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APPELLATE PANEL **SC Court of Appeals**

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1109844

OLIVER M. WILEY,

EMPLOYEE,
CLAIMANT/APPELLANT,

vs.

SUMTER COUNTY,

EMPLOYER,

AND

SOUTH CAROLINA COUNTIES
WORKERS' COMPENSATION TRUST

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina
on September 16, 2014, upon notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

January 27, 2015

REVERSES IN FULL

APPEARANCES:

Claimant represented by John D. Clark, Esquire,
of Clark Law Firm, Sumter, South Carolina.

Defendants represented by Anne V. Noonan,
Esquire, of Willson Jones Carter & Baxley, P.A.,
Mount Pleasant, South Carolina.

PROCEDURAL HISTORY

This claim arises from an admitted work accident of April 14, 2011, involving medical treatment for the lower back and left hip. The subject of this appeal involves a dispute over Claimant's entitlement to temporary total disability benefits (TTD).

On December 18, 2013, a hearing was held before the Honorable Melody L. James (hereinafter single Commissioner) in Camden, South Carolina to resolve the issues raised by Claimant's request for a hearing via Form 50. It is Claimant's position that he is entitled to TTD from November 3, 2011, as his inability to work is causally related to the work accident. Claimant relies on the opinions of Dr. Johnson and Dr. Storick for this position. Defendants contend that Claimant is not entitled to TTD for any period of time, as Claimant was given light duty work following the accident and thereafter released to full duty by an authorized treating physician on November 3, 2011. Defendants argue that after Claimant was released to full duty, he failed to return to work and was thereafter terminated by his employer, and Claimant never presented documentation from an authorized treating physician writing him out of work following November 3, 2011. Accordingly, Defendants argue that Claimant's inability to earn wages is not due to or because of the work injury; therefore, Claimant is not entitled to TTD. As additional support for their position that Claimant is not entitled to TTD for any periods of time, Defendants also point to the fact that Dr. Lozanne, an authorized physician, opines that Claimant reached maximum medical improvement for the lumbar spine on December 29, 2011, with 0% impairment, without work restrictions and without the need for future medical treatment, and Dr. Bethea, also an authorized physician, opines that Claimant is at maximum medical improvement for the left hip as of June 27, 2012, without any impairment rating or work restrictions.

In addition to documentary evidence submitted by the parties, both medical and

nonmedical, testimony was taken from Claimant and from witnesses for the Defendants, Lorraine Dennis and Erik Hayes.

On May 28, 2014, the single Commissioner issued a Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *That Claimant incurred an admitted injury by accident during the course and scope of his employment with Sumter County on April 14, 2011, pursuant to S.C. Code Ann. §42-1-160 (1976, as amended).*
2. *That the situs of injury is not an issue before SCWCC for determination at this time.*
3. *That proper notice of the accident and injury was given to the Employer by Claimant, pursuant to S.C. Code Ann. §42-15-20 (1976, as amended).*
4. *That the claim in this matter was timely filed, pursuant to S.C. Code Ann. § 42-15-40, (1976, as amended).*
5. *That Claimant's Average Weekly Wage is \$911.87, and his Compensation Rate of \$607.92, pursuant to S.C. Code Ann. §42-1-40, (1976, as amended).*
6. *That the Claimant is receiving treatment for the injury and differential diagnosis to his hip and/or lower back. The etymology of the pain has been explored by various physicians.*
7. *That Claimant's medical treatment provided by Employer is causally related to Claimant's work accident.*
8. *That during the pendency of this matter, the Claimant has not sought temporary total, but the matter has been held in abeyance by the prior orders of the Commission. (Orders from hearings of March 22, 2012, September 11, 2012,*

march 5, 2013, and August 15, 2013).

9. *That Claimant was released to regular duty on November 1, 2011 by the treating physician, Dr. Danny H. Ford. (113).*
10. *That at the time of release, Dr. Ford stated "his current symptoms are suspicious for lumbar radiculopathy/sacroilitis," but that he does not treat radiculopathy/sacroilitis and would recommend that Workers' Compensation consider obtaining an MRI for Claimant's lumbar spine along with a referral to a spine surgeon for further treatment recommendations.*
11. *That Claimant's did not attempt to return to work. He did call the employer on October 26, 2011 and November 2, 2011. On November 7, 2011, Claimant came by his place of employment, but did not attempt work.*
12. *The Claimant presented a work excuse to the Employer dated December 2, 2011 from the Dorn VA Medical Center, but this was not accepted because it was not from an authorized medical provider.*
13. *That Claimant was terminated for his failure to show up for work, or provide an excuse for his failure to appear. He was not out of work at that point and time from his injury. Pollack*
14. *That Claimant saw Dr. Karl A. Lozanne on December 29, 2011. Dr. Lozanne was an authorized treating physician. Dr. Lozanne (150-152) opines that the Claimant is at MMI and can work without restrictions.*
15. *That Claimant saw Dr. James F. Bethea on June 4, 2012. (26-31) Dr. Bethea is an authorized treating physician. Dr. Bethea opines that the Claimant can work without restrictions. (26-31 and 108).*

