STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Antonio Aiken, Appellant, vs. South Carolina Department of Employment and Workforce, Respondent.	Docket No. 17-ALJ-22-0291-AP **ORDER**

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SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or court) pursuant to a Notice of Appeal filed by Antonio Aiken (Appellant). The Appellant requests review of the decision of the South Carolina Department of Employment and Workforce's (Department or Respondent) Appellate Panel (Panel), which concluded that the Appellant was indefinitely disqualified from receiving unemployment benefits, effective April 30, 2017, due to his being "unavailable for work" because of partial medical restrictions that limited the jobs the Appellant could accept. After careful consideration of the briefs of the parties and review of the record, the court finds that the record contains substantial evidence supporting the Panel's finding that the Appellant was unavailable for work and, therefore, ineligible for benefits. As such, the decision of the Panel is affirmed.

BACKGROUND

The Appellant worked for Whitefords, Inc., at a Kentucky Fried Chicken franchise, until his discharge on or about April 29, 2017. The Appellant testified at the hearing that he served as a general manager in his most recent capacity. On March 22, 2017, prior to his termination, the Appellant underwent rotator cuff surgery on his right shoulder. As the Appellant is right-handed, this impacted his dominant arm. Following his surgery, the Appellant began a twelve (12) to eighteen (18) week physical therapy program to rehabilitate his shoulder.

On April 6, 2017, the Appellant's treating physician released him for

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"administrative/sedentary" work with a sling on his right arm beginning on April 10, 2017. The Appellant was to wear the sling "at all times for a total of [four (4)] weeks postoperative," after which a medical restriction limited the amount of weight the Appellant could lift with his right arm to sixteen (16) ounces. The Appellant returned to work on April 10, 2017 with his arm in a sling because of his employer's staffing needs. The Appellant continued working in this capacity until his discharge. However, the Appellant testified that his job occasionally required him to lift more than 16 ounces. If the Appellant needed to lift more than 16-ounces, he would use his left hand. If he needed both hands to lift an item, the Appellant testified that he would ask another employee to lift the item for him. On or about April 29, 2017, the Appellant was discharged for unsatisfactory performance.

During his sixth week of his rehabilitation, the Appellant testified that he discontinued use of the sling on his right arm. On May 19, 2017, his treating physician cleared him to "return to normal work duties" with an updated medical restriction that limited him from lifting or exerting more than five (5) pounds of force with his right shoulder until a follow-up appointment on June 16, 2017. The Appellant testified that after June 16, 2017, he expected his physician to fully release him without restrictions.

Though the Appellant's medical restriction limited the types of jobs he could perform, he testified that "anything [he is] capable of doing, [he] can and will do if [he] is called." The Appellant's work experience largely consists of approximately ten (10) years of management positions in the food service industry. [1] He also testified that he has experience as a cashier, in warehouse positions, as a stocker, and as a cook. The Appellant testified, however, that all of those positions required him to lift more than his medical restrictions would permit. The Appellant further testified that during his job search leading up to the hearing, he saw numerous positions for which he has some prior training or experience, but he could not take the jobs because they required him to lift more than he was able. In fact, the Appellant conceded that during his job search, he saw only one position – as a parking lot attendant – that would not have required him to lift more than his physician permitted. Yet, the Appellant testified that he did not accept that position because he did not have prior experience or training in the field.

In his initial claim for unemployment benefits, the Appellant noted that he had a health

[1] Specifically, the Appellant's initial claims application states that he has more than one year of experience as a food service manager, and more than one year of experience as an "assembler[] and fabricator, all other."

condition that limited his ability to work full-time but he also noted that he had been working with that condition. The Appellant was listed a broad range of jobs he was willing to accept in his application. Specifically, the Appellant stated that he was available for work Monday through Friday from 8:00AM to 8:00 PM, that he was willing to travel the same or greater distance from his last job, that he would accept the same pay as his last job, that he was willing to relocate, that he was willing to look for other types of work, and that he could start immediately. By letter dated May 09, 2017, the claims adjudicator determined that the Appellant was "unable to work" and, thus, ineligible for benefits. Specifically, the claims adjudicator stated that "due to a health condition, [the Appellant is] unable to work and [is] determined ineligible under [S.C. Code Ann. 41-53-110]." On May 14, 2017, the Appellant appealed the decision of the claims adjudicator to the Appeal Tribunal (Tribunal). On May 30, 2017, the Department held a hearing on the issue of the Appellant's ability to work.

