THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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WCC File No. 1516896

Appellate Case No.: 2017-001483

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Herbert Randall
Employee, Claimant

Respondent/Appellant

v.

Palmetto State Transportation
And
Cherokee Insurance Company,
Carrier

Appellants/Respondent

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# APPELLANTS' INITIAL BRIEF OF THE APPELLANT/RESPONDENT

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## STATEMENT OF THE CASE

Herbert Randall ("Respondent") sustained admittedly compensable injuries to his lower back and neck following a motor vehicle accident arising out of and during the course of his employment as an over the road truck driver for Palmetto State Transport ("Palmetto") on October 31, 2015. Specifically, Respondent's fully loaded 18-wheeler truck was stopped on a highway in Texas due to another accident ahead when a vehicle stopped behind him was rear ended by a pickup truck, thereby causing that vehicle to strike his trailer. Respondent received emergency medical evaluation and treatment in Texas. Following discharge from the Emergency Room in Texas, Respondent continued his trip to Illinois where he was administered a post-accident drug screen per Palmetto's company policy at a local facility on November, 4, 2015 (APA p. 76). He was referred to Palmetto's company medical provider at Greenville Memorial Hospital's Center for Occupational Health upon his return to South Carolina on November 11, 2015 (APA p. 45). Thereafter, the carrier initiated temporary total disability ("TTD") benefits (See WCC Form 15 and WCC eCase file summary of procedural transactions on claim).

On November 17, 2015, the results of Respondent's drug screen were certified as positive for marijuana (APA p. 76). Palmetto terminated Respondent's employment based on the positive drug screen. Specifically, Palmetto's Director for Human Resources, Scott Justice, testified that over the road drivers are ineligible under federal law to continue driving following a positive drug screen until they have completed a company sponsored substance abuse program ("SAP"). Mr. Justice testified that Palmetto's SAP requirements were sent to Respondent via certified mail and there was return receipt in Respondents file (Hr. Tr. p. 54 ll. 18-25). He confirmed Respondent was terminated after he failed to complete the SAP or even respond to Palmetto's efforts to confirm his intentions to complete the SAP requirement. (Hr. Tr. p. 57 ll. 6-22). The carrier then terminated Respondent's TTD benefits effective December 5, 2015 (See WCC File Form 15 received on 12/17/15) based on "good faith denial of the claim." The specific ground for termination of TTD on the Form 15 was "failed post-accident drug test." Mr. Justice clarified that TTD benefits were stopped due to Respondent's termination for cause. (Hr. Tr. p. 65 ll. 21-22). Per Mr. Justice, but for Respondent's termination, Palmetto would have been provided him with modified work in the guardhouse to the terminal checking trucks in and out. (Hr. Tr. p. 58 ll. 22-25).

Respondent's former counsel filed a Form 50 on February 8, 2016 seeking, *inter alia*, reinstatement of TTD benefits; however, the parties entered a Consent Order approved by the Commission dated March 18, 2016 to dispose of the need for Hearing. (See WCC Order). The Order provided for the carrier to continue authorization and financially responsibility for further medical evaluation/treatment with the authorized provider, Dr. Hodge. All other issues, including TTD, were "held in abeyance." (See WCC Order dated 3/18/16). Dr. Hodge previously determined Claimant was not a good surgical candidate. (APA p. 59).

Respondent was thereafter seen by another neurosurgeon in April 2016, Dr. Chittum, who recommended ACDF from C3-C7. (APA p. 72). Respondent then retained his current counsel who filed an initial Form 50 Hearing Request in September 2016.

