

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

WCC File No. 1007936

Darren L. Pollack, Employee, Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission without authority or citation of any applicable South Carolina law erred in holding that an Employer can evade liability for temporary total disability compensation by terminating an employee who is legally disabled due to medical restrictions from an admitted work-related injury.
2. Whether the North Carolina cases of Seagraves v. Austin Co. of Greensboro, 123 N.C.App. 228, 472 S.E.2d 397 (1996) and McRae v. Toastmaster, Inc., 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004) can be applied to South Carolina workers' compensation in that North Carolina's statutory scheme and public policy differ in critical aspects from that of South Carolina.
3. Whether the Workers' Compensation Commission erred to the extent it applied North Carolina law to this issue in that it failed to consider that Pollack was unable to work after his termination due to his injury related work restrictions and remained disabled as a matter of law.
4. Assuming South Carolina follows North Carolina law, was it error of the Workers' Compensation Commission to find Pollack was terminated for misconduct rather than mere cause when there is no substantial evidence to support such a finding and no misconduct was alleged by the Employer.
5. Whether the Single Commissioner erred in overruling Pollack's objection on hearsay grounds to the unsworn statement of Jessie Richardson when it was undisputedly hearsay, Richardson was not listed as a witness and was not available to be cross-examined, and when the incompetent evidence was admitted because it was "relevant and highly probative on the main issue at hand" thus constituting manifest prejudice to Pollack.

STATEMENT OF THE CASE

This is an appeal from a Decision and Order of the Workers' Compensation Commission. The case arose on March 31, 2010, when the Appellant, Darren Pollack, suffered a work-related injury while employed with the Employer, Southern Wine & Spirits of America. Pollack injured his back, right leg and groin lifting a case of liquor. Employer's workers' compensation carrier, Specialty Risk Services, Inc., accepted the claim.

Pollack was placed on light duty restrictions by his doctors on April 5, 2011. For a time, Employer accommodated these restrictions. On July 11, 2011, Employer terminated Pollack's employment, thus refusing to provide employment suitable to his capacity.

Pollack filed a Form 50 (Request for Hearing) on August 19, 2010. On the Form 50, he requested temporary total disability compensation benefits from the date of his termination and continuing. [R. page 1].

Employer filed a Form 51 (Employer's Answer to Request for Hearing) on September 17, 2010. Employer denied the claim pending investigation. [R. page 5].

A hearing was held on November 22, 2010 before Commissioner Derrick L. Williams. Pollack requested temporary total disability compensation be paid on the grounds that he was under light duty restrictions and, by virtue of terminating his employment, Employer was refusing to offer employment suitable to his capacity. Employer contended it was not liable for temporary compensation on the grounds Pollack had allegedly been terminated for cause.

Commissioner Williams issued a Decision and Order on January 7, 2011. Commissioner Williams denied Pollack's request for temporary benefits holding "Claimant violated company policy while on light duty status, which was for cause." [R. page 18, Finding of Fact 1].

Pollack timely appealed to the Appellate Panel of the Full Commission on January 21, 2011. [R. pages 7-8].

The Appellate Panel heard oral arguments on July 18, 2011. By Decision and Order dated September 19, 2011, the Appellate Panel affirmed the Decision and Order of the Single Commissioner along with making additional findings of fact and conclusions of law. [R. pages 21-29].

This appeal followed.

STATEMENT OF THE FACTS

Darren Pollack was employed as a delivery supervisor for Southern Wine & Spirits. He had been employed there for about 10 years. Pollack suffered an admitted injury by accident to his back on March 31, 2010. The Employer and Carrier accepted his claim and began providing medical treatment.

Treatment was provided at Doctor's Care in Myrtle Beach from March 31, 2010 through August 18, 2010. Pollack was diagnosed with lumbar radiculopathy. He was put on restrictions of:

- No lifting more than 10 pounds.
- 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].

