

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

**S.C. Supreme Court**

W.C.C. File No.1007936

Appellate Case No. 2011-200466

Darren L. Pollack, Employee.....Appellant,

v.

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

RESPONDENTS' RETURN IN OPPOSITION TO  
APPELLANT'S PETITION FOR REHEARING

**I. INTRODUCTION**

This Court affirmed the Appellate Panel of the Workers' Compensation's denial of benefits in its decision filed July 17, 2013. *Pollack v. Southern Wine & Spirits of America*, Op. No. 27285 (S.C.Sup.Ct. filed July 17, 2012) (Shearouse Adv.Sh. No. 32 at 27). In its Order, the Court unanimously rejected the assertion by Appellant Darren L. Pollack ("Pollack") that a terminated claimant is always entitled to temporary total disability benefits regardless of "the factual circumstances of the particular case." *Id.*, p. 31. More pointedly, the Court declined to accept Pollack's basic premise that "as a matter of law, no employer may ever terminate an injured, accommodated employee without incurring responsibility for TTD benefits" as contrary to South Carolina law and

the role of the Commission to carefully engage in a comprehensive and even-handed analysis of the facts of each case.

Pollack filed his Petition for Rehearing in this Court on or about July 31, 2013. For the reasons stated herein, as well as those set forth in their Brief and oral argument before the Court, Respondents submit the Court's well-reasoned Opinion reached the correct result. As such, Pollack's Petition for Rehearing should be denied.

## II. ARGUMENT

Pollack's Petition for Rehearing essentially advances the same facts and arguments previously submitted to this Court in his briefing and oral argument. He contends – without any additional supporting bases – that this Court may have “overlooked or misapprehended” his arguments, specifically with regard to application of North Carolina law to the facts presented here. (Appellant's Pet. for Reh'g, p. 1) (citing *Seagraves v. The Austin Company of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397) (N.C. Ct. App. 1996)). In essence, Pollack again attempts to re-define the issue in this case and urges the Court to adopt the second part of the test established in *Seagraves*; to wit, that misconduct will not automatically serve as a bar to the award of benefits where the employee can show his inability to find similar employment or wages stems from his prior work-related injury. This assertion is incorrect, however, as this Court applied the appropriate law and standard of review, carefully considered the briefing and oral argument submitted by the parties, and correctly determined that substantial evidence supports the Commission's order denying benefits. As such, rehearing is unnecessary, and Appellant's Petition should be denied.

**A. The Court Correctly Decided This Case In The Context Of Whether Substantial Evidence Supports The Denial Of Benefits.**

While Pollack does not expressly argue the Court applied the incorrect standard of review in this case, he intimates as much by stating that the Court “viewed this case as a simple factual dispute . . . .” instead of as a question of law. (Appellant’s Pet. for Reh’g, p. 6) In reality, Pollack’s statement is a misguided effort to once again convince the Court, incorrectly, that it should adopt an extra-territorial standard that stems from a different statutory construct.

In *Seagraves*, the North Carolina Court of Appeals construed N.C.G.S. § 97-32<sup>1</sup> and addressed the question of first impression under North Carolina law of whether an employee who is terminated for fault or cause “constructively refuses the light duty work and forfeits workers’ compensation benefits . . . upon termination of the employment for fault or misconduct unrelated to the compensable injury.” *Id.*, 123 N.C. App. at 230, 472 S.E.2d at 399. After analyzing the approaches taken in other states, as well as North Carolina’s statutory scheme, the court concluded that termination for fault would not automatically bar benefits. *Id.* at 233-234, 472 S.E.2d at 401-402. Instead, the court adopted a test whereby the “employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated.” *Id.* at 234, 472 S.E.2d at 401. If the employer meets this burden, the employee’s misconduct is deemed a constructive refusal and bars benefits unless the employee can establish that her inability to find similar work

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<sup>1</sup> Section 97-32, amended in 2011, provides that “[i]f an injured employee refuses suitable employment . . . the employee shall not be entitled to any compensation at any time during the continuance of such refusal . . . .” subject to certain conditions. The South Carolina Code of Laws does not contain a substantially similar provision.

or comparable wages is due to the work-related disability. *Id.*

Respectfully, the North Carolina test adopted in *Seagraves* appears to pre-ordain the result of the analysis and presents the same all-or-nothing categorical approach this Court appropriately declined to consider. Op. No. 27285, p. 7 n. 7. As the Court correctly observed, South Carolina law provides that TTD benefits may commence when “an employee has been out of work *due to* a reported work-related injury . . . for eight days[. . .]” *Id.*, p. 4 (quoting S.C. Code Ann. 42-9-260 (Supp. 2012) (emphasis added))<sup>2</sup>. Further, “disability is considered ‘incapacity *because of injury* to earn wages which the employee was receiving at the time of the injury in the same or any other employment.’” *Id.* (quoting 25A S.C. Code Reg. 67-502(B)(1) (Supp. 2012) (emphasis added)). Most significantly, the Court recognized that, pursuant to South Carolina (and not North Carolina) law, “the entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages. An injured employee will be entitled to TTD compensation when his incapacity to earn wages is *due to* or *because of* the injury.” *Id.* at 5 (citation omitted) (emphasis in the original).