Respondent saw yet another neurosurgeon authorized by the carrier, Dr. Bucci, for a single visit in November 2016. Dr. Bucci concurred with Dr. Hodge that surgery was not indicated, noting most of his pain is axial and not radicular. Dr. Bucci recommended ongoing conservative treatment with a pain management provider (APA p. 79). Dr. Bucci did not initially address work status/restrictions in his narrative report. However, in a medical questionnaire solicited by claimant's current counsel, Dr. Bucci purportedly sates that Respondent has been unable to work RETROACTIVELY since his work accident on 10/31/15 to the present and continuing. (APA p. 81). Dr. Hodge, nor Dr. Chittum, ever addressed Claimant's work/disability status. The only work restrictions in place at the time of Claimant's termination in December 2015 were the original "modified duty" restrictions from the occupational health provider, including no lift/push/pull greater than 15 pounds, no climbing, and minimal "static postures." (APA p. 51), which is consistent with duty Palmetto could have provided in the guardhouse.

A Hearing was convened before Commissioner Mike Campbell on December 7, 2016. At the Hearing the parties agreed Respondent has not reached MMI. As such, the carrier stipulated to provide pain management evaluation and treatment per Dr. Bucci's recommendation with a provider to be designated by them. The carrier also agreed to initiate running TTD benefits from the date of Dr. Bucci's disability note. Regarding entitlement to accrued TTD benefits, Respondent first argued that his TTD benefits were improperly terminated in violation of S.C. Code § 42-9-260( and WCC Regulation 67-504 (A). Specifically, Respondent submits TTD benefits, plus 25% penalty, should be reinstated from the date they were terminated because: a) the carrier did not "immediately" file the Form 15 confirming the termination of benefits with the Commission; and b) the carrier did not serve the Form 15 on him or his former counsel. The Employer/Carrier ("Appellants") counter that any alleged technical deficiencies with an administrative form filing requirement do not justify a windfall of benefits to which Respondent was never entitled based on the merits.

In the alternative, Respondent argues he is still otherwise entitled to TTD benefits based on Dr. Bucci's November 2016 medical questionnaire retroactively opining he has been unable to work since his accident. Appellants counter that an award of TTD cannot be based on a retroactive medical opinion, especially when Dr. Bucci never evaluated or treated Claimant during the alleged period of "disability" in question. Moreover, Appellants argue that, but for the termination of Respondents employment for cause (i.e. failure to complete or acknowledge the SAP requirement to regain his driver eligibility under Federal law),

Palmetto could have accommodated the modified duty restrictions from the occupational health provider, which were the only medical restrictions in place during the period in question.

By Order dated January 26, 2017, Commissioner Campbell found, *inter alia*, Appellants did not violate applicable statutes and regulations in terminating Respondent's TTD benefits; therefore, reinstatement of TTD with an award of penalties was not justified. The Commissioner nevertheless found Respondent was entitled to TTD benefits from the date of their previous termination on or about December 6, 2015. The Commissioner's retroactive TTD award appears to be based on Palmetto's alleged failure to provide any evidence that Respondent ever *received* information regarding the SAP requirement, as well as their purported failure to provide evidence of their company policy regarding the timeframe for compliance with the SAP requirement.

Both parties cross-appealed the Hearing Commissioner's Order to the Full Commission Appellate Panel ("Panel"). Respondent appealed the Commissioner's denial to reinstate TTD benefits with penalties for alleged improper termination in violation of the statute/regulations. Appellants appealed the award of retroactive TTD on grounds that it is not supported by evidence in the Record. By Order dated June 9, 2017 the Panel affirmed the Hearing Commissioner's Order with modifications. Specifically, the Panel found that Appellants terminated TTD benefits in "good faith." (See Panel's Order dated)

## QUESTIONS PRESENTED

I. **Did the Panel err in awarding TTD benefits when Respondent's "inability to earn wages" for the period in question was not due to injury?**

II. **Did the Panel rely on clearly erroneous grounds for awarding TTD benefits?**

III. **Is the Panel's TTD award otherwise supported by competent evidence in the Record?**

## ARGUMENTS

I. **The Panel erred in awarding retroactive TTD benefits because, but for Respondent's termination for cause, Palmetto could have accommodated the modified duty restrictions in place at the time of his termination on an indefinite basis; thus, Claimant was not "disabled" within the meaning of the Act for the period in question.**

