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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 17-ALJ-22-0291-AP

ANTONIO AIKEN, Appellant,

v.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT, Respondent.

INITIAL BRIEF OF APPELLANT

April 16, 2018

SOUTH CAROLINA LEGAL SERVICES

Mark Fessler
SC Bar # 77376
701 South Main St.
Greenville, SC 29601
Office: (864) 679-3254
Fax: (864) 679-3260
markfessler@sclegal.org

Attorney for Appellant

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STATEMENT OF THE CASE

This is an appeal from the Administrative Law Court ("ALC"). The ALC affirmed the final decision of the South Carolina Department of Employment and Workforce ("Department") that found appellant Antonio Aiken (hereinafter "Mr. Aiken" or "Aiken") unavailable to work under S.C. Code Ann. § 41-35-110(3) and indefinitely ineligible for unemployment benefits.

PROCEDURAL HISTORY

Mr. Aiken was discharged from his job with Whitefords, Inc. (hereinafter "Employer"), on April 29, 2017. (R. p. 1). He then applied for unemployment benefits. The Department's initial claims adjudicator disqualified Mr. Aiken indefinitely, finding him unable to work due to a health condition. (R. p. 49). He appealed the decision to the Department's Appeal Tribunal (hereinafter "Tribunal"). (R. p. 68). The Tribunal held a

hearing on May 30, 2017, and issued a decision finding that Mr. Aiken was "not able to work full-time in his customary or an alternate occupation due to medical restrictions prohibiting lifting, pushing, pulling or twisting greater than five (5) pounds." (R. p. 65). Mr. Aiken then appealed to the Department's Appellate Panel ("Panel"). (R. p.68-69). The Panel mailed its final decision on July 13, 2017, which found Mr. Aiken unavailable to work because "he has failed to present sufficient credible evidence establishing he has been medically cleared to work in a full duty capacity since April 30, 2017." (R. p. 2). On August 14, 2017, Mr. Aiken petitioned for judicial review to the ALC. The ALC issued a decision upholding the Panel's decision on December 1, 2017, after which Mr. Aiken moved for reconsideration on December 8, 2017. (R. p. __). The ALC summarily denied rehearing on January 24, 2018. (R. p. __). Mr. Aiken served a Notice of Appeal to the Court of Appeals on February 14, 2018.

FACTS

Antonio Aiken worked for Employer, a Kentucky Fried Chicken franchise, as a general manager. (R. pp. 1, 35:21-36:1). On March 22, 2017, he underwent rotator cuff surgery on his right shoulder. (R. p. 37:1-6). On April 6, 2017, his doctor released him to work with the following restriction, "No lifting greater than a 16 ounce cup of coffee with right arm once sling comes off. Administrative/sedentary work only." (R. p. 21). Around April 9 or 10, 2017, Mr. Aiken returned to full duty work with his arm in a sling. (R. pp. 37:1-2, 38:14-26, 39:13-15, 62, 69). From his first day back until he was fired, he performed his job with a sling on his right arm. (R. p. 39:20-40:2).

Anything Mr. Aiken normally would have done with his right hand, he did with his left. (R. pp.37:16-24, 41:16-19). If ever he needed to use both hands, he had someone else

lift the item for him. (R. pp. 37:25-38:3).

Employer discharged Mr. Aiken on or about April 29, 2017 (R. pp. 2, 6, 42:9-12). Regarding his discharge he testified, "their reasoning was they wanted to go in a different direction, and they weren't happy with my–my performance." (R. p. 38:6-8). Asked whether Employer fired him because of his medical restriction, Mr. Aiken testified, "I can't answer that because I'm not sure because they weren't clear on—they weren't clear about—about that at all." (R. p. 38:11-13). The Panel found that he was discharged for performance issues. (R. p. 1, 38:6-8). This finding has not been challenged or appealed. The Panel did not find that the performance issue involved being physically unable to do the job Employer required of him. (R. p. 1-2).

On May 19, 2017, Mr. Aiken's doctor gave him a second release that permitted him to "return to normal work duties" with a restriction of "[n]o heavy lifting, pushing, pulling, twisting greater than 5 lbs" with his right shoulder only. (R. p. 63). Asked whether his job as a KFC manager ever required living more than five pounds, Mr. Aiken replied, "At times, but I use my left hand," or he had someone else lift it if the item required two hands. (R. p. 37:16-20, 38:1-3). By the time of the Tribunal hearing on May 30, 2017, he no longer wore the sling he had worn while working after his surgery.[1] (R. pp. 37:1-2, 39:22-23). Counting from March 22, 2017, the Tribunal hearing occurred during week ten of his rehabilitation. By that time, Mr. Aiken testified that his physical abilities for his right shoulder called for

[1] The sling came off in week six (6) of his rehabilitation. (R. p. 40, lines 6-9, p. 41, lines 3-4). Week 6 after Mr. Aiken's surgery would have been the week of April 30-May 6. He testified at the hearing that he had been out of the sling for "three and a half weeks," which, counting backward from the date of the Tribunal hearing, confirms that the sling was removed during the week of April 30—May 6, 2017.

"maintaining full range of motion, maximum strengthening, return to full work and recreational activity, precaution [sic] avoid overdoing it and add some strengthening and . . . activities slowly." (R. p 40:11-16).

Mr. Aiken's predominant work experience has been in management positions in the food service industry—positions that he has held for ten years. (R. pp. 44:6-7, 45:8-14). Beyond that, he worked as a cashier for a few years, as a stocker at Family Dollar, in a warehouse, and as a cook. (R. p. 44:8-20, 45:5-18). Despite his partial restriction, Mr. Aiken was willing to take any food services management position available or any other job he could. (R. p. 45:3-46:2). Employer employed him as a manager in the food services industry despite his condition. (R. p. 39:13-15).

When he applied for benefits, Mr. Aiken answered "Yes" to a question on his initial application about whether he had a health condition that limited his ability to accept certain types of work. (R. p. __). He also noted that he had worked with that condition. (R. p. 10). Nevertheless, the Department initially found Mr. Aiken "unable to work." (R. p. 49). On appeal, the Tribunal found that Mr. Aiken was "not able to work full time in his customary or an alternate occupation due to medical restrictions prohibiting lifting, pushing, pulling or twisting greater than five (5) pounds." (R. p. 65). Responding to the fact that Mr. Aiken had worked in his customary position with a medical restriction, the Tribunal speculated that "future potential employers are not required and/or likely to allow the same." (R. p. 65). No evidence was offered on this point. The Tribunal based this finding upon the Tribunal's own comment at the hearing that "a new employer may not necessarily allow you to do that, um, for liability reasons." (R. p. 43:10-11). The Tribunal further held that Mr. Aiken could not establish eligibility for benefits without "medical documentation from his physician

reflecting his ability to work in either his last or any other occupation in which he has prior training and/or experience without restrictions." (R. p. 65).

Mr. Aiken appealed to the Panel. (R. p. 68). He argued that he was able to do the same job he had been doing because he had been working despite a partial restriction, and that if he needed to lift or do anything he either used his left hand or, as the general manager, had someone else lift it. (R. pp. 37:16-38:3, 41:14-19, 69). The Panel did not address these arguments. (R. p. 1-2). The Panel held, "A claimant must be available to work without undue limitation, and must have unrestricted exposure to the labor market." (R. p. 2). It then found that Mr. Aiken's "availability was restricted" because "he has not provided any evidence he had been medically 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 or more pounds." (R. p. 2). The Panel also found that Mr. Aiken had been discharged due to unspecified "performance issues." It did not find that Employer discharged Mr. Aiken because he physically could not manage the fast food restaurant.

