THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2015-000324

Oliver M. Wiley, Employee..... Claimant/Appellant,

v.

Sumter County, Employer, and
South Carolina Counties Workers' Compensation Trust, Carrier, ..Defendants/Respondents.

INITIAL BRIEF OF RESPONDENTS

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II. IS THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT, BASED UPON THE GREATER WEIGHT OF EVIDENCE, CLAIMANT IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS FOR ANY PEROID OF TIME FOLLOWING THE APRIL 14, 2011 WORK ACCIDENT SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATEMENT OF THE CASE

This workers' compensation claim arises from an admitted work accident of April 4, 2011, for which Respondents have provided medical treatment for the lower back and left hip. Respondents have never provided temporary total disability benefits. During the course of authorized treatment, Claimant filed a hearing request seeking temporary total disability benefits backed dated to November 1, 2011 and continuing. A hearing was held before the single Commissioner on December 18, 2013, to address this issue.

At the hearing, Respondents asserted that Appellant is not entitled to any temporary total disability benefits because he was released to full duty by the authorized treating physician on November 1, 2011, and thereafter failed to return to work, which led to his termination for cause. Respondents also took the position that Appellant is not entitled to temporary total disability benefits for any period of time following his work injury as he was never written completely out of work by an authorized treating physician following his termination for cause. In sum, Respondents asserted that at no time following the work accident was Appellant's inability to earn wages due to or because of his work injury, therefore Appellant is not entitled to temporary total disability benefits.

On May 28, 2014, the single Commissioner issued a Decision finding that after being returned to full duty by an authorized treating physician on November 1, 2011, Respondent was terminated for his failure to show up for work, or provide an excuse for his failure to appear. However, the Decision ordered Respondents to provide Appellant with temporary total disability benefits as of November 8, 2012. The single Commissioner's reasoning for this decision was based on the conclusion that by November 8, 2012, one of the authorized treating physicians opined that Appellant was unable to work after that date.

Following this decision, both parties appealed the single Commissioner's decision regarding entitlement to temporary total disability benefits. On appeal to the Appellate Panel of the Full Commission, Respondents took the position that no temporary total disability benefits should be ordered, whereas Appellant took the position that his award of temporary total disability benefits should have been back dated to November 1, 2011.

On January 27, 2015, the Full Commission issued an Order reversing the single Commissioner's decision with respect to the award of temporary total disability benefits, finding that Appellant is not entitled to any temporary total disability benefits. However, the single Commissioner and Full Commission decisions found that Appellant had been terminated because of his failure to return to work following his release to full duty on November 1, 2011 by the authorized treating physician at that time. This appeal followed.

STATEMENT OF THE FACTS

While conducting his duties as a correctional officer, Appellant suffered a slip and fall at work on or about April 14, 2011. As a result, Appellant was initially provided authorized care at Doctors Care for complaints of left hip pain. At the initial visit with Doctors Care, which was on the date of accident, Appellant was given work restrictions. (APA 89-90). While under these restrictions, Respondents offered, and Appellant accepted, light duty work. (APA 89-100 & 161, Hr. Tr. p. 20 & 25). On May 26, 2011, Doctors Care referred Appellant to an orthopedist for examination of the left hip. (APA 99).

Upon referral from Doctors Care, Appellant began seeing Dr. Danny H. Ford of Sumter Orthopedics on June 21, 2011. During the initial visit with Appellant, Dr. Ford reviewed the results of an MRI and x-rays of the left hip, and he documented the studies revealed no abnormalities, acute or otherwise. Dr. Ford diagnosed Appellant with a left hip contusion, and

treated him with anti-inflammatories and physical therapy. On October 18, 2011, Dr. Ford found Appellant to have reached maximum medical improvement and issued a return to work note clearing Appellant for a return to regular duty effective November 1, 2011. (APA 47-56 & 110-2).

The last day Appellant reported to work was on October 23, 2011. He called in sick October 26-28, 2011. (APA 161).

