

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE
SC Workers' Compensation Commission
Appellate Panel

SC Court of Appeals

Appellate Case No. 2026-000328

Bobby Ledwell, Claimant, Appellant,

v.

Arauco North America Inc., a/k/a Flakeboard
America Limited, Employer, and Sentry Casualty
Company, Carrier, Respondents.

FINAL REPLY BRIEF
OF APPELLANT

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STATEMENT OF THE CASE

Respondents' Statement of the Case and of Facts accords with that of Appellant. Both parties agree and it is uncontested that the safety violation occurred during the time of the accident; that the Respondents never offered Appellant light duty employment; and that but for the safety violation and termination for cause Appellant's light duty restrictions "would have been able" to be accommodated. Quoting in pertinent part from Respondents' Statement of the Facts,

"It was determined that the machine had an air leak, and the decision was made to not lock out the machine when looking for the air leak ... during the process of trying to figure out the issue with the machine, and after deciding to not lock out the machine, Appellant sustained cuts to his fingers by slicing them on a blade." (Emp. add.)

"When asked whether Appellant's work restrictions could have been accommodated by Arauco, Bennita Rhynes testified 'absolutely'... Ms. Rhynes further testified that had Appellant not been terminated for cause, Arauco would have been able to accommodate his light duty restrictions. As such, Respondents did not initiate his temporary disability benefits as his restrictions could have been accommodated but for his termination for cause." (Emp. add.)

Thus it is uncontested the safety violation occurred at the time of the accident, and that Respondents never offered Appellant light duty employment but would have offered that but for his termination for cause.

ARGUMENTS

I. IN REPLY, THE COURT SHOULD NOT UPHOLD THE DECISION OF THE COMMISSION DENYING APPELLANT TEMPORARY TOTAL DISABILITY BENEFITS ON THE BASIS OF THE HOLDING IN POLLACK V. SOUTHERN WINE & SPIRITS OF AMERICA AS IT WAS NOT PROPERLY APPLIED AND INTERPRETED.

Respondents' Argument I is made in two sections, A and B.

In response to A: Pollack does not establish the rule that a claimant is not entitled to TTD benefits if the claimant's restrictions could have been accommodated but for their termination for cause.

That is simply not the holding in Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013). While the Pollack decision does not address the requirements of SC Code §42-9-190, which would result in a different holding as a matter of law, and is based solely on SC Code §42-9-260, Pollack can rightfully be read as holding that temporary total benefits are not mandated whenever an employee is discharged from "an accommodated, light duty position". It is that fundamental fact Respondents want the Court to ignore, morph and expand. Mr. Pollack was "discharged from an accommodated, light duty position" for cause for violation of company policy. Here, the Appellant was never offered a light duty position and he was not "discharged from an accommodated, light duty position".

Respondents' entire argument is based on that false premise or equation that "would" or "could have" equals "offered". In Pollack, after stating that Mr. Pollack argued that "as a matter

of law" when an injured worker is under work restrictions the employer must either offer suitable employment within the injured worker's capacity or pay temporary disability benefits, the Court responded to that argument by stating:

"We do not disagree with Appellant's proposition, but it has no application here, for it is premised on the false assumption that the Respondent did not offer suitable employment within his restrictions. It is beyond refute that the Respondent offered Appellant continued employment within his light duty restrictions, which was accepted by the Appellant." (Emp. add.)

The Court then specifically states that that was the defining difference: the employer "offered" Mr. Pollack light duty employment which he "accepted" and while in that light duty position he violated a company policy and was terminated for cause.

Mr. Ledwell was never offered light duty work within his restrictions and that never offered light duty work was never "accepted by the Appellant". The Court held that had either offer or acceptance not existed, "it is beyond refute" it would have been a question of law.

In response to B: As an Exception to benefits, Pollack is narrowly construed.

The fallacy of this argument is contained within the first paragraph of the argument. The Respondents actually argue that:

"The offer of light duty employment is not the issue here. The issue is whether Respondent

could have offered the employment, and it has been clearly establishes they could have."

