THE STATE OF SOUTH CAROLINA
In the 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

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

Judy Johnson, Employee, Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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DID THE APPELLATE PANEL CORRECTLY RULE THE RESPONDENTS' FORM 30 WAS TIMELY FILED WITH THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION?

STATEMENT OF THE CASE

This case is a workers' compensation matter in which Judy Johnson ("Appellant") suffered a compensable shoulder injury while lifting a patient in bed on January 26, 2018. Appellant missed about one week of work from her employer Agape Hospice ("Respondents") and was then allowed to return to light duty. Appellant 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.

Appellant then filed a Form 50 seeking Temporary Total Disability (TTD) compensation from Respondent, which was denied by Respondent in its filed Form 51 due to Appellant's termination for cause.

At the hearing held on June 26, 2018, the Single Commissioner found that Appellant was wrongfully terminated while on light duty. Because of what he deemed to be an "unjustified firing," the Single Commissioner found that payment of TTD to Appellant should begin effective March 8, 2018. The Single Commissioner's Order was electronically served on the parties on August 22, 2018.

On September 10, 2018, exactly 14 days after electronic service was completed upon the parties pursuant to the relevant statutes and regulations, the Respondents timely filed a Form 30 with the South Carolina Workers' Compensation Commission seeking a

review of the decision with a full Appellate Panel of the Commission ("Appellate Panel").

After thoroughly reviewing the evidence and hearing oral arguments on February 19, 2019, the Appellate Panel issued its order on April 23, 2019 reversing the Single Commissioner. The Appellate Panel's findings include: a) Appellant was justifiably terminated for cause on March 8, 2018 for violation of the Respondents' policies and common workplace expectations; b) 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; and c) Appellant is not entitled to temporary total disability benefits for any period of time following the January 26, 2018 work accident because she was terminated for just cause. The Appellate Panel also found the Respondents had timely filed the Form 30 within the appropriate time requirements. The Appellate Panel findings were supported by specific references to the record in its decision and analysis.

Appellant filed this appeal on May 22, 2019.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. McCuen v. BMW Mfg. Corp., 383 S.C. 19, 677 S.E. 2d 28, 31 (Ct. App. 2009); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). The appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2004). An appellate court may only reverse or modify the Appellate Panel's decision if the appellant's substantial rights 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." S.C. Code Ann § 1-23-380 (2006); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004). "The possibility of drawing inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken County, 341 S.C. 448, 445, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct.

App. 2004). The final determination of witness credibility and the weight to accorded evidence is reserved for the Appellate Panel. Bass v. Kenco Group, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

FACTS

Appellant was working for Respondents when she suffered an injury to her shoulder lifting a patient in bed on January 26, 2018. All parties acknowledge Appellant sustained compensable injuries in a work-related incident. She missed a week of work and then was allowed to return to light duty. At the beginning of March 2018, Appellant was about to be transferred to Respondents' new call center for a new light duty position. (R. p. 193, line 24- p. 194, line 11). Appellant, however, was terminated for cause from her employment on March 8, 2018 as a result of insubordinate, derogatory, and hostile comments she made to fellow employees on March 6, 2018. (R. p. 191, line 15- p. 192, line 5).

On March 6th, Greg Charlton, Respondents' Director of Growth and Development, had been conducting an orientation with one of Respondents' new employees. (R. p. 174, lines 12-15). Charlton himself had only been working for Respondents for a few weeks. (R. p. 174, lines 23-25). He had never met Appellant before March 6, 2018. (R. p. 174, lines 15-17). In Charlton's encounter with Appellant that day while touring one of Respondents' hospice facilities, Appellant repeatedly disparaged Respondents in great detail. (R. p. 177, line 8- p. 178, line 2). Appellant even called her boss "stupid." (R. p. 177, lines 20-21). Appellant stated in advance of her tirade, "I don't know who you are but I'm going to just say it as it is." (R. p. 175, lines 10-12). 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.
(R. p. 177, line 8- p. 178, line 2).

Charlton was so dismayed at what he heard that he wrote down what Appellant had said as soon as he got into his car. (R. p. 183, lines 23-24). Charlton then informed his supervisor about the incident. (R. p. 184, lines 1-3).

Betsy Sippel, Chief Human Capital Officer for Respondents, called Appellant into her office two days later and terminated Appellant for cause for violating multiple company policies, which included calling the owner/CEO of Respondents "stupid." (R. p. 191, line 15- p. 192, line 18). Sippel believed Appellant's conduct was harmful to Respondents 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.) (R. p. 246). The Employee Handbook had been signed and acknowledged by Appellant. (R. p. 153, line 11- p. 154, line 8) (R. p. 236).

Appellant has never disputed making the hostile comments. None of Charlton's testimony was ever disputed by Appellant. Charlton's credibility was never questioned at the hearing. (R. p. 185, line 6- p. 186, line 1). Appellant had every opportunity at the hearing to deny that she made the disparaging comments. She never did so. Appellant 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 Appellant stated "yes, probably. Yeah." (R. p. 170, line 22- p. 171, line 9).

ARGUMENTS

1. THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD FOR THE APPELLATE PANEL TO DECIDE APPELLANT WAS TERMINATED FOR CAUSE.

The record contained substantial evidence to support the Appellate Panel's decision. For an injured employee to be entitled to TTD compensation, there must be a nexus between the work-related injury and the inability to earn wages. Pollack v. Southern Wine and Spirits of America, 405 S.C. 9, 747 S.E. 2d 430 (2013). There is no such nexus in this instance because Appellant was terminated for just cause. The plain language ruling of Pollack is that an Employer can terminate an Employee while the Employee is on light duty if it is for cause, thus disqualifying the Employee from receiving TTD. Id.

