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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, T. Scott Beck, Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

Tracking No. 2012-212326

WCC File No: 1103442

Gayla Ramey, Employee.....Appellant/Respondent

v.

Unihealth Post Acute Care Tanglewood, Employer, and
American Zurich Insurance Co., Carrier.....Respondents/Appellants

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RESPONDENTS'/APPELLANTS' PETITION FOR REHEARING

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Pursuant to Rule 240, SCACR, Respondents/Appellants (collectively, "Employer") respectfully petition this Court to grant a rehearing to reconsider its July 16, 2014 order ("Order"). In the Order, this Court affirmed the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission ("Commission") that the Appellant/Respondent ("Ramey") is entitled to temporary total disability ("TTD") benefits following her termination. In support of this motion, Employer respectfully contends that the Court misapprehended certain facts in the records and did not fully consider the application of the South Carolina Supreme Court's decision in Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 747 S.E.2d 430 (2013).

STATEMENT OF THE CASE

This claim arises out of an accident occurring on March 11, 2011, while Ramey was working for Employer. After her fall, Ramey was sent to Doctors Care for treatment. According to Ramey, she clocked-in that morning via a hand-scanning device, but did not clock out when she was sent for treatment. Ramey's belief was that she was to be paid for her normal hours that day despite having to leave work to go to the doctor. Ramey claims that she was not told any differently despite having been given and signing an acknowledgement form on the date of her injury explicitly stating that she would receive no compensation from her employer for time lost to attend doctor appointment. (R. p. 403). Ramey did admit that she was told that she could use PTO time for medical appointments during the waiting period until workers' compensation insurance kicked in. (R. p. 119, ll. 9-20). Ramey was released back to work with certain work restrictions. On March 18, 2011, Ramey came to work but was unable to clock in because of a problem with the hand scanner. Later that morning, she left work to attend an appointment at Doctors Care. At that appointment, Ramey was released back to work at full duty. (R.p. 349).

Ramey returned to work and, at the end of her shift, prepared a "missed punch" form indicating her hours worked that day were 7:00 a.m. to 10:30 a.m. (R.p. 728). Ramey did not

deduct time for leaving work to attend her doctor's visit. The form was approved by her two supervisors that day. According to Ramey, these supervisors knew she had been to the doctor that day and did not indicate they had any problem signing it. (R. p. 113, l. 21- p. 114, l. 3). Claimant, however, did not turn in any records of her doctors visit at the time she submitted the missed time request; those records were turned in later. (R. p. 159, ll. 1-17). As explained by Ms. Lynda Burr, it was not determined that Ramey had submitted a false records until her missed time request and doctors records were shown to the administrator. (*Id.*) Ms. Burr testified that it was company policy for employees not to be paid for doctors visits and that this policy was specifically stated in the forms given to all injured employees. Ms. Burr testified that she has had to terminate employees in the past for submitting false time records and falsification of any document is grounds for immediate termination per corporate policy.

ARGUMENT

In its Order, this Court determined that the substantial evidence in the record supports the Appellate Panel's conclusion that Employer used the incorrect time sheet as an excuse to terminate Ramey. In reaching this decision, Employer respectfully contends that the Court misconstrued the findings of the Commission and did not adequately consider the guidance from the Supreme Court in Pollack. In reviewing the record in this matter, it is important to note that neither the Single Commissioner, nor the Appellate Panel had the benefit of the guidance set forth in Pollack to cases involving this issue. The Pollack decision was issued on July 17, 2013; well after the Single Commissioner's order of September 28, 2011 and the Appellate Panel's order of May 23, 2012. As such, this Court's standard of review should be as much a review of errors of law as it is a review of the substantial evidence.

In Pollack, the Supreme Court made clear that an employee is entitled to TTD payments only when "an employee has been out of work *due to* a reported work-related injury." Pollack,

405 S.C. at 14, 747 S.E.2d at 433 (emphasis in original). The Court rejected the argument of the claimant that he was entitled to TTD because his termination meant that the employer was not providing suitable employment within his light duty restrictions. In doing so, the Court made clear that "entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages." Pollack, 405 S.C. at 15, 747 S.E.2d at 433. The incapacity to earn wages must be "*due to* or *because of* the injury." Id. According to the Court, "[t]his is a quintessential factual question for the fact-finder, the Commission." Pollack, 405 S.C. at 16, 747 S.E.2d at 433.

With all due respect to this Court, there is no finding of fact in the Appellate Panel's decision to support an award of TTD under Pollack. The decision by the Commission in this case was purportedly supported by the following findings of fact:

> 8. The Employer discharged the Claimant for falsifying records for getting paid for the one hour she was at the doctor on March 18, 2011. It was the Claimants clear understanding based upon the acts and information given by the Employer that led the Claimant to believe she was to be paid for time missed from work for her medical appointments.
>
> 12. I find the Claimant was a credible witness. I find further that but for the malfunctioning hand-scanner the Claimant would have clocked out, thereby not having to use the missed time form that the Employer used as an excuse for terminating her.
>
> 13. In the past when the hand scanner was working, the Claimant would clock into work, out for lunch, and back to work. If the hand-scanner had been working on March 18, 2011 the Claimant would not have been terminated.
>
> 14. I do not find it plausible that the Claimant would intentionally put 9 years of service on the line for the one hour that she was at the doctor. She was out of the office for a doctors appointment. This appointment was for an admitted work related injury and the Employer knew the Claimant was at the doctors appointment. The Claimant also gave the Employer the time she was at the Doctors appointment so it was obvious she was not trying to falsify records, deceive the Employer, or hide anything else.

