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 RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Single Commissioner and the Full Commission erred as a matter of law by denying Appellant's claim for temporary total disability compensation after Appellant was terminated for cause by Merrill Gardens, LLC.

2. Whether the decisions by the Single Commissioner and the Full Commission were sufficient under the substantial evidence rule.

STATEMENT OF THE CASE

Appellant, Troy Hinson ("Appellant"), appeals from the unanimous decisions of the single commissioner and the full commission that he is not entitled to temporary total disability payments after he was terminated for cause by Merrill Gardens, LLC (the "Employer").

On April 15, 2022, Commissioner Gene McCaskill heard evidence on this issue. On January 31, 2024, Commissioner McCaskill held that Appellant was "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." *See* Decision and Order filed January 31, 2024 at p. 21. Appellant timely filed a notice of appeal to the full commission.

On August 26, 2024, the full commission heard oral arguments on Appellants' appeal. The full commission issued a decision unanimously affirming the decision by Commissioner McCaskill on November 1, 2024. *See* Appellate Panel Decision and Order filed November 1, 2024.

Appellant appeals from those decisions.

STATEMENT OF THE FACTS

Appellant was hired June 8, 2021 as the maintenance director for Employer, who operates an assisted living facility in Columbia, South Carolina (the "Facility"). *See* T. at 42:1-42:3 & 60:13-60:22 & Defendants' APA at pp. 40-42. Appellant acknowledge that he was hired to be a maintenance supervisor, perform maintenance, and supervise housekeeping. *See* T. at 42:1-42:3. As for housekeeping work, while Appellant would occasionally vacuum or wipe down elevators and doorknobs, the employed housekeepers did most of the actual housekeeping work and he simply supervised them. *See* T. at 42:4-42:19. As for maintenance work, prior to his compensable injury, Appellant testified his maintenance job responsibilities included walking

the grounds, picking up trash in the year and parking lot, cleaning up the trash room, cutting up boxes, and taking mail to apartments, and some more physical tasks. *See* T. at 43:13-43:25.

On July 29, 2021, Appellant injured himself during the course and scope of his employment. *See* T. at 57:15-57:17 & Defendants' APA at pp. 40-42. Respondents accepted Appellant's claim and he was paid temporary total disability compensation.

Appellant returned to work in August 2021 and worked light duty until he underwent surgery on October 29, 2021. *See* T. at 56:16-56:24 & 57:18-58:3. On December 13, 2021, Appellant's doctor authorized him to return to work with certain restrictions. *See* T at 46:19-47:6. On or about December 20, 2021, Appellant was offered a job to return to work as the maintenance director to work within the required restrictions and Appellant accepted. *See* T at 47:20-47:25 & Defendants' APA (2022) at p. 33. He directly reported to Dougal Kear, the general manager with 17 years in healthcare administration. *See* T at 74:13-74:17 & 77:16-77:21.

On January 4, 2022, a form 15 was filed terminating Appellant's temporary total disability benefits because Employer provided him work within his restrictions. *See* Defendants' APA (2022) at pp. 33-34.

After he returned, Appellant acknowledged he was asked to change batteries and filters, do safety checks on residents, check eyewash stations and fire extinguishers, patch holes, and perform touch up painting. *See* T. at 45:4-46:3. Mr. Kear indicated that a lot of Appellant's job was compliance as he would do checks, order supplies for housekeeping, make sure the building looked good, report any damage, attend to resident requests and determine what needed to be done and who could do it. *See* T. 79:13-80:3. Appellant's duties fell within his restrictions because Employer reassigned the more physical aspects of the job to other employees. *See* T. at

79:3-80:10. Appellant agreed that the maintenance work he could not perform within his restrictions was done by other employees or vendors. *See* T. at 45:12-46:3. Further, Appellant acknowledged that if there was something that exceeded his restrictions he was to contact Mr. Kear. *See* T. 64:19-64:23.

Mr. Kear explained the he was supposed to meet with Appellant first thing in the morning every day to discuss the necessary tasks and at the end of the day to determine what was completed. T. 48:1-48:16 & 80:11-81:5. When there were tasks beyond Appellant's restrictions, Mr. Kear or two other maintenance employees would perform them. *See* T. 81:6-81:13. Mr. Kear noted the goal was to continue Appellant's light duty work until he could be released to full capacity. *See* T. at 82:20-83:3.

