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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2024-001975

Troy Hinson, Claimant,. . . . . Appellant,

v.

Merrill Gardens, LLC, Employer, and
Church Mutual Insurance Company, Carrier,. . . . . Respondents.

INITIAL BRIEF OF APPELLANT

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1. Whether the Single Commissioner erred as a matter of law by denying Appellant's claim for temporary total disability compensation in that it failed to follow the binding precedent of Cranford v. Hutchinson Construction and Grayson v. Carter Rhoad Furniture along with failing to follow Martin v. Rapid Plumbing, all of which show that on the procedural and substantive law governing this case Appellant was entitled to be paid compensation following Employer's withdrawal of light duity work.

2. Whether the Commission erred as a matter of law in finding Hinson was legitimatley terminated for cause when the alleged misconduct occurred before he was taken out of work for surgery and the termination was a calculated conspiracy by upper managment including the workers' compensation representative to bring him back to work and terminate him to evade payment of TTD.

3. Whether the Commission erred as a matter of law in failing to find Hinson remained disabled when he was under a 5-pound restrictions which disqualified him from all employment, such that his inability to work was due to his injury and not due to the termination of his employment.

STATEMENT OF THE CASE

This is an appeal from a Decision and Order of the Workers' Compensation Commission.

Appellant Troy Hinson was employed as the maintenance director for Merrill Gardens, an assisted living facility in Columbia, South Carolina. Hinson injured himself on July 29, 2021. After a brief period out of work during which temporary total disability compensation (TTD) was paid, Merrill Gardens brought him back to work on December 22, 2021, under a 5-pound lifting restriction. Merrill Gardens then fired Hinson on January 25, 2022.

The Carrier filed a Form 15 (Section II) terminating compensation on January 4, 2022 trminating compensation effective December 19,2021. [Form 15]. Hinson filed a Form 15 (Section III) hearing request on February 8, 2022. (15 III).

The case was tried before Commissioner Gene McCaskill on April 15, 2022. In a Decision

and Order dated January 31, 2024, Commissioner McCaskill held Claimant Troy Hinson sustained a compensable injury to his lumbar spine and developed an inguinal herna. He further held Hinson "is not entitled to temporary total disability payments from the date of his termination, of January 25, 2022, and ongoing pursuant to *S.C. Code Ann.* § 42-9-260." [Order, page 21].

Hinson timely filed a Form 30 (Notice of Appeal) on January 29, 2024. [Form 30].

Oral argument before the Appellate Panel was heard on August 26, 2024. The Appellate Panel issued a Decision and Order affirming the Single Commissioner on November 1, 2024. [FC Order]

This appeal followed.

STATEMENT OF THE FACTS

Troy Hinson was employed as the maintenance director at Merrill Gardens, an assisted living facility in Columbia. Hinson was hired on June 8, 2021.

On July 29, 2021, Hinson injured his back (with radiculopathy), both hips and abdomen/groin (hernia) pushing a full industrial trash compactor up a ramp. His claim was accepted and treatment was provided. Hinson continued to work under light duty, although was paid temporary total disability compensation [TTD] from July 29-August 2, 2021 and August 13-23, 2021.

Hinson went back on TTD when underwent surgery for his hernia on October 29, 2021. [Claimant's APA page 146]. On November 18, 2021, Dr. Moffat allowed Hinson to return to light duty lifting no more than 15 pounds. The restriction was to be in place for 6-weeks (through December 30, 2021). [Claimant's APA page 161].

For his back, Hinson treated with Dr. O'Leary from September 10, 2021 through January 10, 2022. He was initially placed on restrictions of no pushing, pulling, lifting or carrying over 10 pounds with no kneeling, squatting, crawling or climbing. [Claimant's APA pages 101-102]. On

November 1, 2021, Dr. O'Leary wrote Hinson completely out of work. [Claimant's APA page 111]. On December 13, 2021, Dr. O'Leary put Hinson on a 5-pound pushing, pulling, lifting and carrying limit along with prohibiting twisting and stretching. [Claimant's APA page 119].

Upon receiving Dr. O'Leary's report with the 5-pound lifting restrictions, the workers' compensation representative along with Merrill Gardens' vice-president of operations and human resources director contacted the Dougal Kear, the new general manager of Merrill Gardens. They instructed him to bring Hinson back to work.[Tr. Page 98, lines 11-18; page 105, lines 16-21].

Kear wrote a form letter to Hinson dated December 20, 2021. The form detailed the restrictions. [Defendants' APA page 33]. Defense counsel emailed the letter to Claimant's counsel, prompting an exchange of emails between the attorneys. Claimant's counsel requested a job description. On December 22, 2021,he wrote an email to Defense counsel stating:

Hi Mark,

What exactly will Troy be doing that benefits the employer?