Mr. Aiken then appealed to the ALC challenging the Panel's interpretation of and application of the law to the facts. (R. p. __). He noted that no S.C. appellate court has been asked to decide the extent to which a partially restricted claimant is or is not available to work. (R. p. __). Case law discussing having an "unrestricted exposure" to the labor market to which one has been normally attached has not involved partial medical restrictions. (R. p. ____). Mr. Aiken asserted that looking to the medical restriction alone rather than to the fact that he had demonstrated the ability to work with the restriction was an overly restrictive application of language from *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 108 S.E.2d 554 (1959) and its progeny. (R. p. ___). He pointed to case law saying that there is no

contradiction between a claimant receiving unemployment compensation for doing a job he could and did do in a partially disabled condition. (R. p. ___). He argued that the plain language of the statute requires the claimant to prove either his availability to work his usual job or another job for which he is qualified, and therefore does not have to demonstrate an availability for both categories. (R. p. ____). It only requires him to be ready, willing and able to do the same job he had been doing. (R. p. ___). He finally contended that the Panel's decision finding him unavailable for work was not supported by substantial evidence and in fact relied on an error of law because it turned exclusively on the absence of a doctor's release. (R. p. ____).

In response the Department acknowledged that case law says that one can be partially disabled yet qualify for unemployment benefits. (R. p.____). It argued that Mr. Aiken was still unavailable for work at his usual occupation for two reasons: (1) because he did not have experience or training to perform other jobs he had done, such as warehouse worker, cook, and stocker with a five pound lifting restriction, and (2) because he had only seen one job he could perform, that of parking attendant, in three weeks of searching. (R. p. ___(resp't br. 8-9). It further contended that the Panel faithfully applied *Hyman* and its progeny and did not interpret *Hyman* to create a bright line rule that Mr. Aiken cannot have medical restrictions at all. (R. p. _____ (resp't br. 10-12). The Department concluded that because case law recognizes that "no hard and fast rule can be laid down," the Panel did not create one in this case. (R pp. _____ (resp't br. 13-14).

The ALC reasoned that the Panel did not err as a matter of law by requiring a medical release because the ALC owed deference to the Panel's interpretation, the Panel did not create a bright line rule, and the Panel did not require a full medical release but rather a

release to full duty. (R. p. ____ (order p. 7). The ALC also considered Mr. Aiken's unavailability due to a medical restriction controlled by precedent, citing two prior S.C. appellate decisions and two ALC decisions. (R. p. __). It found substantial evidence for the Panel's decision upon the following reasoning: (1) lifting more than five pounds "is not feasible under his most recent medical restrictions," (2) lifting five pounds is a customary requirement of his job, (3) he had trouble finding work in general for three weeks, and (4) another employer would not have allowed Mr. Aiken to work with his restriction even though Employer did. (R. pp. ____ (order 9-10).

STANDARD OF REVIEW

Section § 1-23-380 of the Administrative Procedures Act (APA) sets forth the conditions upon which the ALC may act on an administrative finding, inference, conclusion or decision of the Department. *AnMed Health v. S.C. Dep't of Emp't and Workforce*, 404 S.C. 224, 228, 743 S.E.2d 854, 857 (Ct. App. 2013). S.C. Code Ann. § 1-23-610(B) establishes the standard of review for the Court of Appeals when reviewing a decision of the ALC. *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct. App. 2008). The Court of Appeals may reverse or modify an ALC decision when the substantive rights of the appellant have been prejudiced because the ALC's finding, conclusion, or decision is:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B)(a)-(f). An abuse of discretion occurs when a decision is controlled by an error of law or a factual finding is without evidentiary support. *Byers v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 243, 245, 407 S.E.2d 653, 654-55 (1991). An appellate court may "freely and absolutely" review the ALC's or agency's error of law, and the deference supplied to factual findings does not carry over to legal conclusions. *Houston v. DeLoach & DeLoach*, 378 S.C. 543, 552, 663 SE.2d 85, 90 (Ct. App. 2008) (*citing Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126,623 S.E.2d 860, 863 (Ct. App. 2005)). Reversible occurs where the ALC makes findings of fact the agency did not make. *Stubbs v. S.C. Dep't of Emp't & Workforce*, 407 S.C. 288, 292-293, 755 S.E.2d 114, 116 (Ct. App. 2014).

The "substantial evidence" standard governs factual findings under the APA. *Gibson v. Florence Country Club*, 282 S.C. 384, 387, 318 S.E.2d 365, 367 (1984). Substantial evidence is something more than a scintilla of evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The evidence in question cannot be viewed blindly from one side of the case. *Id.* The evidence must be viewed in the context of the whole record. *Merck v. S.C. Emp't Sec. Comm'n*, 290 S.C. 459, 461, 351 SE.2d 338, 339 (1986) ("Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached."). Surmise, conjecture, and speculation are not proper bases upon which to draw conclusions. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012) (reversing a workers' compensation award based on speculation). An agency's decision also can be overturned "where there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Hanks v. Blair Mills, Inc.*, 286 S.C.

378, 382, 335 S.E.2d 91, 94 (Ct. App. 1985).

ARGUMENTS

An involuntarily discharged employee is eligible for unemployment benefits under S.C. Code Ann. § 41-35-110(3) if he proves he 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."[2] *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959) (finding the claimant has the burden to prove eligibility). The purpose of the availability requirement is to provide a test for determining whether a claimant is "'genuinely attached to the labor market, *i.e.*, he must be desirous to obtain employment, and must be willing and ready to work.'" *Hyman*, 234 S.C. at 378, 108 S.E.2d at 559 (quoting *Dwyer v. Appeal Bd. of Michigan Unemployment Comp. Comm'n*, 321 Mich. 178, 32 N.W.2d 434, 438 (1948)). "'Whether or not a claimant is in fact available for work depends to a great extent upon his mental attitude, *i.e.*, whether he wants to go to work or is content to remain idle.'" *Id.* In the context of an employee who made an inadequate search for employment, the *Hyman* court said, "[A]vailability for work implies an unrestricted exposure of the applicant for benefits to the normal labor market to which he has been customarily attached." *Id.* 234 S.C. at 379, 108 S.E.2d at 559.

I. The Administrative Law Court (ALC) erred in finding substantial evidence supported the Panel's finding that Mr. Aiken was unavailable to work. He could lift more than five pounds and otherwise perform his usual occupation as a fast food manager.

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[2] The General Assembly enacted this language through Section 2 of Act No. 240, 1969 S.C. Acts 268. The purpose of the amendment, according to the House Journal's report on House Bill 1476, was to "redefine availability for work as a condition of eligibility." 1969 House Journal, p.2321. Previously, the statute had read in relevant part, "An unemployed insured worker shall be eligible . . .if . . . He is able to work and is available for work . . ." S.C. Code § 68-113(3) (1962).

When analyzing the Panel's decision on the issue of substantial evidence, the ALC made three basic conclusions. (Order pp. 9-10). One Aiken does not dispute. The other two are clearly erroneous. The ALC first found that lifting more than five pounds is "required – or, at the very least, customary – for employees in Aiken's usual trade or occupation." (Order p. 9). This is true. (R. p. 37:16-20).

However the ALC also concluded, in harmony with the Panel's conclusion, that lifting more than five pounds "is not feasible under his most recent medical restrictions." (Order p. 9). This is not true, or is at least an incomplete account of the facts. The lifting restriction was only as to one arm. What he could not lift with his right arm he lifted with his left or had employees that he managed perform the task. (R. p. 37:16-38:3). Finally, because of the inherent contradiction between finding that working with a medical restriction was "not feasible" and the fact that Aiken had worked with a more stringent medical restriction, the ALC also found that other employers were unlikely to permit Aiken to work with his medical restriction despite at least one employer in that labor market permitting him to work. (Order p. 10). This latter finding of fact exceeded the ALC's scope of review by making new a finding of fact that the Panel did not make. These two erroneous findings prejudiced Aiken and require reversal.

