

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission

R. Michael Campbell, II, Commissioner; Aisha G. Taylor, Commissioner; Susan S. Barden,
Commissioner

W.C.C. File No.: 1802954
APPELLATE CASE NO.: 2019-000869

Judy Johnson, Employee, Appellant,

v.

Agape Hospice, Employer; MagMutual Insurance Company, Carrier; Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. **WHETHER THE APPELLATE PANEL RETAINED SUBJECT MATTER JURISDICTION TO CONSIDER AND HEAR THE RESPONDENTS' UNTIMELY APPEAL.**
- II. **WHETHER THE APPELLATE PANEL'S ORDER IS NULL AND VOID.**
- III. **ALTERNATIVELY, WHETHER THE APPELLATE PANEL'S DECISION WAS ERRONEOUS IN LIGHT OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AS A WHOLE.**

STATEMENT OF THE CASE

This workers' compensation matter originated when Judy L. Johnson ("Appellant") suffered right shoulder, neck and right-hand(fingers) injuries by accident while working for Respondent Employer January 26, 2018. Authorized treating physician, Thomas D. Armsey, M.D., placed the Appellant on light duty March 2, 2018. As she worked in her assigned light duty capacity, Respondent Employer terminated Appellant on March 8, 2018. Appellant filed a March 22, 2018, S.C. Workers' Compensation Form 50 hearing request for temporary total disability ("TTD") benefits because of lost compensable time from work and wages for the period of March 8, 2018 and continuing due to the Respondent Employer's termination unsupported by cause. The Defendants filed an April 23, 2018, Form 51 answer denying that the Appellant sustained right shoulder, neck, or right hand (fingers) injuries on January 26, 2018. However, during the start of the June 26, 2019, S.C. Workers' Compensation hearing, the Defendants confirmed this claim accepted as to the right shoulder and neck. Therefore, entitlement to TTD benefits was the sole hearing issue. The parties received hearing Order directives July 10, 2018. Avery B. Wilkerson, Jr.'s, Hearing Commissioner, August 22, 2019, Order determined that Respondent Employer unjustifiably terminated Appellant while on light duty and she was entitled to TTD benefits March 8, 2019, until Appellant returned to work or an additional commission Order. The Hearing Commissioner's specific findings included:

1. I believe the Appellant, Judy L. Johnson, long term employee (2012 -2015; 2016-2018) over Gregory McCarrick Charlton less than two (2) weeks.
2. I find that the Appellant's alleged March 6, 2018, company violation did not rise to a proper termination March 8, 2018. The Appellant was on light duty when she was unjustifiably fired. I believe to a much greater extent statements made by the Appellant 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.

Nineteen (19) days later, on September 10, 2018, the Respondents file a S.C. Workers' Compensation Commission Form 30 Request for Commission Review. The Full S.C. Workers' Compensation Panel ("Full Panel") heard oral arguments February 19, 2019. Respondents asserted that the Hearing Commissioner erred in finding Appellant was unjustifiably terminated and that the workplace injuries were not the cause of Appellant's inability to earn wages. Appellant argued that the Respondent's appeal was clearly untimely filed and alternatively the Hearing Commissioner's decisions were not in error.

First, the Full Panel's April 23, 2019, Order did not address the Appellant's subject matter jurisdiction argument properly raised below. Second, the Full Panel reversed the Hearing Commissioner's entire decision finding, without any supporting references in the record, that Appellant was justifiably terminated for insubordination and failure to maintain proper working relationships in violation of Respondent Employer's policies and common workplace expectations. The Full Panel's findings 4, 5, 6 stated that the greater weight of evidence did not support a nexus between Appellant's inability to earn wages and the workplace injury and therefore the Appellant was not entitled to TTD benefits, but again, without references to the record.

This May 22, 2019, appeal followed.

STANDARD OF REVIEW

The S.C. Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the administrative Commission. S.C. Code Ann. §1-23-380; Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). “The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-380(5) (2011). “The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 222, 628 S.E.2d 262, 266 (Ct.App.2006). The appellate court “may reverse or modify the [Commission’s] decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are [a]ffected by other error of law [or are] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” S.C. Code Ann. § 1-23-380(5)(d), € (Supp. 2011). “The Court of Appeals must affirm the Workers' Compensation Commission's decision unless it is clearly erroneous in view of the substantial evidence on the whole record.” Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000).

