THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2025-001282

Mary L. Davis, Claimant, ... Appellant,

v.

Ruiz Food Products, Inc., Employer, and
Safety National Casualty Corporation, Carrier,.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises out of the Commissioner's belated/ arbitrary decision following a hearing held September 27, 2023, on the basis of two (2) WCC Form 50 request for benefits filed by the claimant; one of which was filed at the direction of the Commission adding a November 4, 2022 incident as a separate accident. Order Instructions were not forwarded to defendants (Respondents herein) until five (5) months later on January 23, 2024, and a final decision was not filed by the Hearing Commissioner until July 29th, over eleven (11) months later. That Order was only filed after multiple requests by the defendants asking the Hearing Commissioner to fulfil her statutory responsibility and rule on all the issues before her for decision, and only after a Summons and Complaint was filed by the claimant on July 11, 2024, for Writs of Prohibition and Mandamus to stop a belated/arbitrary decision. A "courtesy" copy of which had been served on the Commissioner on July 19th, ten (10) days before the Order. (R. p. 120; pp. 100-131; p. 25). A Motion for Reconsideration was filed July 31, 2024 and an Amended Summons and Complaint adding the Motion for Reconsideration was filed on August 19th. (R. pp. 132-145; p. 6). A Form Order denying the Motion for Reconsideration was filed October 3, 2024; one (1) year and one (1) week after the hearing.

In the Form 30 Request for Commission Review filed October 9, 2024, the claimant alleged thirty (30) specific Grounds of Exception; and included the Grounds for review as set forth in the Motion for Reconsideration;, and referenced as Grounds for Review the bases as set forth in the Summons and Complaint requesting Writs of Prohibition and Mandamus. (R. pp. 474-511). After Briefing, instead of a public hearing as required for Administrative Agency proceedings, a hearing was held via Zoom February 10, 2025. The three-member Commission Panel filed its decision April 15, 2025, amending the Hearing Commissioner's decision by ordering, in addition to further medical care to the low back, left knee, and left hip arising out of the November 16, 2019 accident, an evaluation and treatment from the authorized treating physician for any condition related to the neck injury she sustained in the November 16, 2019 accident. The Order denied claimant any medical care for any November 4, 2022 injuries; and affirmed the Hearing Commissioner's denial of the claimant's entitlement to temporary total disability benefits based on the Pollack v. Southern Wine & Spirits of America decision. (R. pp. 474-511; pp. 714-717; pp. 416-444; pp. 445-461; pp. 8-21). Following the Full Commission Decision April 15th, the claimant filed a Motion for Reconsideration on April 16, 2025, to which a Reply was made on April 25, 2025, and a Form Order denying the Motion was entered on May 27, 2025.

Following that, timely notice of the intent to appeal was filed with this Court as to those issues finally concluded and decided, and specifically: 1) Appellant's entitlement to temporary total disability benefits; 2) the arbitrary and capricious delay in making a decision and failure to address all the essential issues including failure to provide medical care; 3) the denial of a de novo hearing for failure to address essential issues; and 4) whether the Hearing Commissioner and Panel violated the Law of the Case doctrine in reference to the original Order of Commissioner Wilkerson. This appeal follows.

Due to the bases on appeal being, in part, the Hearing Commissioner's failure to perform her statutory duty, the arbitrary and capricious delay in reaching a decision, failure to provide a de novo hearing, violation of the Law of the Case doctrine, and the failure of the Full Commission to even consider some of those issues and not address others, a procedural history of the claim prior to the September 27, 2023 hearing, is necessary for an understanding of the issues before the Court:

PRE-SEPTEMBER 27, 2023 HEARING, PROCEDURAL HISTORY

On March 21, 2023, the claimant filed a Form 50 based on the November 16, 2019 accident requesting an Order ordering the provision of medical care and temporary total disability benefits after her termination while on "sedentary work only"

restrictions on February 20, 2023 through the present and continuing. The Form 50 Attachment for the November 16, 2019 accident, first set out that both before and after a June 7, 2021 Order ordering medical care, the claimant had been working light duty under ever increasing work restrictions of her authorized treating doctors, Dr. Alan and Dr. Chokshi. It then set out that a subsequent incident happened at work in which she was "assailed" following which she asked her employer for additional medical care which was not provided and on February 20, 2023, she was terminated allegedly for cause related to violation of a company policy. (R. pp. 52-58). After a Form 51 was filed April 20, 2023, a hearing was set for June 20, 2023. (R. pp. 52-62). Claimant submitted her Prehearing Brief and APA Submissions May 25, 2023, and defendants filed theirs June 9, 2023. On June 20th following a prehearing conference, Commissioner Avery Wilkerson postponed the hearing and filed his Order July 11, 2023, quoting in pertinent part:

> "It was determined that the incident that occurred on November 4, 2022, constituted a separate injury by accident and a separate Form 50 request for hearing needed to be filed concerning that incident so that all issues may be before the Commission as to whether or not the claimant's current problems and request for medical care and benefits stem from the first accident, the second accident, or a combination of the two."

Pursuant to the Order, the claimant filed a separate Form 50 for the second accident with the Commission July 11, 2023, to which a Form 51 response was filed July 27, 2023; and a hearing was reset before Commissioner Aisha Taylor on September 27, 2023, as noted at the beginning of the Statement of the Case.

