the average weekly amount which . . . 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." *Pilgrim*, 391 S.C. at 38, n. 3 (*quoting* § 42-1-40). If the second alternative calculation is unfair, and exceptional reasons exist to use another method of computing the average weekly wage, the Commission ***may*** use another method. *Id.*

Here, the Commission appropriately determined Proud's average weekly wage to be $585.04 with a corresponding compensation rate of $390.05. This average weekly wage was based on fifty-two weeks of employment with Respondents, during which Proud worked at a rate of $26.00 per hour. In fact, Respondents gave Proud a credit by including in her average weekly wage earnings in the quarter in which the injury occurred, thereby increasing her average weekly wage by $25.07. Proud is not entitled to an increased average weekly wage based on the position she was going to start upon successful completion of orientation at an increased rate of $31.40 per hour. The statute is clear: average weekly wage is based on the period *immediately preceding* the date of injury, and not what Proud may have made had injury occurred after she completed orientation and worked for a year in her new position.

"When for *exceptional reasons* the [methods for calculating average weekly wage provided] would be unfair, either to the employer or employee, such other method of computing average weekly wage may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code. Ann. § 42-1-40 (emphasis added). "The statute provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a

claimant's probable future earning loss." *Sellers v. Pinedale Residential Center*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002) (*citing Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

In *Sellers*, claimant was involved in a compensable motor vehicle accident that rendered him a paraplegic at age sixteen. *Id.* at 186, 564 S.E.2d 694, 698. At the time, he worked part-time while attending high school. *Id.* Based on past earnings, claimant's average weekly wage was $100.00, and his compensation rate was the statutory minimum, $75.00. *Id.* The court held it was not in error to increase claimant's average weekly wage to that of an electrician. *Id.* at 192, 564 S.E.2d at 699. The court reasoned claimant demonstrated the interest, aptitude, and ability to become an electrician after he finished school but for the severe injury, because he had worked with his father, an electrician, since he was twelve years old, attended technical college even after the accident but was unable to continue due to the injury, and his father's former employer testified "Sellers was very energetic. He wanted to learn, unlike most kids these days. He had a very determined approach that he wanted to learn the electrical trade, and follow pretty much and do the same thing his dad was doing." *Id.* at 191-92, 564 S.E.2d at 699. The court further reasoned the average weekly wage calculation was correct because it was based on a pay scale presented by a vocational expert. *Id.* at 192, 564 S.E.2d at 699. "The commission considered the extent of the injury and the claimant's age constituted exceptional circumstances requiring a departure from the method of average weekly wage calculation set forth in § 42-1-40." *Roberts v. McNair Law Firm*, 366 S.C. 50, 54, 619 S.E.2d 453, 455 (Ct. App. 2005).

In *Roberts*, claimant was injured and returned to work, where she subsequently received three merit raises. *Id.* at 52, 619 S.E.2d at 454. Claimant argued she was entitled to a compensation rate based on her raises. *Id.* The single commissioner held an argument that claimant will receive a salary increase after the injury could be made in almost every workers' compensation case. *Id.* at 54, 619 S.E.2d at 455. This Court held claimant's average weekly wage and corresponding compensation rate should be based on claimant's earnings before the accident. *Id.* at 53, 619 S.E.2d at 455. The court reasoned the extraordinary circumstances presented in *Sellers* to increase the employee's average weekly wage were not present in *Roberts*: claimant was fully employed and earned a full-time salary at the time of the accident, as opposed to *Sellers* where the employee was a young student who could only work part-time. *Id.* at 54, 619 S.E.2d at 456.

The exceptional reasons presented in *Sellers* are not present here. First, unlike in *Sellers*, where the claimant did not have a higher average weekly wage because he was currently in high school and could not work full time, Proud worked full time for Employer for over a year. Second, unlike in *Sellers*, where the claimant was rendered a paraplegic because of the work accident and was therefore unable to become an electrician with a higher average weekly wage, Proud only sustained an injury to the left ankle and has worked as a full time nurse for over twenty years. Third, unlike in *Sellers*, where the difference in the average weekly wages was based on claimant working only part-time because of attending school, Proud's correct average weekly wage already reflects the wage of a full time nurse. Finally, unlike in *Sellers*, where the claimant's average weekly wage and compensation rate resulted in the minimum rate because

claimant was not able to work full time and was required to graduate high school before taking courses to become an electrician, Proud's average weekly wage and compensation rate are based on her full time employment as a registered nurse.

Further, like in *Roberts*, where the court determined no exceptional circumstance existed to increase claimant's average weekly wage and compensation rate even though claimant received merit rate increases after the accident, Proud's hourly wage increase did not occur at the time of the accident. Rather, Proud bases her argument on an anticipated wage to be paid if she completed orientation for the new, higher-paying position that she never started.

In this case, the Commission appropriately exercised its discretion in declining to set Proud's average weekly wage and compensation rate to reflect a speculative hourly rate she might have received in the future. Neither party knows whether Proud would have successfully completed orientation in order to receive the increased hourly rate or how many hours a week Proud would have worked. Thus, speculating Proud's average weekly wage and compensation rate based on the $31.40 per hour rate does not lead to a fair approximation of Proud's probable future earning capacity and in fact conflicts with an accurate record of her past earnings. Further, as the single commissioner in *Roberts* noted, almost all claimants could argue they would have a higher salary in the time after their workers' compensation injury. For this reason, the South Carolina legislature has seen fit to limit draft calculation of a claimant's average weekly wage and compensation rate based on the prior 52 weeks of employment.

Proud argues that since her transfer to Palmetto Health Richland occurred April 17, 2011, she was making the increased hourly rate at the time of the accident, similar to

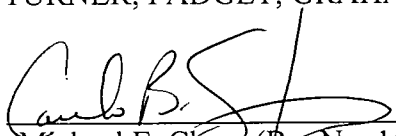
the claimants in *Elliott* and *Booth*, who were found to have average weekly wages based on their rates of pay on the date of accident. *See Elliott v. S.C. Dep't of Transp.*, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004); *Booth v. Midland Trane Heating and Air Conditioning*, 298 S.C. 251, 379 S.E.2d 730 (Ct. App. 1989). However, on the date of accident, Proud still made her Palmetto Health Baptist rate of pay, $26.00 per hour, because she had not yet completed the orientation required to begin her employment with Palmetto Health Richland. Therefore, *Elliott* and *Booth* do not apply.

Allowing Proud to have an increased average weekly wage based on potential post-accident earnings would encourage employers to deny injured workers rate increases because of a fear of higher workers' compensation costs. Thus, the legislature included the term "exceptional reasons," which conveys that an *extraordinary* condition is required to depart from the standard calculation. In the instant case, no such circumstance exists. Accordingly, exceptional circumstances are not present in the instant case to increase Proud's average weekly wage and compensation rate. Substantial evidence supports the Commission's holding that Proud's average weekly wage and compensation rate should be based on Proud's actual earnings in the year prior to the alleged accident and not Proud's speculative future earnings. For these reasons, the July 13, 2012 Decision and Order of the Full Commission relating to Proud's average weekly wage is correct and should be affirmed.

CONCLUSION

For the reasons stated herein, Respondents urge this Court to dismiss this appeal as interlocutory and not subject to immediate appellate review. In the alternative, further proceedings should be stayed pending the outcome of rehearing in *Bone*. To the extent this Court is inclined to reach the merits, the July 13, 2012 Decision and Order of the Full Commission regarding Proud's average weekly wage is correct and should be affirmed.

TURNER, PADGET, GRAHAM & LANEY, P.A.

April 10, 2013 By: 

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