

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W C C File No 1007936

Darren L Pollack, Employee

Appellant,

v

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

Respondents

BRIEF OF RESPONDENTS

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SC CU - 101 799-3957

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STATEMENT OF ISSUES ON APPEAL

- I IS THE FULL COMMISSION ORDER IMMEDIATELY APPEALABLE SINCE IT IS NOT A FINAL ORDER?

- II DOES SUBSTANTIAL EVIDENCE SUPPORT THE CONCLUSION OF THE UNANIMOUS FULL COMMISSION THAT APPELLANT IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS?

- III DID THE FULL COMMISSION CORRECTLY AFFIRM THE SINGLE COMMISSIONER'S ORDER OVERRULING APPELLANT'S OBJECTION TO THE ADMISSION OF EVIDENCE?

STATEMENT OF THE CASE

Appellant Darren L. Pollack ("Pollack") filed a Form 50 on July 3, 2010 for an admitted injury seeking temporary total disability from June 15, 2010 to present alleging he has been out of work due to his work-related injury (R p 1). In their Form 51, Respondents Southern Wine & Spirits of America ("Employer") and its carrier Specialty Risk Services ("Carrier") (collectively "Respondents"), denied temporary total disability benefits (R p 5). Respondents argued Pollack was terminated for cause, and therefore not eligible for temporary total disability benefits.

Following a hearing on November 22, 2010, the single commissioner issued an order dated January 7, 2010, in which he denied Pollack's request for temporary total disability benefits and ruled Pollack failed to prove entitlement to temporary total disability benefits because he was terminated for violating company policy (R p 9-20).

Pollack timely appealed to the Full Commission. Following argument on July 18, 2011, the appellate panel of the Full Commission entered an order on September 19, 2011, affirming the single commissioner's order in its entirety (R p 21-29). Pollack filed a notice of appeal in this Court on October 3, 2011.

STATEMENT OF THE FACTS

Pollack was a Drivers' Supervisor for Southern Wine & Spirits, where he worked for about ten years (R p 51, lines 15-23) On March 31, 2010, Pollack suffered an admitted injury to his back Beginning April 5, 2010, Pollack had lifting restrictions of 15 pounds, and Respondents accommodated the restrictions until Pollack was terminated for cause on June 15, 2010 (R p 35, lines 8-15) Prior to his injury, Pollack had several disciplinary write-ups at work, and agreed he was on thin ice with his employer (R p 42, lines 10-23)

On May 27, 2010, Pollack responded to an accident in a parking lot involving a company vehicle assigned to driver Jessie Richardson, and as Pollack was leaving the lot, his vehicle brushed the side of Mr Richardson's vehicle (R p 36, lines 15-19) Pollack explained when he looked at the vehicle, he merely saw a line that looked like dirt as opposed to impact damage, so he left the lot and went back to the company warehouse without reporting the accident (R p 36, lines 23-25) Southern Wine & Spirits' employer statement reads "all accidents and incidents with the vehicle must be reported whether or not there's damage to the company vehicle, another vehicle, or other property" (R p 46, lines 14-18, p 138) Mr Richardson informed Southern Wine & Spirits of the accident because his supervisor, Pollack, elected not to do so in violation of company policy (R p 47, lines 13-17)

Pollack was suspended with pay pending an investigation (R p 38, lines 20-23) Following a routine drug and breathalyzer test, Pollack was reinstated (R p 40, lines 1-6) Thirteen days after being reinstated, Pollack was terminated (R p 40, lines 14-18)

Pollack concedes he understood Southern Wine & Spirits' policy and that failing to comply with the policy would result in termination (R p 47, line 23 - p 48, line 9)

Sonny Blocker, plant manager for Southern Wine & Spirits, testified it is company policy that any accident or incident must be reported immediately to a supervisor (R p 52, lines 5-8) Mr Blocker testified Pollack was called to investigate accidents, and he was aware of the company's policy (R p 55, line 19 - p 56, line 1) Mr Blocker stated Pollack was terminated for not reporting an accident because it is important for a supervisor to follow company policy, and an employee reporting his supervisor's violation of company policy is grounds for termination (R p 57, line 21 - p 58, line 3, p 66, lines 7-12) The decision to terminate Pollack came from Miami through Southern Wine & Spirits' human resources department (R p 57, lines 14-20) Further, Southern Wine & Spirits was able to accommodate Pollack's restrictions and but for Pollack's termination, they would have been able to continue to accommodate his work restrictions (R p 64, lines 12-22)

