

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Opinion No. 27285
Heard May 14, 2013 – Filed July 17, 2013

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JUL 31 2013

S.C. Supreme Court

Darren L. Pollack, Employee, Appellant,

v.

Southern Wine & Spirits of America, Employer, and Specialty Risk Services, Carrier,
..... Respondents.

PETITION FOR REHEARING

The Appellant hereby files this Petition for Rehearing. On July 17, 2013, this Court issued an opinion affirming the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission. Pollack v. Southern Wine & Spirits of America, Opinion No. 27285 (S.C.Sup.Ct. filed July 17, 2013)(Shearouse Adv.Sh. No. 32 at 27).

As grounds for granting this Petition, Appellant would respectfully show that the Court may have overlooked or misapprehended the arguments raised on the second part of the Seagraves test which allowed a terminated employee to prove that this ongoing loss of earnings capacity was the result of the work-injury rather than the termination. As a result, the Court created a rule with a predetermined outcome that does not balance the interests of employers and employees. Thus, while the test adopted by the Court "serves employers as a shield against injured employees who engage

in unacceptable conduct while employed in rehabilitative settings,” it inadvertently fails to protect injured employees from unscrupulous employers who might fire them in order to avoid paying them their due benefits.” McRae v. Toastmaster, Inc., 597 S.E.2d 695 (N.C. 2004).

ARGUMENT

The Court should grant rehearing to adopt the entire *Seagraves* test, as it is the only way to ensure that the interests of employee and employers alike are protected.

In its decision, the Court established a rule that if an employer can prove it terminated an employee for cause while the employee is working under restrictions from a work-related accident, then the employee is (effectively forever) barred from receiving TTD because his “inability to earn wages was not *due to* or *because of* a work-related injury.” Pollack v. Southern Wine & Spirits of America, Opinion No. 27285 (S.C.Sup.Ct. filed July 17, 2013)(Shearouse Adv.Sh. No. 32 at 27, 33). Respectfully, Appellant asks the Court to reconsider this holding as the result will have significant harmful and unintended consequences to injured workers in our State.

The Court framed the issue as “whether there is substantial evidence to support the Commission’s finding that Appellant was terminated for cause and therefore Appellant’s inability to earn wages was not *due to* or *because of* a work-related injury.” Pollack v. Southern Wine & Spirits of America, Opinion No. 27285 (S.C.Sup.Ct. filed July 17, 2013)(Shearouse Adv.Sh. No. 32 at 27, 33). In a footnote, the Court “decline[d] to address the Commission’s discussion of the doctrine of constructive refusal. Id., n. 7.

Respectfully, restricting the inquiry to whether an employee was terminated for cause *does not* prove whether the inability to earn wages is due to or because of a work-related injury. Answering that question is much more complicated – particularly if you want the answer to be fair

to both the employee and the employer. The workers' compensation system does not operate in a vacuum; it is very much a practical real-world system.

Even though the Court upheld the Commission's factual findings regarding his termination, it cannot be said that Darren Pollack never intended nor expected to be fired; neither did he intend or cause any actual harm to his employer's interest. As Sonny Blocker testified, "[Pollack] admitted that he actually rubbed the side of the van, he didn't think there was any damage and he didn't report it." [R. Page 57, lines 2-6]. The termination arose out of a simple misunderstanding over whether an accident which caused no damage to company property required a written report.

The point here is not to reargue the facts as found by the Commission. The point is that Darren Pollack made a mistake – which he corrected as soon as it was called to his attention. The punishment needs to fit the crime. That mistake already cost him his job of 10 years. Forever barring him from receiving temporary disability compensation is akin to a life sentence for running a stop sign. A better, fairer rule would allow an employee to present evidence that his *ongoing* inability to earn wages was due to his physical incapacity. See S.C. Code Ann. § 42-1-120 (2007)(“The term ‘disability’ means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”).