“[G]uiding [o]ur workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission’s decision “must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Wynn v. People’s Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

“The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established.” Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). “[T]he fact finder may disregard” medical evidence only if there is other competent evidence in the record to support their conclusion. Id.

ARGUMENT

I. THE APPELLATE PANEL DID NOT HAVE SUBJECT MATTER JURISDICTION.

The Appellant maintains that the Full Panel lacked appellate jurisdiction and therefore the August 22, 2019, Hearing Commissioner's Order is the law of the case. S.C. Code Ann. §42-17-50 specifically prescribes fourteen (14) days from the date of a workers' compensation award in which to file an application for commission review. *See Allison v. W.L. Gore & Assoc.*, 394 S.C. 185, 714 S.E.2d 547 (S.C. 2011). The Full Panel did not have the authority to extend the fourteen (14) day filing period. *Id.* (finding the Full Panel lacked jurisdiction where the Appellant filed the Form 30 two days after fourteen-day statutory deadline).

“The fourteen (14) day period is jurisdictional. The Commission **will not accept** for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the Hearing Commissioner's order.” S.C. Code of Regulations R.67-701 (Supp. 2010) (*emphasis added*).

The Administrative Tribunal served the executed Hearing Commissioner's order via electronic transfer on August 22, 2018. Therefore, the Form 30 Request for Commission Review deadline post-mark date was September 4, 2018. The Appellants' Form 30 request for review was clearly certified on September 10, 2018, six (6) days past the statutory deadline. Therefore, the Full Panel does not retain appellate jurisdiction and this appeal should be dismissed.

II. WHETHER THE APPELLATE PANEL'S APRIL 23, 2019, DECISION AND ORDER IS NULL AND VOID

Without subject matter jurisdiction, the Full Panel's order is null and void. *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (an order issued without jurisdiction is void and a void order has no legal effect).

III. ALTERNATIVELY, WHETHER THE APPELLATE PANEL’S DECISION WAS ERRONEOUS IN LIGHT OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AS A WHOLE.

The Appellant asserts that the Full Panel’s decision was “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record”. S.C. Code Ann §1-23-380. (5)(e). The record clearly supports that the Appellant was terminated without just cause based upon the evidence presented, lack of evidence presented, witness testimony, and record as a whole. “Under the Administrative Procedures Act (APA), the Court of Appeals may reverse or modify the decision of the Workers' Compensation Commission when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” Sellers v. Tech Service, Inc., 421 S.C. 30, 803 S.E.2d 731 (Ct. App. 2017), rehearing denied.

The Appellant was a thirty-seven (37) year nurse; hired not once, but twice, by the Employer; in a supervisory capacity; familiar with corrective actions; working light duty at her assigned location as a result of the accepted right shoulder and neck injuries; and absent any actual company violations. [HRG. TR. 6:7-10; 11:20-22; 12: 11-13:8; 13: 9-18] [Def. APA #1]. She testified that there was a disciplinary action form that was used to evaluate infractions, and which implemented essentially a three-strikes policy before termination based on a 60-day and then 90-day probationary period (per offense). [HRG. TR. 15:24 – 16:4]. The Appellant testified that to her knowledge, she has never had any corrective actions or company violations. [HRG. TR. 16:9-13].

On March 6, 2018, the Appellant worked light duty doing audits at the Lexington Hospice House. [HRG. TR. 16:20-17:1]. She met and had a conversation with Mr. Greg Charlton, who was a new employee of Agape as Lead Marketer. [HRG. TR. 17:2-14]. The Appellant provided

information about potential marketing, discussed changes at the Employer, and expressed concern about where she would be put. [HRG. TR. 17:15-18-19:18]. She states that she had a conversation with Mr. Charlton and Ms. Sarah Todd about other assisted living facilities where Agape could market and potentially get new patients. [HRG. TR. 17:12 – 18:18]. The Appellant mentioned that she was unhappy with herself because she was unable to work at her full capacity and mentioned that there had been a few changes for the nurses recently at Agape. [HRG. TR. 19:1-9]. Another marketer Sarah Todd was present but in and out. [HRG. TR. 18:2-5].

