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BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION SC Court of Appeals

Judy Johnson,	)	
	)	
Employee, Claimant/Respondent	)	W.C.C. FILE NO: 1802954
vs.	)	
	)	
Agape Hospice,	)	
	)	
Employer,	)	APPELLATE PANEL ORDER
	)	
and	)	
	)	
MagMutual Insurance Company,	)	
	)	
Carrier, Defendants/Appellants	)	

Appellate Panel Review held in Columbia, South Carolina on February 19, 2019 upon notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed April 23, 2019

Appearances: Claimant/Respondent Represented by Elizabeth McMahon Pentz of McWhirter, Bellinger & Associates, P.A. Defendants/Appellants Represented by Stephen R. Smoak and Vincent A. Sheheen of Savage, Royall & Sheheen, LLP

PROCEDURAL HISTORY

This claim arises from an admitted work accident of January 26, 2018, involving an injury to Claimant's shoulder. The subject of this appeal involves a dispute over Claimant's entitlement to temporary total disability benefits (TTD).

On June 26, 2018, a hearing was held before the Honorable Avery B. Wilkerson, Jr. (hereinafter "Single Commissioner") in St. Matthews, South Carolina to

resolve the issues raised by Claimant's request for a hearing via Form 50. Claimant's position is that she is entitled to TTD from March 8, 2018 and continuing.

Defendants contend that Claimant is not entitled to TTD for any period of time, as Claimant was given light duty work following the accident and thereafter terminated for cause on March 8, 2018 because of Claimant's insubordination and pursuant to Employer's policies. Accordingly, Defendants argue that Claimant's failure to earn wages is not due to or because of the work injury; therefore, Claimant is not entitled to TTD.

On August 22, 2018, the Single Commissioner issued a Decision and Order containing the following Findings of Fact and Conclusions of Law:

SINGLE COMMISSIONER'S FINDINGS OF FACT

1. I believe the Claimant, Judy L. Johnson, long term employee (2012-2015; 2016-2018) over Gregory McCarrick Charlton less than two (2) weeks.
2. I find that the Claimant's alleged March 6, 2018 company violation did not rise to a proper termination March 8, 2018. The Claimant was on light duty when she was unjustifiably fired. I believe to a much greater extent statements made by the Claimant were not the smartest of words, nor were they ideal or clear. However, this does not excuse withholding payment of TTD under the S.C. Workers' Compensation Act. Payment of TTD should begin on March 8, 2018 and continue through the present. This was an unjustified firing.

SINGLE COMMISSIONER'S CONCLUSIONS OF LAW

1. S.C. Code Ann. §42-9-10. Amount of compensation for total disability; what

constitutes total disability.

(A) When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-six and two-third percent of his average weekly wage[s].

The claimant is entitled to the agreed upon compensation rate per week from March 8, 2018, to present and on a continuing award until the Claimant returns to work or an additional Order of this Commission.

2. S.C. Code Ann. §42-9-190. No compensation to injured employee refusing suitable employment.

If an injured employee refuses employment procured for him suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal.

The Claimant accepted and performed suitable employment with the Employer until wrongfully terminated on March 8, 2018.

3. S.C. Code Ann. §42-9-200. Dates on which compensation commences.

No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in Section 42-15-60; but, if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of the disability.

The Claimant satisfied the waiting period and is entitled to TTD from March 8, 2018, to present and on a continuing award until the Claimant returns to work or an additional Order of this Commission.

4. S.C. Code Ann. §42-9-260. Notice to commission when payments have begun; suspension or termination of payments.

(A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, an employer may start temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

The Claimant was wrongfully terminated while on light duty and therefore, out of work as of March 8, 2018, due to a reported and accepted work-related accident which resulted in injuries. See *Pollack v. Southern Wine and Spirits of America*, 405 S.C. 9, 747 S.E.2d 430 (2013). Therefore, the Claimant is entitled to TTD from March 8, 2018 to present

and on a continuing award until the Claimant returns to work or an additional Order of this Commission.

### SINGLE COMMISSIONER'S DECISION AND ORDER

Claimant is awarded TTD benefits beginning March 8, 2018 and continuing as provided under the South Carolina Workers' Compensation Act. No hearing costs are assessed.