A fired worker with no work restrictions is in a far better position to find a new job than someone in Pollack's place. Consider that at the time of his termination, Pollack was on the following work restrictions:

- No lifting more than 10 pounds.¹

¹In its Opinion, the Court mentions that Pollack “was permitted to remain in his position, subject to the 15-pound lifting restriction.” Pollack v. Southern Wine & Spirits of America, Opinion No. 27285 (S.C.Sup.Ct. filed July 17, 2013)(Shearouse Adv.Sh. No. 32 at 27, 33).

- No operation of hazardous or fast-moving machinery, no driving.
- Ground level work only, no ladders or heights.
- No repetitive bending, stooping, squatting, pushing, jerking, twisting or bouncing.
- No continuous standing and/or sitting.
- Minimum walking or climbing (including stairs).
- Limited use of back.
- No overhead lifting. [R. page 86].

For Pollack to support his family, he would have to find a job within those restrictions. Moreover, he would have to tell any potential employer that he was under the care of a neurosurgeon for epidural steroid injections and, if the injections were not successful, a lumbar fusion. [R. pages 120-122]. If he lied about these facts, he would not only be subject to immediate termination upon discovery, he would also be barred from receiving medical treatment should he reinjure himself.²

By the same token, knowing of his medical condition, no employer in their right mind would hire him. Even if a less than sedentary job within these restrictions exists, no rational employer would risk hiring him for fear of “buying” a major workers’ compensation claim. See Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007)(under last injurious exposure rule, “the insurer on the risk at the time of the second injury [is] solely liable when the second injury aggravates the first

Pollack was under a 15-pound restriction when he went back to work on April 5, 2010, but by June 15, 2010 when he was terminated, Pollack was under much more severe restrictions. The significance of the more severe restrictions is not so much that Respondent was able to make the accommodations, but that there are jobs in the open market for people with 15-pound restrictions. There are little to no jobs within the restrictions Pollack was actually under. [R. Page 40, line 19-page 41, line 14].

²The new employer would have no liability under the “fraud in the application defense.” See, e.g. Cooper v. McDevitt & Street, 260 S.C. 463, 196 S.E.2d 833 (1973) Respondent would be relieved from further liability for medical treatment under the “intervening accident” rule. See Whitfield v. Daniel Const. Co., 226 S.C. 37, 40, 83 S.E.2d 4602(1954)(“every natural consequence which flowed from this injury, unless the result of an independent intervening cause, sufficient to break the chain of causation, is likewise compensable.”)

injury.”).

Pollack’s other alternative would be to apply for unemployment. Unfortunately, this is not an option either. As he testified, “I’m not eligible because of the work restrictions put forth by my doctor. The employment office told me that my benefits can be reinstated once I’m cleared to work at regular status.” [R. Page 40, line 22-page 41, line7]. This testimony is accurate. Eligibility for unemployment benefits requires that the applicant “is able to work and is available for work at his usual trade, occupation, or business . . .” S.C. Code Ann. § 41-35-110 (2010). This would not be a problem for a worker who had not been working under accommodations; for Pollack and others similarly situated, it is a huge problem. Indeed, Pollack’s restrictions would disqualify him from being hired in his regular occupations as a driver or driver-supervisor by Respondent. [R. Page 62, line 11-page 64, line 6]

Unemployment compensation does have a penalty provision which could apply to Pollack had he been otherwise eligible for unemployment benefits. An employee discharged for cause is ineligible “for not less than five nor more than the next nineteen weeks, in addition to the [one week] waiting period.”³ S.C. Code Ann. § 41-35-120 (2)(b) (2010). It is logically inconsistent for a disabled worker – who is in a much more vulnerable position – to suffer indefinite ineligibility when unemployment compensation limits ineligibility to 20 weeks for the same act. Yet, this is the result

³Employees terminated for misconduct are completely ineligible for unemployment compensation. This would not apply to Pollack, as “misconduct” is defined as “conduct evincing such wilfull and wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in the carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to his employer.” S.C. Code Ann. § 41-35-120 (2)(a) (2010).

commanded by this case.

