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S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel
Commissioner T. Scott Beck
Commissioner David W. Huffstetler
Commissioner Derrick L. Williams

Appellate Case No. 2012-212605
WCC Case No. 2008-WC-15-00441

Margaree Maple, ... Petitioner ~~Appellant~~

v.

Heritage Healthcare of Ridgeway, Employer,
and Phoenix Insurance Company, Carrier . . . . . Respondents

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

WHETHER THE COMMISSION CORRECTLY DETERMINED THE CLAIMANT IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS WHERE SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE EXISTS SHOWING THE CLAIMANT UNJUSTIFIABLY REFUSED SUITABLE EMPLOYMENT AND HER INABILITY TO WORK WAS NOT BECAUSE OF OR DUE TO HER WORK INJURY?

STATEMENT OF THE CASE

This appeal arises from a workers' compensation claim in which the claimant, Margaree Maple ("Appellant'), alleged a work-related injury on August 31, 2008. A hearing was held before Commissioner Andrea Roche ("Single Commissioner") on February 9, 2009. At the time, it was agreed that Appellant was not at maximum medical improvement. Appellant sought an order awarding her temporary total disability ("TTD") benefits from the date of injury forward. (App. p. 213). Appellant's employer and its carrier (collectively, "Respondents") denied that Appellant was entitled to TTD benefits on that basis that she was terminated from her job for falsifying a work excuse and failing to maintain proper contact with her employer. Respondents took the position that this behavior constituted an unjustified refusal of suitable employment, thus disqualifying Appellant from any right to temporary total disability benefits. (App. p. 244). Respondents admitted Appellant suffered a minor injury to her knees when she fell at work but denied any resulting compensable injuries.

The Single Commissioner issued a Decision and Order on December 18, 2009. (App. pp. 167-189). The Single Commissioner found that Appellant, or someone on her behalf, falsified a work excuse and that Appellant failed to maintain sufficient contact with her employer. The Single Commissioner found that this behavior constituted refusal

of suitable employment, that her absence from work was not occasioned by her injury, and that Appellant was not entitled to TTD benefits as a result. The Single Commissioner's order was appealed to the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel"). In an order dated June 16, 2010, the Appellate Panel unanimously affirmed the Single Commissioner' order in its entirety.

Appellant appealed to the Court of Appeals on July 16, 2010. On May 16, 2012, the Court of Appeals issued an unpublished order affirming the Appellate Panel's decision in part, and reversing in part. (App. p. 545). Following Appellant's Petition for Rehearing, the Court of Appeals issued a substitute opinion on June 27, 2012. The Court of Appeals: (1) remanded the case to the Commission for additional factual findings, and (2) held the Commission properly held the record open for additional evidence not available at the hearing. Appellant appeals these rulings.

STATEMENT OF THE FACTS

Appellant's alleged work injury occurred on August 31, 2008. Appellant testified that she was passing out food trays to the residents when she slipped in some water that was on the floor. (App. p. 334). She stated that she fell to the floor landing on her hands and knees. She further testified that her immediate pain was in both of her knees but her right arm began to bother her later on. (App. pp. 334-335). Appellant's supervisor instructed her to go the emergency room. (App. p. 336). Appellant testified that the hospital examined her legs and gave her some pain medication. (App. p. 338). Appellant testified that a doctor gave her paperwork that indicated that she could go back to work

on September 4. (App. p. 339) (see also App. p. 250, 483 and 528[1]). Appellant admitted that she was scheduled to work on September 1. (App. pp. 337-338).

Appellant testified that she took this note to her employer and gave it to Lynda Burr. (App. p. 340). Appellant believed she took the note in on September 2, 2008, but she wasn't sure about the date. She went on to testify that when she was supposed to return on September 4th, her legs were hurting still and she called in to Sherry Goodwin and told her that she would not be able to come in that day but would return to work on Saturday. (App. p. 341). Appellant testified that Ms. Burr agreed to set a doctors appointment for Appellant on Friday. When she was informed of this, Appellant explained to Ms. Burr that she didn't have a car and would have no way to get to the doctor on that day. (App. p. 341). She testified that Ms. Burr made the appointment anyway and Appellant wasn't able to go.

Appellant did come back to work on Saturday and Sunday of that week, September 6 and 7. (App. p. 342). On September 9, 2008, Appellant was seen by a nurse practitioner at Fairfield Family Practice. (Id.) Appellant was provided a work note taking her out of work until September 18, 2008. (Id.) Appellant was next seen by Dr. Gaddy on September 16, 2008. (App. p. 344). Appellant testified that Dr. Gaddy gave her a work note that held her out of work until September 30, 2008 unless sedentary work could be provided. (App. p. 349). On September 17 or 18, Appellant received a note with her paycheck notifying her that she had been terminated for falsifying documents. (App. p. 350).