In affirming the claims adjudicator's determination that the Appellant was ineligible to receive benefits, the Tribunal stated that, "[a]lthough [the Appellant's] previous employer allowed him to return to work wearing a sling and working under said restrictions with the assistance of other employees, future potential employers are not required and/or likely to allow the same." The Tribunal reasoned that the Appellant's previous jobs required him to lift more than 5 pounds and the Appellant had no prior training or experience in a field or position that would not require him to lift more than 5 pounds. As such, the Tribunal concluded that the Appellant is "not able to work full-time in his customary or an alternative occupation due to [his] medical restrictions . . . ." On June 5, 2017, the Appellant appealed the Tribunal's findings to the Panel.

By letter dated July 11, 2017, the Panel upheld the Tribunal's finding that the Appellant was properly determined to be indefinitely ineligible to receive unemployment benefits due to the Appellant's unavailability. The Panel affirmed the findings of the Tribunal, reasoning that the Appellant had not been cleared to work without his medical restrictions and that he only had prior training or experience in fields that required him to exert more than 5 pounds of force with his right arm. The Panel noted that, even though the Appellant submitted documentation indicating he was pending a subsequent medical evaluation for full release in June 2017, he had not provided "sufficient credible evidence establishing he has been medically cleared to work in a full-duty capacity since April 30, 2017." As such, the Panel concluded that a claimant "must have unrestricted access to the labor market" and that the Appellant's medical restrictions amounted to

an undue limitation on his availability for work.

ISSUE ON APPEAL

Did the Panel commit an error of law by requiring the Appellant to be "medically cleared to work in a full duty capacity"?

Did the Panel commit an error of law by applying S.C. Code Ann. § 41-35-110 to the Appellant's claim, in light of the forgoing circumstances?

Is the decision of the Appellate Panel finding the Appellant unavailable for work under S.C. Code Ann. § 41-35-110(3) supported by substantial evidence in the record?

STANDARD OF REVIEW

The ALC has jurisdiction to hear this matter pursuant to Section 41-35-750 of the South Carolina Code (Supp. 2015). In this case, the court sits in its appellate capacity, under the Administrative Procedures Act (APA). *See* S.C. Code Ann. §§ 1-23-600(D)–(E) & 41-35-750 (Supp. 2015); *see also Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of the Department, was an agency within the meaning of the APA). Under the appellate standard of the APA, the court's review in appellate cases is limited to the record, absent alleged irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2015).

Additionally, the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

Findings of fact made by the Department on a claim for unemployment benefits are conclusive, and this court will not review such findings except to determine whether there is substantial evidence to support such findings. *See Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C.

369, 375, 108 S.E.2d 554, 557 (1959). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). 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 . . . .'" *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

"If [a] statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 717 (2014) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). "[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons." *Id* at 34, 766 S.E.2d at 718. "[Courts] give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.*

DISCUSSION

The conditions of eligibility for unemployment benefits are set forth in S.C. Code Ann. § 41-35-110(3), which states that:

> An unemployed insured worker is eligible to receive benefits with respect to a week only if the department finds he: (3) is able to work and is available for work at his usual trade, occupation, or business or in another trade, occupation, or business for which he is qualified based on his prior training or experience . . . .

"The purpose of the availability requirement is to provide a test for determining whether a claimant is actually and currently attached to the labor market." *Wellington*, 281 S.C. at 117, 314 S.E.2d at 38 (citing *Hyman*, 234 S.C. 369, 108 S.E.2d 554). Availability for work, in the context of eligibility for unemployment benefits, "implies an unrestricted exposure . . . to the normal labor market to which [the claimant] has been customarily attached." *Hyman*, 234 S.C. at 379, 108