STATEMENT OF FACTS

Ms. Mary Davis (Appellant) sustained an admitted injury on November 16, 2019 when she fell on a wet floor and was taken by ambulance to the emergency room. She was referred for authorized treatment with McLeod Occupational Health where she was treated by Dr. Stuart Sandler. Throughout the course of treatment from December 2019 to September 4, 2020, and in his opinion letter of June 19, 2021, Ms. Davis was treated and diagnosed with the following: low back pain, contusion of left hip, **cervicalgia**. (R. pp. 210-230). In his opinion statement, Dr. Sandler stated that to a:

> "reasonable degree of medical certainty, all the problems for which we have treated her in reference to her knee, hip, low back, and **neck** are causally related to and are either directly or were preexisting asymptomatic problems that were aggravated by the original work-related injury which occurred on November 16, 2019."

After treatment for and then denial of certain medical care and a hearing, on June 8, 2021 the Commission ordered the defendants to provide evaluation and treatment for the left hip, leg and knee by a local orthopaedist. (R. pp. 1-5). Subsequently after

refusal to provide further care and her termination, March 21, 2023 Ms. Davis filed a Form 50 requesting the Commission order the defendants to provide medical care for her upper and lower back and her left hip and knee through her authorized treating physicians, Dr. Alan and Dr. Chokshi. (R. p. 111; pp. 52-58).

In the Attachment to her Form 50, Ms. Davis noted that on November 4, 2022, while working for the employer under light duty restrictions of "sedentary work only", another incident occurred at work "when she was assailed by a fellow worker allegedly trying to hug her" but which involved him grabbing and pulling her by both of her hands, and pushing and pulling her with her trying to get away from the other employee. (R. p. 56).

After a Pre-Hearing Conference before the scheduled June 20, 2023 hearing, Commissioner Wilkerson opined that the second incident that occurred on November 4, 2022 constituted a separate injury by accident and required a separate Form 50 be filed concerning that incident so that all issues may be before the Commission and quoting:

> "as to whether or not the claimant's current problems and request for medical care and benefits stem from the **first accident, the second accident, or a combination of the two"**

and ordered that after the filing of the additional Form 50, this matter was to be reset for hearing before the Jurisdictional Commissioner. (R. p. 63).

Per the direction of Commissioner Wilkerson, on July 11, 2023 Ms. Davis filed a separate claim for benefits due to the November 4, 2022 accident and requested the same relief, that being medical evaluation and treatment for her neck, back, and hip, leg, and knee and such other bodily parts as were determined to be causally related. In addition, Ms. Davis requested temporary total disability benefits from the date she was terminated on February 20, 2023, to continue until released at maximum medical improvement. (R. pp. 64-67).

The two claims came to be heard by Commissioner Taylor on **September 27, 2023.** (R. p. 71). Almost exactly four (4) months later on **January 23, 2024,** the Commissioner issued the following Order Instructions:

> "1. Per Order of this Commission, claimant sustained compensable injuries to her left knee, left hip, and low back.
>
> 2. Claimant has been receiving authorized causally related medical treatment at the direction of the defendants.
>
> 3. Dr. Alan issued claimant light-duty work restrictions, which the employer was able to accommodate.
>
> 4. The claimant was ultimately terminated after being 'observed throwing food away, which was against company policy'.
>
> 5. I find that but for claimant's work policy violation, her light-duty work restriction would have continued to be accommodated. Claimant's testimony that she and other employees always

> throw food away without discipline is unpersuasive.
>
> 6. I find claimant is not entitled to TTD benefits. See Pollack.
>
> 7. I find defendants are continuing to provide medical treatment in compliance with the prior Orders of the Commission and the Act.
>
> 8. No penalties or hearing costs are assessed." (Emp. add.) (R. pp. 73-74).

On **March 18, 2024,** defendants' Counsel having noticed the Commissioner had not addressed all the issues before her in her "Notes for Decision", wrote a letter requesting further instructions. Quoting:

> "First, at the September 27, 2023 hearing, you said you would analyze whether portions of Shanda Blackwell's deposition testimony, as well as emails submitted by the claimant, were hearsay, and indicate your Findings in the Order Instructions. No indication was made in the Instructions.
>
> Second, one of the issues at the hearing was the compensability of the claimant's alleged November 4, 2022 assault. The Order Instructions do not contain any Findings on the compensability of that alleged accident." (R. pp. 75-76).

After that, having heard nothing from the Commissioner, by letter on **May 15, 2024,** defendants' Counsel again sought the direction of the Commissioner in reference to those issues. (R. p. 77).

Again, on **July 1, 2024,** defendants' Counsel sent a copy of the March 18th letter in a series of emails regarding the Order

Instructions and the failure to rule on certain issues. The response from the Commissioner's office was:

> "Good afternoon. Commissioner has this but I don't have any information at this time. I will remind her of this. Sorry for the delay...". (R. p. 127; p. 79).

The parties agree and it is uncontested the Commissioner did not rule on issues before her for decision.[1]

On July 11, 2024, the Commissioner having not entered an Order in over ten (10) months since the hearing, Ms. Davis filed a Complaint in the Circuit Court requesting a Writ of Mandamus and a Writ of Prohibition. (R. pp. 36-50).

On July 19, 2024, Appellant's Counsel inquired whether or not the Commission would accept service and provided a **"courtesy copy"** of the pleadings that had been filed in the Circuit Court. (R. pp. 129-131).

On July 29, 2024 without contact with either party, Commissioner Taylor unexplainedly issued an Order herself.

Ms. Davis's Counsel then filed a Motion for Reconsideration and an Amended Complaint on August 19, 2024, asking for a Writ of Mandamus and Writ of Prohibition prohibiting the Commissioner from issuing an Order on Appellant's Motion for Reconsideration, to which a Return was filed. The Commissioner then issued an

[1] While Ms. Davis takes the position that there are multiple issues upon which the Commissioner did not rule, the Respondents take the position she did not rule on at least two (2) specific issues before her for decision.