ARGUMENT

I THE FULL COMMISSION ORDER IS NOT IMMEDIATELY APPEALABLE BECAUSE IT IS NOT A FINAL ORDER

Pollack's underlying workers' compensation claim is pending before the Commission, therefore, this appeal is interlocutory and should not be considered until a final judgment disposing of all issues has been rendered. The only issue addressed by the single commissioner and appellate panel of the Full Commission is whether Pollack is entitled to receive temporary total disability benefits for a limited and definite period of time. The Commission has yet to address Pollack's claim for permanent disability, and the jurisdictional commissioner recently issued a decision and request for drafting of an order on the issue of whether Pollack is required to undergo surgery as recommended by his authorized treating physician. As the orders denying temporary total disability benefits are interlocutory and do not constitute a final adjudication of all claims in this case, the appeal is interlocutory and should be dismissed.

South Carolina and the Workers' Compensation Commission, "adhere to the final judgment rule. Accordingly, subject to certain exceptions, an appeal lies only from a final judgment." *Brunson v American Koyo Bearings*, 367 S C 161, 165, 623 S E 2d 870, 872 (Ct App 2005), *reh g denied* (Jan 19, 2006), citing *Hagood v Sommerville*, 362 S C 191, 194-195, 607 S E 2d 707, 708 (2005), S C Code Ann § 1-23-380, -390, Rule 201(a), SCACR. "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v Sommerville*, 362 S C 191, 195, 607 S E 2d 707, 709 (2005) (citing *Tatnall v Gardner*, 350 S C 135, 138, 564 S E 2d 377, 379 (Ct App 2002))

The issue on appeal in the instant case is not a final order and does not prevent a final judgment

Under the circuit court's order in this case, the commission must determine on remand whether the injury occurred during the scope and course of employment, set the claimant's average weekly wage and compensation rate, and answer other questions which may arise. Therefore, we find the commission must conduct additional proceedings before a final judgment is reached. Thus, this order is not appealable.

Long v Sealed Air Corp, 391 S C 483, 485, 706 S E 2d 34, 35 (Ct App 2011). The single commissioner only addressed the issue of whether Pollack is entitled to temporary total disability benefits. All other benefits to which Pollack may be entitled are not addressed in the single commissioner's order, including the issue of whether Pollack is required to have surgery as recommended by the authorized treating physician, whether he has reached maximum medical improvement, and whether he is entitled to any permanent disability compensation.

Since no final judgment has been rendered in this claim, this appeal should be dismissed as interlocutory and remanded to the Commission for further proceedings. Dismissal and remand will preserve judicial resources and prevent piecemeal appeal of the various issues presented (and not yet decided) in this case. To the extent this Court determines this appeal involves a final judgment ripe for appellate review, a contention Respondents view as incorrect, Respondents nevertheless contend the orders challenged on appeal should be affirmed in their entirety.

II SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION OF THE UNANIMOUS FULL COMMISSION THAT APPELLANT IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS

The Full Commission reviewed the substantial evidence below and correctly determined Pollack is not entitled to temporary total disability benefits in light of his

termination for cause and not due to his admitted work-related injury “Disability benefits are used to compensate the employee for the difference in what he was making before and after an accident *due to the injury sustained*” S C Code Reg 67-502(B)(1) (*emphasis added*) The Full Commission reviewed the substantial evidence and agreed that Respondents accommodated Pollack’s light duty work restrictions until he violated company policy, which required termination The judgment below must be affirmed because these findings are supported by the substantial record evidence and because Pollack cannot establish that an error of law has been committed

A Respondents Had Work Available For Appellant And Accommodated Appellant’s Light Duty Work Restrictions Until He Was Terminated For Cause

Beginning April 5, 2010, Respondents accommodated Pollack’s light duty work restrictions (R p 35, lines 8-15) These accommodations remained in place until Pollack was terminated for cause and for reasons unrelated to his June 15, 2010 injury The plant manager, Sonny Blocker, testified that but for Pollack’s violation of company policy, he still would be working in a light duty capacity for Respondent (R p 64, lines 12-22) The single commissioner found Mr Blocker’s testimony very credible (R p 19) “It is logical for the full Commission, which d[oes] not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner’s opinion” *Green v Raybestos-Manhattan Inc*, 250 S C 58, 64, 156 S E 2d 318, 321 (1967) If Pollack had not violated company policy, he would still not be entitled to disability benefits because he would be receiving his regular salary