A. The ALC erred by imputing a finding of fact to the Panel that the Panel did not make and then affirming it

In discussing whether substantial evidence supports the Panel's decision the ALC held, "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." (Order p. 10). The Panel did not make such a finding. The ALC cannot impute to the Panel a finding of the Tribunal in order to affirm it where the Panel articulated its own independent reasons and did not include the Tribunal's finding.

As an initial matter, the Panel did not simply uphold the Tribunal. It relied on a different aspect of S.C. Code Ann. § 41-35-110(3) than the Tribunal did. The statute speaks of a claimant being both "able" and "available to work." The Tribunal found that Aiken was "not *able* to work full-time in his customary or an alternate occupation . . ." (R. p. ____) (emphasis added). The Panel found that Aiken's "*availability* was restricted" because he had "not been medically cleared to return to full duty . . ." (R. p. _____) (emphasis added). Thus, the ALC's belief that the Panel's findings and the Tribunals' findings are fully congruous cannot be supported because the decisions rest on different legal reasons.

The Panel's decision did not implicitly incorporate the Tribunal's findings either. S.C. Code Ann. § 41-35-710 permits the Panel to "affirm, modify, or set aside a decision of an appeal tribunal . . ." The Panel "has the authority to make its own findings of fact consistent with or inconsistent with those of the appeal tribunal." *Merck v. South Carolina Emp't Sec. Comm'n*, 290 S.C. 459, 460-61, 351 S.E.2d 338, 339 (interpreting a substantially similar version of Section 41-35-710). All final agency decisions must "include findings of fact and conclusions of law, separately stated." S.C. Code Ann. § 1-23-350. In this case the Panel modified the Tribunal decision and included "separately stated" findings of fact that relied exclusively on the absence of a medical release. (R. p. __). The Panel chose not to make any finding about what employers would or would not

do,[3] and its affirmance of the Tribunal's ultimate conclusion did not implicitly incorporate the Tribunal's findings.

If the Panel did make an implicit finding of fact here, which it did not do, that would be reversible error as well. It is a bedrock principle of administrative agency law that "[i]mplicit findings of fact are not sufficient." *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151 (1986). *Able Communications* addressed the lack of specificity in the agency's decision. Its logic regarding why implicit findings are not adequate should apply to this case if the ALC's reading of the Panel's decision embrace the Tribunal's findings is accurate. *Cf. Grant v. Grant Textiles*, 372 S.C. 196, 203, 641 S.E.2d 869, 872 (2007) (applying "the logic of *Able Communications*" to an agency decision that used statutory language without "clearly set[ting] forth the underlying facts upon which it relied to support its conclusion."). Factual specificity facilitates judicial review, but it also enables the claimant to know what is being decided in the first place.[4] Where an agency decision offers some reasons to support its decision but not others, the reviewing court ought to review the reasons given, not supplement them with additional reasons the agency did not provide whether by independently searching the record or by gleaning them from an inferior tribunal's decision. *See Kiawah Prop. Owners Group v.*

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[3] Such a finding would have been unsupported by evidence. The only statement in the record on this issue involved the Tribunal speculating that "a new employer may not necessarily allow you to do that, um, for liability reasons." (R. p. _____). S.C. Code Ann. Regs. §47-51(C) provides for the Appeal Tribunal to take evidence, not to give it. It further provides, "Any party to the appeal may present relevant testimony." The Tribunal is not a party to the appeal.

[4] The ALC's reasoning also creates issue preservation concerns. If the Tribunal makes a finding that the Panel omits, on appeal the claimant will have to raise to the ALC both its grievances with the Panel's decision and with any Tribunal findings that support the Panel's but which the Panel left out. Unemployment claimants, and probably many attorneys, are unlikely to appreciate such a nuance.

PSC, 338 S.C. 92, 97, 525 S.E.2d 863, 865 (1999) (citing S.C. Code Ann. § 1-23-380 to hold that a court erred by supplying reasons on appeal that the agency could have used to explain its decision but did not use).

Because the Department's final decision did not include a finding of fact about what other employers would or would not have done, the ALC erred in making it. The ALC's limited scope of review did not grant it authority to make a finding of fact that the Panel did not make. *Stubbs v. S.C. Dep't of Emp't & Workforce*, 407 S.C. 288, 292-293, 755 S.E.2d 114, 116 (Ct. App. 2014). In *Stubbs*, the Panel found the claimant's appeal to be untimely because he failed to act timely in mailing the appeal. The ALC affirmed the result but held that the claimant had not deposited the appeal into a proper mailbox. The Court of Appeals found this alternate theory of the facts violated the ALC's scope of review. *Id.* As in *Stubbs*, the ALC has looked to an alternative factual basis to uphold the Panel's decision to find Aiken unavailable for work instead of the one the Panel used. The Panel found him to be unavailable because (1) "he has not provided any evidence that he had been medically cleared to return to full duty" and (2) "he has not provided any evidence . . . that he has training or experience in work that does not require him to lift, twist, push, or pull five or more pounds." (R. p. ___). It did not find that other employers in the food services industry are not likely to hire him with his partial restriction to one arm. It was error for the ALC to make such a finding by inferring it from the Tribunal's decision and then affirming it.

B. The ALC erred by finding that Aiken could not feasibly work under his medical restriction.

The Panel found that Aiken was restricted because he had not "been medically

cleared to return to full duty." (R. p. ____). Similarly, the ALC found that it was "not feasible" for Aiken to lift more than five pounds. (R. p. ____). To the contrary, Aiken was and remained able to perform the same type of food services management work that he had been doing for the last ten years. A finding that he could not lift more than five pounds or otherwise perform the same job he had just been doing is not supported by substantial evidence and cannot survive appellate review.

Considering the entire record, it is clear that Aiken's medical restriction did not prevent him from working because it did not prevent him from lifting items with his left arm or directing his employees to lift anything else. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (the record cannot be viewed blindly from one side of the case). It is undisputed that Aiken's left arm was sound and that he, as a manager, could require others to help in the situations where lifting required two arms. (R. pp. ____). In his initial application Aiken stated his restriction as "No lifting with right arm," but also noted that he had worked with the condition. (R. p. _____). He also testified as follows:

ANTONIO AIKEN: I was, um, able to work, but I was unable to lift any – nothing More—no more than five pounds with the right arm.

HEARING OFFICER: And in your job as the general manager of daily operations at the KFC restaurant, were you required in your job to lift things, uh, that were more than five pounds with your right arm?

ANTONIO AIKEN: At times, yes, but I used my left hand.

. . . . .

There has been situations where I had to – I would've had to use both hands. That's why I had somebody else there to lift it for me.

(R. pp. 37:14-38:3). The Panel did not disbelieve this testimony. Arguing to the Panel,

Aiken emphasized that he could work with his left hand and that in his job as a manager employees are available to lift two-handed items when needed. (R. p. _____). In its decision, the Panel does not mention Aiken's ability to lift with his left arm or that he could have an employee help. (R. p. _____). Instead, the Panel was fixated exclusively on the medical documentation issue. (R. p. ____). The ALC acknowledged Aiken's statement about being able to lift with his left arm but downplayed it by noting that it is not his dominant arm. (R. p. _____). There is no evidence that he could not lift five pounds, or whatever a fast food manager might at times need to lift, with his left arm. Yet in the final analysis the ALC found that it was not feasible for Aiken to lift more than five pounds. (R. p. _____).