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[1] The document at App. p. 250 was submitted as part of Defendants' APA Submissions to the Commission. Repeated copying has rendered the document illegible. This same document was made an exhibit to the Depositions of Dr. Ross and Nurse Connor (see App. p. 483 and 528) and are less degraded.

Lynda Burr, the Human Resources Generalist for the employer testified at the hearing for the Respondents. She testified that she was out of work the day Appellant's accident occurred, but was informed of it when she returned to the office. Ms. Burr testified that she made several attempts to contact Appellant by telephone and left several messages requesting a return call. (App. p. 375). Ms. Burr stated that Appellant's sister Johnnie Mae Butler, who also works at the facility, offered to go to Appellant's house and ask her to get in touch with Ms. Burr. (Id.).

Ms. Burr finally spoke with Appellant on September 3, 2008, when the claimant came in to pick up her paycheck. (App. pp. 375-76). At that time, Ms. Burr made an appointment for the upcoming Friday. (App. p. 376). Upon learning the Appellant did not make that appointment, Ms. Burr tried unsuccessfully to reach Appellant by phone again. (App. p. 377). Ms. Burr later learned that Appellant had been written out of work, after which she contacted Appellant's physician to determine if Appellant could work light duty. (Id.) As Ms. Burr testified, the employer routinely accommodates light duty restrictions and makes every effort to comply with modified duty assignments. (App. pp. 378-379). Ms. Burr testified that she asked Appellant for paperwork form the ER visit but Appellant stated she didn't have it. (App. p. 379) After Appellant had provided her second work release note on September 9, 2018, Ms. Burr testified she again tried for several days to reach Appellant by phone at the number Appellant had provided. (App. p. 394-95)

Mr. Burr testified that when Appellant first returned to work and provided a work release from the ER, Ms. Burr has some questions about it. (App. p. 380). Ms. Burr noted that in her experience with the emergency room, they only excuse people from

work for the day of treatment unless the injury is very serious. (Id.) Because she questioned the validity of the note, Ms. Burr contacted the ER at Fairfield Memorial and was informed that the ER doctors do not write patients out for extended periods of time. (Id.) Ms. Burr stated that she later received a discharge note from the claimant's ER visit that stated the claimant could return to work on September 1st, **not September 4th**. (App. p. 381). The discharge note was received on September 17, 2008. (App. p. 382). Upon receipt of the discharge note, Ms. Burr informed her supervisor and the decision was made that Appellant would be terminated for submitting a falsified document. (App. pp. 382-83). Ms. Burr explained that other than the issue with the falsification of the work excuse, the company had no problems bringing Appellant back to work on modified duty. (App. p. 383).

Ms. Burr testified that, prior to the termination, arrangements had already been made to return Appellant to modified duty but they had been unable to reach her to get her to return to work. (App. p. 383). Ms. Burr had sent Appellant's sister to her home on several occasions, but no one answered the door. (App. p. 384). She stated that she tried everything she could think of to get Appellant to come in to work. (Id.) On September 15, 2008, Ms. Burr sent an overnight letter to Appellant advising her of the employer's numerous attempts to reach her and to bring her back to work. (App. pp. 396-97). The letter also noted that Appellant had been released to return to work light duty on September 12, 2008. Ms. Burr testified that she could not say for certain whether Appellant knew that Dr. Gaddy had approved the modified duty, but Appellant had been instructed to keep in frequent contact with Ms. Burr and failed to do so. (App. p. 398).

On September 18, 2008, the decision to terminate Appellant was made based on the apparent falsification of the work release. (App. pp. 399-400). This decision was based on a company policy that any falsification of documents is grounds for immediate termination. (App. p. 403). This decision was based on the document that appeared on its face to have been altered, as well as information from the ER indicating Appellant had only been released for one day. (App. pp. 405-06).

Single Commissioner Hearing

At the hearing, Appellant objected to the submission of the employer's personnel records related to Appellant's termination on the grounds they were irrelevant. (App. p. 326). Defendants argued that they were directly relevant to Appellant's claim for TTD benefits. (App. pp. 326-27). The Single Commissioner allowed the records into evidence. Appellant's position was that she was entitled to TTD benefits from the date she was released to light duty on September 18, 2008, through January 13, 2009 when she was released to full duty. (App. p. 328). Defendants argued she should not be entitled to any TTD for that period because she had been fired for falsification of records. (App. pp. 328-29). Defendants admitted that Appellant sustained minor injuries to her knees from her fall but denies any other body parts, including the back, shoulder and wrist. (App. p. 329). The Single Commissioner held the matter of effected body parts in abeyance to be taken up later by the parties. (App. pp. 329-30). No objection was noted on the record.

