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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

R. Michael Campbell, II, Aisha G. Taylor and Gene McCaskill,
Commissioners for the Appellate Panel

Case No. W.C.C. File No.: 1109844

Oliver M. Wiley, Employee, Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT FOLLOWING CLAIMANT'S RELEASE TO FULL DUTY BY AUTHORIZED PHYSICIAN DR. FOR 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?
2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT BASED UPON THE GREATER WEIGHT OF EVIDENCE, CLAIMANT IS NOT ENTITLED TO TEMPORARY TOATL DISABILITY BENEFITS FOR ANY PERIOD OF TIME FOLLOWING THE APRIL 14, 2011 WORK ACCIDENT.

STATEMENT OF THE CASE

This is an appeal from a Decision and Order of the South Carolina Worker's Compensation Commission filed January 21, 2015 Appellant/Claimant Oliver Wiley suffered admitted accident on April 14, 2011 and received medical treatment to the left hip, and back. Claimant sought temporary total disability from November 1, 2011 and continuing. Defendant denied that Claimant was entitled to temporary total disability or additional medical treatment and sought an order finding Claimant at MMI for all injuries.

The Single Commissioner conducted a hearing on December 18, 2013 and filed a Decision and Order on May 28, 2014 awarding Claimant's request for temporary total disability (TTD) beginning on November 8, 2012 and continuing as provided under the South Carolina Workers' Compensation Act. Both parties requested Commission review and the Full Commission reversed the Single Commissioner's decision in full by its order filed January 27, 2015. On February 11, 2015 Oliver Wiley served the notice of appeal on Sumter County and the South Carolina Counties Worker's Compensation Trust.

FACTS

Appellant began working for Defendant Sumter County as a correctional officer in August of 1993. He started as a regular line officer and was eventually promoted to Sergeant, Lieutenant and then Captain. (R. p.69, lines 16-18) On April 14, 2011, while breaking up a fight, Appellant slipped and fell on food particles on the floor. He landed on his left hip and one of the inmates involved in the fight came down on top of him. Appellant experienced pain in the left hip after the accident. (R. p.70, line 15– p.71, line 5)

Dr. Danny Ford, an orthopedist, was authorized by respondents to provide medical evaluation of Claimant's left hip. On June 21, 2011, Dr Ford diagnosed Appellant with a left hip contusion and provided conservative treatment including physical therapy. Dr. Ford also restricted Appellant to temporary light duty employment. (R. p. 182-p.183) The employer provided Appellant with light duty employment per Dr. Ford's order. (R. p.85, lines 10-22)

On November 3, 2011 Dr. Ford released Appellant to full duty for the hip but stated that his current symptoms were suspicious for lumbar radiculopathy/sacroilitis, a condition for which he does not provide treatment, and recommended referral to a spine surgeon. (R. p.190-p.191) Respondents did not immediately provide the recommended referral by this authorized treating physician. Appellant sought medical treatment on his own from the Dorn VA Medical Center and was given a work excuse that he "has been advised not to return to work until: Monday December 12, 2011." (R. p.180) This excuse was not accepted by employer and Appellant then advised the employer that he was unable to return to full duty employment due to pain and requested light duty. Appellant's request for light duty was denied and he was terminated from employment because he did not return to work and did not provide a work excuse from an authorized treating physician. (R. p. 81, lines 1-11)

On December 13, 2011, following an Independent Medical Evaluation, Timothy M. Zgleszewski, MD, diagnosed Appellant with low back pain and left leg paresthesia and probable bilateral sacroiliac joint and/or lumbar facet joint dysfunction/pain and opined that Appellant “should not return to work in my medical opinion until the above additional diagnostic testing and treatment is rendered. In my medical opinion, the examinee would be at risk for further injury if he returns to work before the additional diagnostic testing and treatment is rendered.” (R. p.176-p.179)

On December 29, 2011, Respondents provided Appellant with an Independent Medical Evaluation with Karl Lozanne, MD who opined that Appellant had suffered a hip contusion and that he had nothing further to offer Appellant. (R. p. 167-p.168)

By Consent Order of April 20, 2012, Respondents agreed to provide Appellant a second opinion evaluation for the low back. (R. p.40-p.41)

On June 4, 2012 Respondents provided appellant with an evaluation by James F. Bethea, MD who diagnosed Appellant with lower back and left hip pain. Dr. Bethea recommended a bone scan to assess Appellant’s sacroiliac joint pain. Dr. Bethea stated that if the bone scan is negative, Appellant would be at Maximum Medical Improvement. Dr. Bethea did not give Appellant any work restrictions at that time. The bone scan revealed slight increase activity focally at the posterior and superior aspect of the left hip trochanter. Appellant was then given an injection into the trochanter and Dr. Bethea indicated that Appellant was at Maximum Medical Improvement without permanent impairment or work restriction. (R. p.161-p.166)