Order on the Motion for Reconsideration October 3rd before a hearing on the Complaint could be held in October 2024 rendering the Complaint and the requests for Writs of Prohibition and Mandamus moot. (R. pp. 132-145; pp. 6-7).

Based on the testimony and evidence submitted at the September 27th hearing, the Record establishes that as her authorized treating physicians (Drs. Alan & Chokshi) increased her restrictions, the Employer changed her multiple times into various new lighter duty jobs in an effort to provide light duty work within the restrictions issued. (R. p. 186; p. 207). At the time of the November 4th incident, Ms. Davis was under work restrictions from Dr. Chokshi of "sedentary work only" which were more stringent than those placed on her by Dr. Alan a year earlier. The Employer sought to address her "sedentary work only" restrictions by providing her a stool on the line and allowing her to work at a table where her "sedentary" job was to **throw away** bad product. Testimony at the hearing from Ms. Davis and Jonathan Holder is uncontested that this was normally a job performed by the employees working on that line and machine and her job was a special light duty job created for her where all she had to do was sit and **throw away** product. (R. p. 606, ll. 19-24; p. 608, l. 21 - p. 609, l. 6; R. p. 661, l. 25 - p. 662, l. 7). It is also uncontested/undenied that she was instructed by her supervisors that she was to "**throw away**" any product that

had gotten cold. (R. p. 605, l. 21 - p. 606., l. 22; R. p. 666, l. 23 - p. 667, l. 7). Ms. Davis testified that up until the November 4th incident the other employees working on the machine where she worked had helped her to keep up with the pace of production and assisted in sorting through and **"throwing away"** bad product. After the November 4th incident and it being reported, Ms. Davis's testimony is uncontested that she was not provided assistance in doing that sedentary duty job which required her to keep up with the demands of the production line. (R. p. 610, l. 17 - p. 611, l. 1; p. 661, l. 21).

Jonathan Holder testified, on behalf of the defendants, that the basis for her termination was that she was throwing away product, including cold product. "I believe it was destruction of company property". He acknowledged that her job in her "sedentary" duty capacity was to throw away bad product. If she were not there, he testified: "It could be leads. It could be supervisors. It could be material movers. It could be a handful of people that did her job." (R. p. 662, ll. 3-4). He also confirmed that the Plant throws away 1-2 tractor-trailer truckloads a day of bad product. (R. p. 664, ll. 1-3). He testified that he reviewed video tape of Ms. Davis doing her job and based on her being observed on several occasions throwing away stacks of product, she was terminated.

Mr. Holder acknowledged in his testimony that he did not know the policy for what product should be thrown away but did know that bad product included "cold" product, which was to be thrown away. He could not deny Ms. Davis's testimony that she had been instructed by her supervisors and everyone on the line in management to keep the table clear and not stacked up and as to why "that I do not know". (R. p. 667, ll. 5-19). He only watched the video and never watched video of anyone else or her ever before throwing away product. (R. p. 672, ll. 3-19). There is no evidence of any meetings with Ms. Davis concerning why she was throwing away the product she threw away. (R. p. 667, ll. 3-19; p. 674, l. 25 - p. 675, l. 24).

In reference to the November incident, Ms. Opal Jones' and Ms. Shanda Blackwell's deposition transcripts were placed into evidence. Both of those depositions confirmed that an incident occurred on November 4th but the other person involved in the incident, Mr. Eugene, stated that he was simply trying to hug her and it involved a hugging incident. An employee witness to the incident, Ms. Octavia Harrison, confirmed Ms. Davis's testimony in that Ms. Davis was either bumped or knocked into her as a result of the incident. Her witness statement states that Ms. Davis "bumped" into her. She also stated she thought Mr. Eugene and Ms. Davis were kidding around. (R. p. 528, l. 1 - p. 529, l. 10). The videos of the night of the incident which

served as a basis for denying the incident occurred were thrown away. (R. p. 656, ll. 5-9, ll. 16-18).

Ms. Shanda Blackwell, both in her deposition, and her email confirmed that she had had a conversation at the request of Ms. Mary Davis about the incident/assault and need for medical care and that both she and Vennie had spoken with the TM (Team Member) in the South Safety Office and that she had told them at that time her doctor had instructed that she needed to ask them about authorization for her to get an MRI done on her neck after she was assaulted last week by another TM. She also advised them that she had given the paperwork from her doctor to the Safety Tech on the day before. Ms. Opal Jones confirmed that she took the statements from the employees and was aware of the incident on the night that it occurred. (R. p. 558, l. 21 - p. 559, l. 21; p. 562, ll. 13-25; p. 567, l. 4 - p. 568, l. 24).

No evidence was placed into the Record concerning the policy of the company for termination of an employee for throwing away product. While previous company policy violations involving attendance or checking in or coming in late were made a part of the Record, there was no written company policy or any other written company policies referred to in the company termination packet entitled "Termination Information" or placed into the Record. (R. p. 296). The only termination reason listed was: "violation of company policy". Then under "Notes" it states

she was terminated for being seen on several occasions "willfully destroying and throwing away company product". Again, in the Record there is no evidence of any guidelines/ instructions nor was there any discussion at the time of termination with the claimant about her instructions how to do her light duty job which was to throw away bad product or as to what product should or should not be thrown away nor any communication with her as to why she was throwing away the product seen on the video. Also, there is no evidence in the Record to dispute what the Appellant was told as to what product was to be thrown away by her supervisors in her "sedentary work only" job which was to **"throw away"** company product that was unusable.