There are no actual jobs within this restriction. We don't want him put in a punitive or retaliatory position.

Defense counsel provided the job description on December 22, 2021. The job was classified as *VERY HEAVY* with the following physical demands:

MERRILL GARDENS

ENJOY MORE

MAINTENANCE DIRECTOR

PHYSICAL DEMANDS

The physical demands and work environment described below represent the activities and surroundings of the position:

- Must be able to lift up to 60 lbs. on a frequent basis and 100 lbs. on an occasional basis, push/pull up to 40lbs., carry up to 30 lbs. for up to 100 yards, and constantly stand and walk.
- Must be physically able to climb stairs and ladders. Must be able to climb on top of and walk on a roof.
- Must be able to work within crawl spaces.
- This job requires occasional stooping, bending, twisting, crouching, kneeling and crawling.
- Specific vision abilities required by this job are close, distance, color and peripheral vision; depth perception; and the ability to adjust focus.
- This position is frequently required to communicate with clients and Team Members through talking and listening.
- While performing the duties of this job, the employee is regularly required to see, hear, and use hands to handle and feel. Specific vision abilities required by this job include close vision and color vision.
- Able to smell as necessary to discern resident's needs and building emergencies.
- Physically able to handle, grasp, and reach throughout the workday.

[Claimant's APA pages 204-217].

Hinson accepted the offer and duly reported for work on December 22, 2021. As detailed more fully in the argument, various issues arose concerning Hinson's inability to meet full-time hours due to his medical and physical therapy appointments, inability to physically perform all the tasks required of him, an incident where he called in an outside painting contractor to repaint an apartment, and allegations by Dougal Kerr of insubordination and a lack of communication.[1]

On January 4, 2022, the adjuster filed a Form 15 (Section II) terminating TTD on the grounds that "Claimant has been released to return to work at limited duty and employer has provided limited duty work with the terms upon which the Employee has been released." [Form 15]. Note this is incorrect, as Hinson actually returned to work. This section of the Form 15 applies to terminating TTD when the employee refuses limited duty work.

On January 12, 2022, Claimant's counsel sent another email to Defense counsel:

> Hi Mark.
>
> Troy Hinson called me this morning. Apparently his boss has told him he needs to go on disability because he cannot do the work that needs to be done.
>
> I think the problem is that Troy is on work restrictions which preclude him from working as the maintenance man for the apartment complex. In short, there is no economic benefit to the employer by having him there given his restrictions.
>
> Would you please call me? I don't want Troy to get fired over this (not that he has given me any expectation that is actually going to happen) and end up in a battle over TTD. Seems as if the employer doesn't really have work within his restrictions, then he needs to go back on TTD.

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[1]Hinson testified that this was because he was at authorized physical therapy and doctor's appointments. Kear admitted he "found out later that the reason [he] couldn't reach him is because he's at the doctor appointments." [Tr. Page 99].

Thoughts? Can you call me about this? Thanks.
[Claimant's APA page 216].

At some point – probably at th same time they brought him back to work – Merrill Gardens upper management decided to terminate Hinson's employment. Per Dougal 24Kear, the decision was made by "A combination of *our Workers' Comp rep*, my vice president of operations. Our HR of our home office made that decision." [Tr. Page 98, lines 11-18 (emphasis added); page 105, lines 16-21].

Following the instructions from upper management. Kear wrote a letter of termination to Hinson stating: " . . . we made the decision to end your employment with us effective today 1/25/22." [Claimant's APA page 218]. Kear presented the letter to Hinson shortly after he reported to work on January 25, 2022. At the meeting, Kear explained the purported reasons for the termination. The testimony of Kear and Hinson is detailed at *infra* pages 20.

Later that afternoon, Claimant's counsel emailed Defense counsel stating:

> Good afternoon Mark.
>
> Your client terminated Troy's employment this morning. As you know, I had previously expressed concerns over the fact he is physically unable to do the work and was concerned that they might fire him. They have now done so.
>
> Would you please confirm for me that TTD will be restarted effective today?

Respondents refused to restart TTD. Hinson filed the Form 15 (Section III) on February 8, 2022. [Form 15].

Hinson returned to Dr. Moffat on January 26, 2022 reporting an aggravation of the hernia. Dr. Moffat ordered an injection – which was denied by Defendants. He wrote "it does not seem advisable for him to return to a maintenance type job with manual labor given his symptoms and its

impact on his quality of life." [Claimant's APA pages 176-177].

