

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

WCC File No.: 1516896

Appellate Case No. 2017-001483

RECEIVED
SEP 26 2017
SC Court of Appeals

Herbert Randall,
Employee

Respondent/Appellant,

v.

Palmetto State Transportation,
Employer And
Cherokee Insurance Company,
Carrier,

Appellant/Respondents.

**RESPONDENTS' INITIAL BRIEF OF THE
APPELLANT/RESPONDENTS**

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STATEMENT OF ISSUES ON APPEAL

1. Did the Commission err in finding that Defendants' termination of Appellant's TTD benefits complied with the applicable statute allowing termination of benefits based on good faith denial of the claim for benefits?

2. If the Commission did err, should these alleged technical deficiencies with an administrative form filing requirement justify a windfall of benefits to which Appellant was never entitled on the merits?

STATEMENT OF THE CASE

Herbert Randall (“Appellant”) sustained admittedly compensable injuries to his lower back and neck following a motor vehicle accident arising out of and in the course of his employment as an over the road truck driver for Palmetto State Transport (“Palmetto”) on October 31, 2015. Specifically, Appellant’s fully loaded 18-wheeler truck was stopped on a highway in Texas due to another accident ahead when the vehicle stopped behind him was rear ended by a pickup truck, thereby causing that vehicle to strike his trailer. Appellant received emergency medical evaluation and treatment in Texas. Following discharge from the Emergency Room in Texas, Appellant 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, Respondent initiated temporary total disability (“TTD”) benefits.

On November 17, 2015, the results of Appellant’s drug screen were certified as positive for marijuana (APA p. 76). Palmetto terminated Appellant’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”). Justice testified that Palmetto’s SAP requirements were sent to Appellant via certified mail. He confirmed Appellant was terminated after he failed to complete the SAP or even respond to Cherokee’s efforts to confirm his acknowledgement of the SAP requirement. (Hr. Tr. p. 57 ll. 6-22). Respondent then terminated Appellant’s TTD benefits as of December 5, 2015 (See WCC File Form 15 received on 12/17/15). The purported ground for termination of TTD on the Form 15 was “failed post-accident drug test.” Justice clarified, however, that TTD benefits were stopped due to termination of Appellant’s employment for cause. (Hr. Tr. p. 65 ll. 21-22). Per Mr. Justice, but for Appellant’s termination, Palmetto would have been provided Appellant modified work in the trucking terminal’s guardhouse checking trucks in and out. (Hr. Tr. p. 58 ll. 22-25).

Appellant’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 file). The Order

provided for Respondents to continue authorization and financial 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 Appellant was not a good surgical candidate. (APA p. 59). Appellant was thereafter seen by another neurosurgeon in April 2016, Dr. Chittum, who recommended ACDF from C3-C7. (APA p. 72). Appellant then retained his current counsel who filed an initial Form 50 Hearing Request in September 2016.

Appellant saw yet another neurosurgeon authorized by Respondents, 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 appellant’s current counsel, Dr. Bucci purportedly states that Appellant 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 Appellant’s work/disability status. The only work restrictions in place at the time of Appellant’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).

A Hearing pursuant to Appellant’s most recent Form 50 was convened before Commissioner Campbell on December 7, 2016. At the Hearing the parties agreed Appellant has not reached MMI. As such, Defendants stipulated to provide pain management evaluation and treatment per Dr. Bucci’s recommendation with a provider to be designated by them. Regarding TTD benefits, Appellant first argues that his TTD benefits were improperly terminated by Respondents in violation of S.C. Code § 42-9-260 and WCC Regulation 67-504. Specifically, Appellant submits TTD benefits, plus 25% penalty, should be reinstated as of December 15, 2015 to the present, because: a) Respondents did not “immediately” file the Form 15 confirming the termination of benefits with the Commission; and b) Respondents did not serve the Form 15 on his former counsel. Defendants counter that any alleged technical deficiencies with an administrative form filing requirement do not justify a windfall of benefits to which Appellant was never entitled based on the merits.