These restrictions remained in place throughout the treatment with Doctor's Care. As he did not improve and his MRI showed multiple herniated discs, he was referred to a neurosurgeon. Dr. Brennan, the neurosurgeon, ordered a trial of epidural steroid injection and, if the injections were

not successful, a lumbar fusion. [R. pages 120-122].

Despite the restrictions, Pollack continued working in a light duty capacity for the Employer. On May 27, 2010, he was called to investigate a traffic accident involving one of the drivers he had supervised. The driver had backed into a sign in a customer's parking lot. Pollack wrote up an accident report on this incident.

As he was backing up to leave, Pollack "brushed the side of the vehicle up against the bumper of another one of our company vehicles." [R. page 36, lines 6-19]. He got out and looked at the vehicle. He testified, "It looked like there was a line on the vehicle. . . It looked like a line of dirt." [R. page 36, lines 20-23]. He then left the parking lot and went back to the office.

Pollack did not initially fill out an accident report for the line of dirt caused when his truck brushed up against the other truck. He explained he did not fill out a report because there was no reportable damage. He testified:

My understanding of an accident was if a vehicle's involved in an incident involving another piece of property, be it a vehicle or standing property, that caused damage with a monetary value to it, would be considered an accident. [R. page 37, lines 9-13].

He stated he did not see any damage on the other truck that would fit this description. He said, "I'm sure if they washed that vehicle, that mark would have gone away." [R. page 37, lines 4-9]. He stated worse damage than the line of dirt such as minor tree marks, scratches, numerous dings and dents on the trucks are not ordinarily reported. [R. page 38, lines 2-8].

The following Monday, Pollack's supervisor, Joe Green, called him asking where was the accident report for the incident in question (referring to the incident where his vehicle brushed the other vehicle). Green's supervisor, Sonny Blocker, was also on the call. Pollack "told them that I

wasn't in an accident. I believe what occurred was not considered an accident." [R. page 38, lines 17-18]. Blocker confirmed this, stating, "And he admitted that he had 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 1-5].

Pollack was suspended pending an investigation. His supervisor, Joe Green, told him "Well, by looking at the mark on the vehicle, I think we're going to consider this an accident. I need you to fill out an accident report." [R. page 39, lines 1-9]. Pollack duly complied and filled out an accident report. [R. pages 139-141].

Sonny Blocker then called Pollack. He told him since it was now considered an accident, he was to take a drug test and breath alcohol test. Pollack immediately complied. [R. page 39, lines 19-25]. Blocker confirmed that once he "explained to [Pollack] that he violated the policy, [Pollack] completely complied with it at that point in time . . ." [R. page 60, line 25-page 61, line 3].

Pollack was reinstated on June 4th, the same day he took the test. So far as he knew, that was the end of the matter. [R. page 40, lines 1-8].

However, on June 15, 2010 – 13 days after he had been reinstated and returned to work – the Employer terminated Pollack without warning. [R. page 40, lines 9-18]. Sonny Blocker admitted that Southern Wine & Spirits did not comply with its own written policy calling for immediate termination for failure to report an accident. [R. page 61, line 4-page 62, line 5]. Pollack did not quit his job; did not try to get fired; did not expect to get fired; and did not refuse any work offered to him within his restrictions. [R. page 41, lines 15-23].

After being terminated, Pollack applied for unemployment benefits. He was not eligible for unemployment compensation because of the work restrictions from his doctor. [R. page 41, lines 2-7]. Pollack has been looking for work since he was fired. He has not found any work and is

having a hard time finding any work within his restrictions. [R. page 41, lines 8-14]. Sonny Blocker testified Southern Wine would not be able to hire a person for Pollack's job who was under the same restrictions. [R. page 64, lines 3-6].

STANDARD OF REVIEW

An appellate court has the power upon review to reverse or modify a decision of the Workers' Compensation Commission if the findings and conclusions of the Commission are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010).

