

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-22-0354-AP

Appellate Case No. 2012-207906

AnMed Health, Appellant,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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A single dispositive question emerges from the briefs filed by AnMed Health and the Respondents: Whether, based on the record as a whole, substantial evidence exists to support a finding that Ms. Crowe had a history of Guillain-Barré Syndrome ("GBS")? The record yields but one conclusion that can withstand any scrutiny – that Ms. Crowe does not have a history of GBS. In the absence of that history, the determination of the South Carolina Department of Employment and Workforce (the "Department") that Ms. Crowe's undisputed non-compliance with AnMed Health's flu vaccination policy was excusable is not supported by substantial evidence and must be reversed. In addition to medical justification for non-compliance, the Department first identified two additional grounds as a basis for contending the claimant's refusal to take the flu vaccination was reasonable. AnMed Health will address those matters before turning to the medical documentation issue.

I. No Substantial Evidence Exists to Support the Appellate Panel's Findings That Claimant's Non-Compliance Was Reasonable Because, As A Long-Standing Employee, She Had Not Been Previously Required To Take The Flu Vaccine And Had No Patient Contact.

Apparently recognizing that AnMed Health's flu policy was adopted to protect the health and safety of its patients and staff and follows best-practice procedures recommended by the Centers for Disease Control (the "CDC"), the Department has abandoned the conclusion reached by the Appellate Panel that the policy was unreasonable. SCDEW Brief at 11 and 13 (" . . . whether AnMed's policy is a reasonable one is not what is at issue . . ."; "Ms. Crowe never attempted to show or argued that AnMed's flu policy was not generally reasonable.") Instead, the Department asserts that substantial evidence exists to affirm a finding that the Appellate

Panel did not make, but may be inferred from its ruling – that Ms. Crowe's refusal to comply with the flu policy was reasonable.

In its brief, the Department cites three factual findings by the Appellate Panel to support its decision:

1. Ms. Crowe worked for 26 years for AnMed Health without being required to receive a flu vaccine;
2. Ms. Crowe had no patient contact in the performance of her duties; and
3. Ms. Crowe presented "credible medical documentation that such an immunization would jeopardize her health."

A. Nothing in the Record Supports the Appellate Panel's Finding that Long-Standing Employees Should be Exempt From the Policy Merely Because They Have Not Been Required Previously To Take the Flu Vaccination.

There is not a single sentence in the record that explains why it would be reasonable for AnMed Health employees to be excused from having to take the flu vaccine merely because they have not done so in the past without regard to medical conditions. If this seniority based criteria were used, where would such a loophole be closed? Would it be at 5, 10, 20 or 25 years? How many other employees who are similarly situated would in fairness have to then be granted the exemption based on longevity as well? In its brief, the Department identifies no evidence or logic that would support its contention that the flu policy should not apply to longstanding employees. The effect of the position advanced by the Department would be to undermine an employer's ability to make health and safety improvements in the workplace simply because it had not done so before. No evidence in the record exists to support the conclusory finding that because Ms. Crowe was employed by AnMed Health for 26 years without being required to receive a flu vaccine that her refusal to

comply with the policy was reasonable. The finding is arbitrary and wholly unsupported by the record.

B. The Record Does Not Support the Appellate Panel's Finding That No Patient Contact Is a Reasonable Basis to be Exempt From the Flu Policy.

Similarly, in justifying her non-compliance with the flu policy, the claimant introduced no evidence to show that AnMed Health would be able to protect the health of its patients and staff by requiring vaccinations only of those employees having patient contact while permitting many workers without direct patient care responsibilities to be excused from the requirement. To the contrary, the record contains repeated references to the need for comprehensive application of the policy to contain the highly contagious disease – one that extends to the entire AnMed Health community:

To protect patients, visitors, and other health care workers (HCW's), the influenza vaccination will be viewed as a health competency and patient safety requirement. Health care workers (HCW's) include, but are not limited to AnMed Health employees, students, volunteers, temporary agency staff, "travelers," and certain vendors. **Unless an approved exemption is made (as described herein) the influenza vaccination will be a condition of initial and continued employment of all AnMed Health employees, and a condition of permissive entrance onto the premises of any AnMed Health service delivery site for all other HCW's, regardless of whether direct patient contact is expected.**

AnMed Health Influenza Immunization Protocol, R. p. 15 (bold emphasis in original; italics added for emphasis).