Appellant and Ms. Burr provided testimony to the Single Commission, after which the hearing was concluded. Following the hearing, the Single Commission indicated she would keep the record open to receive the deposition testimony of the

doctor or nurse responsible for preparing the work excuse at the ER. The deposition of Dr. Ross, the ER physician who saw Appellant the day of her injury, was taken on April 21, 2009. At his deposition, Dr. Ross testified that the work release note was not in his handwriting but that it was probably written by nurse Starr Connor. (App. p. 443). He also testified that there was nothing about Appellant's condition that would have indicated she needed to be out of work for more than one day. (App. p. 463). Following Dr. Ross' deposition, the parties agreed to set the deposition of Nurse Connor. (App. p. 529). Nurse Connor's deposition was taken on June 1, 2009. In her deposition, Nurse Connor testified the work release note was in her hand writing but that it had been changed from when she prepared it. (App. p. 504). It was her testimony that she did not write "fours" like the one on the note; hers were always open at the top. (App. p. 505). She testified that no one had asked her to change it and she would not have done so if asked as it would be illegal. (App. p. 506).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs this Court's review of the Full Commission's decisions. Shealy v. Aiken Cnty., 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981)). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Id. This Court "can reverse or modify the Full Commission's decision in this case only if [the claimant's] substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Id. "Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the

Commission are conclusive." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Id., 334 S.C. at 339, 513 S.E.2d at 845. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

ARGUMENT

THE COMMISSION'S DECISION DENYING THE CLAIMANT TEMPORARY TOTAL DISABILITY BENEFITS IS SUPPORTED BY THE SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE IN THE RECORD AND SHOULD BE AFFIRMED IN ITS ENTIRETY.

There is substantial, reliable, and probative evidence in the record supporting the Appellate Panel's affirmation of the Single Commissioner's findings of fact and conclusions of law. The Appellate Panel correctly determined that the Single Commissioner appropriately exercised her discretion in accepting additional evidence after the hearing and in no way abrogated Appellant's right to a fair and impartial hearing. Additionally, the evidence of record support the Commission's finding that Appellant was terminated for falsification of documentation and her inability to earn wages was not due to or because of her injury. Furthermore, the record demonstrates that Appellant failed to maintain proper contact with her employer despite numerous attempts to contact her to bring her back to work at light duty. In short, the Appellate Panel's order affirming the Single Commissioner's December 16, 2009 Decision and Order should stand in its entirety and Appellant's assignments of error should be dismissed.

I. Appellant's argument that the Court of Appeals erred in remanding the case to the Commission for further findings is not preserved for appellate review and not supported by the evidence in this case or the law.

a. Appellant's argument is not preserved.

Appellant's first argument on appeal is that the Court of Appeals erred in not reversing the order of the Commission for failure to make findings of fact as to Appellant's disability under the South Carolina Workers' Compensation Act ("Act"). It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. See e.g., Creech v. S.C. Wildlife and Marine Res. Dept., 328 S.C. 24, 491 S.E.2d 571 (1997); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); see also 4 C.J.S. APPEAL AND ERROR § 213 (1993) ("At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon.").

In this case, Appellant's Form 30, Request for Commission Review, which purports to set forth all of Appellant's exceptions to the Single Commissioner's order, does not include allegations that the Single Commissioner failed to include sufficient findings of fact to support her order. The Appellate Panel's order, with few exceptions, is duplicative of the Single Commissioner's order. This is particularly true with respect to the Findings of Facts and Conclusions of Law reached by the Single Commissioner, as

both of these sections were included verbatim in the Appellate Panel's order. Appellant, having failed to raise this issue before the Appellate Panel, cannot now raise the issue for the first time on appeal. Thus any contention as to the insufficiency of the findings, and any corresponding error on the part of the Court of Appeals is not preserved for appellate review.

b. Appellant's argument that the absence of findings as to her period of disability requires a reversal of the Commissioner is without merit as that issue was not necessary to the decision rendered by the Commission.

Assuming that her argument is preserved for appeal, Appellant is incorrect in her assertion that the Commission committed reversible error by not making specific findings of fact as to whether or not Appellant was disabled under the Act. Similarly, the Court of Appeal's remand for further findings was not required in order to review the Commission's order. The decision of the Single Commissioner, as affirmed by the Appellant Panel, was that Appellant was not entitled to any TTD benefits because she had refused suitable employment and her alleged inability to earn income was not occasioned by any work-related injury. These findings are supported by the substantial evidence in the record and should be affirmed.

While Appellant frames the argument that her disability was the "central issue" in the case, the record reflects that the central issue was in fact whether or not Appellant was entitled to TTD benefits. See App. pp. 213 (Form 50), 220-21 (Form 58), 327 ("It's the position of the Claimant – we've basically narrowed the issue down – the Claimant's here seeking temporary total disability benefits for a time."). The issue of whether or not Appellant was disabled under the Act was not specifically required to be determined by

the Single Commissioner as her decision on Appellant's refusal of suitable employment and loss of earning capacity was determinative of the issue. The findings of the Single Commissioner, and thus the Appellate Panel, were more than sufficient to support their decision that Appellate was not entitled to any TTD benefits.