Ms. Davis filed for unemployment and the appeals tribunal found as a fact in sustaining her claim for unemployment, that Ms. Mary Davis, stated under oath that she:

> "was told she was discharged for throwing away company product. The claimant also maintained she was responsible for inspecting the tortillas after they were cooked and dispose of ones that did not meet the employer's quality standards. She maintained that she did not discard tortillas that met the criteria to be used as she was trained."

That testimony was undisputed by the employer. Again, Mr. Holder did not dispute her statements as to her understanding

and her training as to the tortillas that were to be disposed of.

In her decision only filed after the Complaint for Writs of Mandamus and Prohibition had been filed, Commissioner Taylor, in addition to the eight (8) instructions, made an additional twelve (12) Findings of Fact not recorded anywhere in the Record or in her Notes for Decision. In addition, the Notes for Decision did not contain any references to the Record and specifically Findings of Fact #2, #6, #7 and #8 contain absolutely no reference to the evidence submitted in the case or any basis for those alleged Findings of Fact. (R. pp. 30-31; pp. 73-74).

STANDARDS OF REVIEW

WORKERS' COMPENSATION APPEAL

The SC Administrative Procedures Act establishes the substantial evidence standard for judicial review of the factual Decisions of the Workers' Compensation Commission, SC Code Ann. §1-23-380 (5)(e), and that an Appellate Court may reverse or modify a Decision of the Commission that is 1) affected by an error of law or 2) is clearly erroneous in view of the reliable, probative, and substantial evidence in the Record as a whole. Clemmons v. Lowe's Home Centers, Inc. - Harbison, 412 S.C. 366, 772 S.E.2d 517 (SC App. 2015) reh. den.; reversed 2017 WL 920730, withdrawn and superseded on rehearing, 420 S.C. 282, 803 S.E.2d

268 (2017). (Reversed, based on substantial evidence on "loss of use"). Dent v. East Richland County Public Service Dist., 423 S.C. 193, 813 S.E.2d 886, reh. den. (SC App. 2018). (Reversed, substantial evidence on disability due to back injury). Also very pertinent to this appeal is SC Code §1-23-380(5) subsections: (a) in violation of constitutional or statutory provisions; (c) made on lawful procedure, or (f) **arbitrary** or **capricious** or characterized by an **abuse of** discretion or clearly unwarranted exercise of discretion. (Emp. add.)

IN A WORKERS' COMPENSATION APPEAL, THESE STANDARDS APPLY.

Under SC Code §42-17-40 the Commission must make Findings of Fact and Rulings of Law on all "questions at issue". Under SC Code §1-23-350, the final Agency Decision shall include Findings of Fact and Conclusions of Law separately stated. SC Code §42-9-5 requires any Award made must be based upon, "specific and written detailed Findings of Fact substantiating the Award". Those mirror our judicial precedents which hold, while recognizing the factual determination is the responsibility and **"duty"** of the Commission, that **"duty"** to make Findings of Fact requires that "(1) not only **must** Findings of Fact" be made upon **all** essential factual issues for decision but (2) they must be sufficiently definite and detailed" to enable the Appellate Court properly to determine whether (the) Findings of Fact are supported by evidence" and that (the) "law has been properly applied to them". Drake v. Raybestos-

Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); Baldwin v. James River, 304 S.C. 485, 405 S.E.2d 421 (SC App. 1991). (Emp. add.)

The Workers' Compensation Act is to be given a liberal interpretation. It is the established law of this state that any reasonable doubt as to the construction of our workers' compensation law must be resolved in favor of the claimants, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage rather than non-coverage. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). In Ham, the Supreme Court chastised and reminded the Commission of its **"duty"** under the Act, and quoting:

> "In order to reach its conclusion, the Commission had to construe the Act **literally** rather than **liberally**, had to read into the Act words, the omission of which by the legislature was obviously intentional on its part, and had to violate the further legislative intent **towards coverage under the Act.** In doing so, I am convinced that it committed error, and such a construction of the Act should be rejected by the Courts. Instead of straining to adopt that sort of interpretation, **the Courts will follow exactly the opposite course of reasoning, in order to give the Act a liberal construction** ...". (Emp. add.)

Exceptions and restrictions on providing coverage under the Act and benefits to the injured worker **are to be strictly**

construed. Foran v. Murphy USA, 420 S.C. 377, 803 S.E.2d 311 (SC App. 2017); Barnes v. Charter One Realty, 411 S.C. 391, 768 S.E.2d 651 (2015); James v. Anne's, Inc., 390 S.C. 188, 701 S.E.2d 730 (2010); Peay v. US Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993); Cokely v. Robert Lee, Inc., supra.

ARGUMENTS

I. THE HEARING COMMISSIONER AFFIRMED BY THE COMMISSION DID NOT MAKE FINDINGS OF FACT ON AND DID NOT ADDRESS ALL THE ESSENTIAL ISSUES BEFORE HER FOR DECISION, WHICH REQUIRES THAT THIS MATTER BE REVERSED AND REMANDED FOR A NEW HEARING.

Way before the advent of the statutory requirements that the Commission must make detailed Findings of Fact and Conclusions of Law, the Supreme Court held that the **"duty"** to determine factual issues is placed solely "on the Commission" and that:

> "Such **duty** requires that not only must Findings of Fact be made upon **essential factual issues** but they must be **sufficiently definite and detailed** to enable the Appellate Court properly to determine whether the Findings of Fact **are supported by the evidence** and that **law has been properly applied** to them." Drake v. Raybestos-Manhattan, Inc., 341 S.C. 116, 127 S.E.2d 288 (1962).

Failure to fulfil that **"duty"** is a fundamental breach requiring reversal because "the Commission alone is the ultimate fact finder"; Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (SC App. 1996); and is a three (3) person jury whose factual decision no Court on appeal has authority to change.