16. *That during the period of time from December 15, 2011 until June 4, 2012, there are medical opinions of Dr. Timothy M. Zgleszewski and the VA that indicate that the Claimant should be out of work. Neither are authorized physicians/providers. These opinions are written subsequent to the Claimant not returning to his employment. More weight is given to the treating physicians, Dr. Ford, Dr. Lozanne, and Dr. Bethea in their concurrent opinions of work status. The Claimant also presents an opinion from Dr. Storick; Dr. Storick does become an authorized physician. However, Dr. Storick's opinion back-dates the period of time that the Claimant is out of work to the date of injury. He was not the treating physician during that period of time, and more weight is afforded the opinions of the physicians that were treating the Claimant at the time.*
17. *That Claimant is written out of work on August 13, 2012 by Dr. Johnson (non-authorized). Dr. Johnson is an orthopedic surgeon. Dr. Johnson refers the Claimant to Dr. Storick, who becomes a treating physician. Dr. Storick does provide an injection an injection on November 8, 2012. At this point in time, Dr. Johnson's opinion is consistent with the treating physician, Dr. Storick, that the Claimant should be written out of work, and Dr. Storick is actually seeing the patient at this point.*
18. *That on August 13, 2012, Dr. Johnson's impression was (1) left sacroiliac joint strain and (2) rule out contusion L-5 nerve root.*
19. *That on February 21, 2013, Dr. Johnson opined that Claimant was a candidate for rhizotomy of either the sacroiliac joint or L5-S1 facet, or both.*
20. *That the L5-S1 facet injection by Dr. Storick on November 8, 2012 decreased*

Claimant's left pelvic discomfort per report of Dr. Lozanne.

21. *On November 20, 2013, Dr. Wetzel ordered radio-frequency ablation on left L3-5.*
22. *On September 20, 2013, Dr. Wetzel stated that Claimant is only able to return to modified duty.*
23. *That Claimant's temporary total should begin as of November 8, 2012. Although the Claimant was terminated in 2011, the Claimant is now unable to return to work with this employer or any other employer because of his injury.*
24. *That Claimant's incapacity for work is total as of November 8, 2012.*

CONCLUSIONS OF LAW

ACCORDINGLY, it is concluded as a matter of law that:

1. *That Claimant incurred an admitted injury by accident during the course and scope of his employment with Sumter County on April 14, 2011, pursuant to S.C. Code Ann. §42-1-160 (1976, as amended).*
2. *That Claimant's Average Weekly Wage is \$911.87, and his Compensation Rate of \$607.92, pursuant to S.C. Code Ann. §42-1-140, (1976, as amended).*
3. *That Claimant was terminated for his failure to show up for work, or provide an excuse for his failure to appear. He was not out of work at that point and time from his injury.*
Pollack
4. *That Claimant's temporary total should begin as of November 8, 2012. Although the Claimant was terminated in 2011, the Claimant is now unable to return to work with this employer or any other employer because of his injury, pursuant to S.C. Code Ann. §42-9-10, (1976, as amended).*
5. *That Claimant's incapacity for work is total as of November 8, 2012.*

AWARD

Claimant is awarded temporary total disability beginning November 8, 2012 and continuing as provided under the South Carolina Workers' Compensation Act.

Claimant and Defendants timely appealed from the findings and related conclusions of law that relate to Claimant's entitlement to TTD. Specifically, Claimant argues that the single Commissioner should have awarded TTD effective November 3, 2011, whereas Defendant take the position that it was error for the single Commissioner to award any TTD. All proffered testimony has been taken. Such, together with all documentary evidence and oral argument, has been delivered to the individual members of the Appellate Panel and has since been under careful consideration. The greater weight of evidence does not support a finding that Claimant's inability to earn wages was total as of November 8, 2012 because of the work injury or at any time following the work related accident of April 14, 2011. Accordingly, the single Commissioner's decision on this issue of entitlement to TTD is hereby REVERSED in full.