The Act requires that the Commission make an award, "together with a statement of the findings of fact, rulings of law, and other matters *pertinent to the questions at issue*." S.C. Code Ann. § 42-17-40(A) (Supp. 2012) (emphasis added). Under the APA, "[a] final decision shall include findings of fact and conclusions of law, separately stated." S.C. Code Ann. § 1-23-350 (2005). This Court has held:

> [T]he statutory duty on the part of the [Commission] requires that findings of fact be made upon the *essential factual issues*. Additionally, such findings 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 whether the law has been correctly applied to those findings.

Airco, Inc. v. Hollington, 269 S.C. 152, 160, 236 S.E.2d 804, 808 (1977) (emphasis added). "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence." Parsons v. Georgetown Steel, 318 S.C. 63, 66, 456 S.E.2d 366, 368 (1995).

While Respondent's recognize that the length of an order is not determinative of the sufficiency of its contents, it is worth noting that the Appellate Panel and Single Commission orders are each 23 pages long. These orders consist of 18 pages recounting the evidence of the case, with 8 separate findings of fact, and 6 conclusions of law supporting the singular decision that Appellant was not entitled to TTD benefits. Among the specific findings of fact are the Commission's determination that Appellant falsified a work excuse, that her falsification of medical documents and failure to keep in sufficient

contact with her employer amounted to refusal of suitable employment, and that Appellant's absence from work was not occasioned by her injury.

Appellant premises her contention of error on the grounds that "there is simply no evidence that Ms. Maple ever refused an offer of light duty, i.e., suitable employment." Brief of Petitioner, p. 16.[2] In her order, the Single Commissioner found:

> 4. That, based upon the evidence in the record and the testimony at the hearing, the claimant, or someone on her behalf, falsified the work excuse from Fairfield Memorial Hospital Emergency Department.
>
> 5. That, based upon the evidence in the record and the testimony at the hearing, by falsifying the work excuse and by the claimant's subsequent behavior in her insufficient contact with the employer, the claimant was refusing suitable employment.
>
> 6. That, based upon the evidence in the record and the testimony at the hearing, the claimant's absence from work was not occasioned by her injury.
>
> 7. That, because of the foregoing findings, the claimant is not entitled to temporary total disability compensation.

App. p. 210. These findings of fact were sufficiently detailed in order for the Single Commissioner to decide the essential factual questions required in order to determine Claimant's right to temporary total disability benefits.

i. Appellant's refusal of suitable employment is a complete bar to benefits.

The "essential factual issue" in this case was whether or not Appellant was entitled to TTD and this matter was sufficiently addressed by the Single Commissioner.

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[2] In her brief, Appellant refers to the Single Commissioner's directive requesting a proposed order as "findings." See Brief of Petitioner, p. 16, 19. Pursuant to the Act and the APA, the decision of the Single Commissioner and her findings of fact and conclusions of law are set forth in her December 18, 2009 Decision and Order. The Single Commissioner's directive is not a final order and does not represent the findings of the Commission.

The Act provides that, [i]f an injured employee refuses suitable 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." S.C. Code Ann. § 42-9-190 (1985). It should be noted that this statute makes no specific reference to a finding of disability; it merely bars an injured employee from receiving benefits if she is found to have refused suitable employment. It is for the Commission to determine the factual basis for what constitutes such refusal. In her order, the Single Commissioner found that Appellant had refused suitable employment by her actions in submitting a falsified medical record and in failing to maintain contact with her employer. These findings are amply supported by the record. As discussed above, the record reflects that the work release note had been altered after it was prepared by hospital personnel and given to Appellant. Moreover, the record reflects that Appellant's employer had made numerous attempts to contact Appellant to get her to come back to work. In addition to numerous calls and attempts to send people to her house, Claimant was notified by letter dated September 15, 2008 that failure to return to work would be deemed a resignation. (App. p. 259). Appellant never responded to that letter or any of the other contacts.

In this case, it was admitted that Claimant had sustained a compensable injury and, at the time of her termination, she was released on light duty. The evidence shows that the employer had light duty work available to her and, but for her failure to respond to the employer's effort at communicating with her and her falsification of medical records, the employer would have accommodated her restrictions. The Single Commission found that S.C. Code § 42-9-190 was a bar to her receipt of compensation because her failure to respond and conduct resulting in her termination amounted to a

refusal of suitable employment. Barton v. Higgs, 381 S.C. 367, 371, 674 S.E.2d 145, 147 (2009) ("as the agency charged with administering the Workers' Compensation Act, this decision should be given great deference."); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.").

Under the facts of this case, a specific finding of disability or incapacity is not required in order for the Commission to have determined that Appellant was not entitled to TTD benefits. The Single Commissioner's order, as well as the Appellate Panel's order, contains a sufficient statement of the essential factual issues in order to support the determination of the Commission that Claimant was not entitled to TTD. There is no requirement that the Commission make specific detailed findings as to factual issues that are not essential to its decision. As such, the Commission's findings meet the requirements of the Act and the APA and should have been affirmed by the Court of Appeal. A remand for additional findings is not warranted.

ii. Appellant's incapacity to earn wages was not the result of her work-related injury.

