

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 2011-ALJ-22-0354-AP

AnMed Health,

Appellant,

v.

South Carolina Department of
Employment and Workforce
and Pamela S. Crowe,

Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR IN AFFIRMING THE APPELLATE PANEL'S DECISION THAT PAMELA CROWE IS ELIGIBLE FOR UNEMPLOYMENT BENEFITS BECAUSE ANMED HEALTH DISCHARGED HER WITHOUT CAUSE CONNECTED WITH HER EMPLOYMENT?

STATEMENT OF THE CASE

After being terminated from her job by Appellant AnMed Health (AnMed), Respondent Pamela Crowe filed a claim for unemployment benefits with the South Carolina Department of Employment and Workforce (SCDEW) on December 14, 2010. (R.p.12). The claims adjudicator determined that Appellant was discharged for cause in connection with work because she failed to get a flu vaccination as required by AnMed's policy; therefore, the claims adjudicator disqualified Ms. Crowe from receiving benefits for 10 weeks, pursuant to S.C. Code Ann. § 41-35-120(2) (Supp. 2011). (R.p.36).

Ms. Crowe timely appealed the initial determination to the Appeal Tribunal. (R.p.37). On February 10, 2011, the Appeal Tribunal conducted an evidentiary hearing with live testimony from both parties. (R.pp.39-80). In Decision No. 2011-A-2754, the Appeal Tribunal found Ms. Crowe eligible for benefits without disqualification because she had not been discharged for cause. (R.pp.101-102).

On February 28, 2011, AnMed appealed the Appeal Tribunal's decision to the Appellate Panel. (R.pp.103-104). The Appellate Panel affirmed the Appeal Tribunal's finding that Appellant was discharged without cause connected with the employment and therefore affirmed Ms. Crowe's eligibility for unemployment benefits. (R.pp.9-10, Decision No. 2011-P-238).

On July 1, 2011, AnMed sought judicial review of the Appellate Panel's opinion (which is SCDEW's final administrative decision), by filing a Notice of Appeal with the Administrative Law Court. On January 24, 2012, the ALC issued an Order affirming SCDEW's decision that Ms. Crowe is eligible for unemployment benefits.

AnMed now seeks this Court's review of the ALC Order.

FACTS

Ms. Crowe worked as a benefits coordinator for AnMed from August 27, 1984 to December 14, 2010. (R.p.45). As the Benefits Coordinator, Ms. Crowe worked in the Human Resources department, and therefore, she did not have any direct contact with AnMed's patients. (R.p.85). In the 26 years that Ms. Crowe worked for AnMed, she had never taken a flu shot. (R.p.71, line 72-p.64, line 1).

In September 2010, AnMed established a mandatory flu vaccine policy. (R.pp.83-84). The policy required that all AnMed employees be immunized against influenza as a condition of continued employment, unless "an approved exemption" was made. (R.p.84).

Soon after the new policy was announced, Ms. Crowe requested an exemption. (R.p.47, lines 16-19; p.85). Her request was based on direct family history of a negative reaction to the flu shot. Both in her request for the exemption and at the hearing in front of the Appeal Tribunal, Ms. Crowe fully explained that she did not want to be forced to get the flu shot because of her daughter's negative reaction to a flu vaccine in 2001. Ms. Crowe described how her 19-year-old daughter Nicole, who worked in Urgent Care for AnMed, got a flu shot at the request of her manager. Within two weeks of being vaccinated, Nicole suffered numbness from her feet up to her chest and was hospitalized. The neurologist treating Nicole initially suspected Guillain-Barre Syndrome (GBS), triggered by the flu shot. Nicole was eventually diagnosed with Multiple Sclerosis (MS), which caused her death six years later at the age of 25. (R.pp.69-73; 85).

AnMed's policy regarding an exemption from the flu shot provided that employees could request an exemption based on the Centers for Disease Control (CDC)

guidelines. The written policy stated that the “CDC guidelines for exemptions currently include: severe egg allergy, severe allergy to any component of the vaccine, a past severe reaction to the influenza vaccine, or a history of Gillian-Barre [sic] syndrome.” (R.p.84). The policy further provided that each exemption request would be reviewed on a case-by-case basis, and if an exemption was granted, a plan would be made for the employee to wear a surgical mask. Ms. Crowe specifically told AnMed that although she worked in a building that was separate from the hospital, she was willing to work at her desk wearing a surgical mask. (R.p.72, line 21-p.73, line 2; p.85).