In the alternative, Appellant argues that he is still otherwise entitled to TTD benefits based on Dr. Bucci's medical questionnaire opining Appellant has been unable to work since his accident. In response, Defendants submit that an award of TTD cannot be based on a retroactive medical opinion, especially when Dr. Bucci never evaluated or treated Appellant during the period in question. Moreover, Defendants argue, but for Appellant's termination for cause (i.e. failure to 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 disputed TTD entitlement period in question.

By Order dated January 26, 2017, Commissioner Campbell found, *inter alia*, that Defendants did not improperly terminate Appellant's TTD benefits in violation of the statute and regulations; therefore, reinstatement of TTD with an award of penalties was not justified. The Commissioner nevertheless found Appellant was entitled to TTD benefits from the date of their previous termination on 12/6/2015 to the present and continuing. The Commissioner's retroactive TTD award appears to be based on Palmetto's alleged failure to provide any evidence that Appellant 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. The Commissioner also ordered further psychological evaluation and treatment.

Both parties cross-appealed the Commissioner's Order to the Full Commission Appellate Panel ("Full Commission"). Appellant appealed the Commissioner's denial to reinstate benefits with penalties based on Defendants alleged failure to comply with statutes and regulations governing proper termination of TTD. Defendants appealed the Commissioner's decision to nevertheless award Appellant retroactive TTD. Defendants did not appeal the running TTD award based on Dr. Bucci's out of work opinion.

By Order dated May 31, 2017, the Full Commission affirmed and amended the Hearing Commissioner's Order with amendments. Specifically, the Commission found that Defendants terminated TTD benefits in "good faith" and complied with applicable statutes and regulations governing such termination. The Full Commission, like the Commissioner, found Appellant was entitled to TTD benefits from the date of their previous termination on 12/6/2015 to the present and continuing. Again, the decision to award retroactive TTD appears to be based on Palmetto's

alleged failure to provide any evidence that Appellant ever *received* information regarding the SAP requirement, as well as their purported failure to provide any evidence of their company policy regarding the timeframe for compliance with SAP.

STANDARD OF REVIEW

Judicial review of a Commission decision is governed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. 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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

ARGUMENT

- 1. The Commission properly found that Respondents termination of TTD benefits complied with the applicable statute allowing termination of benefits based on good faith denial of the claim for benefits.**

The Commission and found that Defendants properly terminated Appellant's TTD benefits in accordance with S.C. Code § 42-9-260 and declined to order reinstatement of TTD and imposition of a 25% penalty on the accrued balance. (See Commission Order). Respondents submit that the Commission's Order is correct on these points, but not for the same reasons he found. *See* SCACR 220 (c) ("The appellate court may affirm any ruling, order, decision or judgment upon any grounds appearing in the Record on Appeal."). Specifically, § 42-9-260 (B)(3) allows termination of TTD benefits within 150 days of notice of the accident when a "good faith investigation by the Employer

reveals grounds for denial of the claim.” (emphasis added). This is the statutory ground cited by Defendants on the WCC Form 15 for terminating benefits and filed with the Commission in this case.

Contrary to Appellant’s arguments, nothing in § 42-9-260 limits termination of benefits to cases where compensability of the *entire* claim is denied. The term “claim” is not defined by the Act, but Defendants submit it is a generic term applicable to any assertion of entitlement to specific benefits and/or other relief provided for by the Act within the broader context the overall case. For purposes of this statute governing termination of TTD benefits, “denial of the claim” encompasses denial of compensability of the *entire claim*, as well as just a “claim” for *entitlement to TTD benefits*. In other words, the statute does not exclusively require denial of the entire claim to terminate TTD, if grounds for termination of the TTD component only are revealed after benefits have been initiated.