A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999). Upon a proper appeal under the Worker's Compensation Act when only a question of law is involved, the facts having been concluded by the finding of the Commission, the appellate court as to review and correction of errors has plenary powers. Jolly v. Atlantic Greyhound Corp. 207 S.C. 1, 35 S.E.2d 42 (1945).

ARGUMENT

I. Darren Pollack is entitled to ongoing temporary total disability compensation because he is disabled due to his injury and the Employer has not provided employment suitable to his capacity since June 15, 2010.

The Single Commissioner *without citation of any South Carolina law* denied Pollack's request for temporary total disability benefits holding "Claimant violated company policy while on light duty status, which was for cause." Such a rule would be completely contrary to established South Carolina law; would violate public policy; and would impermissibly turn the Commission into a forum to litigate employment related issues. See Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct.App. 1997)(reason employer fired claimant are not "strictly relevant to the matter before the commissioner [and] are matters that must be resolved in state or federal court, not before the Workers' Compensation Commission."). Moreover, such a rule would be particularly draconian in this case where the termination arose out of an innocent mistake over what the company considered a reportable accident.

The Appellate Panel made additional findings of fact and conclusions of law. However, the Appellate Panel also failed to cite any South Carolina Law standing for the proposition that an employer can evade liability for temporary total disability compensation by firing an employee under work restrictions. Instead, the Appellate Panel viewed the issue as a dispute over the legality of the termination itself as shown by this finding:

Pursuant to S.C. Code § 42-9-260, an employer is required to pay temporary total disability benefits when the employee is out of work due to a reported work-related injury. Nothing in this statute can be read for the proposition that an employer may never terminate for cause an employee who is otherwise entitled to receive temporary total disability payments. [R. page 27, Finding of Fact 19.

This *is* a correct statement of the law – but the second sentence is irrelevant to the issue in this case. The propriety of Pollack’s termination is an issue for the Court of Common Pleas – to be decided under employment law; not for the Commission. See Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)(“we do not believe [issues of why claimant was terminated] were strictly relevant to the matter before the commissioner--whether [employer] was entitled to discontinue the disability payments being made to [claimant].”); S.C. Code Ann. § 41-1-80 (2010)(creating civil action for lost wages and reinstatement for employees terminated in retaliation for instituting workers’ compensation case). It has nothing to do with the employer’s legal obligation “to pay temporary total disability benefits when the employee is out of work due to a reported work-related injury.”

The Commission’s role is sharply limited to making three factual findings which, if established, require the Employer to pay temporary total disability compensation to Pollack. The Employer must pay temporary total disability compensation when: (1) the employee is under work restrictions from a workplace accident; (2) the employer is unwilling or unable to provide employment suitable to the employee’s capacity; and (3) the employee has not reached maximum medical improvement. In this case it is undisputed that Pollack met all three requirements. As such, he is entitled to receive temporary total disability benefits as a matter of law.

A. Under South Carolina law, an employer cannot avoid paying temporary total disability compensation by firing an employee on light duty restrictions.

An employer cannot evade its obligation to pay temporary total disability compensation by firing an employee on light duty restrictions. In a decision fully affirmed by Commissioners Wilkerson, Lyndon and Roche, the same Single Commissioner correctly stated the law in South

Carolina:

I conclude under South Carolina law that an employer must pay temporary total disability to an employee fired for cause while on medical restrictions due to a compensable injury.

There is a sound policy basis underlying this rule. The hope is that upon recovery from their injuries, injured workers will be able to return to their previous employment. Workers' compensation claimants are one of the few classes of workers in South Carolina that enjoy some measure of statutory job security. See S.C. Code Ann. § 41-1-80 (1985) (prohibiting discharge or demotion in retaliation for instituting a workers' compensation claim). A rule excusing employers from paying temporary compensation to terminated employees would create an incentive for employers not to offer light duty to injured workers or even manufacture reasons to fire them outright.