S.C. Code § 42-1-120 defines "disability" as the "incapacity *because of injury* to earn the wages which the employee was receiving at the time of the injury in the same or any other employment" (emphasis added). As such, the entitlement to TTD benefits is premised on a nexus between the work-

related injury and the inability to earn wages. In the seminal case of Pollack v. Southern Wine & Spirits, 405 S.C. 9, 747 S.E. 2d 430 (2013), the Supreme Court affirmed the Commission's denial of TTD benefits where the evidence established that the claimant's incapacity to earn wages was due to his termination for cause, not his work-related injury. Thus, an award of TTD is not justified where an employer could have provided work enabling a claimant to earn wages, but was rendered unable to do so because claimant engaged in conduct mandating his termination for cause. *Id.*

In this case, Palmetto terminated Respondent's employment for cause, specifically, his failure to complete, or even acknowledge, the SAP requirement following his positive drug test for marijuana. It is important to note that Federal law/regulations, not Palmetto's company policy, mandate the SAP for an over the road driver to reinstate his/her commercial driver's license (CDL) following a positive drug screen administered for any reason. Had Respondent not been terminated for his failures, Palmetto could have placed him in the guardhouse to perform modified duty checking in trucks to the terminal, which is consistent with the restrictions from the occupational health provider of no lifting greater than 15 pounds and alternating static postures- i.e. sitting and standing.

The fact that CDL eligibility is not required to work in the guardhouse is irrelevant. Respondent was employed by Palmetto as an over the road driver, continued eligibility for which required completion of the SAP. Modified work in the guardhouse, although available indefinitely, is still transitional by nature. Accepting the guardhouse assignment would not alter Respondent's job title or employment status as a driver. Likewise, the fact Palmetto did not specifically offer the guardhouse positon to Respondent prior to his termination is equally immaterial. Palmetto should not be forced to eschew terminating Respondent for valid reasons prior to offering light duty employment out of fear of incurring TTD liability. *See* Pollack *supra* at p. 434 (allowing entitlement to TTD following termination for cause would "insulate injured employees who engage in misconduct while employed in rehabilitative settings and essentially tie the hands of an employer who has sought to accommodate the employee to the best of its ability. Such an unwarranted construction of the statutory and regulatory language would have the additional and undesirable effect of discouraging employers from endeavoring to accommodate injured workers with light duty work").

Finally, contrary to Respondent's arguments, this case obviously does not implicate the law of refusal, or constructive refusal, of "suitable employment" per S.C. Code § 42-9-190 because Palmetto never got the opportunity to make the guardhouse offer prior to their valid termination of Respondent's employment for cause. Rather, Respondent's alleged inability to earn wages is simply an issue of causation. The Panel clearly erred in awarding TTD benefits accruing after Respondent's termination

because, but for such termination, the evidence in the Record establishes he could have been earning wages in the guardhouse.

## II. The logical basis for the Panel's retroactive TTD award is unclear, but to the extent it is based on an underlying premise that Palmetto's termination of Respondent's employment was improper, such premise is clearly erroneous, thus rendering the award an error of law.

Under the Administrative Procedures Act ("APA") S.C. Code § 1-23-310 *et seq* he Court may reverse the Panel's findings if they are "clearly erroneous" or based upon an "error of law." S.C. Code 1-23-380 (g)(4) and (5); *See also* Lark v. Bi-Lo, Inc., 276 S.C.130, 276 S.E.2d 304 (1981). The Panel's Finding of Fact # 21 outlining the purported basis for the TTD award is confusing or immaterial at best, and wholly illogical at worst. Either way, this finding as the basis for the TTD award is clearly erroneous and affected by an error of law.