Davis v. SC Dept. of Corrections, 444 S.C. 138, 906 S.E.2d 569 (2024); Drake v. Raybestos-Manhattan, Inc., supra.

While SC Code §42-17-40 since the inception of the Act has required that the Commission Award has to contain "Findings of Fact, Rulings of Law, and set forth other matters pertinent to the questions at issue", the Legislature has added to that the requirements under the APA under SC Code §1-23-350 that all administrative agencies are required to make detailed Findings of Fact and Conclusions of Law and if a Finding of Fact is set forth in statutory language, it shall be accompanied by, "a concise and explicit statement of the underlying facts supporting the finding". The General Assembly then added SC Code §42-9-5 which requires that any Award must be "**based upon specific and written detailed Findings of Fact** substantiating the Award." While there is a plethora of decisions by the Supreme Court and Court of Appeals holding that, where a Commission Decision does not comply with the requirement of making detailed Findings of Fact the case will be reversed and remanded, one case and its two (2) appeals which is most instructive will be cited here; Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970). In first Hill, the Hearing Commissioner had found that the claimant failed to establish his right to compensation. On appeal, the majority of the Full Commission made the following statement in reversing that decision:

> "In the absence of any medical testimony to the effect that claimant had a history of suffering from physical seizures and since there is so much controversy as to how claimant fell, it is the opinion of the majority of the Commission that the **basic purpose** of the Workers' Compensation Act is **to include injured workmen within its protection** rather than exclude them." (Emp. add.)

The Supreme Court in reversing and remanding the case for a more "definitive" Finding, noted that the majority of the Commission decision contained only "brief references to the testimony and no reasons were stated for the factual Finding that the claim was compensable." After further criticism of the lack of a factual basis for its decision, the Court held:

> "The vice in this award, **which we here disapprove** is that the quoted statement, in the absence of further factual or legal clarification of the basis for the ultimate finding of compensability, creates a substantial question as to whether the majority of the **Commission applied the correct rule of law** with reference to the **burden of proof."** (Emp. add.)

The Court then remanded the case to the Commission:

> "for the purpose of making a decision or award which will clearly reflect its findings **in accordance with the greater weight of the preponderance of the evidence."** (Emp. add.)

The Hill decision is most instructive because after remand it was again taken up to the Supreme Court. On remand, the Full Commission, in its Order based on the Remand, again affirmed the Award of benefits to the injured worker and that decision was affirmed by the Circuit Court. On appeal the Supreme Court

affirmed the Award. In Hill two the Court found the Commission fulfilled its statutory duty and made a "specific Finding of Fact" that it had reviewed all the transcript testimony and the other evidence available and based on that review of the conflicting evidence they found that the claimant had established by a "preponderance of the evidence" that he was entitled to an award of benefits. Hill v. Jones, 260 S.C. 183, 194 S.E.2d 888 (1973).

The Court need look no further than the Commissioner's Order Instructions **wherein she makes absolutely no reference to any of the testimony or evidence presented.** She does not even "generically" refer to either the testimony, the APA Submissions, or the deposition testimony presented to her. For example in her Findings there is not even a general statement like, "I have reviewed the deposition testimony of Shanda Blackwell and find etc., etc.".

If the Court chooses or feels it needs to go beyond her failure to make detailed Findings of Fact and Conclusions of Law in her Order Instructions, the Order she filed herself, **only after** defense counsel brought to her attention **repeatedly that she had not made decisions in her notes on several issues before her for decision,** does not contain references to the evidence upon which her purported Findings of Fact are made. The Court will find after reciting the same eight (8) Order Instructions

made in January, the Commissioner makes twelve (12) additional Findings of Fact, nowhere stated in the Record and made over ten (10) months after the hearing, but the Commissioner still did not make Findings of Fact on all the issues before her for decision and did not fulfil her **"duty"**.

In the Order, the first eight (8) Findings of Fact are simply a restatement of the inadequate Order Instructions. For example, under Finding of Fact #2 she states that the claimant is receiving authorized causally related medical treatment at the direction of the Respondents. In reference to Dr. Alan, there is no evidence defendants were providing the medical care Dr. Alan recommended. To the contrary, the Record is replete with requests by both Ms. Davis and her Counsel and Dr. Alan's office for authorization. (R. p. 231; pp. 234-245). In Finding of Fact #3 she refers to the employer accommodating Dr. Alan's light duty restrictions, but **there is absolutely no reference to Dr. Chokshi's work restrictions, which are the work restrictions under which she was working at the time of the incident on November 4, 2022, and at the time of her termination in February 2023.**

In Finding of Fact #6, she makes the blanket statement:

> "that but for the claimant's work policy violation that light duty restrictions would have continued to be accommodated and that the claimant's testimony was unpersuasive".

This Finding is made without any reference to any factual basis for that Finding. What written policy and contrary to Instruction?

In Finding of Fact #9 the Commissioner alleges that Ms. Davis in reference to the second accident of November 4th alleged that she had been "assaulted by a co-worker". She then under Finding of Fact #14 states that Ms. Davis never filed a police report regarding the alleged assault. A review of Ms. Davis's statement establishes that she never alleged that there had been an assault. She simply made an allegation that she was approached and was grabbed and aggressively pushed so hard that she hit another team member trying to get away, then he stopped and walked off. In other words, it was a grabbing and pushing incident, not an allegation of assault. The only reference made by anyone to assault is by Shanda Blackwell in an email where she uses the words "that Ms. Davis was assaulted last week". In her deposition, Ms. Jones confirmed that she did not consider the incident to be "an assault" (R. p. 534, ll. 17-21) and the company which would have reported it had it been an assault did not report the incident. (R. p. 534, ll. 17-21; p. 523, l. 9 - p. 524, l. 6). None of this evidence is referred to and again, Finding of Fact #9 does not even contain a reference to any testimony but simply Ms. Davis's allegation of an assault which is not true according to Ms. Opal Jones' testimony. (R. p. 523, ll. 15-19). In fact, in her

Form 50 requesting a hearing on the November 4th incident, she described the accident as follows:

> "Fellow employee suddenly, grabbed, pulled, and pushed Ms. Davis in hallway area."