On March 8, 2018, the Appellant testified that she was at Hospice House on Stoneridge in the back room doing audits for the Hospice Houses which was part of her light duty. [HRG. TR. 19: 19-25]. The Appellant had a meeting called by Betsy Sippel without anyone else present. [HRG. TR. 20: 2-12]. Ms. Sippel present the Appellant with a separation agreement. [HRG. TR. 20: 15-16]. The Appellant stated she did not understand why she was being fired. [HRG. TR. 20:17]. Ms. Sippel responded that the employer heard that the Appellant was unhappy with Agape. [HRG. TR. 20:20-21]. The Appellant revoked the separation agreement. [HRG. TR. 22:4-16]. Following her termination, the Claimant went to the Center Street office on March 12, 2018, to turn in her company computer, charge cards and vehicle and revoked the separation agreement. [HRG. TR. 23: 6-24: 13]. The Claimant testified that she spoke with Amanda Whitehead, her advocate at Agape, and that it was the Claimant's understanding that she would not receive Workers' Compensation checks. [HRG. TR. 24:17-25: 3].

The Claimant was not aware that anyone alleged she spoke ill of the Employer prior to March 6, 2018. [HRG. TR. 25:20-23]. She left the Employer on good terms in 2015. [HRG. TR. 25: 24-26:1]. The Claimant stated she did not speak negatively after leaving on March 8, 2018. [HRG. TR. 26:2-8].

On cross examination, the Claimant did not present the disciplinary form and could not reference the form in the employee handbook [Def. APA #1]. [HRG. TR. 17-27:2; 28:1-10]. Further, the Claimant could not point to 60-day and then 90-day probation reference in the employee handbook, but stated they were on the disciplinary form. [HRG. TR. 28:11-29:11; 29:17-21]. The Claimant testified that if an employee called their boss stupid in front of other employees that they would be counseled, disciplined, but keep their job. [HRG. TR. 29:22-30:9].

On redirect the Claimant identified a separate policy that nurses followed on their laptops regarding infractions. [HRG. TR. 30:15- 31:8].

The Defense called witness Gregory McCarrick Charlton, the Director of Growth and Development at Agape for the past five (5) months. [HRG. TR. 33:4-8]. Mr. Charlton testified that on March 6, 2018, he had been working at Agape for two (2) weeks when he and Sarah Todd had a conversation when he met the Claimant. [HRG. TR. 33: 12-15; 34:5-13]. Mr. Charlton was dismayed by the conversation and subsequently made notes. [HRG. TR. 35:17-24; 42:19-24]. He reduced these notes to an email. [HRG. TR. 36: 1-37:2 Mr. Charlton informed Kelly Stone, Vice President of Operations. [HRG. TR. 42:25-43:3]. He testified he informed Vice President Stone out of concern. [HRG. TR. 43:7-13]. Mr. Charlton confirmed that coworker Sarah Todd was also present during the conversation with the Claimant on March 6, 2018. [HRG. TR. 43:14-15]. He did not receive any reward or promotion for passing on the information. [HRG. TR. 43:19-22].

On cross examination, Mr. Charlton testified that Vice President Stone requested that he provide notes about the March 6, 2018, conversation with the Claimant. [HRG. TR. 44:6-9]. He was not aware if Sarah Todd wrote a similar statement. [HRG. TR. 44:10-12]. Mr. Charlton traveled to approximately three (3) facilities on March 6, 2018 and met several people. [HRG. TR. 44:15-25].

The Defense then called Marilyn Elizabeth “Betsy” Sippel, the Chief Human Capital Officer of Agape since 2012. [HRG. TR. 46: 18-25]. She was over anything employee related, human resources, workers ‘compensation benefits, wellness programs, anything to do with employees. [HRG. TR. 47:1-5]. Ms. Sippel stated she was familiar with the Claimant and the Claimant’s accident on January 26, 2018. [HRG. TR. 47:6-13].