This is not to say that a workers' compensation claimant has unfettered protection from any misconduct on his job. The employer's right to fire an at will employee is entirely separate from its obligation to pay temporary compensation to disabled workers. [Beckworth v. Palmetto Restaurant Group, South Carolina Workers' Compensation Commission File Nos. 0816849 and 0921184 (filed September 7, 2010), page 13-14, Conclusion of Law 6].

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. See S.C. Code Ann. § 42-9-190 (2005); S.C. Code Ann. § 42-9-200 (2007) ("if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of disability"); S.C. Code Ann. § 42-9-260(A) (Supp. 2006); 25A S.C. Code Ann. Reg. 67-502 (2007) (defining "disability", "return to work without restriction", and "temporary partial incapacity"); Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (1991)) (fact that incarcerated claimant remained unemployable for reasons other than his injury was not dispositive of his right to temporary compensation; rather, the issue was whether the injury had resulted in some loss of his earning capacity). See also Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d

320 (1996)(temporary compensation improperly suspended because claimant not at MMI and still under restrictions by the doctor, thus no evidence period of temporary total disability ever ended); Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975)(allowing an employee temporary total benefits and rejecting the carrier's argument that the claimant's loss of earning capacity was caused by his full-time attendance at school rather than his work-related injury). Cf. Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996)(claimant's inability to work was still due to her injury and not to her pregnancy and that the prolongation, caused by the pregnancy, of the period of temporary disability did not alter that overriding fact).

The Commission lacks statutory authority to make findings on why an employee was terminated – or to bar compensation on this ground. See Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)(“we do not believe [issues of why claimant was terminated] were strictly relevant to the matter before the commissioner--whether [employer] was entitled to discontinue the disability payments being made to [claimant].”). The sole inquiry is whether employment was offered suitable to the employee’s capacity and whether the employee accepted it. Here, there is no question Pollack accepted the work that was offered. Southern Wine and Spirits *unilaterally* withdrew the offer of suitable employment. As such, it *must* pay temporary compensation.

The one administrative agency with authority to bar statutory benefits for termination for cause is the Department of Employment and Workforce (formerly the Employment Security Commission). See S.C. Code Ann. § 42-35-120 (2010)(“ worker is ineligible for benefits for: Discharge for cause connected with the employment.”). It makes logical sense to bar unemployment compensation to workers fired for misconduct since the very philosophy underlying unemployment

compensation is to protect workers who lose their jobs through no fault of their own. Employees who voluntarily quit are ineligible for unemployment compensation, as are those who are terminated for cause.

As the Workers' Compensation Commission has no similar statute, the Commission lacks authority to bar temporary compensation to a disabled employee fired from a light duty position for cause. The Commission simply cannot create barriers to payment of compensation out of whole cloth – particularly when those barriers not only have no statutory support, but actually contradict the statute. Moreover, the policy considerations underlying workers' compensation are radically different than those underlying unemployment compensation. Any flexibility the Commission has must be “exercise[d] . . . in making compensation awards to ensure the best interests of the workers are protected to the extent the award is not otherwise prohibited by the Workers' Compensation Act.”

James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010).

At its heart, workers' compensation is a no-fault system. Our courts have uniformly held that temporary total disability compensation must be paid when the employee is under work restrictions and no employment suitable to those restrictions is provided by the employer. Outside factors – even including misconduct by the employee which removes him from the job market – make no difference.

The clearest example of this fundamental principle occurred in Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (1991). In Last, the employee suffered an injury and began receiving temporary total disability payments. He was then incarcerated on unrelated criminal charges, causing him to miss a scheduled doctor's appointment. His employer's insurance carrier stopped payment of temporary compensation upon learning of his incarceration. A single commissioner ruled

compensation was improperly stopped. The Appellate Panel reversed, finding the employee was not entitled to temporary compensation because: (1) he had refused medical treatment and (2) removed himself from the job market. The circuit court reversed the Appellate Panel's finding. The Supreme Court agreed with the circuit court holding there was no evidence the employee had refused medical treatment or refused suitable employment. The court explained:

Appellant argues that Claimant is not entitled to receive temporary total benefits for his work-related injury because his loss of capacity to earn wages is caused by his incarceration and not the injury. We disagree.