The medical restriction is not proof that Aiken could not lift more than five pounds at all or that he was physically incapable of doing his job. It says "Antonio Aiken may return to normal duty immediately with the following restrictions: May return to normal duties but is restricted in his [*sic*] of his Right shoulder. No heavy lifting, pushing, pulling, twisting greater than 5 lbs. until next follow up in 4 weeks." (R. p. _____). The restriction is targeted specifically to one shoulder. And the fact that he did his job, with a sixteen-ounce lifting restriction, for approximately twenty days before he was discharged proves conclusively that the five pound medical restriction could not have unduly limited his ability to manage a fast food restaurant. (R. pp. 21, 38:14-26). The only evidence presented shows he was not discharged because he could not physically do the work, but because Employer "wanted to go in a different direction." (R. p. 38:7).

The Department may argue, as it did before the ALC, that the record suggests that Aiken could have been fired due to his physical incapacity. (R. p. _____(Resp't Br. 9).

The ALC noted this point in its decision. (R. p. _____). The exchange upon which the Department relied was

HEARING OFFICER:	So what was the reason that you were separated from your job?
ANTONIO AIKEN:	Um, they were saying—the—their reasoning was they wanted to go in a different direction, and they weren't happy with my—my performance.
HEARING OFFICER:	Did your, uh, the nature of your injury have anything to do with the separation?
ANTONIO AIKEN:	I, um, that I'm not sure of. I-I mean, I-I can't answer that because I'm not sure because they weren't clear on—they weren't clear about—about that at all.

(R. p. 38:4-13).

For the purposes of appeal, the Panel did not find that Aiken was discharged due to his medical limitation. The Panel noted that "the claimant was discharged for performance issues . . ." and went no further (R. p. 1). To go further than the Panel did in order to insinuate that Aiken's physical restriction caused his discharge requires an additional impermissible finding of fact. *Stubbs v. S.C. Dep't of Emp't & Workforce*, 407 S.C. 288, 293, 755 S.E.2d 114, 116 (Ct. App. 2014) (instructing the ALC to review only the findings the Panel made or to remand it if the findings are not sufficiently detailed).

The phrase "performance issues related to his work" could refer to any number of circumstances not related to Aiken's physical abilities. (R. p. ___). There is no basis for assuming that by "performance issues" the Panel meant performance issues caused by his lifting restriction. (R. p. ____). Such an argument would rely on a speculative inference from the vague response, "I can't answer that because I'm not sure because they weren't clear on . . .that at all." The Panel read nothing into this comment. An employer is not

required to give any reason for why it discharges an employee, and taken at face value all it means is that Employer did not spell out why it fired Aiken.

In the final analysis, the ALC grounded its decision that Aiken was unavailable for work in the conclusion that he was unable to work because he could not lift more than five pounds. This conclusion is factually unsound because the medical restriction was not an absolute limitation, although the Panel and the ALC treated it as such. The restriction only applied to one arm, and Aiken testified he could perform any lifting duties required of him by using his left arm or by having an employee under his management perform the task. (R. p. _____). He also demonstrated his ability to work his usual occupation by doing that work for almost three weeks prior to his discharge. (R. p. __). There is no reasonable basis for finding that he was unavailable to work where he could work, did work, and remained able and available to work his usual job, which is all the statute requires.

C. The ALC erred in looking to Aiken's inability to perform other jobs to find substantial evidence that he was unable to perform his usual occupation.

In finding substantial evidence that Aiken was unduly restricted from the labor market for his usual occupation, the ALC placed great emphasis on the fact that Aiken had not found another job in the three weeks he had been searching. (Order. p. 9-10). It reasoned that the lack of results proved Aiken's unavailability for work. The fact does not carry the legal weight the ALC ascribed to it. First, the Panel did not rely on this fact to form any particular conclusion, as it was concerned only with the absence of a medical release. (R. p. _____). So the ALC's scope of review did not permit it to draw factual conclusions based on it. But more importantly, looking to whether Aiken can perform other occupations to determine whether he can perform his usual occupation misconstrues

the plain language of S.C. Code Ann. § 41-35-110(3).

Under the statute, Aiken had to show either (1) that he was able and available to work at his usual trade, business, or occupation or (2) that he was able and available to work at a trade, business, or occupation for which he is qualified by prior training or experience. S.C. Code Ann. § 41-35-110(3). The statutory language does not require a claimant to prove both. The General Assembly chose to use the disjunctive "or." *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both."); *Wigfall v. Tideland Utils.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003) ("'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" (citation omitted)). So to point out that Aiken could not find work as a stocker, cook, or warehouse employee is not legally adequate proof that he was unavailable for his usual occupation in food services management. At the least it conflates and confuses what ought to be two separate analyses.

In the event the statute is found to be ambiguous on this question, it must be interpreted liberally to effectuate its beneficent purpose. *Sherbert v. Verner*, 240 S.C. 286, 306, 125, S.E.2d 737, 747 (1962) (Bussey, J., dissenting) reversed on other grounds, 374 U.S. 398 (1963) (noting that the able and available to work component of the eligibility statute ought to be construed liberally). The statute provides relief to protect against "involuntary unemployment," which is the "greatest hazard of our economic life." S.C. Code § 41-27-20. In order to "prevent [the] spread" of involuntary unemployment and "to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, " unemployment reserves are to be used for those "unemployed through no

fault of their own." *Id.* Aiken was involuntarily unemployed, and there is no evidence that he was at fault in his discharge. [5] Giving the statute a liberal interpretation, if it is indeed ambiguous, reinforces the conclusion that the General Assembly intended to permit a claimant to prove availability for either his usual occupation or for a prior occupation for which he is experienced, but not necessarily both.

Also, to find substantial evidence based on the fact that Aiken had not found work in three weeks requires a logical leap that is not supported by the record. The ALC used this fact as proof that Aiken either could not do the work or could not find another employer to hire him with his restriction. (Order p. 9, 10). But these inferences are speculative because Aiken could in fact do the work and there is no evidence about whether another employer would have hired Aiken. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012) (noting that surmise, conjecture, and speculation are not proper bases upon which to draw conclusions.). There also is another reasonable explanation. It may be that food services management jobs were not available in labor market during those three weeks between the time of Aiken's discharge and the Tribunal hearing.

The question of whether a market exists for Aiken's services as a food services manager is different from the question of whether he himself is available to perform those services. Although the distinction has not been considered by an appellate court in South Carolina, other courts have reasoned that

> 'Market' in this sense does not mean that job vacancies must exist; the purpose of unemployment compensation is to compensate for the lack of

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[5] The issue of fault is not presented in this appeal because disqualifications for fault under S.C. Code Ann. §41-35-120(2) were adjudicated separately. For the purposes of this appeal, the Panel found that Aiken was discharged for unspecified "performance issues." (R. p. ___).

> appropriate job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which he is offering them.

Reger v. Adm'r, Unemployment Comp. Act, 132 Conn. 647, 651, 46 A.2d 844, 846 (Conn. 1946) (quoting Freeman, Able to Work and Available for Work, 55 Yale Law Journal 123, 124 (1945)). *Accord Ashmore v. Unemployment Comp. Comm'n*, 45 Del. 565, 569, 86 A.2d 751, 753 (Del. Super. Ct. 1956) (quoting the same text) and *Willard v. Vermont Unemployment Comp. Comm'n*, 122 Vt. 398, 402, 173 A.2d 843, 846 (1961) (same). And as the Supreme Court of Massachusetts explained in a case cited with approval by our Supreme Court in *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 379, 108 S.E.2d 554, 559 (1959),

> On the other hand, benefits are not to be denied simply because an employee has not become reemployed. To do so would thwart the beneficent purpose of the law to furnish something by way of reimbursement to a limited extent to one who has sustained a loss of wages because of the inability of industry to furnish steady employment. Reasonable opportunity to secure employment diminishes with the wane of industrial production. One is not to be deprived of benefits if he is compelled to remain idle simply because there are not enough jobs for all those who are able, ready and willing to work.