STANDARD OF REVIEW

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

DECISION/ANALYSIS

Under Section 42-9-260 and the accompanying regulations, the entitlement of temporary total disability benefits (TTD) is premised on a nexus between the work-related injury and the

inability to earn wages, and an injured employee will be entitled to TTD compensation when the incapacity to earn wages is due to or because of the injury. *Pollack v. Southern Wine & Spirits of America*, 405 S.C. 9, 15, 747 S.E.2d 430, 433 (2013). The Claimant in this matter is not entitled to TTD benefits at any time as the factual nexus required by *Pollack* is not supported by the greater weight of evidence.

I. The single Commissioner erred in finding that Claimant was entitled to TTD beginning November 8, 2012, and continuing, because Claimant's light duty restrictions were accommodated following the work accident; he thereafter refused to return to full duty when cleared to do so by an authorized treating physician on November 1, 2011, and was eventually terminated for this refusal; and because no authorized treating physicians have written Claimant out of work after November 1, 2011, or at any point thereafter.

A. Following his release to full duty, Claimant was terminated for cause and therefore not entitled to TTD under *Pollack*.

Following the admitted work accident of April 14, 2011, Claimant was offered and did perform light duty work for Sumter County. (Hr. Tr. p. 20; *see also* APA 89-99). Effective November 1, 2011, Claimant's authorized treating physician, Dr. Danny H. Ford, cleared Claimant for a return to full duty. He noted his current symptoms are suspicious for lumbar radiculitis/sacriilitis. (APA 113). Despite clearance for full duty, Claimant did not report back to work or attempt to do his job. (Hr. Tr. p. 27). On his own, Claimant went to the Dorn VA hospital on December 2, 2011, where he was given a note documenting that he could return to work on December 12, 2011. (Hr. Tr. p. 27-8; APA 45). Despite being told he could return to work on December 12, 2011, by the staff at Dorn VA hospital, Claimant did not report back to work or attempt to do his job. (Hr. Tr. p. 28). Claimant also failed to provide documentation from any physician authorized by Defendants showing that he was taken out of work. Thereafter, Claimant was terminated by Sumter County for abandoning his job. (Hr. Tr. p. 43;

APA 164). The single Commissioner in finding of fact #12 found that following his termination, Claimant was not out of work because of his work injury per *Pollock*, i.e. Claimant was terminated for cause unrelated to the work injury, and this finding is supported by the greater weight of evidence as described above.

B. Claimant has never provided documentation from an authorized treating physician showing that he is unable to work as of November 8, 2012; therefore, he is not entitled to TTD from that date and continuing.

Not only was Claimant unable to provide an “out of work” note from an authorized physician before his termination for abandonment, a closer reading of all the evidence put forth to the single Commissioner reveals that Claimant has never provided documentation from a physician authorized by Defendants showing that he is unable to work. To the contrary, the greater weight of the medical evidence indicates that Claimant has been capable of full duty work following his release by Dr. Ford. Specifically, Dr. Lozanne performed an authorized evaluation of Claimant’s lumbar spine and found that Claimant had reached maximum medical improvement as of December 29, 2011, with 0% impairment, no work restrictions, and without the need for future medical treatment. (APA 150-2). Also, Dr. Bethea, who provided authorized treatment to Claimant’s left hip, found that Claimant had reached maximum medical improvement on June 27, 2012, without permanent physical impairment and was “capable of full work.” (APA 26-31).

Nonetheless, the single Commissioner, in error, found that Claimant is entitled to TTD from November 8, 2012. *See* single Commissioner finding of fact #16 and #22. The single Commissioner’s reasoning behind these findings, as described below, is confusing and based on incorrect facts, and are therefore reversed.

The single Commissioner’s reasoning behind findings of fact #16 and #22 is as follows:

Dr. Storick, who became an authorized treating physician on November 8, 2012, who was originally referred by Dr. Johnson, a non-authorized treating physician who holds the opinion that Claimant was out of work as of August 13, 2012, filled out a questionnaire prepared by Claimant's attorney on June 5, 2013, back dating Claimant's out of work period to the date of injury, therefore making Dr. Storick's opinion consistent with Dr. Johnson's opinion that Claimant should be out of work on the date Dr. Storick began seeing Claimant as an authorized provider, which was November 8, 2012. This line of reasoning is not only tenuous at best, but flawed for several reasons.