### ISSUES ON APPEAL

Within the applicable time period, Defendants timely filed a Form 30 appeal for appellate judicial review asserting several exceptions to the Single Commissioner's Decision and Order.<sup>1</sup> In Defendants' Appellate brief to the full Commission panel, the exceptions were consolidated into three (3) issues presented on appeal, which can essentially be narrowed down to the following two issues:

1. Did the Single Commissioner err, in finding as fact and concluding as a matter of law, that Claimant was "unjustifiably fired" and not terminated for proper cause?

2. Did the Single Commissioner err, in finding as fact and concluding as a matter of law, that Claimant's workplace injury was the cause of her inability to work?

### STANDARD OF REVIEW

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<sup>1</sup> Claimant argued Defendants' Form 30 Request for Commission Review was not timely filed within the fourteen (14) days from receipt of service of the single commissioner's order pursuant to S.C. Code Ann. §42-17-50 and S.C. Reg. 67-701 (Supp.2010). In this instance, the order was sent electronically by the Commission on August 22, 2018. Pursuant to S.C. Reg. 67-213, service was effective five (5) days later on August 27, 2018. "Service made electronically is deemed complete five days after the date the electronic transmission is completed, unless the Commission's electronic server indicates that the transmission was unable to be completed." S.C. Reg. 67-213 (Supp.2010). Subsequently, Defendants filed a Form 30 on September 10, 2018, which is timely and within the fourteen (14) days from receipt of service of the order.

In an Appellate Review, the Appellate Panel shall review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its finding of facts and reach its own conclusions of law consistent or inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.* 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.* 283 S.C. 534, 324 S.E.2d 87 (Ct. App 1984).

#### DECISION/ANALYSIS

Following the admitted work accident of January 26, 2018, Claimant missed about one week of work and then returned to light duty. At the beginning of March 2018, Claimant was about to be transferred to Employer's new call center for a new light duty position. (Hr. Tr. pp. 52-53). Claimant, however, was terminated for cause from her employment on March 8, 2018 as a result of insubordinate and hostile comments she made to fellow employees on March 6, 2018. (Hr. Tr. pp. 50-51).

On March 6th, Greg Charlton, Employer's Director of Growth and Development, had been conducting an orientation with one of Employer's new employees. (Hr. Tr. p. 33). Charlton himself had only been working for Employer for a few weeks. (Id.). He had never met Claimant before March 6, 2018. (Id.). In Charlton's encounter with Claimant that day while touring one of Employer's hospice facilities, Claimant repeatedly disparaged Employer in great detail. (Hr. Tr. pp. 35-37). Claimant even called the company owner/CEO "stupid." (Hr. Tr. p. 36). Claimant stated in advance of her tirade, "I don't know who you are but I'm going to just say it as it is." (Hr. Tr. p. 34). Some of those statements were:

- Scott (owner/CEO of Employer) is so stupid.
- They should close this place down.
- Their inventory is so screwed up.
- People are walking out the door left and right.
- I'm surprised you didn't do more research before coming on board.
- This company is going to hell in a hand basket.
- Closing the assisted living facilities was the dumbest thing.

(Hr. Tr. pp. 36-37).

Charlton was so dismayed at what he heard that he wrote down what Claimant had said as soon as he got into his car. (Hr. Tr. p. 42). Charlton then informed his supervisor about the incident. (Hr. Tr. p. 43).

Betsy Sippel, Chief Human Capital Officer for Employer, called Claimant into her office two days later and terminated Claimant for cause for violating multiple company policies, which included calling the owner/CEO of Employer "stupid." (Hr. Tr. p. 51). Sippel believed Claimant's conduct was harmful to the Employer and fit squarely within forbidden employee conduct in the Employee Handbook. (Id.). Among the prohibited conduct outlined in the handbook is: 1) insubordination; and 2) failure to maintain proper working relationships. (Id.) (Def. APA pp. 4-5). Defendants presented the Employee Handbook which was signed and acknowledged by Claimant. (Hr. Tr. pp. 12-13) (Def. APA p.1).

Importantly, Claimant has never disputed making the hostile comments. The Single Commissioner made a finding of fact that he believed "the Claimant, Judy L. Johnson, long term employee (2012-2015; 2016-2018) over Gregory McCarrick Charlton, less than two (2) weeks." This finding was incorrect since none of Charlton's testimony was ever disputed by Claimant. Charlton's credibility was never questioned at

the hearing. (Hr. Tr. pp. 44-45). Furthermore, Claimant had every opportunity at the hearing to deny that she made the disparaging comments. She never did so. Claimant simply did not agree with the consequences of her actions. When asked on cross-examination if she would expect an employee to keep their job after calling their boss stupid in front of other employees, the Claimant stated "yes, probably. Yeah." (Hr. Tr. pp. 29-30). This finding of fact was also in error because employment tenure is not a dispositive factor in assessing the credibility of witnesses.