After several injections and physical therapy failed to provide relief, Dr. O'Leary referred Hinson to Dr. LaMotta for a surgical evaluation. [Claimant's APA page 117]. On March 16, 2022, Dr. LaMotta opined he was not a surgical candidate, instead referring him for chronic pain management (denied by Defendants). Dr. LaMotta placed Hinson on permanent restrictions of of no pushing, pulling, lifting or carrying over 15 pounds with no kneeling, squatting, crawling, twisting or work at heights." [Claimant's APA pages 191-197].

The case was tried before Commissioner McCaskill on April 25, 2022. On January 31, 2024, Commissioner McCaskill issued an Decision and Order. He held (1) Defendants did not improperly stop TTD benefits; (2) Claimant is not entitled to temporary total disability payments from the date of termination, of January 25, 2022, and ongoing pursuant to *S.C. Code. Ann.* § 42-9-260; and (3) the 25% penalty pursuant to *S.C. Code. Ann.* § 42-9-260(g) is not applicable and not assessed. [Order, page 21].

This appeal followed.

STANDARD OF REVIEW

A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999). Upon a proper appeal under the Worker's Compensation Act when only a question of law is involved, the facts having been concluded by the finding of the Commission, the appellate court as to review and correction of errors has plenary powers. Jolly v. Atlantic Greyhound Corp. 207 S.C. 1, 35 S.E.2d 42 (1945).

The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and provide a basis from which they reasonably may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures. Broughton v. South Carolina Game and Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). The substantial evidence rule, prescribed in the statute, means the appellate court will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276, S.E.2d 304 (1981). However, when only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). The Commission must consider all the evidence in the record when developing its findings of fact. Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App.1999).

"It is true that the Appellate Panel is the ultimate fact-finder and does not have to accept even uncontradicted evidence. In this sense, the factual decisions of the Appellate Panel may appear to be akin to those implicit in a jury's verdict, which appellate courts may not generally disturb as long

as the verdict can be reconciled with any evidence reasonably supporting it. But the decisions of administrative agencies, such as the Appellate Panel, are different from jury verdicts in several important respects. One difference is that juries need not explain the reasoning behind their decisions, while the Appellate Panel must. Another difference is that the Appellate Panel's decisions cannot stand if they cross the line drawn by § 1-23-380. Unlike a jury verdict, the Appellate Panel's factual decisions may be reversed if they are arbitrary or clearly wrong, which they are here." Russell v. Wal-Mart, Op. No. 28258 (S.C. Sup. Ct. filed Jan. 29, 2025) (Howard Adv. Sh. No. 5 at 18).

ARGUMENT

1. The Commission made an error of law in failing to award TTD based on the binding precedent of *Cranford* and *Grayson*.

The Appellate Panel held this case fell under the rubric of Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013). It held "[w]e find that Claimant was terminated for cause and, as such, is not entitled to payment of TTD." [Order page 17, Finding of Fact 52; page 19, Conclusion of Law 3]. This ruling is error as this case is controlled by Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)(temporary total disability compensation should have awarded as a matter of law because employee was not at MMI and had never been released to work without restrictions). Despite Cranford being argued before both the Single Commissioner and Appellate Panel, the Commission completely ignored this binding case law in its analysis.

Pollack and Cranford deal with different fact patterns. In Pollack, the employee suffered an admittedly compensable back injury and was put on a 15-pound lifting restriction. Because he was a supervisor, he was able to work his regular job with accommodations for the restrictions. He was ultimately fired for failing to report an accident causing property damage to one of the employer's delivery trucks. The supreme court affirmed the Commission's finding that an employee who is terminated for cause while working light duty – *"who never received TTD benefits"* – is barred from receiving TTD under the rationale that his inability to work is due to his own misconduct rather than his injury. Pollack v. Southern Wine & Spirits of Am., 405 S.C. 9, 16, 747 S.E.2d 430, 434 (2013)

In Cranford, the employee also suffered an admitted back injury. He was out of work for three weeks, during which time his employer paid him $265.00 per week in lieu of TTD. He returned to work on light duty but then was terminated eighteen days later for "being unsafe on the job site." The employer refused to pay TTD arguing Cranford was terminated for cause. The

Commission agreed and denied Cranford's claim for TTD. On appeal, this Court held TTD had to be paid because he was still under work restrictions and had not reached MMI.