First, the documentation provided by Claimant memorializing Dr. Storick's first visit with Claimant, which was on November 8, 2012, does not mention anything about work restrictions or inability to work. (APA 20-3). Furthermore, Claimant was again seen by Dr. Storick on May 9, 2013, for an independent medical evaluation, and the narrative of this visit is also devoid of work restrictions or any statement about Claimant being unable to work. (APA 105-07). Accordingly, little if any weight should have been given to the questionnaire that was not completed until June 5, 2013 (APA 24-5), as Dr. Storick did not mention anything about being out of work or work restrictions in his actual treatment narratives.

Second, contrary to the single Commissioner's finding that Claimant was referred to Dr. Storick by Dr. Johnson, the treatment narrative is explicitly addressed to "Karl," and begins with, "Thank you for the referral of Oliver Wiley for the injection," and the cc: line at the bottom says "Karl Lozanne, M.D." (APA p. 20). The single Commissioner correctly found that Dr. Lozanne provided an authorized evaluation on December 29, 2011, and he opines that Claimant does not have any work restrictions, and on December 20, 2012, he placed Claimant at maximum medical improvement without any work restrictions. (APA p. 150-52). So, to give any additional weight

to the supposed “out of work” opinion of Dr. Storick by virtue of being referred by Dr. Johnson, a doctor that holds a “Claimant is out of work” opinion, was based on the incorrect assertion that Claimant was referred to Dr. Storick by Dr. Johnson, when Claimant was in fact referred to Dr. Storick by an authorized physician that opines Claimant does not have *any* work restrictions.

Finally, and most importantly, a correct reading of Dr. Storick’s June 5, 2013 questionnaire reveals that Dr. Storick never opined that Claimant has at any point been completely unable to work because of the work accident. When asked to state whether “Claimant has been able to return to work as a *correctional officer* since [the date of the work accident] (emphasis added),” he responded “no.” (APA p. 25). This is a correct statement, but the single Commissioner did not take into account the fact that per the medical records and Claimant’s testimony he was working on light duty following the work accident, albeit not as a correctional officer, but in another capacity permitted by Sumter County. Dr. Storick has never opined that Claimant has been unable to work in *any* capacity since the work accident. And when asked whether Claimant “is able to return to work at this time,” he responded, “yes, if light duty is available.” (APA p. 25).

Despite Dr. Storick’s opinion that Claimant can return to light duty, in finding of fact #22 the single Commissioner reasoned “[a]lthough the Claimant was terminated in 2011, for abandonment of his job, the Claimant is now unable to return to work with this employer or any other employer because of his injury [as of November 8, 2012].” In this finding, the single Commissioner did not factor in how Claimant’s work restrictions had been accommodated through light duty work up until his release to full duty by Dr. Ford on December 1, 2011. This line of reasoning is contrary to the decision in *Pollack*, which instructs that a claimant’s inability to work has to be due to or because of the injury in order for TTD to be triggered.

Just like the claimant in *Pollack*, the Claimant here is not out of work due to or because of the work injury, but because he was terminated for cause, i.e. not showing up to work without valid excuse, and but for this termination for cause, Claimant would still be working for Sumter County. Sumter County had accommodated Claimant's light duty restrictions in the past, and Claimant presented no evidence to show that Sumter County would not have accommodated his light duty restrictions per Dr. Storick's June 5, 2013 opinion. So, it was error for the single Commissioner to conclude that because Claimant no longer worked for Sumter County, even though he was cleared for light duty by Dr. Storick as of June 5, 2013, he is entitled to TTD by virtue of the fact that he no longer has a job anywhere. For the reasons, we find the single Commissioner's findings and related conclusions of law regarding Claimant's entitlement to TTD should be reversed.

- II. The single Commissioner erred in finding that Claimant's incapacity for work was total as of November 8, 2012, because there was no evidence that any authorized treating physician had written Claimant out of work following November 1, 2011, and where an authorized treating physician cleared Claimant for light duty work as of June 5, 2013, which would have been accommodated but for Claimant's termination that was not due to or because of his work injury.**

The single Commissioner's finding of fact and related conclusion of law that Claimant's incapacity for work is total as of November 8, 2012, is contrary to the greater weight of evidence submitted by the parties. Specifically, although the single Commissioner states in finding of fact #15 that more weight is given to the opinions of the authorized physicians with respect to Claimant's work capacity, that line of reasoning is inexplicably abandoned when the single Commissioner presents Dr. Storick's June 5, 2013 questionnaire as the basis for the finding that Claimant's incapacity for work is total as of November 8, 2012.