Under the Workers' Compensation Act, a claimant is entitled to compensation for a total disability resulting from a work-related injury. S.C. Code Ann. § 42-9-10 (Supp.1990). Disability" is statutorily defined as "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." S.C. CODE Ann. § 42-1-120 (1985). This Court has construed this statute in various contexts and held that the loss of earning capacity caused by the physical injury is the pertinent measure of compensable disability. See, e.g., Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967); Bowen v. Chiquola Mfg. Co., 238 S.C. 322, 120 S.E.2d 99 (1961); Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954).

In Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975), this Court allowed an employee temporary total benefits and rejected the carrier's argument that the claimant's loss of earning capacity was caused by his full-time attendance at school rather than his work-related injury. Thus, the fact that a claimant is unemployable for reasons other than his injury is not dispositive. The issue is whether a claimant has suffered some loss of earning capacity as a direct result of his work-related injury.

Id.

Last makes it clear that even criminal conduct which results in inability to attend doctor's appointments or accept light duty work does not bar an employee from receiving temporary total disability compensation. So long as the loss of earnings capacity results from the work-related injury, temporary compensation must be paid.

Here, Southern Wine and Spirits unilaterally withdrew its offer of light duty work to Pollack

– essentially failing to mitigate its damages. It is undisputed that at the time of his involuntary termination Pollack was under work restrictions due to his injury. [R. page 86; page 62, lines 6-10]. These restrictions disqualified him from working in his occupation. [R. page 62, line 11-page 64, line 6]. As he was considered to be disabled under the Act, Pollack’s loss of earnings capacity is a direct result of the limitations resulting from his work injury. 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.”). Therefore, the Decision and Order of the Commission should be reversed and this Court should hold Pollack is entitled to receive temporary total disability compensation as a matter of law.

B. The North Carolina doctrine of “constructive refusal” of suitable employment is inconsistent with South Carolina law.

The Commission purported to base its decision on South Carolina law – albeit without referencing any statute or case law other than § 42-9-260 (which supports Pollack’s argument). The Appellate Panel went on to find as an alternative ground that “even under the North Carolina addressed by Claimant’s counsel at oral argument, Claimant is barred from receiving benefits because (1) claimant was terminated for cause stemming from his own misconduct, (2) the same misconduct would have resulted in termination even if Claimant was not on work restrictions, and (3) the termination was unrelated to his accepted workers’ compensation injury.” [R. page 27, finding of fact 21].

The North Carolina law referenced by the Commission is known as the Seagraves test. It comes from Seagraves v. Austin Co. of Greensboro, 123 N.C.App. 228, 472 S.E.2d 397 (1996) and McRae v. Toastmaster, Inc., 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004). South Carolina has

no comparable case law. Our case law holds the contrary, to wit; an employer must either provide suitable employment or pay temporary total disability. The basis for this is a fundamental difference in the statutory scheme between the two states. In South Carolina, temporary compensation ends at MMI and is capped at 500 weeks regardless of whether or not the employee is still disabled and out of work. S.C. Code Ann. § 42-9-10 (2007). In North Carolina, compensation can continue so long as the employee is unable to find work within his restrictions. North Carolina's policy encourages employers to rehabilitate their injured workers as returning them to work (even with a different employer) is the only method of terminating compensation. This policy also requires the employee to make a diligent search for work as a condition of receiving continuing compensation.

In South Carolina, once an injured worker makes the initial showing of disability, his "[d]isability is presumed to continue until the employee returns to work . . ." 25A S.C. Reg. 67-502(B)(2)(2007); 25A S.C. Code Reg. 67-506(A)(2007). Unlike North Carolina, there is no requirement that an employee seek comparable employment as a precondition of receiving temporary compensation. Cf. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004)(North Carolina requires commission to determine if "a former employee's failure to procure comparable employment [is] the result of his or her job-related injuries or the result of the employee's termination for misconduct").