Ms. Sippel testified that Kelly Stone contacted her about alleged statements the Claimant made. [HRG. TR. 47: 14-22]. She acknowledged that Mr. Charlton’s testimony were the statements passed to her [HRG. TR. 23-48:3]. Ms. Sippel agreed that the Claimant was on light duty at the time the alleged statements were made. [HRG. TR. 48: 4-6]. Ms. Sippel testified that page eleven (11) of the Agape Employee Handbook states “it is not possible to list all forms of behavior that are considered unacceptable in the workplace.” [HRG. TR. 48: 7 – 49:1]. Pages 11 and 12 of the handbook cite a list of conduct that could potentially result in discipline, unrelated to the disciplinary forms previously discussed by the Claimant. [HRG. TR. 49:5 – 50:1]. However, Ms. Sippel acknowledged the disciplinary form the Claimant earlier testified about as a supervisor’s tool. [HRG. TR. 49:10-25]. The employee handbook did not address probationary periods or levels of infractions. [HRG. TR. 50:2-14].

Ms. Sippel noted that she, Kelly Stone, and Dee Dee Henderson were the ones to determine that the Claimant should be terminated, [though neither Ms. Stone nor Ms. Henderson were available witnesses]. [HRG. TR. 50: 15-19]. Ms. Sippel testified that they looked at the statements made by the Claimant and felt that they were included by three (3) different categories in the handbook as reasons for termination: gossiping, insubordination, and failure to maintain proper working relationships. [HRG. TR. 50:20 – 51: 5]. Ms. Sippel testified that the alleged statements were harmful and spoiled the agency. [HRG. TR. 51:6-14]. Additionally, it was noted that the

Claimant called the owner of Agape “so stupid” and that it is company policy that employees can be fired for one incident according to the handbook. [HRG. TR.51: 15 – 53:19]. Ms. Sippel stated she felt that “so stupid” and “stupid” were the same thing but did not know why the email cited “so stupid”. [HRG. TR. 51:15-52:13]. The Employer was preparing to open a call center and looked to the Claimant to perform in one of those positions as part of her light duty. [HRG. TR. 52: 21-53:8]. Ms. Sippel testified that she previously fired persons for one violation and that the Claimant’s violation rose to the level of termination. [HRG. TR. 53:12-21].

Ms. Sippel recognized Claimant’s Exhibit #2 as an email exchange received from Ms. Stone regarding Mr. Charlton’s conversation with the Claimant. [HRG. TR. 58:1-16]. She did not remember what date the termination decision was made. [HRG. TR. 58:17-19]. Ms. Sippel confirmed no one else was present when she met the Claimant on March 8, 2018. [HRG. TR. 58: 20-59:2]. However, she testified that there were no disciplinary or corrective actions involving the Claimant leading up to termination. [HRG. TR. 59:11-18].

The Full Panel’s decision was based in part as follows: “Furthermore, Appellant had every opportunity at the hearing to deny that she made the disparaging comments. She never did so.” S.C. Regulation 67-603 governs an Employer’s response to a Claimant’s hearing request. An Employer can admit and deny allegations. However, the Act does not have a comparable requirement for Appellants. In no place does the statutory scheme prevent a Claimant’s recovery based upon the absence of the word “deny.” Appellant testified specifically in detail about the controversial conversation she remembered with Gregory Charlton. The Full Panel’s decision held the Appellant to a nonexistent standard of law.

Mr. Charlton testified he visited several facilities and talked to many people on March 6, 2018, during his employee orientation. Neither Ms. Todd nor “other employees” were present at the hearing

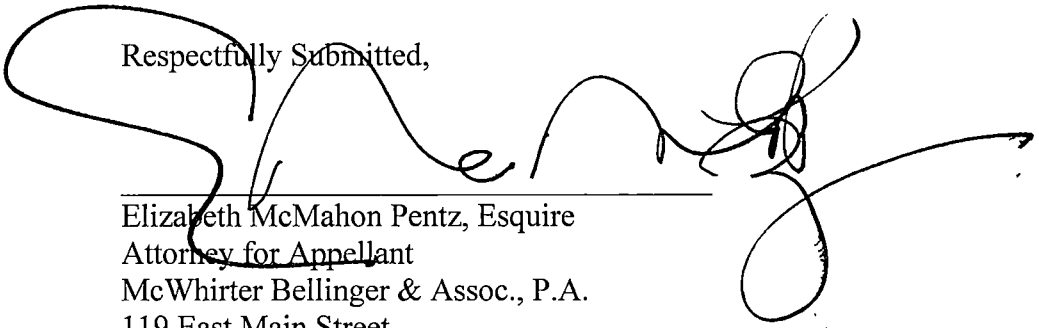
to corroborate Mr. Charlton's account. Further, the Employer could not present any corrective actions, disciplinary issues, or evidence of the Appellant as anything less than a dedicated employee.