Donald R. Johnson, II, MD, evaluated Appellant on August 13, 2012 and diagnosed Appellant with left sacroiliac joint strain and rule out contusion of L-5 nerve root and stated that

“I do not feel that he can return to the workplace even with restrictions as this point.” (R. p.150-p.151)

Following a hearing on September 11, 2012, Commissioner James ordered on November 5, 2012 that additional diagnostic testing may tend to lessen Appellant’s period of disability and ordered Respondents to provide Appellant with an EMG and a diagnostic sacroiliac joint injection. (R. p.31-p.35)

On November 8, 2012 Steven B. Storick, MD provided Appellant with the sacroiliac joint injection. On June 5, 2013 Dr. Storick opined that Appellant could not return to work as a correctional officer since April 14, 2011 and could only return to light duty at that time. (R. p.155-p.160)

On February 21, 2013 Donald Johnson, MD opined that since Appellant got good relief from Dr. Storick’s injection, he was a candidate for Rhizotomy. (R. p.152)

Following a hearing on March 5, 2013, Commissioner Beck found that “Defendants shall provide a Rhizotomy by Dr. Storick as recommended by Dr. Donald Johnson. On August 28, 2013, by Consent Order of Commissioner Beck, Respondents agreed to authorize Dr. Wetzel to perform the Rhizotomy. (R. p.36-p.37)

From September 5, 2013 through November 11, 2013, Ryan Wetzel, MD performed a Rhizotomy on Appellant, and opined on September, 2013 that Appellant could only return to modified duty at that time. (R. p.136-p.149)

ARGUMENT

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. *See Lark v. Bi-Lo, Inc.*,

276 S.C. 130, 276 S.E.2d 304 (1981); *Gibson v. Spartanburg Sch. Dist. No. 3*, 338 S.C. 510, 526 S.E.2d 725 (Ct.App.2000). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” *Bursey v. South Carolina Dep't of Health and Env'tl. *289 Control*, Op. No. 3813, 360 S.C. 135, 600 S.E.2d 80, (Ct.App. filed June 1, 2004) (Shearouse Adv. Sh. No. 24 at 47); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp.2003). Under the scope of review established in the APA, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp.2003).

The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. *Frame*, 357 S.C. at 527, 593 S.E.2d at 494; *Corbin v. Kohler Co.*, 351 S.C. 613, 571 S.E.2d 92 (Ct.App.2002). This Court's review is limited to **611 deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. *See Gibson*, 338 S.C. at 517, 526 S.E.2d at 728-29; *see also Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 434 S.E.2d 292 (Ct.App.1993) (noting that in reviewing decision of Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

Substantial evidence is not a mere scintilla of evidence, nor the 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. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002); *Broughton v.*

South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999) *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004).

1. **BECAUSE APPELLANT'S INABILITY TO EARN WAGES WAS DUE TO HIS WORK RELATED INJURY AND HE WAS NOT TERMINATED FROM EMPLOYMENT FOR CAUSE AS CONTEMPLATED BY POLLACK v S. WINE & SPIRITS OF AM., APPELLANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS UNDER THE S.C. WORKER'S COMPENSATION ACT.**

The SC Workers' Compensation Commission erred in finding that Claimant was not out of work at the time of his termination due to his injury. The substantial evidence in the record is that Claimant was in fact out of work at that time due to his injury, and there was not cause for his termination and denial of Temporary Total Disability as contemplated by Pollack.

Pursuant to S.C. Code Ann. Section 42-9-260 (1976 as amended) and the accompanying regulations, the entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages. An injured employee will be entitled to TTD compensation when his incapacity to earn wages is *due to* or *because of* the injury. *See Travelscape, LLC v. S.C. Dep't of Rev.*, 391 S.C. 89, 98, 705 S.E.2d 28, 33 (2011) ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). This is a quintessential factual question for the fact-finder, the Commission. *See, e.g., Johnson v. Rent-A-Center, Inc.*, 398 S.C. 595, 730 S.E.2d 857 (2012) (holding substantial evidence supports the Commission's findings that the employee was disabled and entitled to TTD benefits). As a result, this Court is limited to determining whether substantial evidence supports the Commission's finding that Appellant's inability to earn wages was a result of his

termination for cause, not his work-related injury. Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 15-16, 747 S.E.2d 430, 433-34 (2013), reh'g denied (Aug. 29, 2013).