Appellant has a hard time believing this argument is being made and basing it on Pollack. Precatory to the holding in Pollack is the fact that Mr. Pollack was offered light duty work within his restrictions and while working under those light duty restrictions he was terminated for cause for violation of a company policy. The Appellant will leave to the Court its own reading of Pollack but it is beyond challenge that the offer of employment within the claimant's restrictions is a fundamental fact to the holding in Pollack.

The Respondents cite a footnote from Lancaster Cnty. Bar Ass'n v. SC Comm'n on Indigent Defense, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) which is in accord with many holdings of the Court, that the Court will reject an interpretation of a statute which leads to an absurd result which could not have been intended by the Legislature.

Appellant hopes the Court will look at all of the decisions decided by this Court and the Supreme Court, and yes even including Pollack, and apply the specific holding in Lancaster to an interpretation and application of the requirements of SC Code §42-9-190. When the Court does the Court will find, as the Supreme Court did in Pollack and this Court and the Supreme Court have in their many decisions in this area, that an

interpretation of that Statute and even SC Code §42-9-260, without requiring an offer or acceptance would lead to absurd results.

II. IN REPLY, THE COMMISSION DID ERR AS A MATTER OF LAW BY INFUSING FAULT INTO THE WORKERS' COMPENSATION SYSTEM.

In reply, Appellant would argue first that as to and at the time of accidental injury fault does not apply in any way to that occurrence and fault cannot be bifurcated. Respondents are simply trying to use fault in any way occurring as part of the injury by accident to avoid paying benefits. They are also trying to add to the dictates of the Act. The Act and wording are to be liberally construed in favor of benefits and inclusion, Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Ex Parte Home, 437 S.C. 218, 877 S.E.2d 798 (SC App. 2022); and exceptions to coverage and providing benefits are to be narrowly construed and applied. Foran v. Murphy USA, 420 S.C. 377, 803 S.E.2d 311 (SC App. 2017).

If one looks at fault in causation/compensability, the Act has one exception. Under SC Code §42-9-60, if injury is occasioned by intoxication or willful intent to injury on behalf of the employee then the employee is not entitled to compensation. The burden of proof is on the party claiming the exception and it is the only exception to compensation in reference to causation.

In reference to compensation after the injury, the Act contains several. Under SC Code §42-9-190, if the employee refuses a job within his capacity the worker is not entitled to any compensation, "during the continuance of such refusal". It only stops benefits while the worker continues to refuse that job.

Under SC Code §42-15-60, if the worker refuses offered medical care during his disability, compensation can be stopped "until the refusal stops". Again, only during the refusal and with the further restriction that benefits cannot be stopped where the Commission determines the refusal was justified.

Under SC Code 42-15-80, the injured worker is required to attend an examination by a physician requested by his employer/ insurance carrier. If the injured employee does not attend, his right to compensation is suspended, "until such refusal" ceases.

Under SC Code §42-9-260, "once temporary disability payments are commenced" during the first 150 days benefits may be stopped without a hearing for specific enumerated reasons. One of those reasons is where the employer has "offered" light duty employment.

Those are the only exceptions to the payment of compensation either at the time of injury by accident or after injury by accident and constitute the only fault by the injured employee that can result in a denial of compensation benefits.

Outside of those, strictly to be construed exceptions, workers' compensation is a no-fault system.

In all of the following situations (case citations in Appellant's Brief), both this Court and the Supreme Court have held that fault has no place in the workers' compensation system or under the Act.

It was Mr. Last's fault he went to jail; it was Mr. Hines' fault he went back to school; it was Ms. Orr's fault she got pregnant; it was Ms. Davis' fault she took her medication and fell asleep; it was Mr. Grayson's fault he lost his driver's license; it was Mr. Cranford's fault he was being somewhat unsafe on the job; and it was Mr. Gray's fault he was driving at a high rate of speed.

On a final note, this argument is actually an argument in reference to Appellant's argument that Last and all these precedents are juxtaposed to Pollack, and should be followed.