S.E.2d at 559; *see also Judson Mills v. S.C. Unemp't Comp. Comm'n*, 204 S.C. 37, 28 S.E.2d 535, 538 (1944) ("I am constrained . . . to conclude that in order to be entitled to benefits under the act the unemployed individual must be able to and available for the work which he or she has been doing."). A claimant can show that he is genuinely attached to his applicable labor markets – and, thus, available for work – upon a showing that he is "willing, able, and ready to accept suitable work or employment, which he does not have good cause to refuse . . . ." *See Sherbert v. Verner*, 240 S.C. 286, 296, 125 S.E.2d 737, 742 (1962) (citing *Unemp't Comp. Comm'n of Va. v. Dan River Mills, Inc.*, 197 Va. 816, 91 S.E.2d 642 (1956)), *rev'd on other grounds*, 374 U.S. 398 (1963). Moreover, a claimant's availability for work must be in accordance with the customs and/or requirements of his usual trade or occupation. *See id* at 298, 125 S.E.2d at 743. Conversely, "courts have universally held that a claimant who undertakes to limit or restrict his willingness to work to certain hours, types of work, or conditions, not usual and customary in the trade, is not 'available for work.'" *Id* at 296, 125 S.E.2d at 741 (quoting *Unemp't Comp. Comm'n of Va. v. Tomko*, 192 Va. 463, 65 S.E.2d 524 (1968)).

"The burden is upon the claimant to show that he has met the benefit eligibility conditions and that he is available for work." *Hyman*, 234 S.C. at 379, 108 S.E.2d at 559. Whether a claimant has unrestricted exposure to the labor market is a question of fact to be determined by the Department in accordance with the facts and circumstances of each case. *See Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997) (citing *Wellington v. S.C. Emp't Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 39 (Ct. App. 1984)).

The motive for the creation of unemployment benefits, generally, was to prevent the spread and lighten the burden of involuntary unemployment in the wake of the Great Depression. *See Judson Mills v. S.C. Unemp't Comp. Comm'n*, 204 S.C. 37, 28 S.E.2d 535, 536-37 (1944). In stressing this intention, the court in *Judson Mills* stated that "[t]he primary purpose of this provision would be greatly impaired, if not completely defeated, if benefits were paid to persons who became unemployed, not because the employer could no longer provide them with work but solely because of changes in their personal circumstances." *Id* at 537.

Here, the Panel determined that the Appellant was unavailable for work because his medical restrictions limited the jobs he could work. (R. at p.1). Specifically, the Panel found that the Appellant had not shown that he had been "cleared to return to full duty or that he has training or experience in work that does not require him to lift, twist, push, or pull [five (5)] or more

pounds." (R. at p.2). As such, the Panel concluded that the Appellant's medical restrictions amounted to an undue limitation on his exposure to the labor market and, thus, his availability. (R. at p.2).

At the hearing, the Appellant argued that he has already worked in his usual trade or occupation with his medical restrictions, and that he is ready and willing to work again with his medical restrictions when called upon. (R. at p.36, lines 25-26; p.38, lines 14-16). Moreover, on appeal to this court, the Appellant argues through counsel that the Panel's findings are not supported by substantial evidence, that the Department erred as a matter of law by requiring a medical release to full duty to find him available for work, and, more broadly, that application of Section 41-35-110 is inappropriate in cases involving partial medical impairments and its use in the instant case constitutes an error of law.

The court must initially determine whether the Panel erred as a matter of law by finding the Appellant ineligible based on unavailability. The Appellant contends that the Panel erred by creating a bright line rule that claimants with medical restrictions are ineligible for unemployment benefits until cleared for work in a "full duty capacity." This court is not persuaded by this argument. Firstly, where the statute is ambiguous as to a specific issue, as is the case here, the Department and, consequently, the Panel, are entitled to deference with respect to interpreting and applying Section 41-35-110. While the Panel stated that the Appellant has not provided evidence showing he has been "medically cleared to work in a full duty capacity," nothing in the Panel's decision indicates that this finding is more broadly applicable than to the specific facts present in the instant case. (R. at p.2). Moreover, the Panel does not explicitly require full medical release but, rather, sufficient medical release to allow the Appellant to work in a full-duty capacity in his usual occupation. (*See* R. at p.2). This is because the Appellant does not have prior training or experience in fields that would allow him to work with his current medical restrictions. (R. at p.2). As such, the court finds that the Panel's holding would not serve as a bar to eligibility if the Appellant were able to acquire training or experience in a field where he could work under his current medical restrictions, or if the Appellant had his restrictions relaxed – even if short of being lifted altogether – such that they were compatible with job requirements for working in his usual trade or occupation. Thus, the court cannot find that the Panel created a bright line rule applicable to all claimants and, as such, is unable to find that the Panel erred as a matter of law in that respect.