On November 3, 2011, Appellant returned to Dr. Ford with continued complaints, and Dr. Ford documented suspicion for lumbar radiculopathy/sacroiliitis. As for the hip, he opined that Appellant was fine. As he does not treat radiculopathy/sacroiliitis, Dr. Ford recommended that Respondents consider obtaining an MRI of the lumbar spine along with a referral to a spine surgeon. However, there is no documentation among the records from this visit showing that Dr. Ford either took Appellant out of work or gave him work restrictions. (APA 55-56 & 114). Later that day, Appellant called his supervisor, Major Daryl F. McGhaney, informing that he was told by Dr. Ford that there was nothing else he (Dr. Ford) could do for him and that he (Dr. Ford) would contact Respondents about scheduling an MRI. Appellant further informed that his lawyer had advised him not to come back to work until he had the MRI. (APA 166).

On November 7, 2011, Appellant met with Director Simon Major, Major McGhaney, and Erik Hayes to discuss his work status. During this meeting, Appellant explained that he was released to full duty by his doctor but he still had pain in his hip, so he went to a doctor at the VA Hospital on his own. He further informed that he was waiting on an MRI to be scheduled before he could return to work per the advice of his attorney. (APA 165).

Approximately a week later, on November 11, 2011, Respondents sent Appellant to have an MRI of the lumbar spine, and the results of that study came back normal. (APA 46).

Appellant did not return to work the entire month of November 2011. (APA 161).

Contrary to what he told his supervisors, Appellant did not go to the VA Hospital until December 2, 2011. Documentation from that visit reveals that Appellant was cleared for a return to work on December 12, 2011. (APA 45).

Through arrangement of his attorney, Appellant was seen by Dr. Timothy M. Zgleszewski for an independent medical evaluation of the lumbar spine on December 13, 2011. In his narrative, Dr. Zgleszewski documents that Appellant had an MRI of the lumbar spine, but he does not mention the results, which came back normal. Dr. Zgleszewski opined that Appellant was not at maximum medical improvement for the lumbar spine and recommended various modalities of treatment for the same; however, he documented "If [Appellant] is deemed to be at MMI," then Appellant would be considered to have 13% impairment to the back/spine. He also opined that Appellant should not return to work until his diagnostic and treatment recommendations were completed. (APA 41-44). Appellant did not return to work on any day during December 2011. (APA 161).

Upon Dr. Ford's referral, Appellant was seen by Dr. Karl A. Lozanne at Columbia Neurosurgical Associates, P.A. on December 29, 2011. Dr. Lozanne reviewed the radiologist reports of the lumbar MRI and documented that he had nothing to offer from a neurosurgical perspective. He further documented that there were no particular restrictions or impairment rating to the lumbar spine. (APA 151-2).

On January 4, 2014, Major McGhaney documented that as of that date he had not received a doctor's excuse from Appellant for missing work on December 30 & 31, January 1, 2012. Furthermore, he had not received a doctor's excuse for not reporting to work for the entire month of November 2011, and December 12 & 13, 2011. Because of Appellant's absenteeism,

Appellant was deemed to have committed Abandonment of Position, which is defined as absence from work for more than two (2) consecutive days without providing a doctor's excuse, and Major McGhaney recommended that Appellant be terminated. Thereafter, Appellant was terminated by Respondents for abandoning his job. (APA 101 & 164; Hr. Tr. p. 43).

Upon agreement of the parties via Consent Order, Respondents arranged for Appellant to see Dr. James F. Bethea for a second opinion regarding the lower back on June 12, 2012. The narrative from that visit documents that Dr. Bethea reviewed MRIs of the left hip, which revealed minimal degenerative change, and of the lumbar spine, which failed to reveal any abnormality. Dr. Bethea recommended against any injections, but he did recommend a bone scan of the pelvis to assess the left sacroiliac joint, and if that scan proved to be negative, then Appellant would be at maximum medical improvement and there would be no work restrictions. Dr. Bethea specifically declined to place any work restrictions on Appellant at that point. (APA 26-28). Dr. Bethea saw Appellant again on June 27, 2012, to review the results of the bone scan. Dr. Bethea documented that the bone scan revealed "slight" increased activity in the greater trochanter of the left hip, and he provided a steroid injection into that area. Dr. Bethea opined that Appellant was at maximum medical improvement, capable of full work, and was without permanent physical impairment. (APA 29-31).