III. IN REPLY, THE POLLACK V. SOUTHERN WINE & SPIRITS OF AMERICA DECISION IS WRONG AS A MATTER OF LAW.

Respondents actual entire argument is that Appellant did not properly preserve the issue and that Appellant's argument and the law do not apply because this is not "a normal case". First, the argument is actually properly preserved within the Pollack decision itself in discussing the undisputed facts of an offer of light duty employment while the claimant is under

medical care (a disability) and an acceptance of that employment. Further, the Appellant would leave to the Court's reading of the Record especially Appellant's requests to both Commissioner and Full Commission ("FC") for reconsideration and his FC Brief, but would submit that he properly preserved this argument. In Appellant's Full Commission presentation, he argued this point in reference to SC Code §42-9-190 which is the Statute which contains those requirements and which was not addressed in any way in Pollack. Under Pollack and SC Code §42-9-190 where those facts are "beyond dispute" they are determinative. In Pollack, SC Code §42-9-190's requirements are not addressed as they are in other decisions as cited in Appellant's Brief but are the basis for and the prerequisite to the Pollack decision: "beyond dispute... "offered" and ... "accepted by the Appellant".

Further, Pollack is contrary to the fundamental maxim of law that where the facts are undisputed the decision becomes one for the Court as a matter of law. Applying that maxim to the requirements of SC Code §42-9-190, and Last v. MSI Construction Co., 305 S.C. 349, 409 S.E.2d 344 (1991), the Last and Pollack decisions cannot be reconciled. Appellant hopes and prays the Court will follow Last and apply that maxim to the undisputed facts in this case along with the requirements of SC Code §42-9-190 and follow that Code Section and the Last decision. While

hopefully the Respondents will not appeal, if they do, Appellant's Counsel welcomes, relishes and wants the opportunity to argue the wrongfulness of the Pollack decision under SC Code §42-9-190.

While Pollack is wrong on many, many bases, it is wrong on a very fundamental basis. When the Court reflects on the entire structure of the Workers' Compensation Act and upon its creation and the fundamental principles that have been set out by the Supreme Court and this Court in reference to it, that fundamental moral flaw will become as clear as that Easter Sunday morning sunrise 2,000 years ago. The entire statutory scheme and all decisions of the Supreme Court and this Court have always been focused on placing the financial burden during disability on the shoulders of the party most able to bear that burden which is the employer/carrier. To rule otherwise, and to shift the financial burden to the injured worker during the disability shifts it not only to the injured worker but to all of our charities and to our society. The employer and its insurance carrier are much more financially able to bear that burden than the injured worker, and that in fact is the entire purpose of and why the Act was originally created and why it is drafted like it is. Appellant's Counsel hopes that that

fundamental principle is not lost in the mist of time and that Bloody Thursday will not have been for naught.¹

IV. IN REPLY, THE COMMISSION DID ERR BY FAILING TO REVERSE THE HEARING COMMISSIONER FOR HER FAILURE TO OFFER TO RECUSE HERSELF.

The Appellant does not contest nor disagree with the citations and the law cited by Respondents but those citations are post the issue here. Appellant's problem with and the reason that the Full Commission should have reversed the Hearing Commissioner and remanded for a de novo hearing is her failure to comply with the preliminary decision required by the Canons of Judicial Conduct. Under the Canons, a Judge shall disqualify herself in any proceeding in which the Judge's impartiality might reasonably be questioned. As probably all of the Judges that will hear this case have done in situations where the Judge's impartiality might reasonably be questioned, the Judge notifies the party (parties) that their impartiality might be reasonably be questioned and, this is the important part and the basis of this appeal, the Judge offers to recuse herself. The parties are then allowed to make the decision as to whether or not to proceed or ask the Judge to recuse herself.

¹ "The shooting at Chiquola Mill became known as 'Bloody Thursday'", Belton and Honea Path News-Chronicle, September 6, 2009, by Frank Beecham. On September 6, 1934 seven workers were shot (in the back fleeing) and killed and thirty others wounded at the Chiquola Mill in Honea Path, SC. They had walked out of the Mill and were on strike for workers' rights and better safety conditions. The 1936 Workers' Compensation Act passage followed in 1936.

That did not happen here. At the hearing, the Appellant was made aware of the fact that the Commissioner's impartiality might reasonably be questioned but the Commissioner made no effort to nor offered to recuse herself. Instead as reflected in the Record, she minimized it and proceeded. That decision places the parties in an untenable situation and heightens the possibility of impartiality coming into play.