TTD benefits are not available to Pollack pursuant to South Carolina’s statutory scheme where substantial evidence demonstrates his inability to earn wages resulted from his termination for cause and not from his work-related injury. South Carolina precedent adequately addresses this question, and, contrary to the arguments raised in Pollack’s Petition for Rehearing, it is simply unnecessary to resort to application of North Carolina

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<sup>2</sup> Pollack sustained a work-related injury on March 31, 2010. He returned to work with restrictions on April 5, 2010, and remained on light duty assignment at full pay until he was terminated for cause on June 15, 2010. (R. p. 35, lines 8-15) In light of their accommodation of Pollack’s restrictions, Respondents never commenced payment of TTD benefits

law. For this reason, the Petition should be denied.

**B. The Court's Opinion Appropriately Recognizes That The Workers Compensation Commission Is Well Suited To Assess Entitlement To TTD Benefits.**

In his misguided push for adoption of North Carolina law, Pollack posits that the Court has adopted a one-sided and unbalanced “rule” that unfairly protects only the interests of employers. (Appellant’s Pet. for Reh’g, p. 1) This is simply not the case. Instead, the Court’s Opinion appropriately recognizes that the issue of whether incapacity to earn wages is attributable to injury or proscribed conduct is “a quintessential factual question for the fact-finder, the Commission.” *Pollack*, Op. No. 27285, p. 31-32. (citation omitted). Implicit in this statement is the recognition that the Commission, in its “fact-finding role,” is best-suited to carefully scrutinize the evidence in order to determine whether the employee is entitled to an award of TTD benefits.

Going a step further, the Court’s review of the record in this case reflected thoughtful consideration by the single commissioner and the Full Commission, with both “remaining sensitive to an employer’s possible motivation to ‘look for’ a reason to fire an injured worker.” *Id.*, p. 33 n. 5 (“The jurisdiction in this area reflects the Commission’s commendable recognition of the natural motivations that may be at play when an employer seeks to deny or terminate TTD benefits<sup>3</sup>.”). Finding none, the Court appropriately affirmed. Nothing in Pollack’s Petition militates in favor of a contrary result, offers a persuasive reason to divest the Commission of its role in determining

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<sup>3</sup> Indeed, the Commission has addressed this issue in its regulatory provisions. Specifically, S.C. Code Reg. 67-514(A) requires the employer’s representative to request permission in order to terminate or suspend TTD benefits and to file documentation setting forth the “reasons for termination or suspension.” *See also* WCC Form # 15, Temporary Compensation Report, Section II (“Attach documentation as to the reason of the termination.”).

entitlement to benefits pursuant to South Carolina law and in accordance with the evidence presented, or suggests that the Commission will be anything less than even handed in its approach to future cases.

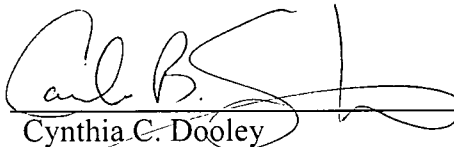
The Court admonished that the “denial of TTD benefits must be scrutinized carefully” with particular sensitivity to “an employer’s possible motivation to ‘look for’ a reason to fire an injured worker.” *Id.*, p. 33. Thus, the Court correctly deferred to the fact finding role of the Commission to determine the motivations of the parties in each case where the grant or denial of TTD compensation benefits is at issue. Respondents respectfully submit that this is the correct approach, that it conforms to South Carolina authority, and that the Opinion should, therefore, stand. For all of these reasons, Pollack’s Petition for Rehearing should be denied.

### III. CONCLUSION

The Court’s Opinion fully addressed all of the issues on appeal, and it correctly decided those issues. Pollack’s Petition for Rehearing does not demonstrate otherwise, and there is no reason for the Court to revisit its decision. For these reasons, Pollack’s Petition for Rehearing should be denied.

August 9, 2013

By:



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PROOF OF SERVICE

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I certify that I have this 9th day of August 2013 served a copy of  
RESPONDENTS' RETURN IN OPPOSITION TO APPELLANT'S PETITION FOR  
REHEARING by United States mail to:

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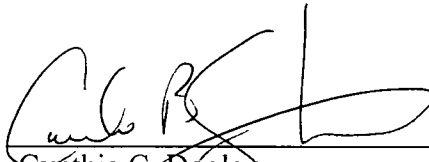
Ms. Virginia L. Crocker, Judicial Director  
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(Signature page to follow.)

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By:

A handwritten signature in black ink, appearing to read 'Carmelo B. Sammataro', written over a horizontal line.

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