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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

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Tracking No. 2012-212326

WCC File No: 1103442

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Gayla Ramey, Employee.....Respondent,

v.

Unihealth Post Acute Care Tanglewood, Employer, and  
American Zurich Insurance Co., Carrier.....Petitioners

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**PETITION FOR WRIT OF CERTIORARI**

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 25, 2014.

## QUESTIONS PRESENTED

**WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING AN AWARD OF TEMPORARY TOTAL DISABILITY BENEFITS WHERE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT CLAIMANT'S INABILITY TO EARN WAGES WAS DUE TO OR BECAUSE OF HER INJURY?**

## STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks a review of an opinion of the Court of Appeals affirming an order awarding temporary total disability benefits to a workers' compensation claimant that had been terminated in accordance with a strictly enforced neutral company policy. As discussed below, the Court of Appeals' decision is in conflict with this Court's opinion in Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 747 S.E.2d 430 (2013) and, pursuant to Rule 242(b), SCACR, certiorari should be granted.

This matter was initially brought before the South Carolina Workers' Compensation Commission on a claim arising out of an admitted work-related fall that occurred on March 11, 2011. The claimant, Gayla Ramey ("Respondent") worked as a registered nurse at a health care facility owned and operated by her employer, Unihealth Post Acute Care Tanglewood ("Employer"). On the morning of her fall, Respondent clocked-in using a hand-scanning device at her place of work. (App. p. 180) After her fall, she was sent for medical treatment and was placed on light duty, which was accommodated by Employer. (App. p. 230) Upon returning to work, Respondent was advised of her rights and responsibilities as a workers' comp claimant, including that she was not to receive wages from her employer for time spent attending doctors appointments and that she could receive PTO for time off from work until she started to receive workers' compensation benefits, if any. (App. p. 469-70)

On March 18, 2011, Respondent came to work but left shortly thereafter to attend a doctor's appointment. (App. p. 183) Respondent testified that she tried to clock out around 7:30 a.m. but was unable to because of a malfunction with the hand-scanner. (App. pp. 183-84) Respondent returned to work after her appointment at around 9:45 a.m. but was told to go home early so that she could work the next two days. (App. p. 184) Before leaving the facility, Respondent completed a Request for Missed Time form to record her time worked that day. On the form, she recorded her time worked as 7:00 a.m. to 10:30 a.m. and failed to deduct for her time away from work that morning. (App. p. 185) Respondent's immediate supervisors signed her form when it was handed to them. (App. p. 185) Respondent later turned in records from her March 18, 2011 doctor's visit. Upon receiving the missed time form and the medical records, the facility administrators determined that Respondent had violated company policy by seeking to be paid wages for time away from work. (App. p. 231) The Human Resources Director testified that this policy was strictly enforced and she had terminated employees in the past for submitting false time records. (App. p. 236-37) On March 21, 2011, Respondent was called into the HR Director's office and informed that she was being terminated in accordance with company policy for submitting false documentation. (App. p. 186) On March 24, 2011, Respondent returned to her doctor and was placed back on light duty. (App. p. 417)

This claim was initially heard before Commissioner G. Bryan Lyndon ("Single Commissioner") on August 10, 2011, in Columbia, South Carolina. The Single Commissioner issued a Decision and Order on September 28, 2011, finding that Respondent sustained a compensable injury by accident on March 11, 2011, to her back and right upper extremity and was entitled to temporary total disability compensation from March 24, 2011 and continuing. (App. pp. 71-83) In his order, the Single

Commissioner found that Respondent was a credible witness and that he did not believe that her failure to deduct the time for her medical appointment from her pay was done intentionally for the purpose of being deceitful, but was merely an error in procedure due to malfunction of the scanner that would typically be used to clock in and out. He also found that Employer led Respondent to believe that she would be paid for the time she was at her causally-related medical appointments despite the documentation provided to Respondent after her injury that this was not the case. The Single Commissioner made no findings regarding the existence of the Employer's written policies regarding this issue or the Employer's prior enforcement of this company policy. An Appellate Panel of the Commission held a review hearing on March 20, 2012, and issued an order affirming and adopting the Single Commissioner's order in its entirety. (App. pp. 85-95)