In addition to finding that Appellant's conduct amounted to a refusal of suitable employment, the Single Commissioner also found that Appellant's "absence from work was not occasioned by her injury." (App. p. 210). Under the Act, an employer is required to pay TTD when "an employee has been out of work *due to* a reported work-related injury." S.C. Code Ann. § 42-9-260 (Supp. 2010) (emphasis added). Moreover, under the Commission's regulations, "disability" is defined as "[i]ncapacity *because of injury* to earn wages which the employee was receiving at the time of injury." 25A S.C.

Code Ann. Regs. 67-502(B)(1) (Supp. 2010) (emphasis added). In a recent decision, this Court expressly held that "entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages." Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 15, 747 S.E.2d 430, 433 (2013). In that case, the claimant had been terminated by his employer for violation of company policies. Similar to Appellant, the claimant in Pollack alleged he was entitled to TTD from the date of his termination because the employer was no longer providing work to accommodate his light duty restrictions. This Court expressly rejected that argument as it would produce an absurd result where an employer could never terminate an employee regardless of circumstances without having to provide TTD. Id., 405 S.C. at 15, 747 S.E.2d at 433, n. 4. In doing so, this Court made clear that a claimant's incapacity to earn wages, and hence their entitlement to TTD, must be "*due to* or *because of* the injury." Id., 405 S.C. at 17, 747 S.E.2d at 434.

In this case, the Single Commissioner found that Claimant's "absence from work was not occasioned by her injury." This finding is supported by the substantial evidence in the record showing the employer terminated Appellant based on their determination that the work excuse provided after her injury had been falsified. The evidence shows that the document, on its face, appeared to have been altered, that it excused Appellant from work for longer than was typical in such situations, and was not consistent with documentation obtained directly from the medical provider. The testimony of Nurse Connor establishes that it was, in fact, altered after she filled it out. As stated by this Court in Pollack, the determination of whether a claimant's incapacity to earn wages is due to or because of an injury, "is a quintessential factual question for the fact-finder, the

Commission." Pollack, 405 S.C. at 16, 747 S.E.2d at 433. Having resolved this quintessential factual question, the determination by the Commission as to Appellant's entitlement to TTD should be affirmed as supported by the reliable, probative and substantial evidence in the record. Shealy, 341 S.C. at 454, 535 S.E.2d at 442 ("In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder.")

Appellant's attempts to distinguish Pollack are unavailing in this case. While the claimant in Pollack was in fact working light duty at the time of the violation of policy that caused his termination, the timing of the termination was not a determinative factor. The only issue to be determined in these case is whether or not the claimant's incapacity to earn wages was *due to* or *because of* her injury. See S.C. Code Ann. § 42-9-260(A) (Supp. 2012) ("When an employee has been out of work *due to a reported work-related injury*...") (emphasis added); S.C. Code Ann. § 42-9-10(A) (Supp. 2012) ("When the incapacity for work *resulting from an injury* is total...") (emphasis added); S.C. Code Ann. § 42-1-120 (1985) ("The term "disability" means incapacity *because of injury* to earn the wages...") ("emphasis added"). Whether the conduct resulting in termination occurs before or after any offer of suitable employment is irrelevant to the application of the Act. An employee who, for reasons unrelated to her injury, is terminated by her employer is not entitled to TTD benefits.

Appellant further argues that Pollack should be overturned. In doing so, Appellant focuses in the procedural issues in the Act and the Commission's regulations related to when and how an employer may terminate TTD benefits to which a claimant is receiving or entitled. Notwithstanding that all of the cited authorities are inapplicable to a claimant who is not eligible for TTD benefits under the Act, Appellants repeatedly

refers to and uses the term "disability" without ever defining that term. As set forth in the Act, the term "disability" means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120 (1985). Appellant's entire argument appears to focus on the part of the definition related to "injury" but completely ignores the substantive part of the definition indicating that it is the incapacity to earn wages that is the critical matter. The rule in Pollack does not inject an element of fault into the process as argued by Appellant, rather it properly considers the factual basis for the incapacity to earn wages as required by the General Assembly in defining this term as it did.

For the foregoing reasons, the decision of the Commission is supported by the substantial evidence in the record and should be affirmed.

II. The Commission did not err in holding open the record for the submission of reliable and probative evidence not available at the hearing.

a. The Single Commissioner acted within her discretion to direct and accept deposition testimony following the conclusion of the hearing.

Appellant contends that the Single Commissioner erred in holding the record open and directing the parties to take the depositions of Dr. Ross and Nurse Connor. This argument is without merit and flies in the face of the established authority of the Commission and the obligations imposed by the Act.