This interpretation is consistent with the overriding purpose for enactment of S.C. Code § 42-9-260 (B)(3). That purpose ostensibly is to encourage carriers to initiate benefits without prejudice as quickly as possible by allowing for a subsequent denial of entitlement to benefits if circumstances reveal otherwise. For example, this application would allow denial of a “claim” for TTD benefit only, while still allowing for provision of medical treatment. Any requirement that compensability of the entire claim be denied before TTD can be terminated would only have the deleterious effect of thwarting the statute’s very purpose and causing harm to injured workers in need of important medical treatment. Certainly, the Legislature contemplated the imminently foreseeable case where compensability and entitlement to medical is acknowledged but liability for TTD is disputed. If the Legislature intended for claim compensability and entitlement to TTD benefits to be inextricably linked to the extent that benefits can only be terminated if there are grounds for denying compensability of the entire claim, then they would have presumably codified that intent in the compensability statute. It only makes sense that a statute governing termination of TTD payments- § 42-9-260- would allow termination when entitlement to those benefits is denied and disputed.

Moreover, Respondents’ interpretation of S.C. Code § 42-9-260 (B)(3) would allow for termination of benefits initiated in error and/or termination of benefits to which it is subsequently discovered an injured worker is not entitled to receive in the first place. For example, it is

elementary that entitlement to TTD benefits is premised on the inability to earn wages due to a compensable injury, so there is no sound policy reason for disallowing termination of TTD after it is subsequently discovered that an appellant's inability to earn wages was due to some cause other than his compensable injury. *See Pollack v. Southern Wine & Spirits*, 405 S.C. 9, 747 S.E. 2d 430 (2013) (affirming the Commission's denial of TTD benefits where the evidence established that the appellant's incapacity to earn wages was due to his termination for cause, not his work-related injury).

In situations where inability to earn wages may not be due to injury, it would be absurd to allow an injured worker to continue reaping the windfall of benefits to which he was never entitled just because the carrier does not have grounds to deny compensability of his entire claim. Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000); *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). Again, this scenario is commonplace in the workers' compensation arena, so it only makes sense that there be a mechanism in place to account for it. Defendants submit that mechanism is § 42-9-260 (B)(3).

Further, an analysis of other provisions of S.C. Code § 42-9-260 lends additional support to Respondents' arguments. S.C. Code § 42-9-260(E) provides an employer with the right to request a hearing "at any time to address termination or reduction of temporary disability payments." To implement its statutory mandate, the Commission promulgated the Form 21 to address termination of benefits "for any cause." (See generally the Form 21 (II). A possible basis for termination of benefits "for any cause" on the Form 21 would certainly include termination based on a good faith denial of a claim for TTD benefits only, more specifically, denial of TTD because the incapacity to work is not due to injury. If termination for any just reason can be addressed "at any time" per subsection (E), then the Commission clearly has broad discretion on termination of TTD issues under subsection (B) as well.

Courts generally afford agencies substantial discretion in the interpretation of statutes they are charged with implementing. *See Faile v. S.C. Emp't Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent

reasons." This discretion would logically extend to determination of what constitutes good faith denial of a "claim." Therefore, § 42-9-260(B)(3) allows termination of TTD benefits based on a good faith denial of entitlement to such benefits, including grounds that appellant's inability to earn wages is due to reasons other than compensable injury.

In this case, Respondents initiated TTD benefits upon Appellant's return to South Carolina following his accident in Texas. After discovery of his termination by Palmetto, the carrier terminated TTD benefits via filing of the WCC Form 15 (II). Again, the Form 15 asserts a good faith denial of the claim for TTD as the reason for termination, specifying "failed post-accident drug test" as the underlying basis. Mr. Justice clarified at the Hearing that TTD benefits were stopped due to termination of Appellant's employment for cause. (Hr. Tr. p. 65 ll. 21-22). The Record establishes that Appellant's positive drug screen initiated the series of events that led to his termination for cause. As such, Appellant's termination of employment for cause is a "good faith" basis for denial of his claim for ongoing TTD when the reason for Appellant's "inability to earn wages" is due to such termination and not his work injury. *See Pollack supra*. Respondents merely denied entitlement to ongoing TTD benefits, while still acknowledging compensability of the underlying claim and providing medical benefits.