The distinction between Pollack and Cranford is that Pollack had never been disabled.[2] He lost no time from work because the employer was always able to accommodate his restrictions. As no TTD was paid, Pollack was never presumed disabled and never came under the protections of § 42-9-260. Conversely, Cranford had been disabled and received salary in lieu of TTD before returning to work. His situation was controlled by the statute and regulations governing payment, suspension and termination of TTD. Indeed, the Pollack court observed that "It is undisputed that Appellant, **who never received TTD benefits**, was accommodated by Respondent within his light duty work restrictions." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013)(emphasis added). Because Hinson had been paid TTD (like Cranford and Grayson), he was deemed to be disabled and thus received protections unavailable to Pollack.[3] See, also Davis v. Unihealth Post Acute Care, 402 S.C. 541, 741 S.E.2d 770 (Ct. App. 2013)("After UniHealth terminated that employment, its own agreement that she was disabled and its refusal to provide alternative employment required UniHealth to pay her temporary total compensation until the payments could be properly terminated.").

Cranford exactly followed our supreme court's earlier decision in Grayson v. Carter Rhoad

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[2]Pollack, Cranford and Grayson are all good law. Although Pollack came out one year after Cranford, the court never mentioned, let alone overruled, Cranford and Grayson. Furthermore, because Cranford followed Grayson it was not implicitly overruled by a higher court.

[3]To be clear, the issue here is not whether the employer could legally terminate Hinson's employment. The issue is whether Hinson is entitled to an additional period of TTD because the employer stopped providing employment within his restrictions and refused to restart TTD.

Furniture, 312 S.C. 250, 439 S.E.2d 859 (Ct.App.1993), *aff'd as modified by* Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). In Grayson, "[t]he supreme court held that because Grayson was released with work restrictions, there was in reality *no* evidence that Grayson's period of temporary total disability ever ended prior to his firing. Because Grayson's benefits were never properly terminated in accordance with Regulation 67-504, Grayson was entitled to have his benefits reinstated retroactively." Cranford at 75-76, 731 S.E.2d 308). Accord, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006)(holding procedures to suspend or terminate temporary compensation require strict compliance).

Strikingly, the facts of these two cases are virtually identical to the facts in this case, As explained by this Court in Cranford:

> Like Grayson, Cranford was injured while working for his employer and was paid temporary compensation while out of work. Grayson was released to work with the instructions to "be somewhat careful with lifting." Similarly, Cranford's discharge report from Conway Medical Center instructed Cranford to refrain from "heavy lifting" and "strenuous activity." In addition, Dr. Ellis, the attending surgeon at Conway Medical Center, instructed Cranford to "take it easy." No other physician treated Cranford prior to him returning to work; thus, as in Grayson, there is no other evidence in the record Cranford was released to work without restriction.
>
> Both employers terminated their employees shortly after the employees returned to work while the employees were still under work restrictions. Grayson was fired for not having a driver's license and Cranford was fired for being unsafe on the job site. Both terminations occurred approximately three weeks after returning to work. Prior to the firing, Grayson signed a Form 17, agreeing he was able to return to work. Cranford, on the other hand, never signed a Form 17, but instead had his benefits unilaterally terminated on the grounds that he had "returned to work at least 15 days and no temporary partial compensation [wa]s due."
>
> While Regulation 67–504 was amended in 1997, under the prior and amended version, Hutchinson's firing of Cranford after the fifteen-day window would still require Hutchinson to pay temporary disability unless: (1) a physician determines Cranford is able to "return to work without restriction"; OR (2) A PHYSICIAN determines Cranford has reached Maximum medical improvement such that permanent disability benefits, as opposed to temporary benefits, should be awarded if warranted. See Smith v. S.C. Dep't. of Mental Health, 335 S.C. 396, 399, 517

> S.E.2d 694, 695–96 (1999) ("Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent. This is precisely the reason to terminate temporary benefits in favor of permanent benefits upon a finding of MMI.").

Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012).

In the instant case, it is undisputed that Hinson was (1) under a 5-pound lifting restriction thus "unable to work without restriction;" (2) not at MMI; (3) previously received TTD; and (4) was terminated shortly after returning to work. This fact pattern matches the facts of Cranford and Grayson; not Pollack.

It should also be noted that after his termination Hinson continued to receive medical treatment. Dr. Mattei wrote him completely out of work on February 4, 2022. [APA page 97]. At that point, there were no restrictions to accommodate. Hinson had gone from partially disabled to totally disabled.

Further support for reversing the Commission comes from the procedural violations associated with the Form 15 (Section II). The Employer filed a Form 15 ostensibly terminating temporary compensation because "Claimant has been released to work at a limited duty and employer has provided limited duty work consistent with the terms upon which the Employee has been released." [Form 15].