However, Mr. Kear noted that Appellant would fail to show up in the morning and he would have to try and find him, get him on the radio, call him, or text him. *See* T. at 83:4-84:9. Further, the housekeepers he supervised could not find him. *See id*. Ultimately, Appellant was terminated on January 25, 2022. *See* T. at 84:17-84:23.

Appellant agrees he made mistakes in his job. *See* T. at 72:7-72:9. Mr. Kear noted that Appellant was terminated for numerous reasons. *See* T. at 84:24-88:9. Prior to his October surgery, he incorrectly rewired a cooktop, which created a fire danger for the elderly residents and he improperly turned the mixing valve which caused it to break. *See id*. He failed to properly check water temperatures, as rather than check the temperatures in all 15 lavatories, as was required by his job, he only checked at the source of the water, which could lead to residents being exposed to dangerously hot water. *See id*. Additionally, as noted, he would fail to attend meetings with Mr. Kear, he could not be found and then would simply say he had left because he had an appointment despite it not being at a time of any known appointments. *See id*. He would

leave for scheduled medical appointments and not return when the appointments concluded and he would not show up on time. *See id.* He failed to communicate with Mr. Kear and with the residents. *See id.* Finally, he authorized worked by outside vendors without approval from Mr. Kear, his direct supervisor. *See id.*

Mr. Kear emphatically noted that Appellant's termination had nothing to do with his injury and that if he had not been terminated for cause, he would still be able to accommodate his light-duty work restrictions. *See* T at 90:23-91:11. Since being terminated, Appellant has not made any effort to find work, but acknowledges that he could have continued to perform light duty work at Employer. *See* T. at 65:14-67:9. After Appellant's termination, Respondents declined Appellant's request to restart temporary total disability payments as Appellant had been terminated for cause.

STANDARD OF REVIEW

In workers' compensation cases, the full commission is the ultimate finder of fact. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004) ("[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel."). The factual determinations by the full commission will not be overturned "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, 136, 276 S.E.2d 304, 307 (1981); *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003) ("[t]his Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence."). Accordingly, "an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse when the decision

is affected by an error of law." *Pollack v. Southern Wine & Spirits of America*, 405 S.C. 9, 747 S.E.2d 430 (2013) *citing* S.C. Code Ann. § 1-23-380(5).

ARGUMENT

Appellant makes two essential arguments. First, he argues that the single commissioner and the full commission erred as a matter of law by applying the *Pollack* case instead of *Cranford v. Hutchinson Constr.*, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012) and *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1996). Second, he argues that the single commissioner and the full commission should have reached a different factual determination based on the evidence surrounding Appellant's termination for cause from Employer. For the reasons stated below, Appellant's arguments fail.

A. The Single Commissioner and the Full Commission did not Err as a Matter of Law.

There was no error of law as *Cranford* and *Grayson* address the question of whether temporary total disability benefits were properly suspended or terminated pursuant to the applicable regulations and statutes. Whereas, *Pollack* addresses the question of whether temporary total disability benefits must be started when an employee is terminated for cause. Thus, the analysis of *Pollack* by the single commissioner and the full commission was appropriate in this case.

Not only is the issue in this appeal more appropriately addressed by *Pollack*, the decisions in *Cranford* and *Grayson* are inapplicable as they are based on a subsequently amended regulation. *Cranford* and *Grayson* involve the suspension or termination of temporary total disability benefits based on S.C. Code Ann. Vol. 25-A, Worker's Compensation Regulation 67-504 ("Reg. 67-504"). However, since the decisions in *Cranford* and *Grayson* Reg. 67-504 has been amended. In both *Cranford* and *Grayson*, Reg. 67-504 required the employer to pay

temporary total disability benefits unless (1) the employee was able to "return to work without restrictions;" or (2) the employee had reached maximum medical improvement such that he was entitled to permanent disability benefits.[1] *See Cranford*, 399 S.C. at 75, 731 S.E.2d at 308-309; *Grayson*, 317 S.C. at 309, 454 S.E.2d at 322. As neither employee in either case had reached maximum medical improvement or were released to "work without restrictions" the Court held in both cases the employer was required to pay temporary total disability benefits to the employee because those benefits were never properly terminated. *See id.*