Darren Pollack is barred from receiving workers' compensation benefits, barred from receiving unemployment compensation, and barred from finding a job. And there is nothing he can do about it.⁴

This "harsh and incongruous result" cannot have been intended by the Court. Unless we as citizens have lost all sense of conscience, it cannot be the public policy of this State for "injured employees and their dependents [to become] charges on society." Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

As the Court noted, there is no disagreement "that as a matter of law, when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation." Pollack v. Southern Wine & Spirits of America, Opinion No. 27285 (S.C.Sup.Ct. filed July 17, 2013)(Shearouse Adv.Sh. No. 32 at 27, 31). The employee has a parallel obligation to accept "employment procured for him suitable to his capacity . . ." S.C. Code Ann. § 42-9-190 (2007). These mutual obligations are the core of the legislative scheme underlying temporary compensation.

As the Court viewed this case as a simple factual dispute, it declined to address the doctrine of constructive refusal of suitable employment. Yet, constructive refusal is the real issue before the

⁴As the Opinion is written, there is no mechanism here for Pollack and other terminated employees to *ever* become eligible for temporary total benefits. This creates another different set of inequities. Accommodated work is an ethereal thing. Some employers (including the State of South Carolina) provide it for set periods, at the end of which an employee who has not returned full duty is automatically terminated. Companies go out of business, close plants, lay off entire shifts, or simply decide it is too expensive and troublesome to accommodate a non-productive worker at full salary. And what happens when the doctor increases the restrictions (as actually happened to Pollack) or is taken out of work altogether?

Court. As Pollack testified, he neither expected nor intended to be fired. He never refused work offered within his restrictions.⁵ [R. Page 41, lines 15-23]. In fact, it's pretty obvious he was surprised by the whole thing. Similarly, Respondent has never contended Pollack actively refused suitable employment or intentionally got himself fired to get out of work. [R. Page 65, lines 3-15].

All the parties agree that the facts as found by the Commission are that Respondent fired Pollack for violating a company policy about reporting an accident. Pollack did not *actually* refuse suitable employment; his employer withdrew the offer when it terminated him, albeit for cause. That is the very definition of "constructive refusal of suitable employment."⁶ See McRae v. Toastmaster, Inc., 597 S.E.2d 695 (N.C. 2004)(noting North Carolina's Industrial Commission "concluded that plaintiff 'was terminated for misconduct and she thereby constructively refused suitable employment.'").

The Court, in rejecting one of the arguments made by Appellant, defined the underlying public policy as:

Appellant's interpretation of the law would essentially insulate injured employees who engage in misconduct while employed in rehabilitative settings and essentially tie the hands of an employer who has sought to accommodate the employee to the best of its ability. Such an unwarranted construction of the statutory and regulatory

⁵Ironically, Pollack's restrictions included no driving. [R. page 86]. Had everyone kept to the letter of the restrictions, none of this would have ever happened.

⁶In his Brief, Appellant had argued in the alternative. One position, based on a previous decision of the Commission, was that North Carolina's doctrine of constructive refusal of suitable employment did not apply and that the reason an offer of employment was withdrawn did not matter. That position was soundly rejected by this Court on policy grounds and is not being reargued here. The second position was that if the Court did adopt North Carolina law, Pollack would not be barred because his work-related restrictions prevented him from obtaining alternative employment. At oral argument, Appellant urged the Court to adopt North Carolina law as much more humane and consistent with public policy. It is this position which is being argued on rehearing. Appellant requests that the Court reach this issue.

language would have the additional and undesirable effect of discouraging employers from endeavoring to accommodate injured workers with light duty work.

Pollack v. Southern Wine & Spirits of America, Opinion No. 27285 (S.C.Sup.Ct. filed July 17, 2013)(Shearouse Adv.Sh. No. 32 at 27, 31 n.4). There are indeed important public policy considerations at play here. These very same considerations were weighed by the Supreme Court of North Carolina. In fact, the language quoted above appears to deliberately paraphrase McRae.