As this Court explained in Martin v. Rapid Plumbing:

> The rationale given by Rapid Plumbing is only applicable when suitable employment is offered but not accepted. See S.C.Code Ann. § 42-9-190 (1985) ("If an injured employee refuses employment procured for him suitable to his capacity and approved by the Commission he shall not be entitled to any compensation at any time during the continuance of such refusal."). Thus, had Martin refused to return to work, Rapid Plumbing would have had legal justification to terminate his temporary compensation. Because Martin willingly returned to work, but was unable to continue work after one day, the reason given by Rapid Plumbing did not apply.
>
> Even if Rapid Plumbing could have stopped temporary total disability benefits, it failed to follow the proper procedure for doing so as outlined by section 42-9-260 and regulation 67-504. Rapid Plumbing terminated the compensation on August 10,

> 2002, but failed to file and serve the Form 15 until at least August 28, 2002, and failed to attach the supporting documentation as required by section 42-9-260. These deficiencies are not mere technicalities, but are substantial deviations from the statutory procedure. The circuit court was correct in finding Rapid Plumbing wrongfully terminated temporary benefits.

Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006)(holding 18 day delay in filing Form 15 and failure to attach documentation were substantial procedural deviations requiring imposition of mandatory 25% penalty).

As the Form 15 in the instant case did not comply with the statute, it was ineffective as a matter of law. Moreover, even if it were deemed to be effective, it merely suspended Hinson's temporary compensation for the period when he returned to work. His right to temporary compensation was never legally terminated. See 25A S.C Code Ann. Reg. 67-510 (2007)(providing for additional compensation or penalty for unauthorized suspension of temporary compensation benefits). It was legal error of the Commission to hold "Defendants did not illegally suspend or terminate TTD benefits." [Order, pages 19-20, conclusions of law 4, 6].

In Martin, this Court reversed the Commission's denial of temporary compensation on the above grounds. The Court should follow Martin and hold that Hinson's temporary compensation was never legally terminated such that Hinson would be entitled to receive ongoing temporary compensation plus a mandatory 25% penalty.

The Commission committed multiple errors of law under Martin, Cranford, and Grayson. Therefore, the decision below should be reversed. This case should be remanded to the Commission with instructions to award temporary compensation to Appellant.

2. Even if *Pollack* is the controlling authority in this case, the Court should find that Hinson was not legitimately terminated for misconduct occuring while he was on accommodated duty and award him TTD on a running award from January 25, 2022.

The Pollack court instructed the Commission that "an employer's denial of TTD benefits must be "scrutinized carefully . . . remaining sensitive to an employer's possible motivation to 'look for' a reason to fire an injured worker." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013). A closer look at the evidence shows that Merrill Gardens brought Hinson back to a job he could not do with the intent of terminating him for cause (largely based on alleged past transgressions) to avoid liability for TTD.

The job of Maintenance Director has specific physical demand requirements::

- Must be able to lift up to 60 lbs. on a frequent basis and 100 lbs. on an occasional basis, push/pull up to 40 lbs., carry up to 30 lbs. for up to 100 yards, and constantly stand and walk.
- Must be physically able to climb stairs and ladders. Must be able to climb on top of and walk on a roof.
- Must be able to work within crawl spaces.
- This job requires occasional stooping, bending, crouching, kneeling and crawling.

[Claimant's APA page 37].

On December 13, 2021, Dr. O'Leary put Hinson on restrictions of no pushing, pulling, lifting and carrying over 5 pounds, along with no twisting or stretching. [Claimant's APA page 119]. *Under these restrictions, Hinson is unable to meet any of the above requirements of the job*. Dougal Kear confirmed this, testifying: "The majority of the job [is really physical]." [Tr. Page 107, lines19-25].

Knowing full well that Hinson was under a 5-pound restriction, Merrill Gardens nonetheless put Hinson back into the exact same position he had been working before his injury: Maintenance Director. Kear testified that to get the maintenance work done, Merrill Gardens had to call on "The

regional maintenance director, maintenance director – his name is Jeff – from another community and myself and also our chef." [Tr. Page 104, lines 7-23].

This begs the question of why? What was in it for them? It makes no economic sense to bring an injured employee back to work a critically important position in an assisted living facility when he can't do the job. The only answer is that Merrill Gardens intended all along to fire Hinson shortly after he returned to work, thus setting up a Pollack defense. We know this because of who made these decisions and the ostensible reasons given for Hinson's termination.

Kear testified that the decision to bring Hinson back and ultimately fire him a few weeks later were made by "A combination of *our Workers' Comp rep*, my vice president of operations. Our HR of our home office made that decision." [Tr. Page 98, lines 11-18 (emphasis added); page 105, lines 16-21]. The fact the *workers' compensation representative* and a vice president at the home office made the decision to terminate Hinson – rather than his actual manager – confirms that Merrill Gardens was not calling Hinson back to work for a legitimate business reason unrelated to workers' compensation.

