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**Apr 21 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Appellate Panel of the South Carolina Workers' Compensation Commission

T. Scott Beck; Aisha Taylor; R. Michael Campbell, II  
South Carolina Workers' Compensation Commissioners

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Case No. 1820190  
Appellate Case No. 2021-001380

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James Sims, Employee,

Appellant,

v.

Automation Personnel Services, Inc., Employer, and  
Zurich American Insurance Company, Carrier, and  
Gallagher Bassett Services, Inc., Third Party Administrator,

Respondents.

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**INITIAL BRIEF OF APPELLANT**

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Thomas S. Phillips (S.C. Bar No. 102802)

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## STATEMENT OF ISSUES ON APPEAL

- I. The Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding that Appellant was not entitled to back-owed temporary compensation for a closed period.
  
- II. The Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding that Appellant was not entitled to penalties for Respondents' improper termination of temporary compensation.

## STATEMENT OF THE CASE

Appellant sustained injuries to, *inter alia*, her left Achilles tendon on August 1, 2018, after she was cut by a sheet of glass. Following the injury, she was ultimately treated by Dr. Michael E. Le (“Dr. Le”), who placed Appellant on sedentary duty. Record of Le. During Appellant’s treatment by Dr. Le, Respondents authorized treatment with Dr. Eric Loudermilk (“Dr. Loudermilk”), a pain management physician. Record of Loudermilk.

Appellant’s initial evaluation by Dr. Loudermilk was on April 17, 2020. Record of Loudermilk. At that visit, Dr. Loudermilk recommended an EMG/nerve conduction study of the left leg and prescribed medications. *Id.* He did not address work restrictions at this time, as Appellant was already restricted to sedentary duty by Dr. Le. *Id.*

Following Appellant’s appointment with Dr. Loudermilk, the EMG/nerve conduction study was not authorized by Respondents. It was not until November 13, 2020 that Respondents authorized a return appointment with him. Between Appellant’s first and second appointments with Dr. Loudermilk, Dr. Le released Appellant at MMI from an orthopaedic standpoint and restricted her to medium duty. Record of Le. That being said, however, Dr. Loudermilk has opined that had Appellant not already been restricted to sedentary duty at the first appointment with him, restrictions of (1) no prolonged standing or walking greater than 30 minutes at a time; and (2) no climbing ladders or exposure to unprotected heights would have been ordered and remained in place. Questionnaire of Loudermilk.

At the hearing, a representative for Respondents testified that multiple jobs were offered to Appellant within the medium duty range as prescribed by Dr. Le, although Appellant denied the number and types of jobs alleged to have been offered. Hr. Tr. p. 28, l. 20-p. 32, l. 15;p. 18, l. 25-p. 19, l. 17. Regardless, the representative for Respondents testified that they would not

have been able to accommodate Appellant in the medium duty category based upon the restrictions by Dr. Loudermilk. Hr. Tr. p. 32, l. 24-p. 35, l. 9.

A hearing was held before the Single Commissioner on November 23, 2020. The claim had previously been set for hearing on September 24, 2020, but the parties thought they had reached an agreement to resolve the issues. However, after the parties failed to reach an agreement, Respondents requested that the hearing be rescheduled pursuant to the prior hearing requests.

At the hearing before the Single Commissioner, Respondents argued that they were entitled to a credit for temporary compensation from July 20, 2020 until November 6, 2020 (the “Closed Period”), as Appellant refused suitable employment during that period. Appellant took the position that she was entitled to back-owed temporary compensation for the Closed Period and that she was entitled to penalties.

Following the hearing, the Single Commissioner found as follows:

“Finally, [Respondents] are not responsible for any weekly payments to [Appellant] during the period in which her weekly benefits were suspended following the originally scheduled hearing.”

*See* Decision & Order of the Single Commissioner.

In response to the Decision & Order of the Single Commissioner, Appellant timely filed an application for review by the Appellate Panel of the South Carolina Workers’ Compensation Commission. The parties were heard on June 21, 2021, after which the Appellate Panel issued its Decision & Order on November 5, 2021, affirming the decisions of the Single Commission that are appealed herein. *See* Decision & Order of Appellate Panel. This appeal followed by Appellant’s Notice of Appeal timely filed with the South Carolina Court of Appeals.

## STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) establishes the standard for appellate review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the Appellate Panel 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.” *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1–23–380(5)(d)–(e) (Supp. 2016). “Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.” *Taylor v. S.C. Dep’t of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep’t of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

## ARGUMENTS

**I. The Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding that Appellant was not entitled to back-owed temporary compensation for a closed period.**

“Disability is presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated.” S.C. Workers' Compensation Regulation 67-502(B)(2). “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.” S.C. Code Ann. § 42-9-190.

In the case at bar, Respondents sought to suspend and/or terminate Appellant's temporary compensation upon her release by Dr. Le. Respondents allege that medium duty jobs were offered to Appellant, but Appellant refused those jobs. Appellant, however, denies the extent of the jobs offered by Respondents and testified that she was unable to return to a medium duty job. Of course, had Respondents sent Appellant back to Dr. Loudermilk, which they neglected to do, Appellant would have been placed on restrictions as outline above, to which the representative for Respondents testified would preclude Appellant for any jobs they alleged to have offered. Therefore, Appellant did not refuse a suitable job (or one that was approved by the Commission), was not offered work within her restrictions, and is entitled to all temporary compensation due to her from the Closed Period.

**II. The Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding that Appellant was not entitled to penalties for Respondents' improper termination of temporary compensation.**

“After the one hundred fifty day period, the employer's representative shall not suspend or terminate temporary compensation except as provided in this regulation or R.67-506.” S.C. Workers' Compensation Regulation 67-505. “Disability is presumed to continue until the claimant

returns or agrees he or she is able to return to work for fifteen calendar days.” *Id.* **Suspension** is only appropriate when (1) the treating physician has released the claimant to full or light duty and the employer provides claimant with a job; or (2) the claimant returns to work for another employer. *Id.* Moreover, **termination** is only appropriate if the claimant signs Form 17 or by Order of the Commission. *See id.*; *see also* S.C. Workers’ Compensation Regulation 67-506.

“If the employer’s representative suspends, terminates, or reduces temporary total or temporary partial compensation benefits without first complying with the procedures in this Article, the claimant may be entitled to additional compensation and penalty.” S.C. Workers’ Compensation Regulation 67-510. “There shall be added to such unpaid installment an amount equal to ten percent thereof.” S.C. Ann § 42-9-90. “The claimant may request a hearing to assess a penalty and, or, interest for late payment.” S.C. Workers’ Compensation Regulation 67-1602.

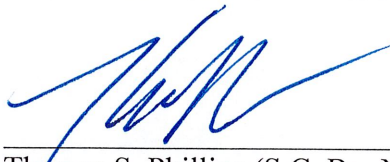
In the case at bar, Appellant had not signed Form 17, nor had the Commission approved termination of her temporary compensation. Based upon these facts, together with the foregoing, Respondents improperly suspended and/or terminated Appellant’s temporary compensation. Therefore, Appellant is entitled to penalties thereon.

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that the Decision & Order of the Appellate Panel of the South Carolina Workers’ Compensation Commission be reversed.

**[Signature Block Follows on Next Page]**

RESPECTFULLY SUBMITTED,



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April 21, 2022

**VIA ELECTRONIC MAIL**

Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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**SC Court of Appeals**

Re: James Sims v. Automation Personnel Services, Inc., et al.  
Case No. 1820190  
Appellate Case No. 2021-001380

Dear Ms. Kitchings:

Enclosed are the following documents for filing:

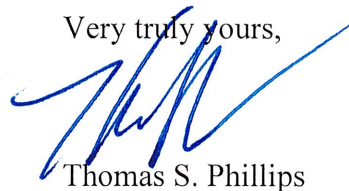
1. Initial Brief of Appellant;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Certificate of Counsel.

I have also enclosed the Certificate of Service of such Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Certificate of Counsel.

Should you have any questions or concerns, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,



Thomas S. Phillips

TSP/pmh  
Enclosures

cc: Ms. James Sims  
Walter R. Frye, III, Esq.