Once the injured worker becomes entitled to receipt of temporary total benefits, an employer can terminate compensation only if certain specific conditions are met. See S.C. Code Ann. § 42-9-260 (2007). 25A S.C. Code Reg. 67-505 (C)(2007). Each scenario contemplates the injured worker either returning to work in some capacity for his employer or some other employer. This is obviously to prevent a worker from simultaneously receiving full wages and temporary total

disability. If the injured worker is earning less than his pre-accident wages (even with another employer), the employer must still pay temporary partial disability. See S.C. Code Ann. § 42-9-20(2005); Reg. 67-505 (C). If he is unable to complete fifteen calendar days of work, temporary compensation must be restarted. Reg. 67-505 (D). These conditions make it abundantly clear that there is absolutely no duty on the part of the injured worker to seek other employment during his period of disability. He is required to accept an offer of suitable employment from his employer, but if none is offered, he is not required to look elsewhere. See S.C. Code § 42-9-190 (2005).

South Carolina's statutory scheme is significantly different in this respect than North Carolina's. See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) ("Although North Carolina workers' compensation case law retains a special significance in this state, our own Legislature's pronouncements of the law must necessarily prevail.") For this reason, no South Carolina appellate court has adopted the Seagraves test.

As such, North Carolina's Seagraves doctrine is not the law in South Carolina. As such, the Commission lacked legal authority to deny him temporary compensation benefits. This Court should reverse and order the Respondents to pay temporary total disability compensation to Pollack.

C. Even if the Court adopts North Carolina law, Pollack is still entitled to temporary total disability compensation because he has been unable to obtain employment due to his work-related disability.

Under North Carolina law, the lawful termination of an injured worker for a reason unrelated to his disability may bar him from receiving temporary compensation. The test is "whether the employee's loss of . . . wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss . . . is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability." Seagraves v.

Austin Co. of Greensboro, 123 N.C.App. 228, 472 S.E.2d 397 (1996). 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., 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004). The employer bears the burden of proof.

Even if the Commission finds the Employer proved all of these elements, the inquiry does not end there. At this point, the claimant must prove that his continuing unemployment is caused by his disability rather than his misconduct. He proves this by looking for work and not being able to find work because of his work restrictions.

Pollack has been looking for work since he was fired. He has not found any work and is having a hard time finding any work within his restrictions. [R. page 41, lines 8-14]. Sonny Blocker testified Southern Wine would not be able to hire a person for Pollack's job who was under the same restrictions. [R. page 64, lines 3-6]. This testimony proves Pollack's continuing unemployment is due to his work restrictions.

This conclusion is bolstered by the fact that Pollack was not eligible for unemployment compensation because of the work restrictions from his doctor. [R. page 41, lines 2-7]. The Department of Employment and Workforce found Pollack could not meet their requirements of being ready, willing and able to work. See S.C. Code Ann. § 41-35-110 (2009) (“An unemployed insured worker is eligible to receive benefits with respect to a week only if the department finds he . . . is able to work and is available for work at his usual trade, occupation, or business or in another trade, occupation, or business for which he is qualified based on his prior training or experience.”).

Neither the Single Commissioner nor the Appellate Panel made any such findings. If North

Carolina law is to be applied here, it is only fair that all portions of it apply – not just those which give an employer an incentive to fire its employees on light duty. The Court should find as a matter of law that Pollack has proven his continuing unemployment is due to his extreme work restrictions. As such, the Commission should be reversed and Pollack should receive temporary total from June 15, 2010.

D. As Pollack committed no “misconduct,” his employer is legally required to pay temporary total disability compensation.