Reg. 67-504 now provides "[t]he employer's representative may terminate or suspend temporary compensation during the first one hundred fifty days after the employer received notice of the injury pursuant to Section 42-9-260. When compensation is terminated or suspended, the employer's representative shall complete Section I and Section II of the Form 15, Temporary Compensation Report." S.C. Code Ann. § 42-9-260(B) provides: "[o]nce temporary disability payments are commenced, the payments may be terminated or suspended immediately at any time within the one hundred fifty days if:…(5) the employee has been released by the treating physician to limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released." Put simply, the law has changed since *Cranford* and *Grayson*, so that temporary total disability benefits can be terminated or suspended even if an employee returns to work "with restrictions."[2]

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[1] Reg. 67-504 provided "[w]hen the claimant reaches maximum medical improvement and the authorized health care provider reports the claimant is able to return to work without restriction to the same job or other suitable job, and such a job is provided by the employer, or the claimant agrees he or she is able to return to work without restriction, the employer's representative may suspend compensation benefits by complying with section D below." *See Cranford*, 399 S.C. at 75 n.2, 731 S.E.2d at 308 n.2.

[2] Appellant's reliance on *Martin v. Rapid Plumbing*, 369 S.C. 278, 631 S.E.2d 547 (2006) is equally misplaced as the employee in that case returned to work without restrictions pursuant to § 42-9-260(B)(1), but did not "remain at work for a minimum of fifteen days." Thus, termination of his temporary total disability benefits was improper. *See id.* at 289, 631 S.E.2d at 553. Here, Appellant returned to work pursuant to § 42-9-260(B)(5), which does not require presence at work for fifteen days. Regardless, even if it did, Appellant returned for more than fifteen days.

In this case, it is undisputed that Respondents provided a Form 15 suspending Appellant's temporary total disability benefits based on the provision of limited duty work. Further, the facts support, and the single commissioner and the full commission found, Employer provided limited duty work consistent with the terms upon which Appellant had been released. Accordingly, Appellant's temporary total disability benefits were properly terminated when he returned to Employer in December 2021.

Thus, as his temporary total disability benefits were properly terminated, the relevant issue is whether Appellant was entitled to have temporary total disability benefits restarted as a result of his termination from Employer. An employee's entitlement to temporary total disability payments requires that he is "out of work **due to** a reported work-related injury." *See* S.C. Code Ann. § 42-9-260(A) (emphasis added). Thus, if an employee, who suffered a compensable injury, is terminated for cause, the employee is not entitled to temporary total disability payments. *See Pollack*, 405 S.C. at 15-16, 747 S.E.2d at 433-434.

In *Pollack*, an employee suffered an admitted injury to his back and returned to work as a drivers' supervisor with restrictions. *See id*. at 11, 747 S.E.2d at 431. While the employee was investigating an accident involving a driver, he hit the side of another vehicle leaving only "a line of dirt on the vehicle" and no real property damage. *See id*. at 12, 747 S.E.2d at 431-432. The employee did not report his own minor accident in violation of the employer's policy. *See id*. at 12, 747 S.E.2d at 432. The employee was suspended, but reinstated by his local superiors, only to be terminated by the corporate office just over two months after having returned from injury. *See id*.

Thereafter, the employee filed a claim for temporary total disability. *See id*. The employer testified that, but for the employee's violation of the company policy in failing to

report his accident, the employee would have continued to work with his restrictions. *See id*. at 13, 747 S.E.2d at 432. The hearing commissioner and the full commission found the employee was not entitled to temporary total disability because he was terminated for cause. *See id*.