Nothing in the record supports the Appellate Panel's finding that the claimant, and by implication untold numbers of other hospital workers, students, volunteers, and vendors, should be exempt from the policy because they have no interaction with patients. The Department's determination that Ms. Crowe's refusal to take the vaccination was reasonable because she had no patient contact was not the product of a

rational, fact-based analysis. Moreover, the finding assumes that patient safety alone was AnMed Health's goal, which is not supported by the record. In announcing the flu policy, AnMed Health President and CEO John Miller cited measures the health care system has taken to advance not just patient safety but the safety of its employees and community as well, stating "[t]his year we are going to take yet another step in making patient, employee, and community safety a priority." R. p. 14. "Each year thousands of Americans die as a result of the flu and flu related illnesses," Mr. Miller added. "We must do our part to reduce the risk of infection and in turn help save the lives of those we care for and those we care about." *Id.*

The Department has not disputed the reasonableness of AnMed Health's goal of protecting the public health and safety, including health care workers, from this highly communicable disease. Neither has the Department disputed that the claimant would have had regular contact with other AnMed Health employees, who would have included health care workers. More importantly, nothing in the record supports a finding that AnMed Health's public health and safety goals could be achieved if it had carved out a substantial exception for those who had no patient contact. For all of these reasons, no substantial evidence exists to support the Appellate Panel's finding that Ms. Crowe's refusal to comply with the policy because she had no patient contact was reasonable.

II. The Record Contains No Credible Medical Documentation That Support A Finding That Claimant Has A History Of Guillain-Barré Syndrome.

In addition to the two Appellate Panel findings discussed above which were used by the Department to support its decision, the Department also found that Ms. Crowe

"presented credible medical documentation that such immunization would jeopardize her health." AnMed Health recognizes the heavy burden that traditionally falls to appellants under the substantial evidence standard of review. The standard, however, does require that to constitute substantial evidence, the record must contain "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." *Todd's Ice Cream, Inc. v. S.C. Employ. Security Comm.*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

A careful review of the record does not present a basis for a reasonable conclusion to support the Appellate Panel's finding that Ms. Crowe presented "credible medical documentation" that the flu vaccine "would jeopardize her health." R. p. 10. The only medical documentation in the record is a terse, handwritten note provided by Erin L. Cooksey, M.D. Dr. Cooksey makes no reference to any tests or diagnoses she has performed on Ms. Crowe. Dr. Cooksey provides no medical information concerning Ms. Crowe's condition. What she does say is that the claimant has a "strong family history of Guillian-Burr [sic] and MS." R. p. 87. Dr. Cooksey does not identify the source of that information. Based on the record, the only inference that can be made from Dr. Cooksey's statement is that she is referring to Ms. Crowe's daughter. Dr. Cooksey, however, reports nothing that would indicate she ever treated Ms. Crowe's daughter, reviewed her medical records, or conferred with her treating physicians.

Not only does Dr. Cooksey's handwritten prescription pad note lack any indicia of reliability, it is contradicted repeatedly in the record by Ms. Crowe. As discussed

more fully in Appellant's initial brief, there are three particularly detailed statements in the record where Ms. Crowe explains the family history related to GBS. The first is Ms. Crowe's acknowledgement that she has never been tested to determine whether she is a carrier of GBS. R. p. 71, ll. 1-5. The second reference is to Ms. Crowe's testimony of two conversations she reported having with her daughter's neurologist. The first conversation was at the time of discharge when Ms. Crowe reports the physician said "[w]e don't believe it's Guillain-Barré; we believe it is Multiple Sclerosis." R. p. 70, ll. 9-10. The second conversation Ms. Crowe referred to with the neurologist during her daughter's hospitalization when after learning Ms. Crowe's daughter took a flu shot several weeks before the hospitalization, the physician reportedly said "[t]hat very well could have activated what's happening here." *Id.* at ll. 15-17.