S.C. Code § 42-9-260 (G) provides for imposition of a 25% penalty on the amount of benefits withheld for failure to comply with statutory provisions governing termination of TTD payments. Because § 42-9-260 (B)(3) allows termination of TTD payments based on a good faith denial of entitlement to such benefits, subsection (G)'s penalty provision is simply not applicable to the instant case. For these reasons, the Commission correctly found that Respondents exercised proper grounds for terminating Appellant's TTD benefits pursuant to § 42-9-260 (B)(3). As such, the Commission's denial his request for reinstatement of those benefits, plus the 25% penalty per subsection (G), should be AFFIRMED.

2. Any alleged technical deficiencies with an administrative form filing requirement do not justify a windfall of benefits to which Appellant was never entitled on the merits.

Appellant contends the Commission erred by not reinstating TTD benefits with the 25% penalty per S.C. Code § 42-9-260 (G) because: a) Respondents did not "immediately" file the Form 15 confirming the termination of benefits with the Commission; and b) Respondents did not

serve the Form 15 on his former counsel in accordance with WCC Regulation 67-504. Respondents submit the Commission correctly found that form should not triumph over substance in rejecting Appellant's hyper technical arguments. In Mictronics v. S.C. Dept. of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. Apps. 2001) the Court of Appeals excused a party from an adverse judgment who was technically in default. This holding was based, at least in part, on the fact Mictronics had a meritorious defense to the underlying substantive matter. *Id* at 345 S.C. at 511. In so holding, the Court stated "this is consistent with South Carolina's policy favoring the disposition of issues on their *merits rather than on technicalities.*" *Id*.

Mictronics is analogous to the instant case in several important respects. Primarily, both cases involve parties seeking to take advantage of alleged technical procedural deficiencies rather than relying on the substantive merits of the underlying matter. In the instant case, Appellant argues that Respondent's filing of the WCC Form 15 memorializing termination of TTD eleven (11) calendar days after their termination was not filed "immediately" within the meaning of WCC Regulation 67-504. As an initial matter, Respondents point out the timetable for filing the Form 15 following termination of benefits is not specified in the Regulations. Therefore, without any further regulatory guidance the term "immediately" can only be interpreted to mean the filing must be made within a reasonable time frame following termination. Defendants submit there is nothing inherently unreasonable about an administrative form filing confirming termination of TTD benefits within 11 days thereafter. Regardless, the "immediate" filing of the Form 15 with the Commission is merely an administrative requirement that has no bearing whatsoever on the merits. Like Mictronics, the focus in this case should be fixed on the merits and substance, not the process.

As for Appellant's contentions that his former counsel was never served with the Form 15 as required by WCC Regulation 67-504 (a point Defendants concede), he at least raises a more substantial issue than the mere timing of the administrative filing. Nevertheless, his arguments still fall well short of justifying reinstatement of TTD and assessment of penalties. Specifically, Appellant did not suffer any prejudice from Respondents' failure to serve the Form 15 on his former attorney. *See Mictronics supra* (holding "the DOR will suffer no prejudice should this case proceed for a determination on the merits") (emphasis added). Appellant confirmed in his testimony at the Hearing that his former attorney was aware of the termination of his TTD, and the purported grounds for same, within a week thereafter. (Hr. Tr. p. 40 ll. 22-25).

Moreover, contrary to Appellant's assertions, filing a Form 15 (III) Request for Hearing to challenge the *merits* of the termination of his TTD benefits was not his only remedy. In fact, his former attorney actually filed a Form 50 Request for Hearing on February 8, 2016 (less than two months after the termination of TTD on or about December 15, 2015). (See WCC Form 50). His Form 50 requested reinstatement of TTD from the date of accident and continuing. A Hearing was set on March 18, but the parties entered a Consent Agreement to dispose of the Hearing and *holding the TTD issue in abeyance*. (See Consent Order). Thereafter, he could have refiled a Form 50 at any time seeking TTD for any periods alleged. He did not pursue this further until his current counsel filed the Form 50 to initiate the current action before the Commission. (Form 50). Under these circumstances, Appellant's allegations of undue hardship due to Respondents failure to serve him with the Form 15 are simply unfounded, especially when his own counsel agreed to hold the issue of his entitlement to those benefits in abeyance via the Consent Order.