To support her exemption request, Ms. Crowe also provided AnMed a signed statement from her doctor, Erin L. Cooksey, M.D. Dr. Cooksey signed AnMed’s exemption request form and stated the following:

This patient must be medically exempt from the flu shot. She has a strong family history of Guillian-Barre [sic] and MS. The flu shot can activate those processes and must be avoided!

(R.p.87).

Despite Ms. Crowe’s reasonable and medically documented request for an exemption from the flu vaccination, AnMed denied the request in November 2010. (R.pp.86, 91-95). The reason for denial was that she had not met the exemption guidelines specified by the CDC. (R.p.91). When Ms. Crowe did not get vaccinated by the December 15, 2010 deadline imposed by AnMed, she was terminated. (R.pp.54, 88).

At the hearing before the Appeal Tribunal, AnMed’s Director of Human Resources, Teresa Threlkeld, testified that AnMed terminated Ms. Crowe because she violated Employer policy by not taking the influenza vaccination. (R.p.45). Threlkeld made clear that Ms. Crowe’s employment was not previously in jeopardy and “the sole

reason” she was fired was because she failed to get the flu shot. (R.p.65, lines 16-20). Threlkeld indicated that Ms. Crowe did not meet the CDC guidelines for exemption because her specific, personal medical history did not include GBS. (R.p.55, lines 1-4).

Ms. Crowe testified that when Nicole was first hospitalized and they told the neurologist she had had a flu vaccine two weeks prior to the onset of her condition, the neurologist replied “That very well could have activated what’s happening here.” Based on what happened to her daughter, Ms. Crowe decided not to get the flu shot in 2010. (R.p.70, lines 10-27).

Ms. Crowe further testified that she believed she had complied with AnMed’s policy because: (1) she had family history of GBS and MS; (2) she provided her doctor’s advice, in writing, not to get vaccinated because of this history; and (3) she indicated she gladly would have worn a surgical mask at work. (R.p.71, line 6-p.72, line 6; p.74, line 17-p.75, line 7).

The Appeal Tribunal found that AnMed failed to establish it had discharged Ms. Crowe for cause connected with employment and thereby held her fully eligible for unemployment benefits. (R.pp.101-102).

AnMed appealed to SCDEW’s Appellate Panel which affirmed the Appeal Tribunal’s decision. Specifically, the Appellate Panel held as follows:

The employer’s policy requiring immunization for continued employment was unreasonable, particularly as applied to the claimant’s unique circumstances. The claimant worked for the employer for 26 years without an immunization requirement, did not have patient contact in the performance of her duties, and presented credible medical documentation that such an immunization would jeopardize her health. Therefore, we find the claimant was discharged without cause connected with her employment.

(R.p.10).

AnMed appealed SCDEW's final administrative decision to the ALC. The ALC found that substantial evidence supported SCDEW's decision that Ms. Crowe was terminated without cause and therefore affirmed the Appellate Panel's opinion. Moreover, the ALC ruled that based on Ms. Crowe's "family history and the information and advice of her physician, the requirement that [Ms.] Crowe take the influenza vaccination was not reasonable and her reason for non-compliance is reasonable." (R.p.4).

ARGUMENT

Standard of Review

SCDEW is an agency governed by the Administrative Procedures Act (APA). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding SCDEW's predecessor, the Employment Security Commission, subject to the APA). Under the APA:

[A] reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion. Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

McEachern v. S. Carolina Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006) (footnotes and citations omitted). This is a very "narrow scope of review." *Id.* at 561, 635 S.E.2d at 649.

"Substantial evidence" is defined as:

[S]omething less than the weight of the evidence; it is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. The substantial evidence rule does not allow judicial fact-finding, or the substitution of judicial judgment for agency judgment.

Todd's Ice Cream, Inc. v. S. Carolina Employment Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984); *see also Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) (substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency").

Furthermore, the reviewing court "may not substitute its judgment ... as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B) (Supp. 2011). "The findings of the agency are presumed correct and will be set aside only if

unsupported by substantial evidence.” *Kearse v. State Health & Human Services Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Finally, the Appellant bears the burden “to prove convincingly that the agency's decision is unsupported by the evidence.” *Id.*

In the instant case, SCDEW decided that Ms. Crowe’s refusal to get the flu shot under AnMed’s mandatory immunization policy constituted reasonable non-compliance, and therefore, she was not discharged for cause connected with her employment. Under this Court’s narrow scope of review, it is clear the agency’s ruling is supported by substantial evidence and the ALC correctly affirmed. Hence, this Court also should affirm.