Again, there is no reference to an assault.

The Commissioner simply failed in her responsibility to make detailed Findings of Fact and/or citing to the evidence either by transcript page/number, deposition page/number, or APA Submission page number; or even generically to the deposition testimony of; the hearing testimony of; or the APA Submissions of. Decisions without such specific Findings do not comply with the requirements of the Act. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). A public officer's failure to comply with a statutory **duty** constitutes malfeasance in office. Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 626 (1997). This case must be reversed as a matter of law or at least reversed and remanded for a new hearing.

II. THE COMMISSION ERRED BY NOT AWARDING THE APPELLANT TEMPORARY TOTAL DISABILITY BENEFITS ON THE BASIS OF POLLACK v. SOUTHERN WINE & SPIRITS OF AMERICA.

It is axiomatic under every decision of the Supreme Court and Court of Appeals that the law is to be liberally construed in favor of providing benefits to the injured worker and any decision limiting benefits is to be "strictly construed" and limited to that set of facts. The Supreme Court and Court of

Appeals have always, always been very careful to make sure when they either deny benefits, reverse and deny benefits, or affirm a decision denying benefits that they limit their decisions to that particular set of facts. For example, in reference to the idiopathic fall concept, the Supreme Court and this Court specifically held and restated the maxim that:

> "As an **exception** to workers' compensation coverage, the idiopathic doctrine should be strictly construed." Barnes v. Charter One Realty, supra; Foran v. Murphy USA, supra. (Emp. add.)

In Barnes, the Supreme Court, and in Foran this Court, strictly construed and limited Crosby v. Walmart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (SC App. 1998). To the contrary, the Commission in this case applied and expanded the Pollack v. Southern Wine and Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013) decision, an exception to an injured worker's entitlement to temporary compensation, while undisputedly under a disability, under a doctor's care and not yet at maximum medical improvement, to deny the Appellant compensation.

First in Pollack, there was a specific written policy that was violated by Mr. Pollack. That company policy put into evidence and set out in the Opinion stated:

> "All accidents and incidents with a vehicle must be reported, whether or not there is damage to the Company vehicle, another vehicle, or other property"

and further that:

> "all accidents in a company vehicle, at fault or not, must be immediately reported to the Driver Supervisor. Failure to report an accident will result in immediate termination." (Emp. add.) 747 S.E.2d at 431.

In addition, the written company policy violated was totally unrelated to the work-related injury and the light duty work he was performing. In the Pollack decision, the Supreme Court warned in reaching its decision to deny Mr. Pollack benefits based on the facts of that case, that "an employer's denial of TTD benefits" must be scrutinized carefully; and that this is a "critically important task" for the Commission in its fact-finding role; and that the Commission must "thoroughly" review the evidence and "thoughtfully consider the evidence" remaining sensitive to an employer's possible motivation to **'look for'** a reason to fire an injured worker." Mr. Pollack did not report the "**unrelated** to (his) light duty restrictions" **accident** and the specific, **unrelated** to (his) light duty restrictions" **written policy**, which was put **into evidence**, required "**immediate termination**". Thus, just as in an idiopathic fall situation, a denial of compensation while under a disability is to be strictly construed and limited to very specific facts. If one agrees with the Pollack decision, the Commission should not expand that beyond the dictates of the Pollack Court wherein they found specifically that the violation of a strict, written

policy that required termination and which was totally unrelated to the work injury and the light duty work being conducted, justified the non-payment of temporary total disability benefits in that light duty situation. To limit Pollack is in accord with every other case decided by this Court and the Supreme Court in reference to light duty work and specifically termination for violation of company policy while on light duty. See: Cranford v. Hutchinson Const. Co., 399 S.C. 65, 731 S.E.2d 303 (SC App. 2013); Davis v. UniHealth Post Acute Care, 402 S.C. 541, 741 S.E.2d 770 (2013).

The Pollack case is simply not the case here. In this case, it is agreed that Ms. Davis's light duty, "sedentary work only" restricted job was to throw away bad product. She testified that under her Supervisor's instructions she was trained to throw away, in addition to the broken, burned, or otherwise bad product, "all cold bread because it was not usable", and to keep the table clean because "they didn't want certain people to see bread on the table". (R. p. 627, l. 21 - p. 628, l. 18). Mr. Jonathan Holder testified that he did not know what she was instructed, but agreed it is company policy in reference to cold product that it should be thrown away. (R. p. 666, l. 23 - p. 667, l. 21). There was no hearing or meeting concerning a review of the video of her having thrown away product as to whether or not product that was being thrown away was thrown away in

accordance with company policy. **There was no written policy placed into evidence concerning what product was to be thrown away or what the policy was in reference to discipline for throwing away product,** and Appellant was not asked to complete a "report detailing the incident" (Pollack), unlike Pollack. It was specifically agreed and stated that the **sole** basis for Ms. Davis's termination was the video showing that she was throwing away company product. Mr. Holder confirmed he had never disciplined or terminated anyone for throwing away product. (R. p. 672, ll. 3-14; p. 675, ll. 11-13).