In the Pollack case, the injured worker had returned to work on modified duty following the admitted injury. While on light duty, he violated company policy regarding the reporting of accidents involving company vehicles and was terminated. This court agreed that the denial of Temporary Total Disability Benefits must be construed carefully, but held that an admitted violation of company policy was substantial evidence to support the Commission's finding that Pollack was terminated for cause and not entitled to Temporary total Disability Benefits.

Appellant not terminated for cause as contemplated by Pollack

In the case at bar, there is no evidence that appellant was terminated for violation of company policy, and Respondent does not advance such a contention. Respondent contends that appellant was terminated solely for failure to return to work. Its Appellant's contention that this was not cause for termination and denial of TTD benefits under Pollack because an authorized treating physician eventually confirmed that Appellant was unable to work, and returning to full duty work as a correctional officer with an impaired physical condition would place him and others that he was required to protect in danger.

The facts of this case are that when appellant was released to return to work for his back, he did not believe that he could perform the work of a correctional officer because of pain and did not return to work. Any argument by Respondents that Appellant never returned to his job to advise his employer of his inability to work or abandoned his job is refuted by the substantial evidence. Appellant told his employer of his condition and even asked for light duty.

Appellant testified as follows:

Q. All Right. Now, and were you able to perform—Again, were you able to perform your job on November 3rd, 2011?

A. No, Sir.

Q. Have you been able to go back in that facility since that day physically?

A. No, sir.

Q. Why not?

A. Because I couldn't do it, and I was still in pain.

Q. All right. And did you tell your employer when you got released on November 3rd that you could not come back to work?

A. Yes, sir.

Q. And did you seek medical treatment yourself?

A. Yes, sir.

Q. Where did you seek it from?

A. Dorn V.A. Medical Center in Columbia.

Q. And did they—Did Dorn V.A. Medical Center give you a work excuse?

A. Yes, they did, sir.

Q. Looking at the APA number one, not the writing on the bottom, but the typewritten information on that exhibit, is that the work excuse you took to them?

A. Yes, sir.

Q. All right. And when you took that to them, what was their response?

A. They took it, and I was called in by the director.

Q. Okay.

A. And I came down and went in his office, myself, him and Major McGhaney, and he told me at that point—I believe that's when he told me he would have to terminate me.

Q. Okay. And did he tell you why?

A. And I asked him—I asked him why was I being terminated. He said because I said I could not work, and I said I had a doctor's excuse. And I asked—the only other question I asked him was could I have that in writing. (R. p.72, line 21-p.74, line 8).

Appellant also asked to be allowed to return to work on light duty at that time but this request was denied.

A. When he—are you talking about when he terminated me?

Q. Before he terminated you when you went back on November 3rd?

A. Oh, yes, sir: I asked is there—"Can I go back on light duty?" And the answer was "No."

Q. Who did you ask that?

A. The director.

Q. All Right. And if he had given you light duty, would you have done it?

A. Yes, sir. (R. p.81, lines 1-11).

This is also important to note because Respondent has argued that because no authorized medical provider ever opined that Appellant was totally unable to work, Appellant is not entitled to an order of Temporary Total Disability Benefits. However, this point is moot because it is undisputed in the record that Appellant was specifically denied light duty of any kind after requesting it and was terminated when a medical provider stated that Appellant could work light duty.

At the time Appellant was denied light duty and terminated, he was released without restriction for his hip only by the authorized treating physician, Dr. Danny Ford, but Respondent had not yet provided the referral to a spine surgeon as recommended by Dr. Ford for his suspicion of lumbar radiculopathy/sacroilitis, a condition for which he does not provide treatment. Appellant was then fired because he did not have a work excuse from an authorized treating physician at that time. However, Respondents eventually provided Appellant a referral for evaluation of radiculopathy/sacroilitis to Steven B. Storick, MD, an authorized treating physician who diagnosed Claimant with left lumbosacral paresthesia, and opined on June 6, 2013 that Claimant has not been able to return to work as a correctional officer since April 14, 2011

and that Claimant could only return to light duty at that time (R. p.155-p.160). Dr Storick's opinion, although issued almost two years later, supports Appellant's initial contention that he could not return to work as of November 1, 2011.

There is also overwhelming expert medical opinion that Claimant was unable to return to full duty on November 1, 2011. Ryan A. Wetzel, MD, who diagnosed Claimant with low back pain with left leg sciatica related to Claimant's work accident, and performed a Rhizotomy on Claimant, opined on September, 2013 that Claimant could only return to modified duty at that time. (R. p.142) Also, Donald R. Johnson, II, MD, opined on August 13, 2012 "I do not feel that he can return to the workplace even with restrictions as this point." (R. p.150-p.151)

In addition to the above referenced expert opinions, Timothy M. Zgleszewski, MD, who diagnosed Claimant with low back pain and left leg paresthesia and probable bilateral sacroiliac joint and/or lumbar facet joint dysfunction/pain, opined on December 13, 2011 that Claimant "should not return to work in my medical opinion until the above additional diagnostic testing and treatment is rendered. In my medical opinion, the examinee would be at risk for further injury if he returns to work before the additional diagnostic testing and treatment is rendered." (R. p.176-p.179).