I. The SCDEW Appellate Panel correctly found AnMed discharged Ms. Crowe without cause connected to her employment because the substantial evidence supports that Ms. Crowe’s refusal to get the flu vaccine was reasonable.

A claimant is eligible for unemployment benefits if she meets the statutory conditions of S.C. Code Ann. § 41-35-110 (Supp. 2011). Under this statute, a claimant must have been separated from her employment “through no fault of [her] own.” § 41-35-110(5). Indeed, the Legislature has declared that the State’s public policy with respect to unemployment insurance is to set aside funds “to be used for the benefit of persons unemployed through no fault of their own.” S.C. Code Ann. § 41-27-20 (1986).

Nonetheless, if SCDEW finds that an unemployment insurance claimant has been discharged “for cause connected with [her] most recent work,” then the claimant is

ineligible for full benefits and will be disqualified from receiving benefits for a certain amount of time. S.C. Code Ann. § 41-35-120(2) (Supp. 2011).

The South Carolina Supreme Court in *Mickens v. Southland Exch.-Joint Venture*, 305 S.C. 127, 406 S.E.2d 363 (1991), explained how to determine whether a claimant has been discharged for cause:

[T]he general rule is that, where the employer's request is *reasonable*, a refusal to comply will constitute misconduct, justifying a discharge for cause. What is 'reasonable' will vary according to the circumstances of each case. Not only must the reasonableness of the employer's request be evaluated, **but also the employee's reason for noncompliance.**

Mickens, 305 S.C. at 130, 406 S.E.2d at 365 (internal citations and quotation marks omitted, second emphasis supplied).

Here, there is substantial evidence clearly supporting the Appellate Panel's decision that Ms. Crowe's noncompliance with AnMed's flu policy was reasonable based on her particular circumstances. The Appellate Panel made the following specific factual finding:

The claimant worked for the employer for 26 years without an immunization requirement, did not have patient contact in the performance of her duties, and presented credible medical documentation that such an immunization would jeopardize her health.

(R.p.10).

It is undisputed in the Record that: (1) Ms. Crowe worked for AnMed for 26 years; (R.p.37) (2) her termination was **not** based on job performance, but instead she was fired solely because of her refusal to take the flu vaccine; (R.p.65) (3) she did not have contact with AnMed's patients; (R.p.72) and (4) she provided medical documentation that she should be medically exempted from having to get the flu vaccine.

(R.p.87). Thus, the Appellate Panel's factual finding is amply supported by substantial evidence.

Moreover, SCDEW's conclusion that these facts led to Ms. Crowe **reasonably** refusing her employer's directive to get a flu shot is neither arbitrary, capricious nor an abuse of discretion. Certainly, Ms. Crowe's personal family history of negative reaction to the flu vaccine was a reasonable justification for her decision not to get immunized.

AnMed contends that SCDEW's decision was based on a "factual error" because of Ms. Crowe's testimony that her daughter was actually diagnosed with MS and not GBS. AnMed seems to suggest that Ms. Crowe's daughter's MS diagnosis absolutely negates any family history of GBS. However, Ms. Crowe testified that she had a family history of GBS and the onset of her daughter's condition was linked to a bout of GBS brought on by her getting vaccinated for the flu in 2001. (R.pp.70-72). Furthermore, her own family doctor unambiguously acknowledged a family history of GBS and unequivocally recommended against Ms. Crowe getting the flu vaccine. (R.p.87).

Consequently, the Appellate Panel's factual finding that Ms. Crowe "presented credible medical documentation that such an immunization would jeopardize her health," (R.p.10), is not based on any factual error and is clearly supported by substantial evidence. The mere possibility that two inconsistent conclusions may be drawn from the evidence does not mean the agency's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. at 226, 467 S.E.2d at 917.

Moreover, the Appellate Panel's related legal conclusion that Ms. Crowe was discharged without cause connected with her employment is one which reasonable minds could reach given the compelling evidence in this case. Discharge for cause is evaluated

not only based upon the reasonableness of the employer's request, but also the reasonableness of the employee's noncompliance. *Mickens*, 305 S.C. at 130, 406 S.E.2d at 365. Clearly, Ms. Crowe's reason for not following her employer's flu vaccine policy was justifiable and defensible based on her particular circumstances and her doctor's recommendation. Here, the Appellate Panel appropriately ruled that Ms. Crowe was not discharged for cause connected with employment pursuant to S.C. Code § 41-35-120(2).

Accordingly, SCDEW's final administrative decision effectively determined Ms. Crowe did not lose her job because of any fault of her own, and therefore, she was **eligible** for unemployment benefits. *See* S.C. Code Ann. § 41-27-20, § 41-35-110(5). This determination of eligibility is supported by substantial evidence in the Record. As a result, the ALC properly affirmed and this Court should likewise affirm.