McRae affirmed the rule originally adopted in Seagraves v. Austin Co. of Greensboro, 472 S.E.2d 397 (N.C. App. 1996). As the McRae court explained:

The court in Seagraves defended its balancing test as a fair and effective means for protecting the interests of both employers and injured employees. On the one hand, the test serves to protect injured employees from unscrupulous employers who might fire them in order to avoid paying them their due benefits. On the other hand, according to the lower court, the test simultaneously serves employers as a shield against injured employees who engage in unacceptable conduct while employed in rehabilitative settings.

McRae v. Toastmaster, Inc., 597 S.E.2d 695 (N.C. 2004).

The test requires analyzing two sets of elements. The employer must show: “(1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury.” McRae v. Toastmaster, Inc., 597 S.E.2d 695, 699 (N.C. 2004). The employer bears the burden of proof.

This is essentially the test adopted by this Court in the instant case – although with the broader term “cause” rather than “misconduct.” The problem is the Court never took the next step – which resulted in a completely one-sided and unbalanced rule. North Carolina protects the interests of both employers and injured workers. South Carolina – at the moment – protects only the

interests of employers. The pendulum can easily be swung back to the middle by adopting the second set of elements in the Seagraves test.

As summarized in McRae:

[A] showing of employee misconduct is not dispositive on the issue of benefits if the employee can demonstrate that his or her subsequent failure to perform suitable work or find comparable work was the direct result of the employee's work-related injuries. Under Seagraves, the employee would be entitled to benefits if he or she can demonstrate that work-related injuries, and not the circumstances of the employees termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities.

Id.

The Seagraves court examined decisions from various jurisdictions before adopting what is the majority view. One of the clearest explanations came from the Colorado Supreme Court: "As long as limitations resulting from an industrial injury contribute to a claimant's inability to secure employment at pre-injury wage levels, compensation benefits are payable for loss of earning capacity. If, on the other hand, the injury and its *sequelae* play no part in the workers inability to find suitable employment, there is no compensable loss of earning capacity." PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo.1995).

To prove the second set of elements, the employee must prove his post-termination loss of earnings capacity is due to physical limitations from his injury. It would be easy to adopt in South Carolina, as the same test has long been required in South Carolina for proof of earning loss. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). Coleman sets out three alternative methods of proof (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment." Id. Any one of these methods will suffice.

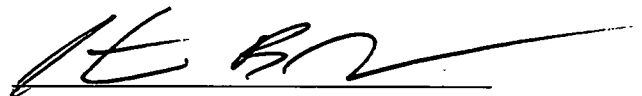
In the case at bar, Pollack presented evidence of his restrictions, his work search, his inability to do his regular job, and his ineligibility for unemployment compensation. He also presented evidence that he would have to undergo back surgery if the injections failed (thus presumably being unable to work in any capacity at that point).

As this Court cannot make the necessary findings and the Commission did not address them, the case should be remanded to the Commission for further findings of fact on whether Pollack's "limitations resulting from an industrial injury contribute to [his] inability to secure employment at pre-injury wage levels." PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo.1995).

CONCLUSION

For the foregoing reasons, the Court should grant rehearing, adopt the full Seagraves test, and remand the case to the Commission for further findings of fact on whether Appellant's continuing loss of earning capacity is solely a result of his termination or whether limitations from his injury which contribute to his inability to secure employment at his pre-injury wage levels.

Respectfully Submitted,



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Workers' Compensation Commission

S.C. Supreme Court

Susan S. Barden, T. Scott Beck and G. Bryan Lyndon, Commissioners

Opinion No. 27285

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Darren L. Pollack, Employee, Appellant,

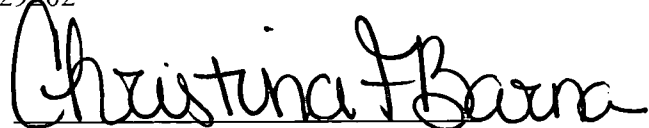
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Southern Wine & Spirits of America, Employer, and Specialty Risk Services, Carrier,
..... Respondents.

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **July 31, 2013**, addressed as follows:

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