Not only did the defendants not present a written company policy that was violated and only made the blanket statement that she had thrown away product, but her testimony before the Unemployment Security Commission was not contested; and similarly to her testimony at hearing in that unemployment hearing, she testified that she was throwing away product in accordance with her training and that she did not throw away any product that could, "be used as she was trained". (R. pp. 251-252). The Unemployment Administrative Hearing Officer specifically noted that "although duly notified of the hearing, the employer did not appear and provide any testimony". He noted "the claimant has consistently denied any wrongdoing and insists she was following **her rework training".** (Emp. add.) Thus, not only in the Hearing Transcript but in the Unemployment

Commission Hearing Transcript, the defendants submitted no evidence of a written policy that was violated or contested the facts of her testimony that she was throwing away product in accordance with and "as she was trained".

The Pollack decision must be, "strictly construed" since it limits benefits to an injured worker and makes them a charge on society while disabled, instead of a liberal construction in favor of benefits which is the law as dictated by our Appellate Courts in their decisions which also all reference achieving one goal of the Act which is to prevent the injured worker from becoming a charge on society. Under the Act, **the burden is placed on the carrier not the taxpayer during the disability.** The Pollack decision simply does not and must not be expanded to apply to the facts in this case.

Pollack is wrong as a matter of law but at most is an exception to the provision of compensation during the "disability" of the injured worker to do work and must be strictly construed as an exception to the overriding and general policy of inclusion under the Act. Pollack adds words that are simply not in the Act and ignores all of the provisions on "disability" in the Act except for SC Code §42-9-260, which has nothing to do with anything other than legally stopping "disability" benefits.

"Disability" is defined in the Act in SC Code §42-1-120 which provides that disability is defined and means the

> "**incapacity because of injury** to earn the wages which the employee was receiving at the time of injury **in the same** or in any other employment".

It is uncontested that at the time of termination Ms. Davis was not in her regular "**same**" position in which she was earning wages before the accident, but was in an accommodated light duty made up position. So, the question as a matter of law is: was the injured worker suffering from a "disability", meaning an "**incapacity**" to earn wages "**because of injury**" at that time; i.e., termination? It does not matter whether the employee was incarcerated (Mr. Last); it does not matter if the employee fell asleep on the job (Ms. Davis); it does not matter if the employee was pregnant (Ms. Orr); it does not matter if the employee went back to school (Mr. Hendricks); it does not matter if the employer decides to close the plant or has a reduction in force; or the employee was going to retire two weeks after the injury; or that the employee moved out of state. If the undisputed facts are that the injured worker was under medical care and at the time in question, was suffering from an "**incapacity**", "disability" to do work that was "**because of injury**", the injured worker is entitled to weekly compensation benefits. Ms. Davis was suffering from an incapacity to do work in any job at the time that she was terminated and was not

released to do her **regular** duty "**same**" job and she was under medical care. Thus, it does not matter **why the employer chose** to stop providing light duty employment during the "disability" and before the claimant was released from medical care. Since Pollack in that specific factual situation stands for a contrary position to that law, that decision is to be strictly construed by this Court and must be limited to the facts of that case. Here, they simply looked at video tape, saw her throwing away product and without checking as to whether or not that was in accordance with her training and as to whether or not it was in accordance with company policy, they simply "looked for" and used that as a basis for terminating her even though her job, again her job, in that light duty sedentary capacity created position was to sort and throw out bad product.

Final Note! The Appellant is not saying and the law does not say that an employer may not fire a bad employee at any time and for any reason or may not stop providing light duty employment to a bad employee at any time for any reason. The Appellant and the law only says that if the injured worker is under medical care and is suffering from an "incapacity to earn wages caused by the injury" and the employer "chooses" not to make light duty available for any reason, the employer has to pay temporary total disability until maximum medical improvement and the disability resolves or it becomes permanent.

While this Court is constitutionally bound to follow the precedents of the Supreme Court, it is not bound where those decisions are in conflict. Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 321 S.E.2d 618 (SC App. 1984); rev. 287 S.C. 219, 337 S.E.2d, 213 (1985). Where the facts are undisputed the issue becomes one of law for decision by the Courts and this Court has referred litigants to these Supreme Court precedents on this maxim. Justice Kittredge writing for the Court: Davant v. Univ. of S.C., 418 S.C. 627, 632, 795 S.E.2d 678, 681 (2016) ("Because the facts are not in dispute, we are free to decide this case as a matter of law."); Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) ("Where there are no disputed facts, the question of whether an accident is compensable is a question of law.").

In both Last v. MSI Construction Co. Inc., 305 S.C. 249, 409 S.E.2d 334 (1991) and Pollack v. Southern Wine and Spirits, supra, the facts were undisputed. This Court must either limit Pollack or choose which precedent it will follow. Last is correct, it is an issue of law and this Court should follow Last. Appellant's Counsel would relish the opportunity to argue this principle on certiorari should the Respondents seek that. The Supreme Court never intended to shift the burden of supporting disabled workers while they are under medical care away from the employers and insurance carriers, who are paid a

premium to provide coverage, to the "taxpayers" and the goodness of our society. Paraphrasing Justice Brennan from Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2nd 287 (1970):

> "The termination of(compensation) pending resolution of a controversy over eligibility, may deprive an eligible claimant of the very means by which to live while he waits. Since he lacks independent resources his situation becomes immediately desperate. ... From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the (injured worker) contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the (workers' compensation system). (Workers' compensation) by meeting the basic demands of subsistence can help bring within the reach of the (injured worker) the same opportunities that are available to others to participate meaningly in the life of the community. ... (Workers' compensation) then is not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity'. The same governmental interests that counsel the provision of (workers' compensation benefits) counsels as well its uninterrupted provision to those eligible to receive it."