II. Whether AnMed's flu policy is "lawful" is not at issue in this case; instead the issue is whether the substantial evidence supports SCDEW's decision that Ms. Crowe is eligible for unemployment benefits.

AnMed maintains that the ALC's Order should be reversed because its flu policy is "lawful" and "fairly" enforced. However, whether AnMed's policy is a reasonable one is not what is at issue in the instant case. The issue instead is whether Ms. Crowe is either eligible for unemployment benefits because she lost her job through no fault of her own or ineligible because she was discharged for cause connected with her employment. As discussed fully above, the Appellate Panel decided that AnMed did not have cause to terminate Ms. Crowe because her noncompliance with the flu policy was reasonable, and the substantial evidence supports SCDEW's determination.

Moreover, even if it could be argued that the fairness of AnMed's policy was the main issue, the Appellate Panel's decision that Ms. Crowe was fired without good cause

is tantamount to a finding that in this individual case, AnMed failed to fairly apply its flu policy by not granting Ms. Crowe an exemption. The Appellate Panel weighed the evidence – which included the medical opinion of Ms. Crowe’s doctor that she not get vaccinated – and decided the evidence was credibly supported that AnMed did not have good cause to terminate Ms. Crowe.

AnMed suggests, however, that the Appellate Panel merely credited Ms. Crowe’s **subjective** explanation offered for her noncompliance. AnMed attempts to analogize this case to one in which a health care worker was found ineligible for unemployment benefits after being terminated for refusing to work with AIDS patients. *See Dougherty v. Unemployment Comp. Bd. of Review*, 686 A.2d 53, 55 (Pa. Commw. Ct. 1996). In *Dougherty*, the Pennsylvania Commonwealth Court stated that “[a] subjective belief **alone** does not constitute good cause for actions that would otherwise disqualify a claimant from benefits.” *Id.* at 55 (emphasis added). The *Dougherty* Court found that the unemployment claimant, “despite his training, harbored unnecessary fears and misconceptions concerning AIDS. Claimant has only demonstrated to this Court that he had *subjective* beliefs that these patients posed a special risk to him and that Employer had inadequately equipped him to deal with those risks.” *Id.*

It is clear that *Dougherty* is inapposite to the instant case. Here, Ms. Crowe did not have subjective fears of needles or an unjustified or disproportionate fear of a negative reaction to the flu shot. On the contrary, Ms. Crowe’s objection to getting the flu shot was based on her daughter’s severe reaction to a flu shot and history of GBS, as well as a documented recommendation by Ms. Crowe’s own doctor based on the same family history. Ms. Crowe’s belief that her daughter’s flu shot caused a negative reaction

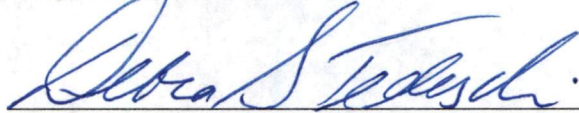
akin to GBS was based on statements made by her daughter's treating neurologist. (R.p.70). This cannot be characterized as a subjective belief. Instead, it was well within the Appellate Panel's discretion to weigh this evidence and determine that Ms. Crowe's actions were **objectively** reasonable under the circumstances.

Ms. Crowe never attempted to show or argued that AnMed's flu policy was not generally reasonable. She merely requested an exemption based on reasonable beliefs of a family history of GBS and agreed to follow the policy's requirement that any exempted person wear a surgical mask while at work. AnMed's arguments to the contrary run far afield of the issue that was actually decided in this case, namely whether Ms. Crowe was discharged for cause. Given the substantial evidence supporting SCDEW's decision that Ms. Crowe was not terminated for cause, the ALC correctly affirmed.

CONCLUSION

The Appellate Panel's decision that Ms. Crowe's refusal to take the flu vaccine was reasonable noncompliance with AnMed's policy is clearly supported by the substantial evidence in the Record. Accordingly, this Court should affirm the ALC's Order which in turn affirmed SCDEW's decision that Ms. Crowe is eligible for unemployment benefits because she was **discharged without cause** connected to her employment.

Respectfully submitted,



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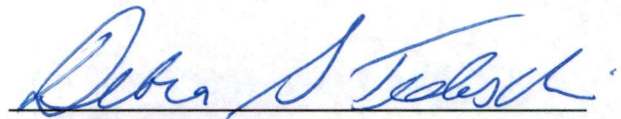
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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