Kear wrote a letter of termination to Hinson stating:

> Due to instances of insubordination, failure to complete tasks, lack of communication to the GM, other team members, business tenant, and residents, actions that jeopardized life-safety, and continuing performance issues that have been discussed with you, we made the decision to end your employment with us effective today 1/25/22.

[Claimant's APA page 218].

Despite these seeming serious allegations, *there is no written documentation of any such events, nor is there documentation of meetings, counseling sessions, or verbal or written warnings.* Merrill Gardens is a large corporation with about 100 communities nationwide. It has written disciplinary policies requiring verbal and written warnings which were not followed in this case.

[Tr. Page 95, line18-page 97, line 10]. Kear had no documentation or evidence of any misconduct occurring prior to Hinson's return to work in December 2021. Indeed, Kear only started working for Merrill Gardens at the end of November 2021. [Tr. page 74, lines 22-25]. Despite the lack of supporting evidence, Kear testified to the supposed reasons his supervisors ordered him to fire Hinson. His testimony reveals it to be a sham.

Respondents' counsel asked Kear why Mr. Hinson was terminated. Kear responded "the first two were the incidents that occurred prior to him going out on the last time he left for the hernia surgery." Kear – without any firsthand knowledge – testified that it was "alleged" Hinson had made two mistakes: (1) miswiring a cooktop on a stove causing it to short out; and (2) improperly turning a mixing valve causing it to break resulting in high water temperatures.[4] [Tr. Page 84-85]. It is undisputed that there is no record of either of these alleged incidents and that Hinson was never trained, counseled, warned or disciplined as a result. The accusations were not raised with him until the day Kear fired him.

The third allegation did occur during Kear's tenure. Kear accused Hinson of insubordination, giving the specific example of Hinson bringing in an outside painting crew to paint an apartment without permission.[5] However, Hinson obtained permission from David Dixon, the regional maintenance director (and Hinson's trainer). Kear was simply angry that Hinson went to Dixon instead of him. He testified: "[Hinson] said to me that David [Dixon] looked at it and said go ahead

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[4] As to the cooktop, Hinson testified that he "assumed I did it right. Everything was good when I left." He testified he had never been written up or given a formal warning, nor had he even heard anything about the cooktop until the day he was fired. [Tr. Page 52, line 18-page 54, line 6].

He testified Dougal "brought up the . . . mixing valve, which I did not mess up." [Tr. Page 61, lines 19-25].

[5]Hinson was unable to paint the apartment due to his restrictions – a fact known to Kear.

and get a painter. Which my question to Troy was why didn't you come and – you still need to communicate to me. That was the key. Gotta let me know because I have to sign off on that." [Tr. Page 100, line 22-page 101, line 23]. Kear's bruised ego is not a legitimate reason to terminate someone, nor was termination warranted given that Hinson obtained permission from the regional maintenance director.

Kear's other allegations concern a supposed lack of communication[6] and Hinson's physical inability to do the work Kear wanted done. Kear was frustrated because: "I expected him in the building. And when I couldn't find him, then he would call me later, 'Well, I was at a doctor's appointment.' And I said, "Well, I didn't know you had a doctor's appointment today. You never told me.'" Yet, Kear knew Hinson had physical therapy appointments on Tuesdays and Thursday plus injections and doctor visits. [Tr. Page 98, line 16-page 99, line 21].

Kear testified:

> the only thing I said to him in a conversation was – because he kept saying to me, "I just can't do this. I can't do the job. I can't do this." And I said, "Well, Troy, the only thing I can do is go by what I have documented from – for a healthcare provider. If you need to get this changed, you need to go to that provider and talk to the provider and get reevaluated and then come back to me with different restrictions and we will accommodate that.

[Tr. Page 91, lines 12-24].

Terminating an injured worker because he cannot do heavy work without exceeding the restrictions from his doctor is blatantly retaliatory and illegal. On cross-examination Hinson denied that "Mr. Kear never asked you to exceed your restrictions" and confirmed "that [he was] asked to exceed [his] restrictions." [Tr. Page 65, lines 1-13].

Hinson described the conversation with Kear when he was terminated. Hinson called in that

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[6]Kear admitted on cross-examination that insubordination was "something where you would have to document it to the personnel file." [Tr. Page 95, lines 12-17].

morning to say he was coming in but that he had been sick the night before with sniffles. He also told Kear he had reinjured his abdomen and back replacing a door strip on the previous Thursday.[7] He testified Kear "said, well, come in and I'll test you [for Covid]." When Hinson arrived he saw that Kear was busy in his office, so he clocked in and went to work.