Farrar v. Director of Div. of Employment Sec., 324 Mass. 45, 49, 84 N.E.2d 540, 542 (1949) (finding a claimant unavailable for work where his search efforts had turn up no jobs as a boss carder in six months of unemployment). Jobs in food services management like the one Aiken had been doing may not have been readily available in the first three weeks after he was discharged. This would not mean, however, that there is no market for those jobs or that Aiken was unavailable for them (i.e. not ready and willing to work).

Because a significant part of the ALC's analysis focused on Aiken's inability to

perform other jobs he had done in the past with his lifting restriction rather than focus on whether substantial evidence supported the decision the Panel that the lack of a medical release rendered Aiken available to work at his usual occupation, the ALC erred. The error prejudiced Aiken because he clearly demonstrated that he could perform his usual occupation as a food services manager and remained available to do the same job after he was discharged for a non-medical reason.

II. The ALC erred by analogizing this case to *Murphy v. S.C. Emp't Sec. Comm'n* and *Judson Mills v. S.C. Unemp't Comp. Comm'n* where it involves facts that no South Carolina appellate court has examined.

The ALC examined two appellate cases and two cases from the ALC[6] to conclude that Aiken's medical restriction made him unavailable to work. None of these cases control the outcome of this case. Nor do any other applicable appellate precedents from South Carolina. All precedents involved claimants who quit jobs that remained available to them, claimants who made inadequate searches for employment, or claimants who imposed time and geographic restrictions on what jobs they would accept.

Whether a partial[7] medical limitation can render a claimant unavailable to work

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[6] These decision are not binding and were correctly decided on the facts of those cases. They are not meaningfully analogous to this case. In *Jokester Wilson v. S.C. Dep't of Emp't and Workforce & Star Food Products*, the claimant, a traveling salesman, could not drive and did not work despite his restrictions. Docket No. 13-ALJ-22-0433-AP (April 30, 2014). If Aiken had been unable to drive or work with his restrictions, then he would not have been "'genuinely attached to the labor market.'" *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 108 S.E.2d 554 (1959). In *Richard K. Grimmett v. S.C. Dep't of Emp't and Workforce*, the claimant was not available to work during one work week in which medical treatments rendered him inactive for three days. Docket No. 12-ALJ-22-0423-AP (Jan. 17, 2013). This case is not *Wilson* or *Grimmett*.

[7] There was some confusion about Aiken's argument here. The ALC characterized Aiken's argument to be that S.C. Code Ann. § 41-35-110(3) did not apply at all and that the Panel erred in applying it. (Order p.7, 8, and 9). In his initial brief, Aiken catalogued S.C. cases applying Section 41-35-110(3) or its predecessor to distinguish their facts. He never argued that the statute is inapplicable. (*See, e.g.* (R. pp. _____ Initial App. Br. p. 8 (discussing the Panel's "misinterpretation of the relevant statute") and 16 ("none of the appellate cases . . .offer specific guidance on how a partial medical restriction should be analyzed under the statute.").

under S.C. Code Ann. § 41-35-110(3) has never been considered by an appellate court in South Carolina. The earliest cases discussing the availability requirement were *Judson Mills v. S.C. Unemployment Comp. Comm'n*, 204 S.C. 37, 28 S.E.2d 535 (1944) and *Hatsville Cotton Mill v. S.C. Emp't Sec. Comm'n*, 224 S.C. 407, 79 S.E.2d 381 (1953). They both involved employees who left work due to personal circumstances. Then came *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 108 S.E.2d 554 (1959). In that case the claimant failed to conduct a personal search for employment where he only inquired about jobs at the employment office when filing his claim and contacted his union. 234 S.C. at 375-76, 108 S.E.2d at 557. None of the cases *Hyman* cited involved partial medical restrictions. (R. pp. _____ (app brief 14)). Nor have the more recent cases of *Wellington v. S.C. Emp't Sec. Comm'n*, 281 S.C. 115, 118 314 S.E.2d 37, 39 (Ct. App. 1984) (finding the claimant's "efforts to obtain employment, based solely on undocumented and unverified telephone contacts, rendered her unavailable for work") and *Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 544, 492 S.E.2d 625, 627 (Ct. App. 1997) (finding that a claimant was not, as a matter of law, available for work where she "flatly refused to work except in the Irmo area during the hours between 8:30 a.m. and 2:30 p.m."). These cases all are concerned with, as *Hyman* was, whether the claimant is "*desirous to obtain employment*, and [ ] *willing* and ready to work." *Hyman*, 234 S.C. at 378, 108 S.E.2d at 559 (emphasis added). Aiken's case concerns the "ready to work" question. *Id.* The adequacy of Aiken's efforts to find employment are not at issue in this appeal.

The ALC relied on *Judson Mills v. S.C. Unemp't Comp. Comm'n*, 204 S.C. 37, 28 S.E.2d 535 (1944) and *Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 492 S.E.2d 625 (Ct. App. 1997). (R. p. _____). The ALC read *Judson* to mean that a claimant was not

available for work where she was only available to work first and second shift. (R. p. __). This misreads *Judson*. That case was not concerned with the number of shifts that the employee could work but rather with the fact that the employee quit her job on the shift she had been working, which remained available to her. In *Judson*, a mother quit her job on third shift after the relative who looked after her children could no longer do so. *Judson*, 28 S.E.2d at 536. She was available for other shifts, just not the one she had been working. *Id.* The Court adopted Judge Oxner's holding, which was

> The 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. I am constrained, therefore, 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.*

Id. 28 S.E.2d at 537 (emphasis added). Thus, *Judson* was concerned with a claimant who quit a job due to personal circumstances that remained available to her. *Sherbert v. Verner*, 240 S.C. 286, 314, 125, S.E.2d 737, 751 (1962) (Bussey, J., dissenting) reversed on other grounds, 374 U.S. 398 (1963) ("[T]he test of availability as laid down by this court in the Judson Mills case [is] whether the claimant was available for the same work which he had been doing.").

Hatsville Cotton Mill v. S.C. Emp't Sec. Comm'n, followed *Judson* to hold that a claimant could not file a valid claim where she was unemployed due to "a change in domestic circumstances" rather than "the failure of her employer to provide stable employment." 224 S.C. 407, 413, 79 S.E.2d 381, 384 (1953). Of similar tenor is *Stone Mfg. Co. v. SC Emp't. Sec. Comm'n*, 219 S.C. 239, 246, 64 SE 2d 644, 646 (1951) (analyzing *Judson* to find that a wife did not quit work with "good cause" under current

S.C. Code § 41-35-120(1) when her husband was transferred to Fort Bragg).

Unlike the claimant in *Judson*, Aiken did not quit a job he had been doing which remained available to him. To the contrary, he was discharged from his usual occupation in food services management, a job he had been doing for the past ten years, and he remained ready, willing and able to do it thereafter. (R. pp. 38:4-8, 41:15-22, 45:3-14, 45:27-46:1).