This case is easily distinguishable from Pollack in that Claimant was not terminated for cause I the nature of misconduct but could simply not return to work because of his injuries, and Claimant was refused light duty work.

Respondents may argue that authorized treating physicians other than Dr. Storick, including Drs. Ford, Lozanne and Bethea, did not restrict Appellant from working. However, Dr. Ford clearly did not intend to offer any opinion on whether Appellant could not return to work because of radiculopathy/sacroiliatic. Dr. Lozanne did not even review appellant's MRI

and Dr. Bethea did not find Appellant to be at MMI until June 27, 2012 after ordering a bone scan of Appellant's pelvis to assess the sacroiliac joint following which he gave Appellant an injection. (R. p.182-p191, R. p.167-p.168, R. p.161-p.166).

Moreover, the Commission specifically ordered Respondents to provide Appellant a Rhizotomy by Dr. Storick who opined that Appellant could not return to work as a correctional officer as of November 1, 2011. (R. p.155-p.160) Giving credibility to Dr. Storick's opinion is the fact that Ryan Wetzel, MD performed the Rhizotomy and on September, 2013 with consent of Respondents and opined that Appellant could only return to modified duty at that time. (R. p.136-p.149). It is also significant that Dr. Storick's treatment was ordered by the Commission after appellant had been examined by Drs. Lozanne and Bethea and the undisputed evidence is that the Rhizotomy actually helped Appellant's condition. (R. p.150-p.152)

Finding that appellant was terminated for cause under these circumstances would lead to absurd results.

In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008), Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 15, 747 S.E.2d 430, 433 (2013), reh'g denied (Aug. 29, 2013). In deciding the issue of whether claimant was terminated for cause for refusing to return to work when he did not believe that he could perform the work because of pain, it is important to consider the dangerous nature of appellant's employment.

Appellant was employed as a correctional officer at a detention facility. It is undisputed that Appellant had been employed as a correctional officer for 18 years, and at the time of the accident, the Detention center had 300 inmates and only 18 correctional officers. (R. p.74, lines 12-20) Appellant testified that over the years he had been involved in numerous altercation in

excess of 30, and that he would have been required to search inmates, crawl under beds and check ceilings and rafters. He also had to protect himself from violence in the facility and did not believe that it was safe at that time to return to work because he could not protect himself or other inmates. (R. p.74, line 21-p.75, line 20)

Considering the known risks and conditions inherent in a detention center housing felony inmates, it would be an absurd result to find that Appellant was terminated for cause under Pollack and not entitled to Temporary Total Disability Benefits for refusing to return to work as a correctional officer in an impaired physical condition while the authorized treating physician is recommending further evaluation. Moreover, Appellant's impaired physical condition was eventually been confirmed by an authorized treating physician. After all, Claimant was injured breaking up a fight while on full duty.

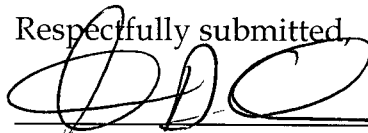
Based on the above, the substantial evidence in the record is that at the time of Appellant's termination he was unable to work due to his work injury, not due to termination for cause as contemplated by Pollack and he is entitled to Temporary Total Disability Benefits from November 3, 2011 until he reached Maximum Medical Improvement.

CONCLUSION

For the reasons stated, this court should reverse the Decision of the South Carolina Worker's Compensation Commission.

August 28 2015

Respectfully submitted,



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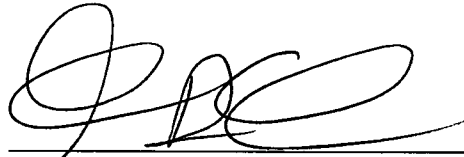
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CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Appellant complies with Rule 211(b),
SCACR.

August 28, 2015



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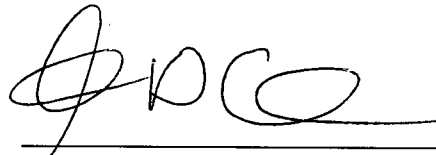
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Trust, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Brief of Appellant on Sumter County, Employer, and South Carolina Counties Workers' Compensation Trust, Carrier, by depositing a copy of it in the United States Mail, postage prepaid, on August 28, 2015, addressed to the attorney of record, Anne V. Noonan, Esquire, 421 Wando Park Blvd, Suite 100, Mount Pleasant, South Carolina 29464.

August 28, 2015



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