As an initial matter, the decision to grant a continuance or hold a record open is a matter in the sound discretion of the Commission and is reversed only if there is a clear abuse of that discretion resulting in prejudice to the appellant. Trotter v. Trane Coil Facility, 393 S.C. 637, 646, 714 S.E.2d 289, 293 (2011) (Affirming decision of Commissioner to close the record after granting extensions to allow the introduction of deposition testimony not available at the hearing.). As discussed in more detail below,

the Single Commissioner did not abuse her discretion and there is no prejudice to Appellant.

Secondly, Appellant's argument is not preserved for appeal as she never objected to the additional discovery and, in fact, expressly acceded to it. As noted in Appellant's brief, the Single Commissioner instructed Respondents to take the deposition of the nurse and/or doctor who wrote the out of work note dated August 31, 2008. Brief of Petitioner, p. 28, citing App. p. 531. Appellant never objected this instruction of the Single Commissioner. Dr. Ross' deposition was taken on April 21, 2009. Based on Dr. Ross' testimony, it was determined that the work release was written by Nurse Connor and the parties agreed to set her deposition. (App. p. 529). In a letter to the Single Commissioner, Appellant's counsel specifically stated: "we welcome this opportunity to take the deposition of this nurse so we can clear [Appellant's] name. The purpose of this letter is of course just to update you on the status per the request of your office." (Id.) The transcripts of each of these depositions were submitted to the Single Commissioner on August 28, 2009 without objection or comment from Appellant. (App. p. 531). It was not until November 4, 2009, after the Single Commissioner announced her decision, that Appellant requested a *de novo* hearing or the right to depose "other person [sic] involved at the emergency room and also to present additional evidence from Ms. Maple and other witnesses concerning this note." (App. p. 263). Appellant did not identify what witnesses or evidence she would be able to produce or how they would alter the testimony of Nurse Connor. Appellant's failure to object to the procedure adopted by the Single Commissioner, and her affirmative statement that she "welcomed" the opportunity to conduct additional discovery, constitutes a waiver of the issue and a failure to preserve

it for appeal. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal).

Despite Appellant's waiver and/or failure to preserve the issue for appeal, the record does not reveal an abuse of discretion by the Single Commissioner. On appeal Appellant argues, without any controlling authority, that the Commission is required to make its decision on evidence that is submitted to the Commission at the hearing. This Court has previously recognized that such a power is within the discretion of the Commissioner. See Trotter, 393 S.C. at 649, 714 S.E.2d at 295 ("We conclude the commissioner did not abuse her discretion in denying Trane's motions for a continuance or to hold the record open for the taking of Dr. James's deposition."). In Trotter, the Commission agreed to hold the record open for 14 days to allow for the introduction of deposition testimony of a witness who had become unavailable to testify at the hearing because of illness. The Commission agreed to a subsequent extension during which the deposition was never scheduled. The Commission then closed the record and this Court found that the Commission properly exercised its discretion on that facts of that case. Much as was the case in Trotter, the Single Commissioner exercised her discretion to keep the record open for the parties to provide the testimony of medical providers directly involved in the creation of the work release. The evidence was directed at resolving an issue critical to the matter before the Commission and more than reasonable under the circumstances.

Appellant cites to Commission regulation 25A S.C. Code Ann. Regs. 67-613(C) (Supp. 2010) as her basis for contending the Single Commissioner erred. While regulation 67-613(C) does outline the circumstances where "[a] party may move for

adjournment," this regulation does not abrogate the powers of the Commission to manage its cases and does not purport to specify the only circumstances by which the Commission may direct the admission of additional evidence. Furthermore, leaving the record open to allow additional evidence is neither a postponement nor an adjournment of a hearing so regulation 67-613(C) does apply in this context. Even if this section does apply, Appellant neglects to direct the Court to the previous sub-section directing that "[a] commissioner may postpone a hearing for good cause" and contains no language limiting this rule to cases where the postponement is made by motion of the parties. 25A S.C. Code Ann. Regs. 67-613(B) (Supp. 2010). "Good cause," under this rule is specifically defined as including when "[a]dditional discovery is needed." 25A S.C. Code Ann. Regs. 67-613(B)(1)(c) (Supp. 2010).

Contrary to Appellant's interpretation of an arguably inapplicable and unavailing regulation, the Single Commissioner acted entirely within her authority and discretion in ordering Defendants to take the depositions of Appellant's caregivers. See S.C. Code Ann. § 42-17-50 (Supp. 2012) (authorizing the commission, among other things, to receive further evidence and rehear the parties); Spearman v. F.S. Royster Guano Co., 188 S.C. 393, 403-04, 199 S.E. 530, 535 (1938) (stating the commission possesses broad authority to take additional testimony); see also 25A S.C. Code Ann. Regs. 67-707(A) (Supp. 2010) (authorizing the commission, in its discretion, to order additional evidence when necessary for the completion of the record); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 844 (Ct. App. 1992) (holding the commission, as the fact finder in a workers' compensation case, has the authority to receive further evidence); Burns v. Joyner, 264 S.C. 207, 212, 213 S.E.2d 734, 736 (1975) ("it is [the Hearing

Commissioner's] responsibility to arrive at a fair determination of the facts and not merely to serve as an umpire calling a contest between competing attorneys.").