The problem with the single Commissioner's foundation for this finding is that Dr. Storick has never opined that Claimant's incapacity for work is total, or words to that effect. Dr. Storick only renders two statements with respect to Claimant's work capacity and they are as follows: (1) Claimant has been unable to work as a correctional officer since April 14, 2011, and (2) Claimant is able to return to light duty as of June 5, 2013. (See APA 25). According to the single Commissioner's decision, it is these opinions that act as the high water mark for declaring that Claimant's incapacity for work is total as of November 8, 2012, when in fact Dr. Storick only acknowledged that Claimant has not been able to do his regular job since the work accident as opposed to saying that Claimant has been unable to work at all.

Furthermore, the single Commissioner gave no weight to the fact that Sumter County had accommodated Claimant's light duty restrictions in the past. There was no evidence Sumter County would not have offered light duty in the future but for Claimant's abandoning his job, as Dr. Storick is an authorized treating physician.¹ To the contrary, the evidence shows that while Claimant was an employee with Sumter County, light duty was offered when indicated by authorized providers or physicians, such as Doctors Care and Dr. Ford, and Claimant did in fact perform light duty. (APA p. 47-56, 145-49, 165-69; Hr. Tr. p. 20).

In sum, based on the greater weight of evidence, it was error for the single Commissioner to find that Claimant's incapacity for work was total as of November 8, 2012.

FULL COMMISSION APPELLATE PANEL FINDINGS OF FACT

After a thorough review of the evidence, including the hearing testimony, and medical evidence, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and arguments of counsel,

¹ The reason why Claimant was never offered light duty following his release to full duty by Dr. Ford as of November 1, 2011, was because he was unable to provide an "out of work" note from an authorized treating physician. See testimony of Lorraine Dennis and Erik Hayes (Hr. Tr. p. 35-66).

with respect to the findings of fact regarding entitlement to TTD as appealed from by both parties, WE, THE APPELLATE PANEL, REVERSE THE FINDINGS OF FACT OF THE SINGLE COMMISSIONER, IN FULL, AND FIND AS FOLLOWS:

1. After Claimant's work related injury of April 14, 2011, Claimant received authorized treatment and was assigned work restrictions that were accommodated by Defendants.
2. Following Claimant's release to full duty by authorized physician Dr. Ford on or about November 1, 2011, Claimant never attempted to return to work, so he was terminated for this failure and therefore not entitled to temporary benefits at that time per *Pollock*.
3. Following his termination, Claimant was never written completely out of work by any of the authorized physicians that examined and/or treated him.
4. Based upon the greater weight of evidence, Claimant is not entitled to temporary total disability benefits for any period of time following the April 14, 2011 work accident.

FULL COMMISSION APPELLATE PANEL CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Law, with respect to the single Commissioner's conclusions of law as they relate to the issue of entitlement to temporary total disability benefits, WE, THE APPELLATE PANEL, REVERSE THE CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER, IN FULL, CONCLUDING AS FOLLOWS:

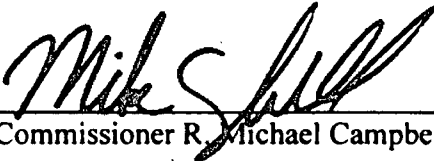
1. Under §42-9-10, § 42-9-260 and *Pollack v. Southern Wine & Spirits of America*, Claimant is not entitled to temporary total disability benefits for any periods of time following the work injury of April 14, 2011.

ORDER/AWARD

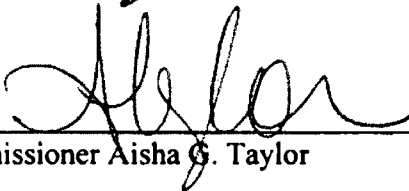
IT IS HEREBY ORDERED that Commissioner Melody L. James' Decision and Order

dated May 28, 2014, is reversed, in full, as it relates to Claimant's entitlement to temporary total disability benefits. Commissioner James' Decision and Order shall not be put into effect.

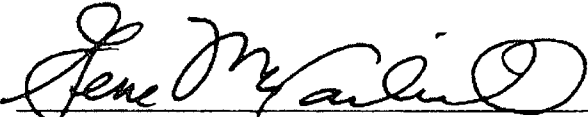
IT IS SO ORDERED.



Commissioner R. Michael Campbell, II



Commissioner Aisha G. Taylor



Commissioner Gene McCaskill, Chair

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on January 27, 2015

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