Thereafter, with the assistance of his attorney, Appellant was seen by Dr. Don Johnson of Southeastern Spine Institute on August 13, 2012. Dr. Johnson reviewed the lumbar spine MRI of November 11, 2011, and agreed that the study was normal, without evidence of herniation, fracture or stenosis. He also agreed that Dr. Bethea's notes revealed an essentially normal MRI of the left hip. Dr. Johnson did not recommend surgery. However, he recommended an EMG/NCS study of the left leg, to see if Appellant's symptoms were related to the L-5 root, and

a diagnostic injection to the sacroiliac joint to be followed by a rhizotomy depending on the results. He further opined that Appellant was not at maximum medical improvement, and he felt that Appellant could not return to the workplace even with restrictions. (APA 15-17).

Upon order of the Commission, Respondents sent Appellant back to Dr. Lozanne, who in turn referred him to Dr. Steven Storick of Palmetto Pain Management for an injection to the sacroiliac joint, which was performed on November 8, 2012. (APA 20-1). Also upon order of the Commission, on November 15, 2012, Dr. Devin Troyer performed an EMG/NCS study of the left leg. Dr. Troyer documented that this study came back normal. (APA 18-9).

By combination of order of the Commission and consent of the parties, Respondents provided Appellant with a series of lumbar injections performed by Dr. Ryan Wetzel on September 5 and November 11, 2013. (APA 1, 103). On or about September 17, 2013, Dr. Wetzel completed a questionnaire asking, among other things, whether Appellant had been able to return to work as a correctional officer since the April 14, 2011 work accident, to which he replied "N/A." He was also asked whether Appellant was able to return to work at that time, to which he responded "yes, in modified duty." (APA 3).

On June 5, 2013, Dr. Storick, more than six months after having seen Appellant for the first time, completed a questionnaire asking, among other things, whether Appellant had been able to returned to work as a correctional officer since the April 14, 2011 work accident, to which he replied "no." With respect to whether Appellant was able to return to work at that time, he responded "yes, if light duty is available." (APA 2-3).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C.

276, 599 S.E.2d 604 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). Substantial evidence is neither a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id.

ARGUMENT

Under S.C. Code of Laws §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). In denying Appellant's entitlement to TTD, the Commission determined the factual nexus described by the Court in Pollack does not exist in this case as Appellant was terminated for abandoning his job,

i.e. for cause, and not due to or because of his work injury. Having determined that Appellant was terminated for cause, the Commission further determined that Appellant was not entitled to TTD at any point after his termination because he was never written completely out of work by an authorized treating physician. These decisions are supported by substantial evidence and should be affirmed.

I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT CLAIMANT WAS TERMINATED BECAUSE HE NEVER ATTEMPTED TO RETURN TO WORK FOLLOWING HIS RELEASE TO FULL DUTY ON OR ABOUT NOVEMBER 1, 2011, AND THEREFORE WAS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS AT THAT TIME UNDER POLLACK V. SOUTHERN WINE & SPIRITS OF AMERICA AS SUCH A FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Full Commission determined that under Pollack, Appellant was not entitled to TTD because his inability to earn wages was due to his failure to return to work following his release to full duty by Dr. Ford on November 1, 2011, which ultimately led to his termination during January 2012. This decision was supported by substantial evidence and should be affirmed.

In Pollack, the employee sustained an injury on the job and thereafter was provided medical treatment, which led to the assignment of work restrictions. 405 S.C. at 11, 747 S.E.2d at 431. The employer accommodated the employee's work restrictions and offered light duty, which was accepted by the employee. Id. It was while on light duty that the employee in Pollack violated company policy and was terminated. Id. at 12, 432. The Court then determined the employee was not entitled to TTD after his termination, as his inability to work was not because of his work-related injury but because of his termination for cause. Id. at 15, 434. In arriving at this conclusion, the Court acknowledge that its decision was limited to determining whether substantial evidence supported the Commission's finding that the employee's inability

to earn wages was a result of his termination for cause, not his work-related injury. Id.