The South Carolina Supreme Court held that S.C. Code Ann. § 42-9-260 provides that temporary total disability may begin when "an employee has been out of work *due to* a reported work-related injury…for eight days[.]…" *See id*. at 14, 747 S.E.2d at 433 (emphasis in original). The Court continued that when an employer offers suitable employment within the injured employee's restrictions, entitlement to temporary total disability benefits is based on whether the employee's inability to earn wages was the result of a work-related injury or termination for cause. *See id*. at 15-16, 747 S.E.2d at 433-434.

Here, like the employee in *Pollack,* Appellant suffered a compensable injury and returned to work in his same role with restrictions. While working in that role, Appellant was terminated for cause. As discussed below, Appellant's termination was justified, and was certainly not so capricious for this Court to overturn the unanimous decisions of the single commissioner and the full commission. Accordingly, the single commissioner and the full commission, by evaluating Appellant's claim for temporary total disability benefits based on the precedent stated in *Pollack*, did not err as a matter of law.

B. The Single Commissioner and Full Commission Made the Correct Factual Determination.

Appellant has a heavy burden to convince this Court that the unanimous decisions of the single commissioner and the full commission were not supported by substantial evidence and were unreasonable. "This Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence." *Jones*, 355 S.C. at 416, 586 S.E.2d at 113 *citing Lark*, 276 S.C. at 136, 276 S.E.2d at 307. "Substantial evidence is evidence which,

considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." *Id*. at 417, 586 S.E.2d at 113 *quoting Howell v. Pacific Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987).

As the South Carolina Supreme Court noted in *Pollack*, a determination of whether an employee was terminated "due to or because of" an injury or for cause "is a quintessential factual question for the fact-finder, the Commission." *See Pollack*, 405 S.C. at 15-16, 747 S.E.2d at 433. Thus, the Supreme Court in that case, and this Court in this case, "is limited to determining whether substantial evidence supports the Commission's finding that Appellant's inability to earn wages was a result of his termination for cause, not his work-related injury." *See id*. at 16, 747 S.E.2d at 434.

While Appellant's Initial Brief is full of rhetorical questions, speculation and conspiracies concerning Employer's allegedly improper motives for terminating Appellant, there is no evidence to back them up. The primary thing Appellant relies on is the advertised description for the job of a maintenance director noting various lifting requirements that would have exceeded Appellant's restrictions. However, Appellant ignores that in his job offer, and in practice, his responsibilities were limited to those duties that were within his restrictions. *See* Defendants' APA (2022) at p. 33; *See* T. at 45:12-46:3; 64:19-64:23 & 79:3-80:10.

Moreover, Appellant points to the involvement of management and workers' compensation representatives in the decision to terminate Appellant as evidence of an improper motive. While ensuring a personnel decision does not violate the applicable law does not seem to point to a nefarious plot and is what occurred in *Pollack*, it is clear both the single commissioner and the full commission were sensitive to the possibility that Employer terminated Appellant as a mere pretext to end temporary total disability benefits, as alleged by Appellant.

See Decision and Order at ¶¶ 62-65 & Appellate Panel Decision and Order at ¶¶ 62-65. They found, with the single commissioner having the benefit of observing the witnesses, based on the totality of the evidence that Employer was justified in terminating Appellant for cause. *See id.*

Moreover, there is substantial evidence Appellant was terminated for cause. Employer, through its general manager Mr. Kear, emphatically noted that Appellant's termination had nothing to do with his injury and that if he had not been terminated for cause, he would still be able to accommodate his light-duty work restrictions.[3] Appellant himself admitted he made mistakes in his job and acknowledged that others performed work that exceeded his restrictions. Mr. Kear detailed the multitude of reasons why Appellant was terminated, including poor performance, insubordination and absenteeism. Ultimately, based on the "greater weight of the evidence," both the single commissioner and the full commission unanimously found Appellant was terminated for cause. Therefore, there is no basis for this Court to overturn the factual determinations of the single commissioner or the full commission.

CONCLUSION

For the reasons stated herein, this Court should affirm the decisions of the single commissioner and the full commission.

[3] Appellant's arguments that he was "incapable of obtaining any job" is belied by the fact that he worked for Employer and noted himself that had he not been terminated he was able to continue to work light duty for Employer. *See* T. at 66:17-66:20.

Respectfully submitted,

March 20, 2025

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