Petitioners appealed the order of the Appellate Panel to the Court of Appeals on June 22, 2012.<sup>1</sup> Final briefing was completed in February 2013 and oral argument was heard before the Court of Appeals on October 10, 2013. At oral argument, the parties presented their positions on the merits of the issues on appeal as well as the impact of this Court's recent decision in Pollack v. S. Wine & Spirits of Am., 405 S.C. 9, 747 S.E.2d 430 (2013) which was issued on July 17, 2013, well after final briefs were filed in this case. On July 16, 2014, the Court of Appeals entered an unpublished decision affirming the order of the Appellate Panel. (App. pp. 1-4) A Petition for Rehearing was filed on July 30, 2014, which was denied on August 25, 2014. (App. p. 12)

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<sup>1</sup> Respondent also appealed the order of the Appellate Panel on the issue of the calculation of Respondent's compensation rate. The joint appeals were considered together and decided by the Court of Appeals in a single opinion. Petitioners raise no assignments of error with regard to the comp rate issue.

## ARGUMENT

### **THE COURT OF APPEALS ERRED IN AFFIRMING AN AWARD OF TEMPORARY TOTAL DISABILITY BENEFITS WHERE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT CLAIMANT'S INABILITY TO EARN WAGES WAS DUE TO OR BECAUSE OF HER INJURY?**

In its opinion, the Court of Appeals erred in affirming the decision of the Appellate Panel on the basis that substantial evidence existed to support the Commission's award of temporary total disability ("TTD") benefits. In reaching this decision, the Court of Appeals failed to adequately consider and apply the legal standard set forth by this Court in Pollack and, therefore, gave undue deference to the findings and conclusions of the Appellate Panel. As set forth in Pollack, the legal issue to be resolved in determining if a claimant is entitled to TTD benefits is whether the claimant's inability to earn income is "due to" or "because of" her work injury. See Pollack, 405 S.C. at 14, 747 S.E.2d at 433 (Holding an employee is entitled to TTD payments only when she "has been out of work *due to* a reported work-related injury.") (emphasis in original); see also S.C. Code §42-9-260 (Supp. 2012). In the absence of these findings, a workers' comp claimant is not legally entitled to compensation under the S.C. Workers' Compensation Act. It is important to note that neither the Single Commissioner nor the Appellate Panel had the benefit of the guidance set forth in Pollack in making their decision. 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, the proper standard of review of these decisions should be a review of errors of law rather than the more deferential substantial evidence standard.

- I. Claimant is not entitled to TTD benefits as there are no findings that her incapacity to earn wages is due to or because of her work injury.

In Pollack, this 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, this Court made it 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. As discussed below, the Appellate Panel, as well as the Court of Appeals, made no factual findings that Respondent’s incapacity to earn wages was “due to” or “because of” her injury and, therefore, committed reversible error in awarding TTD to Respondent.

In this case, by adopting the findings of the Single Commissioner, the Appellate Panel made 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.

(App. pp. 80-81) As evidenced by these findings, the decision of the Appellate Panel was based entirely on its analysis of Respondent's subjective intent to deceive and, finding none, it ordered she was entitled to TTD. The Appellate Panel may well have found Respondent credible as to her intent to deceive but that does not answer the question as to whether her termination was "due to" or "because of" her injury.

Likewise, the Court of Appeals, affirmed this decision based on its view of Respondent's subjective "understanding that she was entitled to be paid for time for doctors visits" despite her failure to read the forms she was provided indicating that this was in fact not the case. (App. p. 3) Based solely on this view, and the absence of any evidence of disciplinary action being taken against Respondent's immediate supervisors for initially signing off on the form, the Court of Appeals concluded that Employer used the incorrect time sheet as an excuse to terminate her employment. The Court of Appeals' and the Appellate Panel's focus on Respondent's intent and subjective understanding is in direct conflict with the holding in Pollack. In Pollack, this 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). Nevertheless, in that case, the claimant was involved in an automobile accident with a company car but violated company policy by not reporting it even though there was no damage and the employee did not think it had to be reported. In short, the violation of the policy was the determinative factor, not the employee’s justification or reason for doing so.

The decision of the Court of Appeals in this case erroneously focuses on the justifications given by Respondent for her actions, rather than on whether the action were in fact a violation of policy subjecting Respondent, or any other employee, to disciplinary action. For this reason, this Court should grant certiorari to review the decision of the Court of Appeals in order to resolve the apparent conflict with the holding in Pollack.

II. The substantial evidence in the record shows that Respondent was terminated for violation of company policy and not because of her work injury.