III. THE COMMISSION ERRED AS A MATTER OF LAW AND FACT BY NOT ADDRESSING THE ESSENTIAL ISSUE FOR DECISION; THE DEFENDANTS'/RESPONDENTS' FAILURE TO PROVIDE/AUTHORIZE MEDICAL CARE FOR THE HIP AND LEG; AND BY NOT ORDERING THAT CARE BASED ON THE SUBSTANTIAL EVIDENCE.

One of the "essential issues" for decision at the hearing was that the defendants had failed and refused to provide/ authorize further and continuing medical care for the claimant's left hip and leg. (R. p. 54; p. 66).

In her Prehearing Brief, the Appellant requested further medical care be ordered that had been recommended and provided by the authorized treating physician, Dr. Rodney K. Alan, in March 2022. In her APA Submissions she put in requests in 2023 from both Dr. Alan's office (R. p. 231) and her attorney's office (R. p. 234) which requests were made multiple times. Although repeated requests had been made prior to but without authorization, Dr. Alan on February 27, 2023, performed an injection in the knee and noted that because her diabetes was "unfortunately" out of control, steroid injections for the hip and knee had to be limited. He also noted her right knee was not bad enough to warrant a total knee replacement, "at this time". He recommended continuing conservative management as he had outlined previously in his treatment records of March 28, 2022, which had been ordered by Commission Order on June 7, 2021. (R. pp. 185-187; pp. 246-250). In the March 28, 2022 Note, Dr. Alan had outlined that she would need continuing conservative care to include intra-articular steroid injections in the left hip three (3) times per year and gel injections in the left knee two (2) times per year. That is exactly the treatment provided on February 27, 2023 and again he recommended that same continuing conservative care in that office visit note: "please see note from March 2022". (R. p. 181). There is no evidence in the Record the defendants ever provided/authorized any of the Dr.

Alan recommended care. Thus, one of the essential issues for decision was the defendants' failure to provide the continuing medical care as ordered by Dr. Rodney K. Alan and the Court will find no reference to that issue in either the Single Commissioner or Full Commission Orders. There is no evidence to the contrary in the Record. There being no Findings of Fact or Conclusions of Law, the Commission erred in its **"duty"** to make Findings of Fact and Conclusions of Law and address all of the essential issues before it for decision which requires reversal and based on the substantial evidence an Order ordering those benefits.

IV. THE HEARING COMMISSIONER/COMMISSION ERRED AS A MATTER OF LAW AND FACT IN MAKING GENERAL ORDER INSTRUCTION #3 AND FINDING OF FACT #3/FULL COMMISSION #4 AS EACH IS INACCURATE AS A MATTER OF FACT AND AS A MATTER OF LAW.

Following Dr. Alan's original work restrictions issued on March 28, 2022 which greatly increased Appellant's prior restrictions, Dr. Chokshi then placed even greater restrictions on her. It was Dr. Chokshi, not Dr. Alan, that restricted her to "sedentary work only" under which she was working on November 4, 2022; and when she was terminated on February 20, 2023. The Hearing Commissioner's Order Instruction and Finding of Fact #3 and the Full Commission's Finding of Fact #4 are wrong and totally inadequate based on the requirement that the Commissioner make detailed Findings of Fact that are

sufficiently definite and detailed enough to allow for Judicial Review.

In neither Finding is there any citation to the evidence; nor to the actual work restrictions of Dr. Alan; nor as to where in the evidence those restrictions are set out; nor is there any reference to any of the evidence concerning Dr. Chokshi and the work restrictions which applied at the time in question. In fact, both Findings of Fact specifically state in reference to Dr. Alan's light duty work restrictions that the "employer was able to accommodate" those. Again, it was Dr. Chokshi's "sedentary work only" restrictions (R. p. 202) under which she was working at the time she was terminated. These Findings are wrong, and not based on the Record and are totally inadequate as were many of the others, not further argued here. See Drake v. Raybestos-Manhattan, Inc., supra; Hill v. Jones, supra. Due to all the egregious errors of law, this Court under its authority should simply reverse this matter, address the issues as a matter of law and/or based on the substantial evidence standard, and grant this lady **without further delay** both the medical care and temporary total disability benefits which she so desperately needs.

CONCLUSION

This matter should be reversed and an award of temporary total disability benefits, and of medical care both be made as a

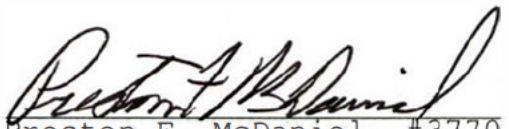
matter of law and remanded to the Commission for further proceedings not inconsistent with the Court's decision. The Pollack v. Southern Wine & Spirits of America, supra, decision must be limited to its facts and found not to apply here. As a matter of law since the Appellant was under medical care, had not reached maximum medical improvement, and was suffering from a disability "incapacity" stemming from the work-related accident and did not refuse a job within her capacity, she is entitled to workers' compensation benefits.

The medical care requested, ordered, and provided by the authorized treating physician, Dr. Rodney K. Alan, has not been provided and based on the substantial evidence in the Record, and also as a matter of law due to the Commission's failure to address that issue in detailed Findings of Fact and Conclusions of Law, those benefits should be awarded.

Those parts of the Decision including specifically the inadequate Findings of Fact and Conclusions of Law made concerning the November 2022 incident that also are contrary to and not in accord with the Law of the Case doctrine under the Order of Commissioner Wilkerson should be reversed as a matter of law and an award of medical and other benefits for the neck be ordered. Those benefits should also be ordered as soon as possible based on the unappealed Findings of Fact that the

claimant's problems with her neck stem from the original 2019 accident.

Respectfully submitted,



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