Next, the Appellant argues on appeal that his medical restrictions are out of his control, do not impact his willingness to work under them, and are not the type of availability limitations that this statutory requirement sought to guard against.[2] As such, the Appellant maintains that the Panel's application of Section 41-35-110 to his claim in the instant case constitutes an error of law. Upon careful consideration of case law on the availability requirement, as well as the evidence in the record, the court disagrees. A review of relevant case law shows that courts have construed and applied this availability requirement liberally in situations where a claimant puts a restriction on his or her willingness or ability to work.

In *Murphy v. S.C. Emp't Sec. Comm'n*, the court held that the claimant was properly found to be unavailable for work because she stated she could only work during certain hours and in a specific geographical area, as she needed to facilitate transportation to and from school for her two children. *Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 492 S.E.2d 625 (Ct. App. 1997). In *Judson Mills v. S.C. Unemp't Comp. Comm'n*, the court held that the claimant was correctly found to be unavailable for work after the claimant stated that she could only work during the first and second shifts because she had no one to watch her children during other times. *Judson Mills v. S.C. Unemp't Comp. Comm'n*, 204 S.C. 37, 28 S.E.2d 535 (1944). In *Grimmett v. S.C. Dep't of Emp't and Workforce*, this court found that the claimant was properly determined to be ineligible based on unavailability because the claimant, who was receiving medical treatments, was unavailable to work for several days during treatments and missed his eligibility review meeting because of a doctor's appointment. *Richard K. Grimmett v. S.C. Dep't of Emp't and Workforce*, Docket No. 12-ALJ-22-0423-AP (January 17, 2013). Finally, and most similarly, in *Jokester Wilson v. S.C. Dep't of Emp't and Workforce & Star Food Products*, this court found that the claimant was properly determined to be ineligible for benefits based on unavailability due to the claimant's medical restrictions that prevented him from performing his customary work. *Jokester*

[2] As a part of this argument, the Appellant cites to S.C. Code Ann. § 41-35-125, which permits benefit eligibility for those who have voluntarily left work or been discharged due to "compelling family circumstances," including separation from employment due to the "illness or disability of the claimant and, based upon available information, the department finds that it was medically necessary for the claimant to stop working or change occupations." However, this statute was not used by the Department in its findings regarding the Appellant, and, as noted previously, the record contains insufficient evidence concerning the Appellant's reason for termination. Likewise, Section 41-35-125 does not contain a limitation that renders Section 41-35-110 inapplicable, even in the presence of a "compelling family circumstance." The court would also note that that the Appellant has never claimed that the rotator cuff surgery, which led to his medical restrictions, was not an elective procedure or was otherwise not voluntarily performed. In any event, if the Legislature had intended to carve out an exception for those with availability restrictions that are medical in nature, it could have done so. However, no such exception was created.

Wilson v. S.C. Dep't of Emp't and Workforce & Star Food Products, Docket No. 13-ALJ-22-0433-AP (April 30, 2014). The court in *Wilson* also noted that the claimant's doctor had removed the restrictions while the claim and appeal process was ongoing, and that the claimant became available for work and eligible for benefits at such point in the record when the restrictions were lifted. *Id.*

Accordingly, this court finds that the facts of the instant case fall within the purview of the availability requirement. While the Appellant's availability restrictions were both physical and medical in nature, they are no less personal or involuntary than those of a mother who must accommodate her young children, or a person who cannot attend work while receiving a series of medical treatments. As such, the Appellant's situation is not the type of unemployment the legislature sought to remedy with the act. The court finds that the Panel's application of Section 41-35-110 in the instant case appears to be in keeping with the purpose of the unemployment benefit program, which was not intended to be applicable to those unemployed due to changes in personal circumstances. Therefore, the Panel's application of Section 41-35-110 in the instant case is not an error of law.