There is no substantial evidence Pollack was terminated for misconduct. Pollack committed no misconduct. Southern Wine and Spirits never even claimed he committed misconduct – their defense was limited to “the fact he was terminated for cause.” [R. page 35, lines 7-15]. At worst, Pollack misunderstood Southern Wine’s definition of a reportable accident. There is no suggestion he deliberately committed any acts against the interest of his employer. In fact, once he was told he needed to fill out a report, he immediately did so – and took a drug test. Sonny Blocker testified that once he “explained to [Pollack] that he violated the policy, [Pollack] completely complied with it at that point in time . . .” [R. page 60, line 25-page 61, line 3]. At no time did he ever try to deny or cover up the fact his truck had brushed the other truck.

Moreover, even though the policy supposedly required *immediate termination* for failure to report an accident, he was not immediately terminated. He was terminated 12 days after he filed the report – a fact that shows he was not terminated for a policy violation but in retaliation for filing the workers’ compensation claim. See Wallace v. Milliken & Co., 305 S.C. 118, 123, 406 S.E.2d 358, 361 (1991)(“We agree with the Court of Appeals that, had the discharge been motivated solely by safety concerns, [the employer] would have terminated [the employee] immediately.”).

Southern Wine and Spirits may very well have been sincere in claiming they terminated Pollack for cause – but *cause* does not necessarily equate with *misconduct*. Misconduct requires some degree of bad faith or ill intent. Pollack did not steal from the company, damage company property, insult or assault a supervisor, or anything else that could conceivably bring harm to his employer. At most he failed to understand an ambiguous company policy – a policy he willingly complied with immediately upon learning of his misunderstanding. This matters because under North Carolina law, for the employer to evade payment of compensation the termination must be for *misconduct*; not merely for cause.

The Commission treated this issue as if Pollack was claiming that he could not be fired at all simply because he was on light duty. The Commission's misapprehension is shown by its legal conclusion that public policy compelled it to reach this result: "To hold differently would lead to the absurd result that an employer may never terminate an employee for cause when that employee has a pre-existing work related injury." [R. page 28, Conclusion of Law 2]. That is hardly the result called for here. Requiring an employer to pay temporary compensation to a fired or laid off worker with a job injury has no effect whatsoever on the at-will employment relationship. An employer's right to fire an at-will employee is separate and distinct from its legal obligation to pay temporary compensation under the Workers' Compensation Act.

As there is no substantial evidence to support a finding that Pollack committed actual misconduct, there is no legal basis *under any legal theory* to deny him temporary total disability compensation. As such, the Commission's decision must be reversed.

II. The Commission erred in overruling Pollack's objection on hearsay grounds to the unsworn statement of Jessie Richardson.

At the hearing before the single commissioner, Employer sought to introduce a handwritten unsworn statement from Jessie Richardson. [R. page 142]. Richardson was the driver involved in the accident Pollack was dispatched to investigate on May 27, 2010. The statement detailed Richardson's version of that incident. Richardson was not listed as a witness nor was he called to testify. [R. page 6].

Pollack's counsel objected to admission of the statement: "Your honor, I have an objection to page 255. It's a handwritten statement from an employee. So, I would object [to] it on hearsay ground." [R. page 32, line 13-15]. The single commissioner overruled the objection stating, "It's handwritten. It looks like it's under Jessie Richardson. Let's leave it in for now. I'm not – I mean, I hadn't read it yet, so I'll note that." [R. page 33, lines 7-10].

When the single commissioner issued his Decision and Order, he made the following finding on the objection to Richardson's statement: "Claimant's objection to APA page 255 is overruled. I find that this statement is relevant and highly probative on the main issue at hand, specifically, claimant's reason for not reporting his incident." [R. page 19, finding of fact 4].

This entire process is highly irregular, violates multiple notions of due process and fairness, and is exceptionally prejudicial to Pollack. A Commissioner is both judge and jury. He cannot delay ruling on an objection to incompetent hearsay evidence until after he reads it. It was undisputedly hearsay.