The ALC also analogized Aiken's case to *Murphy v. S.C. Emp't Sec. Comm'n*, 328 S.C. 542, 492 S.E.2d 625 (Ct. App. 1997) by noting that Murphy placed geographical and temporal restrictions on her willingness to work for personal reasons, thus limiting the jobs she was willing to accept. The ALC then reasoned that Aiken's arm injury is personal in nature and limits the types of jobs he can accept. (R. p. ___). The comparison falls into error when it looks to Aiken's ability to perform "trade[s]" or "occupation[s]" "for which he is qualified by prior training or experience" in order to determine whether he is "available for his usual trade, occupation, or business." S.C. Code Ann. § 41-35-110(3). These are separate statutory inquiries. The *Murphy* decision does not stand for the proposition that a claimant who can perform his usual occupation, but not other occupations, is still unavailable for work. The Court in *Murphy* was concerned with the claimant's refusal to do any job except in Irmo between hours of 8:30 a.m. and 2:30 p.m." *Murphy*, 328 S.C. at 544, 492 S.E.2d at 627. The Court used the phrase "flatly refused to work . . ." outside of the conditions she established, including both her former job and any other job for which she was qualified. *Id.* This is the same concern the *Hyman* court addressed when it said that a claimant must be "willing . . . to work," and that "[w]hether or not a claimant is in fact available for work depends to a great extent upon his mental

attitude, i. e., whether he wants to go to work or is content to remain idle." *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 378, 108 S.E.2d 554, 559 (1959). In this case, Aiken has not "flatly refused to work." *Murphy*, 328 S.C. at 544, 492 S.E.2d at 627. He was able and wanted to do the same job he had been doing for the last ten years as a food services manager. (R. p. ___). He did not put limitations on doing that job, and he was available from 8 a.m. to 8 p.m., was willing to travel and even to relocate to get employment. (R. pp. ___ (10-11).

The only other appellate case to pick up on *Hyman's* language about having an unrestricted availability for work also does not control the present case. *Sherbert v. Verner*, 240 S.C. 286, 125 S.E.2d 737 (1962), reversed on other grounds, 374 U.S. 398 (1963).[8] In *Sherbert*, a Seventh Day Adventist was discharged and found unavailable to work because she refused to work on Saturdays for religious reasons. *Id.* 240 S.C. at 288, 125 S.E.2d at 737. The S.C. Supreme Court observed that "a claimant who undertakes to limit or restrict his willingness to work to certain hours, types of work, or conditions, not usual or customary in the trade, is not 'available for work.'" 240 S.C. at 296, 125 S.E.2d at 741 (quoting *Unemployment Comp. Comm'n v. Tomko*, 192 Va. 463, 468, 65 S.E.2d 524, 527 (1951)); (Order pp. 6 and 10). The *Tomko* decision quoted by the *Sherbert* Court involved miners who were willing to work three days a week but not the five days customary in their trade. *Id.* at 295, 125 S.E.2d at 741. Aiken did not "undertake[] to limit or restrict his willingness to work to certain . . . types of work, or conditions, not usual or customary in

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[8] *Sherbert* was reversed by the U.S. Supreme Court on free exercise grounds under the First Amendment to the U.S. Constitution as made applicable to the states under the Fourteenth Amendment.

the trade" of a food services manager. *Id.* To the contrary, he worked around his partial restriction to one arm by using the other arm or having someone else perform the task if it required two arms to lift. It goes too far to say, on this record, that Aiken imposed conditions on his willingness to do the same job he had just been doing. No appellate precedents are analogous to the facts of this case, and the ALC's misreading of *Judson* and *Murphy* prejudiced Aiken and should be reversed because it caused the ALC to uphold the Panel's decision.

III. The ALC erroneously concluded that the Department could require Aiken to obtain a doctor's release to "full duty" in order to prove he was available for work.

The Panel held that Aiken was not available to work until he was "medically cleared to return to full duty." (R. p. ___). Aiken argued that the Panel could not legally require a medical release as a precondition to finding him available to work. (R. p. (Initial Br. 22-25). This is a legal question. The ALC affirmed the Panel's requirement, finding that it had to defer to the Department's interpretation of S.C. Code Ann. § 41-35-110(3), that the Department did not require a full medical release but only a release to a full duty capacity, and that the Panel did not create or apply a bright line test. (Order p. 5, 7).

The ALC erred by deferring to the Panel's conclusion because the Panel decision rested on its interpretation of case law, not of Section 41-35-110(3). And if the Panel was interpreting the statute instead of case law, then its interpretation is not worthy of deference because it failed to apply a liberal construction to a remedial statute. Furthermore, the only appellate court to have considered the issue of whether an agency can require a medical certification as a condition of eligibility found that no such requirement exists in the statute,

making it legal error for an agency to mandate one. *Mickle v. Mississippi Emp't Sec. Comm'n*, 765 So. 2d 1259 (Miss. 2000). By finding that the Panel could require Aiken to provide a medical certification before Aiken could be found available to work under the facts of this case, the ALC's decision prejudices the Aiken's right to be found eligible to receive unemployment benefits.

A. The ALC erred by deferring to the Department's interpretation of prior S.C. Supreme Court precedent on this issue because deference is neither required nor deserved in this instance.

The ALC upheld the Panel's requirement of a medical release under the agency deference doctrine. (R. p. ____). The ALC misconceived its legal obligation here because the Department was not interpreting or applying an ambiguous statute but rather S.C. Supreme Court precedent. The Panel's decision did not turn on its interpretation of the statutory language "available for work." The Panel's statement of law was "A claimant must be available for work without undue limitation, and must have unrestricted exposure to the labor market." (R. p. __). It then concluded, "The evidence in the case establishes that the claimant's availability was restricted." (R. p. __). The phrase "unrestricted exposure to the labor market" is an incomplete quotation from *Hyman v. S.C. Emp't Sec. Comm'n*, which said that "availability for work implies an unrestricted exposure of the applicant for benefits to the normal labor market to which he has been customarily attached." 234 S.C. 369, 379, 108 S.E.2d 554, 559 (1959). It is not a coincidence that the heart of the Panel's decision Panel employed language coming from *Hyman*, not the statute. A court is not required to defer to an agency's interpretation of case law as that is the particular purview of the courts.

The ALC did not cite any case requiring it to defer to the Department's application

of *Hyman's* language. (R. p. (order 7). Aiken found no cases from South Carolina directly on point, but *Doe v. S.C. HHS* indicates that deference is not required where the agency has not adopted a regulation on the matter. 398 S.C. 62, 68 n.7, 727 S.E.2d 605, 608 n. 7 (2011). There the Court said that because an agency requirement found in agency guidelines "has not been formally adopted as a regulation, it does not have the force and effect of law and is entitled to no deference." *Id.*

Many federal and state courts have rejected the notion that a court must defer to an agency on its interpretation of or conclusions about case law. *See Nunnally v. District of Columbia Metro. Police Dep't*, 80 A.3d 1004, 1012 (D.C. 2013) ("An agency's interpretation of our case law does not trigger an obligation of deference on our part."); *Cianciulli v. Bd. of Trustees, Pub. Employees' Ret. Sys.*, 244 N.J. Super. 399, 402, 582 A.2d 1004, 1005 (N.J. Super. Ct. App. Div. 1990) ("Deference to the expertise of the agency does not require deference to the agency's interpretation of case law or legal conclusions."); *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) ("Because the Secretary based his decision in the instant case on judicial precedent rather than his own interpretation of the statute, we owe 'no more deference than we would any lower court's analysis of the law.'"(citation omitted)). Agencies have no special expertise interpreting and applying case law. *Akins v. FEC,* 322 U.S. App. D.C. 58, 101 F.3d 731, 740 (D.C. Cir. 1997) (en banc), vacated on other grounds, 524 U.S. 11 (1998) ("There is therefore no reason for courts--the supposed experts in analyzing judicial decisions--to defer to agency interpretations of the Court's opinions."). The ALC made an error of law by deciding it had to defer to the Panel's requirement of a medical release. (Order p. 7). The Panel was not interpreting S.C. Code Ann. § 41-35-110(3) but rather the Supreme Court's

interpretation of a predecessor statute.