As noted earlier, the test for entitlement to TTD benefits is the inability to earn wages due to injury. The Panel's Order never finds that Claimant was "disabled" within the meaning of the Act for the period it awarded TTD. Rather, the award appears to be based entirely on umbrage with Palmetto's termination *procedure*. Specifically, the Panel's Order states that Palmetto cannot prove Claimant ever received the SAP package outlining its requirements, nor did Palmetto present evidence regarding a timeframe for its completion to avoid termination. The Panel merely states, "Claimant is entitled to an award of TTD on this basis from the date of termination." (See Panel's Order). Again, "this basis" apparently refers to alleged deficiencies with the *process* of Palmetto's termination of Respondent's employment, not the underlying substance or merits of the termination. This is error for several reasons.

First, Appellants point out that Scott Justice confirmed the SAP package was mailed to Respondent via certified mail return receipt requested. (Hr. Tr. p. 54). He further stated that he observed the return receipt in Respondent's personnel/employment file. (Hr. Tr. p. 54 ll. 22-25). Mr. Justice also stated that Palmetto's safety director also made several calls to Respondent regarding the SAP that were not returned. (Hr. Tr. p. 55 ll. 15-23). The only substantial evidence in the Record establishes that Respondent received proper notice for the basis of his termination. Regardless, the Panel's issues with the *manner of* Respondent's termination cannot be the basis of an award of TTD. The Court in Pollack *supra* reiterates the elementary notion that inability to earn wages **due to injury** is the only applicable test for entitlement to TTD benefits. Again, the Panel never finds that Respondent was "disabled" for the period it awards him TTD, which is clear error.

Appellants acknowledge that the Court in Pollack has tasked the Commission with scrutinizing the *basis for* an employer's termination to determine if it is merely a ruse or pretext to avoid TTD liability [CITE]. If the Commission determines that an employer's purported basis for termination totally lacks merit, then a finding that a claimant's incapacity to earn wages is due to injury, as opposed to the alleged termination for cause, may justify an award of TTD. *See* Pollack *supra*; *See also* Seagraves v. Austin Co. of Greensboro, 472 S.E.2d 397, 123 N.C. App. 228 (N.C. App. 1996) (an employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated).

In this case, a positive drug test is clearly a serious infraction worthy of discipline for an over the road truck driver tasked with transporting goods on interstate highways. Likewise, the wisdom of federal DOT regulations mandating completion of an SAP for drivers to regain their CDL eligibility is self-evident. In this case, the undisputed evidence establishes Respondent tested positive for marijuana and was terminated after failing to complete, or even acknowledge, Palmetto's efforts to notify him of a required substance abuse program. Although Respondent testified that no one with Palmetto personally told him he had failed a drug screen or that he was being terminated for failing to complete an SAP, he admitted that his attorney at the time notified him of same. (Hr. Tr. p. 45 ll. 23-25- p. 46 ll. 1-2). Moreover, he acknowledged awareness of federal regulations requiring completion of an SAP to regain eligibility to drive again. (Hr. Tr. p 45 ll. 1-11). Scott Justice confirmed that it's the driver's responsibility to follow through with the program's requirements. (Hr. Tr. p. 54). The Record is devoid of any evidence that Claimant took any initiative to complete the SAP. Finally, Scott Justice confirmed that Claimant's termination was not treated any differently than non-injured drivers Palmetto had terminated in the past for failure to complete an SAP following a positive drug screen. (Hr. Tr. p. 64 ll. 15-25- p. 65 ll. 1-14). *See* Seagraves *supra.*

For these reasons, the merits of Palmetto's termination of Respondent's employment are simply beyond reproach. The termination was clearly not a ruse or pretext concocted by Palmetto to avoid liability for TTD. As such, there can be no presumption that Respondent's inability to earn wages was due to injury or anything other than a valid termination for cause. The Panel's inferences and musings to the contrary for justifying his TTD award are simply unfounded in the Record and are clearly erroneous under applicable law. As such, the Panel's retroactive award of TTD benefits accruing on or about December 6, 2015 must be REVERSED.