Likewise, Appellant's reliance on Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. Apps. 2006) is untenable. Appellant misapprehends the holding of that case when he states "the Court of Appeals held that the Defendant/Employer was liable for improper termination of TTD benefits because they did not follow the proper procedures set forth in Reg. 67-504." (Appellant's Brief p. 4). In fact, the Court never held that; it merely stated in *obiter dictum* (Latin for "something said in passing" and referring to commentary made by a court that is not necessary to the decision in the case and therefore not precedential. BLACKS LAW DICTIONARY Seventh Edition 2000 p. 879). The Martin court had already determined the carrier in that case lacked proper grounds *on the merits* to terminate Appellant's benefits before engaging in the *dicta* cited by Appellant as authority. Martin at S.E.2d p. 553. As such, Martin is not applicable here.

Since it is abundantly clear that focus should remain on the merits for the termination of the TTD benefits, Appellant's conclusion that "any benefits accrued during a period of unlawful termination would constitute benefits to which Appellant is lawfully entitled" is only partially true. Termination of benefits via an alleged improper procedure does not create entitlement to those TTD benefits withheld; only "inability to earn wages due to injury" (as opposed to other causes) entitles one to TTD. *See Pollack supra*. Respondents agree that arbitrary termination of TTD payments per S.C. Code § 42-9-260 to which Appellant is otherwise entitled on the merits without cause is "unlawful" to the extent that any amounts withheld are subject to the 25% penalty under

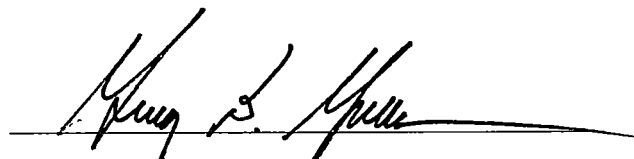
subsection (G). However, that is not the situation presented in this case. Here, the Commission correctly held that Respondents terminated TTD benefits based on a “good faith” denial of his entitlement to those benefits pending a determination of same on the merits.

As such, the Commission properly rejected the triumph of form over substance. The Order denying reinstatement of TTD with imposition of penalties due to an alleged “unlawful” termination of benefits, therefore, must be AFFIRMED.

CONCLUSION

The Commission correctly denied Appellant’s prayer for reinstatement of his TTD payments and imposition of penalties because Defendants complied with S.C. Code § 42-9-260’s substantive requirements for termination of benefits. The Commission properly rejected Appellant’s hyper technical arguments for form to triumph over substance. As such, the Order on these issues should be **AFFIRMED**.

Respectfully submitted,



George D. Gallagher, Esq.

September 25, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File No. 1516896
Appellate Case No.: 2017-001483

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SC Court of Appeals

Herbert Randall
Employee, Claimant

Respondent/Appellant

v.

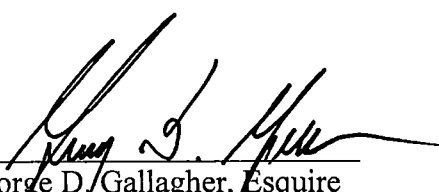
Palmetto State Transportation
And
Cherokee Insurance Company,
Carrier

Appellant/Respondents

PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief of Appellant/Respondents on Jeffrey D. Ezell by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2017, addressed to Mr. Jeffery D. Ezell, Ezell Law Firm, LLC, 15 Irvine St., Greenville, SC 29601.

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September 25, 2017

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SC Court of Appeals

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 Respondents' Initial Brief of Appellant/Respondents 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.

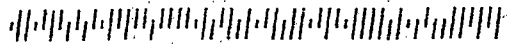
Sincerely,



George D. Gallagher

GDG/anb
Enclosures

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



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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