The most serious error was to admit the statement as "relevant and highly probative." If the unsworn statement of an unlisted witness is "relevant and highly probative" then it is even more

important to sustain the hearsay objection. Such a statement cannot be verified nor can the writer's veracity be tested in the crucible of cross-examination. This is exactly the kind of incompetent and unreliable evidence the hearsay rule is designed to weed out.

Although workers' compensation hearings afford commissioners liberality in admitting evidence, due process requires there be some limits. There are rules and regulations governing the conduct of hearings. For one thing, the regulations require each party to "Complete the Form 58 [Pre-Hearing Brief] and give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements including video recordings and/or transcribed audio recordings have been taken from one of the witnesses including the claimant and indicate who has possession of same." 25A S.C. CODE Ann. Reg. 67-611 (2007). As Richardson was not listed nor was the fact he gave a statement disclosed, it was improper to admit his hearsay statement.

As to the hearsay, while it is true that hearsay can sometimes be admissible in workers' compensation hearing, this is only the case when corroborated by other evidence in the record. See Hamilton v. Bob Bennett Ford, 339 S.C. 68, 528 S.E.2d 667 (2000). The regulations specifically recognize that hearsay is a valid objection. 25A S.C. CODE Ann. Reg. 67-612 (2007) ("the parties do not waive any evidentiary objections to the introduction of a particular exhibit. Such objections may include, but are not limited to relevancy, materiality, qualification of the expert, timeliness, privilege, hearsay or authenticity as may relate to the document in controversy.").

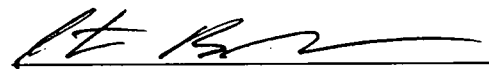
The improper admission of Richardson's hearsay statement was manifestly prejudicial to Pollack. The single commissioner *explicitly* stated that the statement was "*relevant and highly probative on the main issue at hand*," thus confirming that it was *the* dispositive evidence in his

decision. This incompetent evidence plainly tainted the entire proceeding. As the Commission's decision was based on incompetent, inadmissible and highly prejudicial evidence, this Court should vacate the Commission's Decision and Order. Michau v. Georgetown County, Shearouse Adv.Sh.No. 41, S.C.Sup. Ct. Op. No. Opinion No. 27064 page 15(Filed November 21, 2011)(reversing commission's decision to admit incompetent evidence).

CONCLUSION

For the foregoing reasons, the Court should **reverse** the Decision and Order of the Commission. Respondents should be directed to pay temporary total disability compensation to Pollack from June 15, 2010 and continuing on a running award.

Respectfully Submitted,



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June 28, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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

WCC File No. 1007936

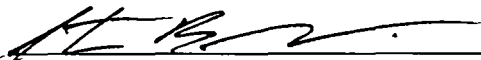
Darren L. Pollack, Employee, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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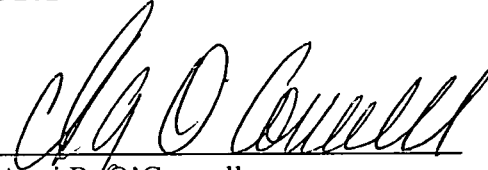
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..... Respondents.

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B. Samuels and I have served the **Final Brief of Appellant** 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 **June 28, 2012**, addressed as follows:

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June 28, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
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JUN 28 2012

SC Court of Appeals

RE: Darren L. Pollack v. Southern Wine & Spirits of America, and
Specialty Risk Services
Case Tracking No.: 2011200466
WCC File No.: 1007936

Dear Ms. Kitchings:

Please find enclosed the unbound original and fifteen copies of **Final Brief of Appellant** and **Reply Brief of Appellant** for filing in the above-referenced matter. Please return one date stamped copy of each brief to our office via our courier.

By copy of this letter and enclosure to Carmelo Sammataro and Cynthia Dooley, counsel of record for the Respondents, we are serving a copy of our **Final Brief of Appellant** and **Reply Brief of Appellant** upon them as indicated by the attached Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/aro

Enclosures

cc w/encl.: Carmelo B. Sammataro, Esquire
Cynthia Dooley, Esquire