Pollack argues no injured worker can ever be terminated while on light duty without receiving temporary total disability benefits (Appellant's Initial Br , p 8) (citing *Beckworth v Palmetto Restaurant Group*, S C Wrk Comp Comm'n , 2010 WL 6274217 (2010)) This is incorrect Unlike the claimant in *Beckworth*, where the general manager claimant was not back to work and terminated because of her store's poor performance (likely due to claimant being unable to supervise due to her injury), in the instant case, Pollack was being accommodated within his work restrictions and terminated only when he violated a company policy that had nothing to do with his admitted injury In other cases cited by Pollack, the claimants were never accommodated for their injuries in their current employment and later terminated for reasons unrelated to their injuries like the claimant in the instant case (Appellant's Initial Br , p 9-10) (citing *Last v MSI Const Co Inc* , 305 S C 349, 409 S E 2d 334 (1991) (incarcerated claimant), *Hines v Hendricks Canning Co* , 263 S C 399, 211 S E 2d 220 (1975) (full-time student claimant))

If Pollack had been terminated because no light duty work was available, Respondents concede he would qualify for temporary total disability benefits However, since his current unemployment status is due to violation of company policy, and not because of his admitted injury, Pollack is not entitled to temporary total disability benefits pursuant to S C Code Ann § 42-9-260

B Appellant Was Terminated For Cause Unrelated To His Workers' Compensation Claim

On May 27, 2010, while Respondents were accommodating Pollack's work restrictions, Pollack responded to an accident in a parking lot involving a company vehicle assigned to driver Jessie Richardson As he left the lot, Pollack's vehicle hit Mr

Richardson's company vehicle (R p 36, lines 15-19) Pollack left the lot and went back to the company warehouse (R p 7, lines 23-25) Mr Richardson informed Southern Wine & Spirits of the accident because Pollack, Mr Richardson's supervisor, had not (R p 47, lines 13-17)

Respondent's employer statement reads "all accidents and incidents with the vehicle must be reported whether or not there's damage to the company vehicle, another vehicle, or other property" (R p 46, lines 14-18, p 138) Plant Manager Sonny Blocker testified it is important for a supervisor to follow company policy, and an employee reporting his supervisor's violation of company policy is grounds for termination (R p 57, line 21 – p 58, line 3, p 66, lines 7-12) As previously discussed, the single commissioner found Mr Blocker's testimony very credible (R p 19)

Holding that an employer is never allowed to terminate any employee under a work restriction would lead to the absurd result that injured employees can take advantage of their protected status by choosing to violate company policy whenever they please without consequence In the instant case, Pollack's discharge was not related to his admitted accident, his termination was based solely on his failure to comply with company policy by deciding not to report his vehicle collision, coupled with numerous other company violations (R p 42, lines 10-23) In fact, Pollack admitted he was already on "thin ice" with Respondents at the time of the vehicle collision (R p 42, lines 17-21)

Pollack argues the Commission does not have the authority to bar benefits for an employee's termination due to misconduct (Appellant's Initial Br , p 11) This

argument fails. The single commissioner did not bar Pollack's right to benefits. Instead, Pollack was never entitled to disability benefits since his wage earning ability was decreased not from his admitted injury, but from his violation of company policy and resulting termination. Had Pollack followed company policy and reported his accident before his own employee did, Pollack would still be working light duty for Southern Wine & Spirits without any loss of wage earning ability. Pollack also argues Southern Wine & Spirits did not follow its own policy because he was not terminated immediately (Appellant's Initial Br, p. 17). However, the termination process for this large company involves many departments, people and locations, and the final decision to terminate Pollack came from Miami (R. p. 57, lines 14-20).