## III. The Panel's TTD award is otherwise unsupported by competent evidence in the Record.

It is elementary that findings of fact by the Panel must be supported by substantial evidence in the Record. Lark v. Bi-Lo *supra.* Moreover, substantial evidence is not a mere "scintilla of evidence." Law v. Richland County School District, 270 S.C. 492, 243 S.E.2d 192 (1978) ("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 that the administrative agency reached or must have reached to justify its action). This Court has shown an increasing willingness in its recent rulings to scrutinize evidence purportedly relied upon by the Commission to support a denial of benefits. Appellants urge the Court to apply that SAME healthy skepticism here and hold, as a matter of law, that no credence should be given to an opinion rendered nearly a year after the fact that Respondent has been unable to work in any capacity since his accident. This worthless opinion from Dr. Bucci is at best merely a scintilla of evidence suggesting Respondent was "disabled" for the period in question (APA p.) [1] As such, it is not substantial evidence supporting the TTD award and must be rejected.

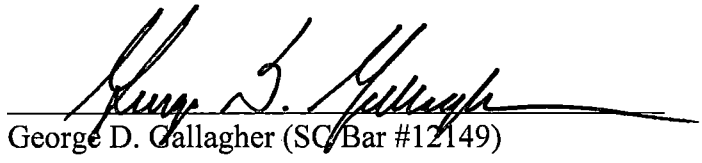
It is undisputed that **Dr. Bucci never treated or evaluated Respondent's condition during the alleged period of disability in question**. A retroactive opinion on Claimant's work status simply cannot supersede the modified duty restrictions imposed by the occupational health provider who contemporaneously evaluated/treated Respondent (See APA p. 51). This is especially the case when the neurosurgeons who treated/evaluated Respondent during the alleged period of disability- Dr. Hodge and Dr. Chittum- essentially endorsed those restrictions *de facto.* As a matter of law, the Panel should have deferred to the work status opinions of the contemporaneous medical providers who actually evaluated and treated Respondent during the period in question, not a provider who only saw him one time nearly a year after the fact. As explained in the previous sections, Palmetto could have accommodated the modified duty work restrictions but for Claimant's termination for cause. For these reasons, the Panel's retroactive TTD award is not supported by substantial evidence and must be REVERSED.

[1] Dr. Bucci's opinion was solicited by Respondent's attorney in preparation for litigation via the typical "check the box" format. Generally, opinions derived from such method are inherently untrustworthy because they lack context and nuance. In addition, the preferred favorable response is typically discernible on its face by the way the question is phrased, thus inducing the provider to simply check that desired answer as the path of least resistance.

## CONCLUSION

For all the reasons, the Full Commission Appellate Panel's retroactive award of TTD benefits accruing on December 6, 2015 must be **REVERSED**.

Respectfully submitted,

By: 

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September 18, 2017

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PROOF OF SERVICE

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I certify that I have served the Appellant Initial Brief of Appellants/Respondent on Jeffry D. Ezell by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2017, addressed to Mr. Jeffery D. Ezell, Ezell Law Firm, LLC, 15 Irvine St., Greenville, SC 29601.

September 18, 2017

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September 18, 2017



The Honorable Jenny Abbott Kitchings
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***RE:*** ***Herbert Randall v. Palmetto State Transportation***
*WCC No.: 1516896*
*Claim No.: WC41487*
*DOA: 10/31/15*
*Our File No.: 1800-0107*

Dear Mrs. Kitchings:

Please find enclosed for filing the original and one copy of the Appellants Initial Brief of Appellants/Respondent with Proof of Service. I would appreciate it if you would return a clocked copy to me in the self-addressed stamped envelope that I have provided.

By copy of this letter, I am serving the Notice upon all counsel of record.

Sincerely,

George D. Gallagher

GDG/anb
Enclosures
cc: Jeffrey Ezell, Esquire (w/encl)
Michael DeCarolis (via e-mail w/encl)

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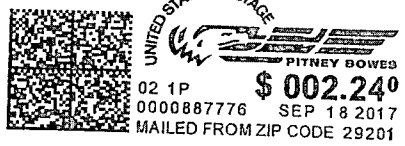


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