Turning to the issue of whether the Panel's findings are supported by substantial evidence, the court would note, as a preliminary matter, that the Appellant had the burden of showing that he has unrestricted exposure to the labor market to which he has been customarily attached. Moreover, this is viewed in light of the customs and requirements of the Appellant's usual trade or occupation. Here, the Appellant testified at the hearing that the only types of work in which he has training or experience requires him to lift more than 5 pounds, which is not feasible under his most recent medical restrictions. (*See* p.42, lines 13-17; p.43, lines 16-28; p.49, lines 1-20). While it is true that the Appellant testified at the hearing that he could work with his medical restrictions at his previous employer's, he also testified that during the time he spent looking for work prior to his hearing, he had not been able to find a job for which he had prior training or experience that did not require him to exert more than 5 pounds of force on his shoulder. (*See* R. at p.36, lines 25-26; p.38, lines 14-16; p.43, lines 12-28; p.44, lines 1-20; p.62; p.69). Thus, based on substantial evidence in the record, the court finds that it is required – or, at the very least, customary – for employees in the Appellant's usual trade or occupation to lift more than 5 pounds. Furthermore, this court finds that the record contains substantial evidence demonstrating that the Appellant lacks

training or experience doing any type of work in which employees do not have to lift more than five (5) pounds by custom or requirement.

Furthermore, the court is not persuaded by the Appellant's argument that since his previous employer allowed him to work with his medical restrictions, he is not unavailable because other employers in the Appellant's usual trade or occupation would allow the same. While the Appellant stated that after his surgery his previous employer permitted him to return to work despite his medical restrictions, this was, by his own admission, due to a staff shortage. (*See* R. at p.36, lines 25-26; p.38, lines 14-16; p.62; p.69). Additionally, the record suggests, or is at least ambiguous with respect to the possibility that the Appellant's physical limitations contributed to his discharge for unsatisfactory work performance shortly after he returned to work under his medical restrictions. (*See* R. at p.38, lines 4-13; p.39, lines 13-15; p.42, lines 9-12). Likewise, the Appellant testified that he saw several job openings during his search leading up to the hearing that would otherwise have been attainable for him had it not been for his medical restrictions. (*See* R. at p.43, lines 12-28; p.44, lines 1-20). Thus, while the Appellant makes much of his previous employer's decision to allow him to work with his medical restrictions, the record is void of evidence demonstrating that similarly situated employers in the Appellant's usual trade or occupation would make the same decision. To the contrary, the Appellant's testimony demonstrates that he struggled to find any job, let alone work for which he has prior training or experience, that did not expressly require him to lift more than his medical restrictions permitted. (*See* R. at p.43, lines 12-28; p.44, lines 1-20). Moreover, to be eligible for benefits a claimant must comply with the objective availability requirements or customs in the fields in which the Appellant has training or experience, not those of any one employer. Therefore, the court finds that the Tribunal's finding, which was upheld by the Panel, that "future potential employers are not required and/or likely to allow [employees to work under medical restrictions with the assistance of other employees]" is supported by substantial evidence in the record. (R. at p.65). Thus, the Panel's conclusion that the Appellant's medical restrictions rendered him unavailable for work, and, therefore, ineligible for benefits, is supported by substantial evidence in the record.

The court is sympathetic to the Appellant's situation and commends him on his efforts to find work. However, the inescapable conclusion is that based on the record, the Appellant is not able to accept certain positions in his customary fields of work due to his medical restrictions. Therefore, applying the law to the facts of this case, this court concludes substantial evidence

supports the Panel's finding that the Appellant did not have unrestricted exposure to the labor market in his usual occupation as a food service manager, or any other line of work in which the Appellant has training or experience, because he was medically restricted from performing tasks necessary for his employment, such as lifting items heavier than 5 pounds. Consequently, the record contains substantial evidence to support the Panel's conclusion that the Appellant was properly determined to be ineligible for benefits based on the Appellant's unavailability.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the decision of the Department's Appellate Panel is **AFFIRMED.** [3]

AND IT IS SO ORDERED.

S. Phillip Lenski
S.C. Administrative Law Judge

December 1, 2017
Columbia, South Carolina

[3] The court's holding is limited to the record before it. The Appellant's claim was first submitted on May 5, 2017. Likewise, the review date by the Panel is listed as July 11, 2017. As such, the court's holding as to the Appellant's eligibility is limited to the period beginning May 5, 2017 and ending July 11, 2017.

CERTIFICATE OF SERVICE

I, Edye U. Moran, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Edye U. Moran
Judicial Law Clerk

December 1, 2017
Columbia, South Carolina

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