He testified:

> So then I got a call for about I guess 20 or 30 minutes after I was in the shop from Dougal [Kear] to come to his office. I came to his office. He started questioning me about a stove and then about a water valve and then said I wasn't communicating with him. That I was being insubordinate because I didn't report to his office for a Covid test. And since I didn't report directly to his office for a Covid test, I was being fired for being insubordinate.[8]

[Tr. Page 51, line 14-page 53, line 1].

The best example of Kear's duplicity is when he was asked a straightforward question about whether Merrill Gardens could hire a person with a 5-pound restriction for a job that requires lifting 60 pounds frequently and 100 pounds occasionally. This is a softball question to which the answer is obviously "no." Despite repeated opportunities to prove himself an honest and credible witness, Kear bobbed and weaved, ultimately refusing to give a clear answer to the question. After dodging a series of questions, Kear was asked:

> If you had two applicants who came to you each with 30 years of experience, identical in every way, identical except one man says I got this five-pound restriction. This other person comes in and says I can do it all. I can lift your 60 pounds. I can

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[7]The reinjury was documented on a follow-up visit by Dr. Moffat, Hinson's hernia surgeon. The visit was on January 26, 2022; the day after Hinson was terminated. After noting the "repetitive stress on this repair from his job," Dr. Moffett opined "it does not seem advisable for him to return to a maintenance type job with manual labor given his symptoms and it impact on his quality of life." [APA pages 176-177].

[8]Hinson related these events to Dr. Mattei on February 9, 2022 and Dr. Moffat on January 26, 2022 (the day after he was fired). [Claimant's APA pages 96-97, 172, 176-177]. The fact his reports to the doctors shortly after he was terminated are consistent with his hearing testimony 4-months later is a strong indicia of credibility.

lift your 100 pounds. No difference between the two. Which one are [you] going to hire?

[Tr. Page 112, line 24-page 113, line 7].

Instead of simply admitting that the only option is the applicant who can meet the lifting requirements of the job, Kear responded with the nonsensical answer: "If a new hire I'm going to hire the one that's the most qualified." He repeated this nonresponsive answer three times. [Tr. Page 113]. This is a witness who was being patently evasive.

Appellant recognizes that the Commission is the sole judge of credibility. Appellant further recognizes that the substantial evidence standard of review is relatively deferential. Nonetheless, as our supreme court recently held, "the Appellate Panel's decisions cannot stand if they cross the line drawn by § 1-23-380. Unlike a jury verdict, the Appellate Panel's factual decisions may be reversed if they are arbitrary or clearly wrong, which they are here." Russell v. Wal-Mart, Op. No. 28258 (S.C. Sup. Ct. filed Jan. 29, 2025) (Howard Adv. Sh. No. 5 at 18).

The supreme court's admonitions in Pollack and Russell about the close scrutiny to be given to an employer's stated rationale for terminating an employee working accommodated duty are the key here. Kear's attempt to justify the termination fails when looked at in this light. Merrill Gardens' home office made the decision to bring Hinson back to work in his regular job with a five-pound lifting restriction that plainly prevented him from doing his job. The home office then fired him on specious grounds without prior warning, counseling or discipline in violation of its own policies. The decision to terminate Hinson was made at the corporate level; not by Kear. Kear was merely the messenger

This Court can and should find that the Commission's decision in finding Hinson was legitimately fired for misconduct is arbitrary and clearly wrong. The decision below should be reversed and remanded with instructions to award temporary compensation to Hinson.

3. As Hinson's restrictions prevent him from working in his occupation, he should be awarded TTD on a running award because his inability to work is due to his restrictions; not his alleged termination for cause.\

At the time of his termination, Hinson was under a 5-pound lifting restriction. There are no jobs listed in the Dictionary of Occupational Titles for someone with such an extreme limitation.[9] On the day he was fired, Hinson was incapable of obtaining any job on the open market, let alone a maintenance job requiring frequent lifting of 60 pounds.

This is important because Pollack cannot be a death sentence for TTD. Pollack is based on the principle that where an employee is fired for misconduct in a no-lost-time case while working accommodated employment then his inability to earn wages is presumed to be due to his misconduct and not his disability. Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013).

The flip side of this is that if an employee is unable to work for the same wages in other employment, then his lost earnings are presumed to come from his limitations which then entitles him to TTD notwithstanding the fact he was terminated. Note this is also a distinguishing factor in Cranford and Grayson. This analysis was succinctly stated by the Colorado Supreme Court:

> As long as limitations resulting from an industrial injury contribute to a claimant's inability to secure employment at pre-injury wage levels, compensation benefits are

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[9] The Department of Labor's Dictionary of Occupational Titles lists various physical demand levels required in various occupations. The lowest category of sedentary work exceed Hinson's 5-pound restriction.