(R. pp. 19 – 20). The decision of the Commissioner, in essence, was based entirely on the Commission's analysis of Ramey's subjective intent to deceive and, finding none, it ordered she was entitled to TTD. Again, it is important to note that Pollack had not been issued yet and neither the Single Commissioner nor the Appellate Panel had the benefit of its guidance in reviewing the evidence. In Pollack, the Supreme Court made it clear that it is the employer's motivations that are at issue, not those of the claimant. See Pollack, 405 S.C. at 16, 747 S.E.2d at 434 (noting the Commission's record of thoughtfully considering the evidence and "remaining sensitive to an employer's possible motivation to 'look for' a reason to fire injured worker."). Importantly, the Court noted that the Commission should recognize "the natural motivations that may be at play *when an employer seeks to deny or terminate TTD benefits*." Pollack, 405 S.C. at 16, 747 S.E.2d at 434, n.5 (emphasis added).

In focusing on Ramey's "intent" to deceive, the Commission failed to appropriately consider Employer's intent and neutral policy-based reason for her termination. While the Commission found that Employer was aware of Ramey's doctor's appointment on March 18, it does not follow that they agreed to pay her for that lost time. Ramey undisputedly submitted a request to be paid for that time and it was expressly against company policy to do so even if Ramey claims to have been unaware of that fact. Her subjective intent aside, Employer received a request by Ramey to be paid for time she was not at work. It was not until later that Ramey submitted the Doctors Care records from that visit (records which showed she had been released to full duty). When the time change request and office visit records were received by management, Employer determined that Ramey had violated company policy and, in accordance with Employer's past handling of similar conduct, Ramey was terminated. There are no finding in the Commission's order, and no evidence in the record, showing that Employer's decision was made *because of* or *due to* Ramey's workers' comp injury. Moreover, such a finding cannot

reasonably be inferred in this case because, at the time of her termination, Ramey had been released to full duty by her authorized treating physician. Thus, at the time of her termination, Ramey was not entitled to or receiving TTD so the "natural motivations" discussed in Pollack were could not have been a factor in the employment decision.

The appropriate analysis under Pollack is similar to that routinely applied in the context of retaliatory discharges. Under S.C. Code § 41-1-80, an employer is prohibited from discharging an employer because the employee has instituted a workers' compensation claim. The burden of proving a retaliatory discharge is on the employee and she must show three elements: 1) institution of workers' compensation proceedings, 2) discharge or demotion, and 3) a causal connection between the first two elements. Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 97 (2000). The statute provides employers with affirmative defenses, including that the employee was terminated for violation of specific written company policy. In this context, the "burden of persuasion never shifts and the employee bears the burden of persuasion that the reason given for termination was pretextual." Id., 343 S.C. at 242-43, 540 S.E.2d at 97. "If the employer articulates a legitimate, nonretaliatory reason for the termination, the proximity in time between the work-related injury and the termination is not sufficient evidence to carry the employee's burden of proving a causal connection." Id. In this case, the evidence shows that Ramey was terminated for violation of company policy. While Ramey contends she did not have the subjective intent to deceive her employer, she has produced no evidence that the termination was retaliatory or that the stated reason was pretextual. As such, the Commission should not have interposed its opinion about Ramey's subjective intent to override a neutral enforcement of company policy. South Carolina remains an "at-will"

employment state and the Commission should not alter that by second-guessing employment decisions merely because the employee has been injured.[1]

Conclusion

For the reasons set forth above, Appellants/Respondents respectfully request that the Court grant a rehearing to reconsider the application of Pollack to this case. The Commission's findings of fact do not support a finding that Employer's action was retaliatory, non-neutral, or the result of her workers' compensation claim. As such, there is no evidence in the record to show that Ramey's inability to earn wages was *due to* or *because of* her work injury. Consequently, the award of TTD benefits was an error of law and should be reversed.

Respectfully Submitted

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July 28, 2014

[1] The Court in Pollack clearly warned against such action: "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." Pollack, 405 S.C. at 15, 747 S.E.2d at 433, n. 4.

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July 28, 2014

The Honorable Jenny Abbott Kitchings
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RE: **Gayla Ramey, Appellant/Respondent v. Unihealth Post Acute Care Tanglewood, Employer and American Zurich Insurance Company, Carrier, Respondents/Appellants**
Civil Action No: 2012-212326
Claim No: 6817 498 209762 3
Our File No: 00283L.00006

Dear Ms. Kitchings:

Please find enclosed the original and six copies of the ***Respondents'/Appellants' Petition for Rehearing*** in the above-referenced matter. Also included is the $25.00 filing fee. I would appreciate your filing the original and returning a clocked copy to me.

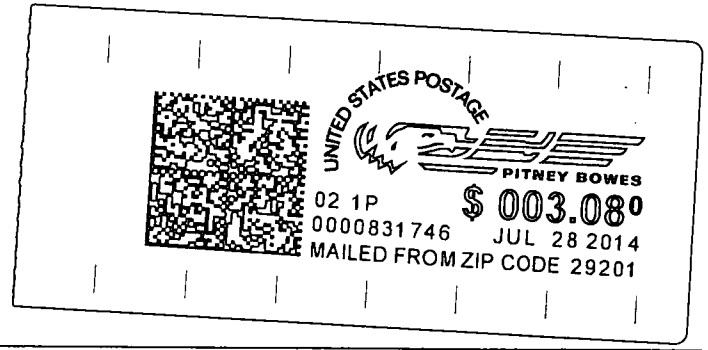
By copy of this letter, I am herewith serving a copy of the enclosed on counsel for the Plaintiff.

Very sincerely yours

R. Daniel Addison

RDA/kmr
Enclosure

cc: Mark R. Calhoun, Esquire
Beverly King, Gallagher Bassett



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