If the ALC correctly decided that the Panel was interpreting S.C. Code Ann. § 41-35-110(3) instead of case law then the Panel's interpretation of that statute permitting it to require a medical release is not worthy of deference. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) ("[T]he court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.").

In analyzing this issue, the statute must be construed liberally in favor of its beneficent purpose. *Stone Mfg. Co. v. S.C. Emp't Sec. Comm'n,* 219 S.C. 239, 247, 64 S.E.2d 644, 647 (1951). Failure to construe a remedial statute liberally can be a basis upon which to reject an agency's interpretation. *See King v. South Carolina Retirement Sys.*, 319 S.C. 373, 376, 461 S.E.2d 822, 823 (1995) (applying the rule of liberal construction to uphold a trial court's reversal of the agency's decision to refuse a statutory death benefit to a state employee).

Mr. Aiken was involuntarily unemployed, so he falls within the ambit of persons the statute intends to protect. *See supra* pp. 18-19. Interpreting the statute to permit the Department to require a medical release creates four problematic consequences. First, no claimant will have specific notice, prior to the Tribunal hearing, that he will be required to prove he has been medically released. Nothing in the statute, regulations, or the Department's hearing notice gives any indication that a medical release will be required of partially disabled or partially restricted employees. The statute talks about being "able" and "available" to work. S.C. Code Ann. § 41-35-110(3). The Department's regulations do not address this eligibility requirement or how a partially disabled claimant might prove

his availability. *See, e.g.,* S.C. Code Ann. Regs. §§ 47-21(A)(1)(claimant must attest that he is able and available for work to file a claim) and 47-104 (stating under section 41-35-110(3) that a claimant must engage in an active search for work). The hearing notice for the Tribunal hearing says that a claimant must be "ready, able and willing to accept suitable work, and that his personal circumstances would not prevent him/her from accepting such work." (R. p. ___). So the requirement that the Panel imposed in this case is unknowable prior to the Tribunal hearing. And as the Tribunal told Aiken, "[n]o documents, exhibits, or testimony can be accepted after the conclusion of the hearing." (R. p. 33). *See* S.C. Code Ann. § 41-35-710 (noting the Panel is to decide "on the basis of evidence previously submitted in the case. . .").

The Department may point to the following exchange to challenge this point.

HEARING OFFICER: And were you aware in order to be eligible for benefits that you do have to be able and available and actively seeking, uh, full-time employment without any restrictions?

ANTONIO AIKEN: Yes.

(R. p. 36:18-21). This exchange does not inferentially prove that Aiken knew he needed to produce a medical release. There is no indication that the word "restrictions" informed Aiken he was being asked specifically about medical restrictions, if the question indeed meant that. Aiken's position is and has been that he is able and available to do the job he had been doing, and that his medical restriction was not a restriction as to that job. The question also leads him to a yes or no answer without asking him to elaborate on specifically what he knew. It also is compound and vague. It is not clear whether his answer refers to being able to work, available to work, actively seeking work without restrictions, or all three. The question itself is not proof that Aiken knew or could have

known he would need to have a doctor certify that he could work without restrictions to meet his burden of proof.

Another troubling result of deferring to the Panel here is that it permits the Panel not to consider all of the relevant facts and circumstances of the case, which it is required to do. *Wellington v. S.C. Emp't. Sec. Comm'n*, 281 S.C. 115, 117, 314 S.E.2d 37, 39 (Ct. App. 1984). The evidence shows Aiken could perform, did perform, and remained able to perform his usual occupation both before and after discharge. He explained how he could work by using his left arm to lift heavier items or by having other employees lift things requiring two arms. (R. p. ___). He pointed this out in his appeal to the Panel (R. p. ____). And he offered his surgeon's statement that by week ten he would be "maintaining full range of motion, maximum strengthening, return to full work and recreational activity." (R. p. 40:10-27). Consistent with this Aiken also testified, "I'm at the point where I can lift up a little—probably a little bit more than five pounds." (R. p. 44:24-26). But the Panel did not take these facts into account. It relied entirely on the absence of a medical release. (R. p. ____). A medical release is not conclusive proof of an inability to work. It is a recommendation by a physician that a claimant can disregard if he wants to work. *See Mickle v. Mississippi Employment Sec. Comm'n*, No. 1998-CC-01730-COA, 1999 Miss. App. LEXIS 584, at *13-14, (Miss. Ct. App. Sept. 28, 1999) (Irving, J., dissenting) (noting that the doctor's release to work with restrictions was an "advisory recommendation to aid in her recuperation; it was not proof that Mickle was physically unable to work eight hours per day.")

The Department may assert that the Panel considered the entire record, but this is not apparent from the Panel's decision. Just because the Panel has a duty to consider all

relevant facts does not mean the Panel considered those facts. The Panel also has a duty to spell out its findings of fact so that one can clearly understand its rationale in order to determine whether the reasoning was legally adequate. S.C. Code Ann. §§ 1-23-350 ("A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."). The Panel never addressed Aiken's explanation as to how he was able to work as a food services manager or the conflicting testimony regarding his actual ability to use his right arm as of the date of the Tribunal hearing. (R. p. ___). One need only read the Panel's analysis to appreciate that it relies on one solitary fact—the absence of a medical release. (R. p.. ___).

A third reason the Panel's interpretation is not a liberal one and is entitled to no deference is because having a partial medical restriction cannot automatically disqualify someone for unemployment benefits. In *Harvey v. Art Metal, Inc.*, 247 S.C. 443, 451, 147 S.E.2d 697, 702 (1966), our Supreme Court said, "Furthermore, *there is no real inconsistency between the claimant's entitlement to unemployment compensation for loss of wages through the termination of a job which he could and did perform in his partially disabled condition*, and his entitlement to some workmen's compensation benefits."[9] (1966). It is not difficult to imagine a scenario where someone has restrictions that prevent

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[9] Cases from other jurisdictions are to the same effect that a partial disability is not inconsistent with being able and available for work. *See, e.g., Ross v. Daniels*, 266 Ark. 1056, 1059, 599 S.W.2d 390, 391-92 (Ark. Ct. App. 1979) (reversing the agency determination that claimant was unavailable where she was only partially disabled yet actively seeking suitable work) and *FDL Foods, Inc. v. Emp't Appeal Bd., Dep't of Inspections & Appeals*, 460 N.W.2d 885 (Iowa Ct. App. 1990) (upholding agency decision that a claimant was available to work despite a medical restriction that meant he could only work one type of job employer offered but which was rarely offered to him due to collective bargaining agreement on bidding procedures).

him from being cleared to return to "full duty" yet still has sufficient physical capability to perform the same job he had been doing. (Panel p. 2). That scenario played out in Aiken's case. The only limitation Aiken faced was that he could not lift more than five pounds with his right arm, a restriction which he worked around. There is no basis for concluding that because one arm was not at "full-duty capacity" Aiken was not able to fully perform the very duties he had been performing prior to discharge. (Order. p. 7).

A final problematic outcome of permitting the Panel to require a medical release is that it ties the claimant's ability to qualify for urgently needed unemployment benefits to when his or her doctor can see him. Such a rule would prevent any claimant who cannot get in to see a doctor from being able to prove availability for work. Aiken testified that, at the Tribunal hearing, he could "probably lift a bit more than five pounds," which was confirmed by his surgeon's estimation that by week ten of his rehabilitation—the same week of the Tribunal hearing—he would be able to "return to full work and recreational activity." (R. pp. 44:24-26, 40:14). But he had to wait seventeen more days for his doctor to officially certify this. (R. p. 44:26-27). To an involuntarily unemployed individual facing the "greatest economic hazard" of his economic life, two weeks with no financial support is significant. S.C. Code Ann. § 41-27-20.