The findings of fact in the Appellate Panel Order, as explained in the decision and analysis, set forth ample grounds for Respondent to terminate Appellant for cause. (R. pp. 18-22). As the ultimate finder of fact, the Appellate Panel found that Appellant's behavior had violated both common workplace expectations and also Respondents' specific employment policies. (R. pp. 20-21); See Shealy v. Aiken County, 341 S.C. 448, 445, 535 S.E.2d 438, 442 (2000).

Even without the specific policies as set forth in Employer's handbook, it is unacceptable in any workplace environment for an employee to call the boss "stupid" and expect to remain employed by that entity. In this instance, Appellant called the owner/CEO "stupid" in front of two new co-employees whom she had never met. (R. p. 177, lines 20-21). This did not occur in a quick outburst of frustration- Appellant prefaced the comments by saying, "I don't know who you are but I'm going to just say it

as it is." (R. p. 175, lines 10-14). This testimony was never disputed. Furthermore, Appellant had every opportunity at the hearing to deny that she made the disparaging comments. She never did so. Appellant 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 Appellant stated "yes, probably. Yeah." (R. p. 170, line 22- p. 171, line 9).

In addition to calling the boss "stupid," Appellant also stated the following:

-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.
(R. p. 177, line 9- p. 178, line 2).

The new employee was so dismayed at what he heard that he wrote down what Appellant had said as soon as he got into his car. (R. p. 183, lines 23-24). He then informed his supervisor about the incident, and Appellant was terminated two days later. (R. p. 183, line 25- p. 184, line 3).

Respondent established its own company policies to govern the behavior of its employees and has a legitimate business interest in the enforcement of the policies. South Carolina appellate courts have consistently upheld this principle: "An employer has the right to establish and enforce any lawful and reasonable business policies, and an employee is obligated to obey the employer, even if an employer's commands or policies seem harsh or severe." O'Neal v. Intermedical Hospital of South Carolina, 355 S.C. 499, 585 S.E. 2d 526 (Ct. App. 2003). Simply because an employee is on light-duty does not change the expected standard of behavior. The substantial evidence as presented shows

the Respondent was not just "looking for" a reason to discharge Appellant, but instead acted in accordance with its policies and rules which Appellant did violate.

Appellant argues that she did not admit to a company violation and therefore does not fall under the holding in Pollack v. Southern Wine and Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013). This claim is not a true interpretation of Pollack. In Pollack, the South Carolina Supreme Court ruled that an employee's inability to earn wages must be "due to" or "because of" the injury for the employee to be entitled to TTD. Id. Here, Appellant's inability to earn wages was because of her own misconduct which resulted in her termination for cause. Appellant's inability to earn wages was not due to her injury. Nor does it matter that Appellant failed to admit a company violation- especially when the testimony regarding Appellant's hostile comments towards her employer was undisputed. Furthermore, even though Appellant has not admitted her behavior, she has also not denied it. The only testimony and evidence in the record about Appellant's comments is from Charlton's testimony and notes.

Appellant would likely still be working in her light-duty position if not for her violation of company policy. In fact, Respondent's representative testified that Appellant was in the process of being transitioned over to a new call center where Appellant's duties would have fit within her light-duty work restrictions at the time. (R. p. 193, line 21- p. 194, line 11). During the approximately six (6) weeks Appellant was on light duty, Respondent had accommodated all of Appellant's work restrictions, and no evidence was presented to show that Respondent was unwilling to continue to do so.

Appellant asserts the Appellate Panel failed to "carefully scrutinize" the Respondent's denial of TTD benefits pursuant to Pollack v. Southern Wine and Spirits of

America, 405 S.C. 9, 747 S.E.2d 430 (2013). This ignores the specific Finding of Fact in paragraph 7 which states "The holding in Pollack applies directly to the present case." (R. p. 21). It also ignores the fifth finding of Fact which held "The Defendants (Respondents) did not simply 'look for' a reason to terminate the Claimant (Appellant), but rather acted in accordance with its policies, which Claimant (Appellant) did violate." (R. p. 21).

2. THE RESPONDENTS' FORM 30 WAS TIMELY FILED WITH THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION.

Appellant incorrectly asserts the Appellate Panel did not have subject matter jurisdiction to hear the case, and therefore its order is null and void. Appellant claims the Appellate Panel "extended" the fourteen (14) day filing period. This did not happen. The filing time period did not begin until after receipt of service of the Single Commissioner' Order.

The Single Commissioner's Order was electronically served on the parties on August 22, 2018. (R. p. 3). Section 67-213 of the S.C. Code of Regulations governs service of orders in Worker's Compensation cases and provides in relevant part:

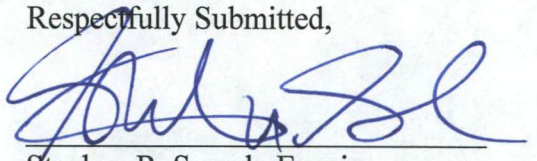
> "When service is made by first class mail, five days are added to the date mailing. Service by first class mail is deemed complete five days after the date of deposit in the United States Postal Service. Service made electronically is deemed complete five days after the date the electronic transmission is completed, unless the Commission's electronic server indicates that the transmission was unable to be completed." S.C. Code of Ann. Regs. 67-213 (Supp. 2018).

Therefore, service was completed and made effective on August 27, 2018. Respondents then filed a Form 30 (Request for Commission Review) fourteen (14) days later on September 10, 2019 which is within the required time period. S.C. Code Ann. 42-17-50 (1976). To interpret the regulations in any other manner would render them meaningless. This argument merely distracts from the substance of Respondent's justified termination.

CONCLUSION

Because there was substantial evidence in the record to establish Appellant was terminated for cause, the Court should affirm the decision of the Appellate Panel.

Respectfully Submitted,



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December 9, 2019

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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