The authority exercised by the Single Commissioner is one that has long been recognized by South Carolina appellate courts. In Hallums v. Michelin Tire Corp., 308 S.C. 498, 419 S.E.2d 235 (Ct. App. 1992), the Full Commission overturned a single Commissioner's award of benefits on the grounds that the Commissioner improperly considered evidence presented after the hearing. On appeal, the Court noted that "[a]n administrative or quasi judicial body is allowed a wide latitude of procedure and not restricted to the strict rule of evidence adhered to in a judicial court." Id., 308 S.C. at 504, 419 S.E.2d at 239. The Court reversed the Full Commission and held the single Commissioner retained jurisdiction of the case until he made his report and issued his order so the post-hearing evidence was properly admitted and relied on by the single Commissioner. Hallums, 308 S.C. at 504, 419 S.E.2d at 239.

Pursuant to the authority recognized in Trotter and Hallums, the Single Commissioner properly ordered that the record would remain open to allow for the depositions of Dr. Ross and Nurse Connor. Appellant's assignments of error are also meritless as she not only failed to object to the evidence at the time it was requested, she explicitly "welcomed" the opportunity to depose Nurse Connor, she did not object when the transcripts were submitted to the Commission, and did not request the right to identify any other relevant witnesses or evidence until after the Single Commissioner issued a directive that was adverse to her position. Appellant cannot now object and argue the Single Commissioner acted beyond her authority.

b. The Single Commissioner did not err in failing to take evidence of the chain of custody of the medical note.

Appellant also argues that the Single Commissioner did not require evidence of the complete chain of custody of the disputed work release note. Similar to Appellant's argument regarding keeping the record open, this argument was never raised to the Single Commissioner, is unpreserved and has been waived by Appellant. Moreover, the suggestion that the chain of custody of a document was required is unsupported by any controlling authority and is without merit.

Appellant argues that "[w]here a document is sought to be admitted, the chain of custody of that documents must be established by the party seeking to admit it." Brief of Petitioner, p. 29. Contrary to this assertion, there is no such requirement and Appellant's cited authorities are inapposite. "Chain of custody" is a concept reserved almost exclusively for evidentiary issues in criminal matters and for testing of bodily fluids. See e.g., Jamison v. Morris, 684 S.E.2d 168, 385 S.C. 215 (2009) ("Under South Carolina law, unless a test is conducted for medical purposes, the result of that test is not reliable unless the proponent can demonstrate a chain of custody."); S.C. Dept. of Social Serv. v. Cochran, 614 S.E.2d 642, 364 S.C. 621 (2005) ("We have consistently held complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed."); Tant v. Dan River, Inc., 286 S.C. 140, 332 S.E.2d 534 (Ct. App. 1985) ("we recognize that the party offering a specimen is required to establish, at least as far as practicable, a complete chain of evidence from the time the specimen is first acquired until it is taken to the final custodian by whom the specimen is analyzed."). Respondents can find no reported opinion in South Carolina analyzing the admissibility or weight of

documentary evidence as requiring the establishment of the "chain of custody" of that document. Even under the South Carolina Rules of Evidence, there is no such requirement to the admissibility of documents and the admissibility standard in workers' compensation cases is more relaxed than in civil matters. See Hamilton v. Bob Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) ("the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission.") (citing S.C. Code Ann. § 1-23-330(1) (1976)); see also Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) ("Great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts."). There is simply no support for the contention that a complete chain of custody be established before the introduction of a document to the Commission and this argument should dismissed.

Appellant also maintains that she was denied due process because "there was absolutely no notice of a defense based on a falsification of documents." Brief of Petitioner, p. 30. Respondents again would note that this issue is not preserved as it was not addressed in Petitioner's Petitioner for Rehearing with the Court of Appeals and, therefore, is not properly before this Court. See App. pp. 549-63; SCACR, Rule 242(d)(2). Nevertheless, this assignment of error is without merit. First, Appellant confuses a factual issue (falsification of documents) with a legal issue (defense to a claim). In this case, Appellant's termination and the factual basis for it (falsification of documents) is not a defense that must be raised; rather, it is a fact that bears on Appellant's entitlement to TTD. See infra, section I.b. Appellant has no due process right to notice of every fact in evidence that would invalidate her claim to benefits under the Act. Even if such a right existed, Appellant plainly had notice of Respondent's

position that she had falsified documents. Respondents' Pre-Hearing Brief specifically noted that "refusal of suitable employment as a bar to benefits" was an issue in the case. App. p. 244. Petitioner's personnel records from Employer were listed as exhibits to the case, including her notice of termination for "falsified medical documentation." App. p. 261. While Appellant did object to the introduction of her personnel records, she did so on the basis that they were irrelevant. Appellant never raised a due process argument at the hearing. It is disingenuous of Appellant, not to mention an unpreserved issue, for her to now argue that she was denied due process and notice and opportunity to be heard on this issue.