Pollack argues the Commission must have applied North Carolina's *Seagraves* test for determining whether a claimant is entitled to temporary total disability benefits. Pursuant to that test, a claimant is not entitled to temporary benefits if his termination was the result of a wrongful act and not his disability (Appellant's Initial Br, p. 13). Again, this argument fails as the Commission specifically held North Carolina law does not apply (R. p. 27). The Commission's holding was based on the plain language of the regulation defining temporary total disability benefits: if the employee is not able to work because of the injury, he is entitled to benefits. See S.C. Code Reg. 67-502(B)(1). In the instant case, Pollack's inability to work did not result from his injury. To the contrary, Respondents were accommodating Pollack's work restrictions after the accident. The only reason Pollack is not able to work is because he violated a company policy that required his termination. Further, although North Carolina has held a claimant is still entitled to temporary total disability benefits if he is not able to find work after

termination because of his work restrictions, South Carolina law does not distinguish when temporary benefits are available. Since Pollack was able to work as accommodated by Respondents, he is not entitled to temporary benefits because his loss of earning capacity was the result of his misconduct in violation of company policy, and not because of his injury.

Accordingly, the Full Commission was correct in affirming the single commissioner. Pollack is not entitled to temporary total disability benefits. Pollack was terminated for cause while Respondents were accommodating his work restrictions, and but for Pollack's violation of company policy, he would still be accommodated by Respondents.

III THE FULL COMMISSION CORRECTLY AFFIRMED THE SINGLE COMMISSIONER'S ORDER OVERRULING APPELLANT'S OBJECTION TO THE ADMISSION OF EVIDENCE

The Full Commission correctly affirmed the single commissioner's decision overruling Pollack's objection to the admission of a handwritten statement as hearsay for two reasons. First, the South Carolina Rules of Evidence do not apply to worker's compensation proceedings. Second, the handwritten statement is not hearsay and qualifies as a business records exception to the hearsay rule. This Court should affirm.

Mr. Richardson's statement was written in the course of regularly conducted business from his personal knowledge of the facts regarding Pollack hitting his truck while trying to leave the parking lot where Pollack met Mr. Richardson. This affidavit was not written in response to possible litigation, but was written for Pollack's personnel file in the ordinary course of Respondents' business. Therefore, this statement constitutes non-hearsay under the business exception rule. *See* Rule 803(6), SCRE.

Further, the South Carolina Rules of Evidence do not apply in workers' compensation proceedings. See S C Code Ann § 1-23-330(1) "The findings and award of the Industrial Commission will not be disturbed by the court because of the presence of hearsay testimony, when there is other competent evidence of sufficient probative force upon which to base the findings." *Cole s Next of Kin v Anderson Cotton Mills*, 191 S C 458, 4 S E 2d 908 (1939) *rev d on other grounds, Peagler v Atlantic Coast Line R Co*, 232 S C 274, 101 S E 2d 821 (1958), (citing *Maley v Thomasville Furniture Co*, 214 N C 589, 200 S E 438)

Accordingly, it was proper for the single commissioner to overrule Pollack's hearsay objection. In addition, "great liberality is exercised in permitting the introduction of evidence [by commissioners] in proceedings under Workmen's Compensation Acts." *Hamilton v Bob Bennett Ford*, 339 S C 68, 70, 528 S E 2d 667, 668 (2000) (citing *Ham v Mullins Lumber Co*, 193 S C 66, 7 S E 2d 712 (1941)). Therefore, the Full Commission was correct in affirming the single commissioner's decision to overrule Pollack's hearsay objection, and this Court should affirm

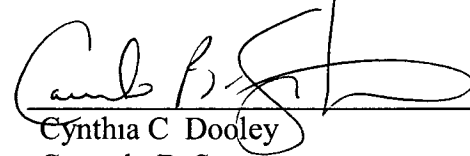
CONCLUSION

For the reasons stated herein, Respondents urge this Court to affirm the orders challenged on appeal

TURNER, PADGET, GRAHAM & LANEY, P A

July 23, 2012

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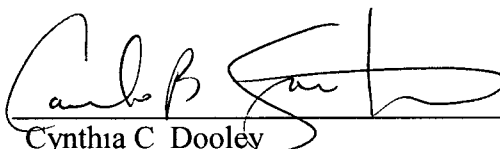
Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF RESPONDENTS complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated August 13, 2007

July 23, 2012

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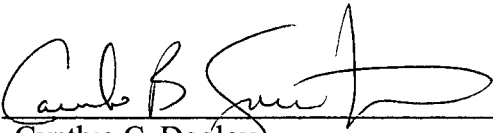
I certify that I have this 23rd day of July 2012 served copies of the BRIEF OF
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