Further, a proper factual analysis regarding temporary total disability benefits pursuant to Pollack v. Southern Wine and Spirits of America was warranted. 405 S.C. 9 (2013). First, in Pollack, the Appellant was on light duty, admitted that he failed to report an accident in violation of company policy. In the case at bar, the Appellant neither admitted a company violation nor was any substantial evidence presented of a company violation pursuant to the Respondent Employer's employee handbook. Second, the Pollack Court stated that "[w]hile we are constrained by the substantial evidence standard of review, we do agree with Appellant that an employer's denial of TTD benefits *must be scrutinized carefully*. Certainly, this is a critically important task for the Commission in its fact-finding role." Id. at 16, 434. At present, the Full Panel's analysis failed to fulfill the Pollack Court's concerns regarding an Employer's denial of TTD. *See Id.* at Footnote No. 5. The Appellant's inability to earn wages was clearly entirely due to wrongful dismissal while on light duty, thus the nexus between the accident injuries and inability to earn wages remains clear.

CONCLUSION

Based upon the foregoing arguments, evidence in the record, case law, and statutes cited herein, the Court should reverse the Full Panel's April 23, 2019, Decision and Order and reinstate the Hearing Commissioner's original August 22, 2019, Order. Alternatively, the Court should reverse the Full Panel's April 23, 2019, Decision and Order based upon clear

Respectfully Submitted,



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Lexington, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission

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R. Michael Campbell, II, Commissioner; Aisha G. Taylor, Commissioner; Susan S. Barden,
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Judy Johnson, Employee, Appellant,

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Agape Hospice, Employer; MagMutual Insurance Company, Carrier; Respondents.

PROOF OF SERVICE

Counsel for the **Appellant** certifies that she served the **Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal** on the Respondents, Agape Hospice, Employer; MagMutual Insurance Company, Carrier, by depositing a copy of the same into the United States Postal Service with proper postage affixed on July 15, 2019, and addressed as follows:

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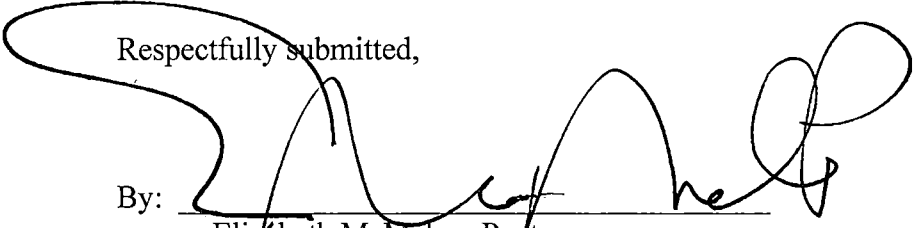
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**PROOF OF SERVICE APPELLANT'S
INITIAL BRIEF AND DESIGNATION
OF MATTER TO BE INCLUDED IN
THE RECORD ON APPEAL**

Lexington, South Carolina
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August 21, 2019

VIA HAND DELIVERY:

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RE: Judy Johnson, Employee, Appellant v. Agape Hospice, Employer; MagMutual
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APPELLATE CASE NO.: 2019-000869
SCWCC FILE NO.: 1802954

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the **Appellant's Initial Brief and Designation of Matter** which we are filing on behalf of the Appellant, Judy Johnson. Also enclosed is a **Proof of Service** on counsel. Please return the additional three (3) filed copies to me via our courier.

I appreciate your time and attention. If additional information is required, please do not hesitate to contact me. Thanking you in advance, I am

Respectfully yours,

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