> S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOTAPPC

> payable for loss of earning capacity. If, on the other hand, the injury and its *sequelae* play no part in the workers inability to find suitable employment, there is no compensable loss of earning capacity. PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo.1995).

In the instant case, Hinson was under restrictions that prevented him from doing any work at all – other than the special accommodations made by Merrill Gardens (which he was still unable to meet).

Furthermore, these were not his only restrictions. Hinson saw his hernia surgeon on January 26, 2022 – the day after he was fired. Dr. Moffatt wrote he "presents with worsening left inquinodynia after resuming work. . . . He does get some relief with gabapentin and ice packs, but the repetitive stress on this repair from his job seems to be impacting his quality of life and ability to do this job. . . . In the interim, it does not seem advisable for him to return to a maintenance type job with manual labor given his symptoms and its impact on his quality of life." [Claimant's APA pages 176-177]. Note that the injection ordered by Dr. Moffatt at this visit was denied by Defendants.

Hinson saw his family doctor, Dr. Mattei, on February 9, 2022. After recounting the history of the injury, return to work, problems working and the termination, Dr. Mattei wrote "Patent has worsened pain in the area of his hernia and low back. **Patient cannot work at this time** as he still needs further help with his low back and a CT for his hernia. I feel for the patient financially because he cannot work at this time." [Claimant's APA page 96-97 (emphasis added)].

To summarize, Dr. Moffat recommends Hinson not do maintenance work, Dr. O'Leary had him on a 5-pound lifting restriction (since relaxed to 10-pounds and then 15-pounds), and Dr. Mattie has him completely out of work as of February 9, 2022. Hinson is not a supervisor like Darren Pollack; he works a job requiring heavy lifting up to 100 pounds. By any reasonable definition, he

is disabled. His inability to earn wages is due to the restrictions from his injuries; not his supposed misconduct.

For Hinson to support his family, he would have to find a job within those restrictions.[10] Moreover, he would have to tell any potential employer that he was under the care of an orthopaedic surgeon, and requires epidural steroid injections and injections for his hernia complications. If he lied about these facts he would not only be subject to immediate termination upon discovery, he would also be barred from receiving medical treatment should he reinjure himself.[11]

By the same token, knowing of his medical condition, no employer in their right mind would hire him. Even if a less than sedentary job within these restrictions exists, no rational employer would risk hiring him for fear of "buying" a major workers' compensation claim. See Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007)(under last injurious exposure rule, "the insurer on the risk at the time of the second injury [is] solely liable when the second injury aggravates the first

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[10]Hinson was challenged by Respondent's counsel as to whether he had attempted to find work. He acknowledged he had not because: "I haven't been able to – I'm not able to work, to tell you the truth. . . . I'm waiting to go – my pain – I was supposed to get my pain nerve shot las week, but it got denied." [Tr. page 66, lines 3-16]. He was also asked:

> Q. What do you think would happen if you were to actually to apply to somebody and say these are my restrictions? I want that job in maintenance. What do you think is going to happen?
>
> A. They're going to move on to the next person.

[Tr. page 68, lines 5-22].

[11]The new employer would have no liability under the "fraud in the application defense."See, e.g. Cooper v. McDevitt & Street, 260 S.C. 463, 196 S.E.2d 833 (1973). Conversely, Merrill Gardens would be relieved from further liability for medical treatment under the "intervening accident" rule. See Whitfield v. Daniel Const. Co., 226 S.C. 37, 40, 83 S.E.2d 4602(1954)("every natural consequence which flowed from this injury, unless the result of an independent intervening cause, sufficient to break the chain of causation, is likewise compensable.")

injury.").

Should the Commission's order stand, Troy Hinson is barred from receiving workers' compensation benefits, barred from receiving unemployment compensation, and barred from finding a job. And there is nothing he can do about it.

This "harsh and incongruous result" cannot be the intent of the Legislature. Unless we as citizens have lost all sense of conscience, it cannot be the public policy of this State for "injured employees and their dependents [to become] charges on society." Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). See, also Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)("Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed.");

The Court should find Hinson is disabled as a matter of law and award TTD on a running award. Alternatively, even if he is not considered disabled by the restrictions from Dr. Moffatt and O'Leary, he should be paid TTD from February 9, 2022 when he was written completely out of work by Dr. Mattei.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed and remanded with instructions to the Commission order payment of TTD beginning on January 26, 2022 and continuing on a running award until stopped by Order of the Commission or written consent of the parties.

Respectfully Submitted,

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February 20, 2025
Columbia, South Carolina