Like in Pollack, Appellant worked a period of accommodated light duty following his work-related injury; however, thereafter Appellant was released to full duty by authorized treating physician Dr. Ford effective November 1, 2011. The strongest support for the Commission's finding that Appellant was terminated for cause versus because of his work-related injury is the fact that Appellant did not report for duty or attempt to work the entire month of November 2011 despite his full duty release. Furthermore, although Appellant insists he requested to go back on light duty at some point after November 1, 2011, he never presented a note from any doctor assigning work restrictions. Importantly, there is no evidence in the record to suggest that Respondents would not have accommodated work restrictions from a doctor had Appellant presented such documentation, as his restrictions were accommodated over several months while under the care of two different medical providers. Additionally, the record shows that Respondents have a policy that any absences of more than two consecutive days needs to be accompanied by a doctor's excuse, and that failure to do so is considered abandonment of one's position. In sum, Appellant never provided a doctor's excuse of any sort for the entire month of November 2011, and he never returned to work for duty during that month, so he was well within the Respondents' definition of having abandoned his job.

Despite telling his supervisors that he had gone to the VA Hospital on his own in November 2011, it was not until December 2, 2011, that Appellant sought treatment from this provider. During his visit to the VA Hospital, Appellant was provided with documentation taking him out of work until December 12, 2011. However, Appellant did not report for duty or attempt a return to work after December 12, 2011.

Contrary to Appellants contention that he was still unable to return to work despite being

cleared for full duty by Dr. Ford, on November 11, 2011, an MRI of the lumbar spine came back normal, and then on December 29, 2011, Dr. Lozanne opined that Appellant had no restrictions and no impairment with respect to the lumbar spine. So, by December 29, 2011, there were MRIs of both complained of body parts – the left hip and lower back – that came back essentially normal, and the opinion of two authorized treating physicians opining that Appellant did not have any work restrictions. Furthermore, there is evidence in the record in the form of documentation kept by Major McGhaney suggesting that Appellant remained out of work not because of his injury, but upon advice of counsel. Finally, in his own testimony during the hearing, Respondent admitted that he never reported back to work or tried to do his job again.

In conclusion, the Commission was presented with plenty of evidence, medical and non-medical, in order to reach the conclusion that Appellant was terminated because of his failure to return to work when cleared to do so, and therefore by the time of his termination he was not entitled to TTD. Accordingly, the Commission's finding on this issue should be upheld as it is supported by substantial evidence.

II. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT, BASED UPON THE GREATER WEIGHT OF EVIDENCE, CLAIMANT IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS FOR ANY PEROID OF TIME FOLLOWING THE APRIL 14, 2011 WORK ACCIDENT, AS SUCH A FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Having determined that Appellant was terminated for cause, the Commission further determined that because Appellant was never written completely out of work by an authorized treating physician after his termination, he was not entitled to TTD at any time thereafter. In doing so, the Commission gave greater weight to the medical opinions of authorized treating physicians over others, which is within its authority to do so, as "[e]xpert medical testimony is

designed to aid the Commission in coming to the correct conclusion. Therefore, the Commission determines the weight and credit to be given to the expert testimony." Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (S.C. App., 2002) (citing Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999).

As an initial matter, it is important to reiterate that no evidence is contained in the record suggesting that Respondents would have ever failed to accommodate light duty restrictions but for Appellant's termination for cause, as Respondents accommodated Appellant's restrictions for approximately six months. Accordingly, Appellant would not be entitled to TTD during periods of time following his termination that he was given work restrictions by a physician, regardless of whether the physician was provided by Respondents or not. Nonetheless, Respondents are not asserting that an employee can never be entitled to TTD following a termination for cause within the meaning supplied by the Court's decision in Pollack. For example, if after termination for cause, an employee that would otherwise have been working on light duty has to undergo surgery for the work-related injury, and is thereafter written completely out of work by his authorized surgeon for a period of time following recovery, Respondents concede that under such circumstances TTD would be appropriate, because the employee's inability to earn wages at that point is due to or because of the injury.