This is not to say that a medical restriction cannot be evidence of a claimant's inability to work, but it cannot serve as the litmus test for availability. The importance of this point is evident where, as in Aiken's case, he presented uncontroverted evidence that he did his job for almost three weeks with a more restrictive restriction than that before the Panel. (R. p. 21, 37:1-2). Where a claimant has evidence that he can and has worked at his usual occupation, to simply say that a doctor has not signed a medical release puts form

over substance, which is contrary to the rule requiring a liberal interpretation of a remedial statute.

Because the Panel did not interpret the statute, deference is not required. And because the Panel's belief that it can require a medical release as a condition of availability is not a liberal interpretation of the statute, deference is not deserved. The ALC's contrary conclusion prejudiced Aiken and should be reversed.

B. The only appellate court in any jurisdiction to have considered the question of requiring a medical release before a claimant can be eligible for unemployment benefits found it to be an error of law based on a statute similar to South Carolina's.

South Carolina has no cases on this issue, but Mississippi's Supreme Court squarely held it to be legal error to rely exclusively on the absence of a full medical release. *Mickle v. Mississippi Emp't Sec. Comm'n*, 765 So. 2d 1259 (Miss. 2000). Mississippi's statute is similar, though not identical, to South Carolina's. The statute in *Mickle* in required a claimant to be "able and available to work." *Id.* at 1261. S.C. Code Ann. § 41-35-110(3) requires a claimant to be "able to work" and "available for work at his usual trade, occupation, or business or in another trade, occupation, or business for which he is qualified." Nevertheless, Mississippi interprets availability the same way South Carolina does. *Compare Mickle*, 765 So. 2d at 1261 ("To be available for work within the meaning of the act, the claimant must be genuinely attached to the labor market, i.e., he must be desirous to obtain employment, and must be willing and ready to work.") *with Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 378, 108 S.E.2d 554, 559 (1959) (identical language).

On the question of whether, as a matter of law, Mississippi's Employment Security

Commission's Board of Review could require a doctor's release to full duty, Mississippi's Supreme Court said, "There is no authority in the statutes or case law [*sic*] required Mickle to produce medical documentation that she has been unconditionally released to return to work." *Id.* at 1263. The Court concluded,

> The Appeals Referee's finding and the Court of Appeals decision that Mickle had failed to submit documentation to show that she had been released and therefore that she had failed to show that she was able to work would create a new requirement not contemplated by the statute and is therefore erroneous.

Id.

Other jurisdictions that have addressed the question of whether medical documentation is required to support an award of unemployment benefits either find that it is not required or have a statute that requires it. *Compare James v. Lemmons*, 177 N.C. App. 509, 516, 629 S.E.2d 324, 330 (N.C. Ct. App. 2006) ("[T]here is no statutory requirement for medical testimony to support an award of unemployment insurance benefits.")[10] *with* Del. Code Ann. Tit. 19 § 3314(8) (Lexis 2018) ("Such disqualification to terminate when the individual becomes able to work and available for work as determined by a doctor's certificate and meets all other requirements under this title.").

As under Mississippi's statutory scheme, no statute, regulation, or case precedent in South Carolina requires a doctor to verify one's availability to work as a precondition to eligible for unemployment benefits under S.C. Code Ann. § 41-35-110(3). The cardinal rule of all statutory construction is that "legislative intent must prevail if it can be

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[10] This case involved the question of whether an employee's absences were medically related, but the proposition is stated as applying to unemployment statutes generally.

reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005).

The ALC reasoned, in part, that because the Panel did not create a bright line rule applicable to all claimants, the Panel did not err. (R. p. ___ (order 7). Whether the Panel employs such a rule generally or created it only for Aiken's case is unknown and ultimately irrelevant. The point is that no regulation or statute either requires him to produce a medical release or informs him of that requirement. The Panel added a requirement to the statute, and it was error to do so.

CONCLUSION

Antonio Aiken is entitled to a reversal of the ALC's decision. He proved that he was able and available to perform the same job he had been doing before Employer involuntarily discharged him, and remanding the case would be futile because there is no reasonable fact finder could conclude that Aiken was unavailable to do the same job he had just been doing when he was discharged. *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967) (finding reversal of a state agency decision necessary, and remand "futile" when the agency's decision was without support in the evidence). If anything, his physical condition improved between the date of discharge and the Tribunal hearing. The ALC erred by finding that Aiken could not feasibly do his job, by finding that other employers would not have hired Aiken, by misreading precedent, and by deferring to and upholding the Panel's belief that it could require Mr. Aiken to produce a medical certification as a condition of finding him available to work.

Because of the ALC's errors, Aiken is entitled to a reversal of the ALC's decision

and a finding that he was not required to provide a medical release as a condition to being found available for work and that the only reasonable conclusion the record permits in this case is that Aiken was available for work at his usual occupation.

Respectfully submitted,

SOUTH CAROLINA LEGAL SERVICES

Mark Fessler
SC Bar # 77376
701 South Main St.
Greenville, SC 29601
Office: (864) 679-3254
Fax: (864) 679-3260
markfessler@sclegal.org

Attorney for Appellant

Greenville, South Carolina

April 16, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

Docket No. 17-ALJ-22-0291-AP

ANTONIO AIKEN, Appellant,

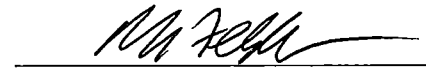
vs.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT, Respondent.

PROOF OF SERVICE

I certify that I served the *Initial Brief of Appellant* and *Appellant's Designation of Matter to be Included in the Record on Appeal* on the South Carolina Department of Employment and Workforce by U.S. Mail, Postage Paid on April 16, 2018 to the following addresses:

Todd Timmons, Esq.
Legal Department
S.C. Dept. Employment and Workforce
P.O. Box 8597
Columbia, SC 29202



Mark Fessler
Attorney for Appellant Antonio Aiken
South Carolina Legal Services
701 South Main St.
Greenville, South Carolina 29601
Office: (864) 679-3254
Fax: (864) 679-3260
markfessler@sclegal.org

South Carolina
Legal Services

701 South Main Street, Greenville South Carolina 29601
Phone: (864) 679-3232 Fax: (864) 679-3260
www.sclegal.org / www.lawhelp.org/sc

April 16, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O Box 11629
Columbia, SC 29211

Re: Court of Appeals Case No. 2018-000258
Antonio Aiken v. S.C. Department of Employment and Workforce
17-ALJ-22-0291-AP

Dear Ms. Kitchings:

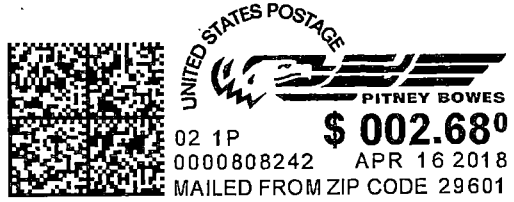
Enclosed for filing is the Appellant's Initial Brief, Designation of Matter on Appeal, and Proof of Service.

Sincerely,

Mark Fessler
Staff Attorney
ph: 864-679-3254

enclosures

cc: Todd Timmons, Esq.
Legal Department
S.C. Dept. Employment and Workforce
P.O. Box 8597
Columbia, SC 29202



M. Fessler

South Carolina
Legal Services
Balancing the Scales of Justice
701 South Main Street
Greenville, SC 29601

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O Box 11629
Columbia, SC 29211