The third section in the record where Ms. Crowe reports developments with her daughter's condition is in the written statement she gave to AnMed Health to appeal the denial of her initial exemption request. R. p. 85. In the statement, Ms. Crowe reports that "the neurologist thought it was Gillian-Barre [sic] Syndrome but after many tests, blood work, MRI, spinal tap, etc. . . she was diagnosed with Multiple Sclerosis." *Id.* Ms. Crowe then added, "[t]he neurologist asked what [Ms. Crowe's daughter] had done within the past two weeks that could have activated the MS gene, that ALL humans carry and she replied, 'I took the flu shot.' He said that could be what activated the MS." (emphasis in original). *Id.*

Comparing the two impassioned accounts Ms. Crowe gave of the conversations at her daughter's bedside with the physician, several things are clear:

- The record contains no reliable evidence of family history that Ms. Crowe's daughter had GBS. Just the opposite is true.
- The record contains no evidence of family history that Ms. Crowe's daughter had any condition recognized by the CDC as being contraindicated for the flu vaccine.
- The record contains no documentation from physicians who treated Ms. Crowe's daughter concerning her diagnosis.
- Ms. Crowe's own reports are clear that her daughter did not have GBS, and that she was diagnosed instead with multiple sclerosis.
- Ms. Crowe's reports attribute two different statements to the neurologist concerning the possibility that a flu shot may have caused her daughter's multiple sclerosis:
 - "He said that could be what activated the MS." R. p. 85 (written statement to AnMed Health).
 - "That very well could have activated what's happening here." R. p. 70, ll. 16-17 (testimony before SCDEW hearing officer).
- The record contains no statement from the neurologist to verify Ms. Crowe's statement, raising the possibility of a connection between multiple sclerosis and the flu shot.
- The record does contain a statement from Dr. Cooksey that the flu shot can activate GBS in which she reports that Ms. Crowe has a "strong family history;" however, no evidence in the record, including Ms. Crowe's own statements supports a finding that she or her daughter had GBS. That fact alone wholly discredits the doctor's statement.

Without acknowledging that Ms. Crowe was unable to satisfy any of the medical conditions established by the CDC for an exemption, the Department invites the Court to carve out a large exception to AnMed Health's flu policy. In its brief, the Department describes what it offers as justification for her non-compliance, namely "Ms Crowe's personal family history of negative reaction to the flu vaccine"

SCDEW Brief at 10. There are three compelling reasons why the Department's proposal should be rejected.

First, if in making this statement the Department assumes the record establishes that Ms. Crowe's daughter contracted multiple sclerosis from a flu shot, it is mistaken. As demonstrated in the quotations cited above, Ms. Crowe first reported in writing to AnMed Health that her daughter's physician stated that the flu shot "*could* be what activated the MS." R. p. 85. The physician suggests nothing more than a mere possibility of a relationship. Such conjecture falls far short of constituting substantial evidence, particularly when the statement is provided by the claimant without any verification from the neurologist.

Second, Ms. Crowe and her physician, Dr. Cooksey, state a flu shot can activate multiple sclerosis. They also imply that a family history of multiple sclerosis is contra-indicated for the flu vaccine. These statements directly contradict the guidance from the CDC on which AnMed Health relied in developing its flu policy. In presenting this issue, the Department is asking the Court to permit individuals to refuse to comply with an employer's workforce health directives, such as the flu policy, because of unverified negative adverse reactions among family members. Similarly, the Department asserts that the Court consider as substantial evidence an equally unverified, conclusory physician's statement that is inconsistent with generally recognized and prevailing standards promulgated by the CDC. No reasonable basis exists in the record to support either position.

Finally, the "personal-family-history-of-negative-reaction" standard proposed by the Department would introduce a highly subjective factor into the review process that

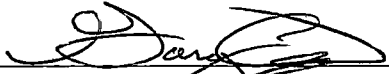
would be difficult to evaluate and administer. When taken as a whole, the record is clear that Ms. Crowe refused to comply with AnMed Health's attempt to protect the health of its patients and workforce because she was fearful that what happened to her daughter would happen to her. As sympathetic as that may be on a personal level, such highly personal considerations are not recognized as justification for an employee's refusal to comply with an employer's expectations.

CONCLUSION

AnMed Health's flu policy was established for one reason – to protect the health and safety of its patients and workforce. Respondents do not challenge the reasonableness of the policy. In refusing to comply with it, the claimant was driven by a personal fear to avoid having to take the vaccine. She presented no credible medical evidence that she had a personal or family history of GBS or any other condition recognized by the CDC as justification for refusing the flu vaccine. For these reasons, the Department's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the **FINAL BRIEF OF APPELLANT** and
FINAL REPLY BRIEF OF APPELLANT comply with Rule 211(b), SCACR.

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