For these reasons, Appellant's argument that the Single Commissioner erred in failing to require a chain of custody on the disputed document is without merit and the order of the Commission should be affirmed.

III. The Court of Appeals did not err by failing to address whether or not Appellant was disabled.

Section III of Appellant's brief merely reiterates her arguments in Section I (namely that the Commission failed to make a finding as to whether or not Appellant is "disabled" under the Act) and proffers numerous scenarios in support of her argument that she should be entitled to TTD. Each of these scenarios are distinguishable from the instant case and do not alter the outcome properly reached by the Commission.

The scenarios and questions presented by Appellant are premised on a fatal misstatement of the law—that an injured worker is entitled to TTD benefits if the employer is not providing light duty, regardless of circumstance. As set forth in detail above, and as specifically held by this Court in Pollack, an injured employee is NOT entitled to TTD benefits if her reason for being out of work in not due to or because of

the injury. While the evidence is certainly in dispute as to what Appellant knew or didn't know about her work restrictions, Appellant's subjective knowledge that she had been released to light duty on September 16 is simply not relevant to the issues in this case. The Commission found, based on all the evidence in the record that Appellant was refusing suitable employment by failing to keep adequate contact with employer.[3] The Commission further found substantial evidence in the record to determine that Claimant, or someone on her behalf, had falsified her work release. This conduct resulted in her termination. This termination and the basis for it were found to be supported by the record in this case and determined by the Commission to render Appellant ineligible for TTD benefits.

Appellant again asserts a contention that was expressly rejected by this Court in Pollack. According to Appellant:

> Since she was not able and available for full duty employment and since the Defendants chose not to offer her employment (whatever the reason) within her limited capacity, the Petitioner was entitled to temporary disability compensation until maximum medical improvement since the only evidence in the Record is that she continued to be disabled.

Brief of Petition, p. 36 (emphasis in original). In Pollack, this Court made very clear that the employer's reason for the decision is very relevant and, in fact, determinative. Pollack, 405 S.C. at 15, 747 S.E.2d at 433, n.4 ("Appellant's interpretation of the law would essentially insulate injured employees who engage in misconduct while employed

[3] To the extent Appellant's argument is premised on the contention that no offer of suitable employment was ever made; Respondents again direct the Court to the September 15, 2008 letter, mailed to Appellant's home indicating that she was being offered light duty and, if she did not respond, she would be deemed to have resigned. App. p. 259.

in rehabilitative settings and essentially tie the hands of an employer who has sought to accommodate the employee to the best of its ability.").

In the instant case, the evidence, as determined by the fact-finder, shows that Appellant refused suitable employment by failing to maintain adequate contact with her employer as instructed and by falsifying a work release note. The evidence further shows that Appellant was terminated for cause and she was not absent from work because of or due to her work-related injury. Consequently, the order of the Commission finding Claimant not entitled to TTD benefits should be affirmed in its entirety.

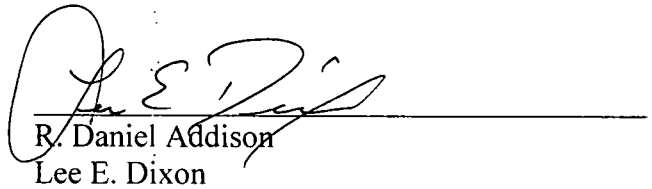
CONCLUSION

The Commission's findings of fact and conclusions of law are supported by the substantial, reliable, and probative evidence in the record. The Single Commissioner properly exercised her discretion in accepting additional evidence after the hearing and in no way abrogated Appellant's due process rights. The evidence of record demonstrates Appellant, or someone on her behalf, altered the work excuse provided to Appellant at the ER and that she failed to maintain proper contact with her employer following the injury. Additionally, the Single Commissioner properly found that Appellant's conduct amounted to an unjustified refusal of suitable employment. The record further demonstrates that Claimant's absence from work was not due to or because of her work injury. For these reasons, the Commission properly ruled that Appellant is not entitled to temporary indemnity benefits under the Act and the Commission's order should be affirmed in it entirety without remand for additional findings.

[Signature on next page]

Respectfully Submitted,

HEDRICK, GARDNER, KINCHELOE & GAROFALO, L.L.P.



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August 1, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Appellate Panel
Commissioner T. Scott Beck
Commissioner David W. Huffstetler
Commissioner Derrick L. Williams

Appellate Case No. 2012-212605
W.C.C. File No. 2008-WC-15-00441

Margaree Maple, ... ~~Appellant,~~ Petitioner

v.

Heritage Healthcare of Rdgeway, Employer,
The Phoenix Insurance Company, Carrier ..... Respondents

PROOF OF SERVICE

This is to certify that a copy of the foregoing Brief of Respondents has been served upon the following by placing the same in the United States mail, first-class postage pre-paid, addressed as shown below on the 1st day of August, 2014.

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