Unfortunately, we will never know what Appellant's decision would have been had the Commissioner offered to recuse herself. What we do know is she expanded the Pollack decision, an exception to coverage, and applied it into an area where neither this Court nor the Supreme Court have ever said it applied and instead of a strict construction of an exception to benefits, the Commissioner expanded the exception to apply in this case.

V. IN REPLY, AT THE REQUEST OF THE COURT AND AS ARGUED BY THE APPELLANTS IN BRIEF, THE DENIAL OF TEMPORARY TOTAL DISABILITY BENEFITS IS IMMEDIATELY APPEALABLE AS A FINAL DECISION ON THAT ISSUE.

The Appellant by way of Reply would simply add a few comments in reference to the Court's request since the Supreme Court has clearly held that a denial of temporary total disability benefits is immediately appealable.

In fairness to this Court and the Supreme Court, Appellant would submit that the real problem lies in the development of the "finality rule" under the Administrative Procedures Act and

its application to workers' compensation claims whereas the Rule is based on the entire spectrum of decisions made by numerous administrative agencies under different laws, regulations and decisions applicable to that agency's specific area. Appellant would submit unlike workers' compensation the vast majority of agency decisions address, in reality, one specific final issue or are either clearly an intermediary Order prior to a final decision on the issue involved or are a final decision on the issue involved.

That is simply not the case in a workers' compensation claim. From start to finish, which is not one finite date, a workers' compensation claim involves many final decisions on many final issues to achieve the fundamental beneficial purpose of the Act to provide swift, sure benefits so as to prevent injured worker from becoming a charge on society during the disability. First, there is a final decision on compensability; notice of the injury; or whether the claim was timely filed. After those final decisions, there are another set of final decisions as to whether the claimant is entitled to medical care and/or whether the claimant is entitled temporary "compensation" benefits. Then there is another set of final decisions in addition to all of the above which have been addressed in numerous decisions by this Court and the Supreme Court since the inception of the Act in 1936, which is a claimant's entitlement

to permanent compensation and whether that is permanent total disability benefits, total permanent partial benefits, schedule member benefits, or the determination of one over the other. Then there is a change of condition. In addition, there is a final decision on whether the claimant is limited to benefits for 500 weeks or to lifetime weekly compensation benefits. Then, there is another set of final decisions made after maximum medical improvement, which is in and of itself a final decision, as to what medical benefits the claimant is entitled to. Is the claimant entitled to causally related lifetime medical benefits or is the claimant entitled to certain medical benefits and for what period of time. Even after that there are final decisions that are appealable. For example: a paraplegic and medical care, Rice v. Froehling & Robertson Inc., 367 S.C. 155, 226 S.E.2d 705 (1976).

Finally, adding to all of those final decisions there is yet another layer. Up until 2007, appeals from the Workers' Compensation Commission ("WCC") were to the Circuit Court ("CC") and there is an entire body of law as to what was appealable beyond the Circuit Court and what was intermediary and returnable to the Commission before further appeal. Having practiced in this area so long, Appellant's Counsel has read those various interlocutory decisions and constantly sees the intermingling of the decisions in that area which have become

further confused with the change in the statute of appeals now going directly to the Court of Appeals. WCC to CC versus CC to Appellate Courts.

So, in the opinion of Appellant's Counsel, the application of the "finality rule" in reference to workers' compensation has a very, very limited application. If the Court intends and is committed to, which Appellant's Counsel believes it is, a continuation of a liberal interpretation of the Act in favor of benefits to and to prevent the injured worker and their dependents from becoming charges on society and to provide swift and sure benefits and medical benefits to the injured worker to decrease the degree of disability, the Rule has very limited application or the fundamental purposes of the Act are gone.

CONCLUSION

For the foregoing reasons by way of Reply in addition to the arguments made by the Appellant, the decision of the Commission should be reversed and this case remanded to the Commission to award Mr. Ledwell temporary total disability benefits until such time as the Commission determines that those benefits should have been stopped in favor of a final determination on his right to compensation after having reached maximum medical improvement.

Respectfully submitted,



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