However, although there are circumstances where an employee might be entitled to TTD despite being terminated for cause, the Commission correctly determined that such a situation did not arise at any time after Appellant in this matter was terminated for cause. In basing this decision on the fact that Appellant was never written taken completely out of work by an authorized treating physician after his termination in January 2012, the Commission did so justifiably and in a manner consistent with its authority under Corbin.

With respect to the authorized treating physicians, Dr. Lozanne saw Respondent before and after the termination, and he never assigned any work restrictions or took Appellant out of work. Dr. Bethea saw Appellant twice during the middle part of 2012, and he too declined to assign work restrictions or write Appellant out of work. Dr. Storick saw Appellant on November 8, 2012, and never mentioned work restrictions or work status in the narrative from that visit. Via questionnaire completed approximately 7 months later, on June 5, 2013, Dr. Storick opined that Appellant had been unable to return to work as a correctional officer since the work accident, but at that point he could return to work if light duty was available. Despite Appellant's insistence that "unable to return to work as a correctional officer" equates to being retroactively taken out of work since the work accident, it is true that Appellant was unable to return to work as a correctional officer following the work accident, but his inability to earn wages was not total as he was offered and accepted light duty performing other work. Accordingly, Dr. Storick never took Appellant out of work. Finally, Dr. Wetzel, who also saw Appellant on more than one occasion, also never wrote Appellant out of work.

In contrast, with respect to the physicians that Appellant went to on his own following his termination, Dr. Johnson saw Appellant once on August 13, 2012, and he opined that Appellant should be written out of work. However, he saw Appellant again on February 21, 2013, after additional diagnostics and injections had been performed by other physicians, and the narrative from that visit does not mention work restrictions or work status.

Overall, the Commission's finding that the greater weight of evidence showed that Appellant was not entitled to TTD at any period of time following the April 14, 2011, is supported qualitatively and quantitatively. Accordingly, this determination should also be affirmed as it was supported by substantial evidence.

CONCLUSION

For the reasons stated herein, the South Carolina Workers' Compensation Commission's decision should be affirmed in full.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

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Date: July 10, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Case Tracking No.: 2015-000324

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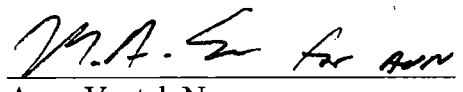
PROOF OF SERVICE

I certify that copies of the INITIAL BRIEF OF RESPONDENTS and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL were served this day on Appellant by depositing a copy of it in the United States Postal Service, first class to Appellant's attorney of record John D. Clark, Clark Law Firm, LLC, Sumter, SC 29151



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July 10, 2015

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Re: Oliver Wiley vs. Sumter County
WCC File No.: 1109844/2015-000342 DOI: 4/14/2011
Carrier: South Carolina Counties Workers' Compensation Trust
Claim No.: 580000232489
WJC&B File No.: 0560.00474
Appellate Case No.: 2015-000324

Dear Ms. Kitchings:

Please find enclosed the following documents regarding the above-mentioned appeal:

1. Respondents' initial brief;
2. Respondents' designation of the matter to be included in the record on appeal; and
3. Proof of service.

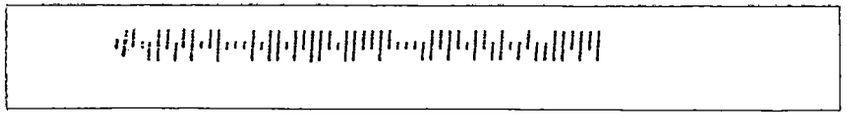
With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Anne Veatch Noonan

AVN/lmb

cc: Mr. John D. Clark



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