#### FULL APPELLATE PANEL'S FINDINGS OF FACT

After a thorough review of the evidence, including the hearing testimony, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and oral arguments of counsel, WE, THE APPELLATE PANEL, REVERSE THE FINDINGS OF FACT OF THE SINGLE COMMISSIONER, IN FULL, AND FIND AS FOLLOWS:

1. The sole issue for determination at the June 26, 2018, Hearing, and therefore the sole issue before the Appellate Panel at this time, is whether Claimant is entitled to temporary total disability benefits from March 8, 2018, and continuing.
2. After Claimant's work related injury of January 26, 2018, Claimant began receiving authorized treatment and was assigned light duty work restrictions that were accommodated by Employer.
3. While working on light duty, Claimant was terminated for cause by Employer on March 8, 2018.
4. Based upon the greater weight of the evidence, the cause for Claimant's termination

includes insubordination and also failure to maintain proper working relationships. The aforementioned causes are in violation of the Employer's policies and common workplace expectations, and were justifiable cause for her termination.

5. Based upon the greater weight of the evidence, the Employer did not simply "look for" a reason to terminate the Claimant, but rather acted in accordance with its policies, which the Claimant did violate.

6. The greater weight of the evidence does not indicate any relationship or nexus between the Claimant's inability to earn wages and her workplace injury.

7. The holding in *Pollack v. Southern Wine and Spirits of America*, 405 S.C. 9, 747 S.E.2d 430 (2013) applies directly to the present case.

8. Based upon the greater weight of evidence, Claimant is not entitled to temporary total disability benefits for any period of time following the January 26, 2018 work accident.

#### FULL APPELLATE PANEL'S CONCLUSIONS OF LAW

With the above Findings of Fact, and as provided in the South Carolina Code of Laws and Regulations, with respect to the Single Commissioner's conclusions of law as they relate to the issue of entitlement to temporary total disability benefits, WE, THE APPELLATE PANEL, REVERSE THE CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER, IN FULL, CONCLUDING AS FOLLOWS:

1. Pursuant to S.C. Code §42-9-260 and the accompanying regulations, the entitlement of temporary total disability benefits is premised upon a nexus between the work-related injury and the inability to earn wages.

2. An injured employee will be entitled to temporary total disability benefits when his

incapacity to earn wages is due to or because of injury, pursuant to *Pollack v. Southern Wine and Spirits of America*, 405 S.C. 9, 747 S.E.2d 430 (2013).

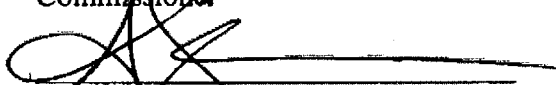
3. Pursuant to S.C. Code §42-9-260 and the accompanying regulations, and the South Carolina Supreme Court's holding in *Pollack*, Claimant has not shown that her inability to earn wages is due to her injury. Rather, based on the applicable law and a preponderance of the evidence presented, Claimant's alleged inability to earn wages from March 8, 2018 to the present and continuing, is due to the fact that she was properly terminated for cause.

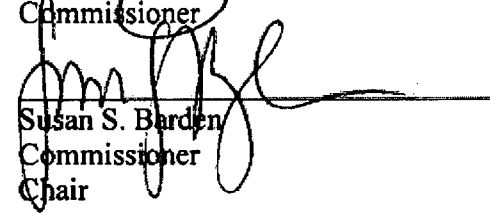
ORDER

IT IS THEREFORE ORDERED by the Full Panel that the Decision and Order of the Single Commissioner is hereby REVERSED in full, and Claimant is not entitled to temporary total disability benefits for any periods of time following the work injury of January 26, 2018, as requested by Claimant.

IT IS SO ORDERED.

  
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R. Michael Campbell, II  
Commissioner

  
\_\_\_\_\_  
Aisha G. Taylor  
Commissioner

  
\_\_\_\_\_  
Susan S. Barden  
Commissioner  
Chair

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Valerie Deller on April 23, 2019***