In focusing on Respondent’s “intent” to deceive, the Court of Appeals and the Appellate Panel failed to consider Employer’s right, as in Pollack, to enforce its company policies applicable to all employees, including workers’ comp recipients. While the Commission found that Employer was aware of Respondent’s doctor’s appointment on March 18, it does not follow that they agreed to pay her for that lost time in direct conflict with its written policies and procedures. Respondent undisputedly submitted a request to be paid for time spent out of work and it was expressly against company policy to do so, even if Respondent claims to have been unaware of that fact. Her subjective intent aside, Employer received a request by Respondent to be paid for time she was not at work. Importantly, Respondent did not turn in the records from her March 18 doctors

visit at the same time she turned in the missed time form. When the time change request and doctor's office records were received in conjunction by management, it was determined that Respondent had violated company policy. Consequently, in accordance with past handling of similar conduct with other employee's, Respondent 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* Respondent's workers' comp injury.

Moreover, such a finding cannot reasonably be inferred in this case. In Pollack, this Court cautioned that employers' actions must be scrutinized carefully because of "possible motivations to 'look for' a reason to fire an injured worker." Pollack, 405 S.C. at 16, 747 S.E.2d at 434. This Court specifically referenced the Commission's efforts in reviewing an employer's motivations that may be at play *when they seek to deny or terminate TTD benefits*. Id., 405 S.C. at 16, 747 S.E.2d at 434, n. 5 (emphasis added). In this case, the record shows that at the time of her termination Respondent had not been written out of work for any length of time, had not received or been entitled to any TTD benefits, and had been released to full duty by her authorized treating physician. Thus, at the time of her termination, the "natural motivations" discussed in Pollack were not and could not have been a factor in the employment decision. There are simply no findings in this case, and no basis for inferring, that her termination was "due to" or "because of" her injury. Consequently, the Petition for Writ of Certiorari should be granted to review the Court of Appeals' decision on this issue.

III. There is no evidence in the record to support a finding that the employment action was pretextual or retaliatory.

Based on the holding of Pollack, and the Administrative Procedures Act, the Commission must make specific factual findings that the termination was based on the fact of the injury rather than the stated company policy in order for Respondent to be entitled to TTD benefits. As discussed above, no such findings exist in this case.

The appropriate analysis in this case 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.

While not directly applicable, the above analysis provides guidance as to what must be shown by a workers comp claimant in proving that her termination (and thus loss of earning capacity) is "due to" or "because of" her injury. In this case, the evidence shows that Respondent was terminated for violation of company policy. The evidence in

the record shows that Employer had terminated prior employees for similar violations and acted consistently in this case. This legitimate and non-retaliatory basis for the termination is supported by the substantial evidence in the record and Respondent has produced no evidence to refute it. Moreover, while Respondent 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. 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.

This Court recognized as much in Pollack:

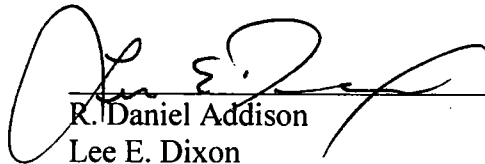
Appellant’s interpretation of the law would essentially insulate injured employees who engage in misconduct while employed in rehabilitative settings and essentially tie the hands of an employer who has sought to accommodate the employee to the best of its ability.

Pollack, 405 S.C. at 15, 747 S.E.2d at 433, n. 4. For these reasons, the Court should grant certiorari, to correct the erroneous decisions by the Commission and the Court of Appeals. The orders in this case operate to override the legitimate enforcement of a neutral company policy based solely on their opinions as to whether or not Respondent’s actions were based on a subjective intent to deceive her Employer. The proper question to have been resolved by the Commission is whether or not she was terminated because of her injury. In its opinion, the Court of Appeals failed to adequately consider this question and, as such, this Court should grant certiorari to review this decision.

#### IV. Conclusion

For all the above reasons, Petitioners request that this Court grant the Petition for Writ of Certiorari to review the decision of the Court of Appeals and consider the apparent conflicts with this Court’s decision in Pollack.

Respectfully Submitted,



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**PROOF OF SERVICE**

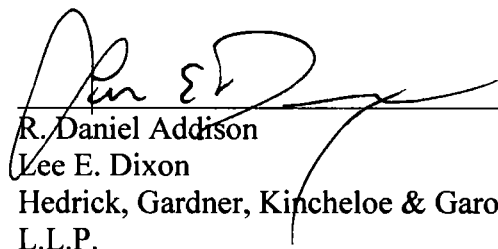
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This is to certify that a copy of the foregoing **Petition for Writ of Certiorari** has been served upon the flowing by placing the same in the United States mail, first-class postage pre-paid, addressed as shown below on the 22<sup>th</sup> day of September, 2014.

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