

The Supreme Court of South Carolina

Darren L. Pollack, Employee, Appellant,

v

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

Appellate Case No 2011-200466

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
~~appeal is hereby certified for review by the South Carolina Supreme Court~~

Upon receipt of this order, the Court of Appeals is hereby directed to forward
the case file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED



C J
FOR THE COURT

Columbia, South Carolina

August 29, 2012

cc

Carmelo Barone Sammataro

Cynthia C Dooley

Stephen Benjamin Samuels

The Honorable Jenny Kitchings

The South Carolina Court of Appeals

Darren L Pollack, Employee, Appellant,

v

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

Appellate Case No 2011-200466

ORDER

The time for serving and filing the motion for extension of time to file record on appeal is granted. The record on appeal and all final briefs have been accepted as filed and will be submitted to the Court for consideration.

FOR THE COURT

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina

cc

Stephen B Samuels
Carmelo Barone Sammataro
Cynthia C Dooley

FILED

8/9/12 AS

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

**MOTION FOR EXTENSION OF TIME TO FILE
RECORD ON APPEAL**

Appellant, by and through his undersigned attorney hereby moves this Honorable Court for for a 7-day extension in which to file the **Record on Appeal**. The Record on Appeal is currently due on June 6, 2012. If the Motion is granted, the due date will be extended to June 13, 2012. As grounds for granting this Motion, Appellant would show additional time is needed as counsel for Appellant will be traveling out of the country June 1 - June 8, 2012. Counsel for Respondents has graciously agreed to consent to the requested 7-day extension.

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By _____
(Clerk) (Deputy Clerk)


Stephen B Samuels
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stephen@samuelslawfirm.net

Attorney for Appellant

Columbia, South Carolina
June 1, 2012

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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,

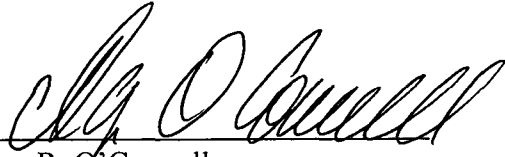
v

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

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B Samuels and I have served the **Motion for Extension of Time to File Record on Appeal** 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 1, 2012**, addressed as follows

Cynthia C Dooley, Esquire
Carmelo B Sammataro, Esquire
Attorney for Respondents
Turner Padgett Graham & Laney, P A
Post Office Box 1473
Columbia, South Carolina 29202


Angi R O'Connell

Columbia, South Carolina

June 1, 2012



Stephen B Samuels, Attorney at Law

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803-779-4000 office, 803-779-4004 facsimile
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June 1, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED
JUN 01 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 original and six copies of **Motion for Extension of Time to File Record on Appeal** for filing in the above-referenced matter. I have also enclosed our firm's check in the amount of Twenty-Five (\$25.00) Dollars as payment of the required filing fee.

By copy of this letter and enclosure to Carmelo Sammataro, counsel of record for the Respondents, we are serving him with a copy of our **Motion for Extension of Time to File Record on Appeal** as indicated by the attached Proof of Service.

Thank you for your assistance 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
Mr Darren L Pollack

TURNER PADGET

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July 23, 2012

HAND DELIVERY

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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JUL 23 2012
SC Court of Appeals

Re Darren L Pollack v Southern Wine & Spirits of America and Specialty Risk Services

Case Tracking No 2011200466

W C C File No 1007936

TPGL File No 2920 688

Dear Ms Kitchings

Enclosed please find the following documents

- 1 Original and 15 copies of the Brief of Respondents,
- 2 Original and one copy of the Certificate of Counsel, and
- 3 Original and one copy of the Proof of Service

Please file the original documents with your office and return clocked copies to me via our office courier Thank you for your assistance with this matter, and please contact me if you have any questions

BUSINESS LITIGATION SOLUTIONS

Bank of America Plaza 17th Floor 1901 Main Street (29201) PO Box 1473 Columbia SC 29202

Phone (803) 254 2200 Fax (803) 799 3957 turnerpadget.com

July 23, 2012

Page 2

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P A



Carmelo B Sammataro

CBS/tj

Enclosures

cc Stephen B Samuels, Esquire
Ms Virginia L Crocker, Judicial Director
(w/enc)



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July 17, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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 **Supplemental Record on Appeal** for filing in the above-referenced matter

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 **Supplemental Record on Appeal** 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

RECEIVED
JUL 17 2012
SC Court of Appeals



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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
Columbia, South Carolina 29201

JUL 10 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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAY 07 2012

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

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

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I The Order of the Appellate Panel of the Full Commission is appealable because it is a final Order on the sole contested issue [in response to Respondents' arguments at pages 5-6]

For the first time in these proceedings, Respondents raise the new issue that because “Pollack’s underlying workers’ compensation is pending before the Commission this appeal is interlocutory and should not be considered until a final judgment disposing of all issues has been rendered ”¹ [Brief of Respondents, page 5] A review of the record and applicable case law shows that the decision below was a final order of all contested issues As such, it is immediately appealable

At the trial of this case, the hearing Commissioner stated

This claim is admitted I believe the Claimant is receiving authorized treatment Sole issue today would be whether or not he’s entitled to temporary total from June 15, 2010 to the present Issue being the Employer/Carrier would allege he was terminated for cause The Claimant would take issue with that and allege he’s entitled to the temporary total [Tr Page 4, line 20-page 5, line 2]

After hearing from the parties, the Commissioner added

We’re going to swear Mr Pollack in I’m going to ask you the lawyers if we can streamline this, just get right to the issue of the temporary total I don’t need – it’s an admitted claim He’s undergoing treatment I don’t need all the background stuff So, we can get right into the sole issue [Tr page 6, lines 16-22]

These remarks from the Commissioner confirm that the sole issue before him was payment of temporary total disability compensation following Pollack’s termination This is borne out by the

¹The South Carolina Supreme Court heard oral arguments on January 26, 2012 in Bone v. U S Food Service and Indemnity Insurance Company of North America The Supreme Court granted certiorari to review this Court’s dismissal of an appeal as interlocutory In Bone, the circuit court remanded the case to the workers’ compensation commission for further proceedings As the instant case does not involve a remand, it is immediately appealable no matter how the Supreme Court decides Bone

limited scope of the orders [SC Order, FC Order]

Respondents' argument that this is not a final order because "All other benefits to which Pollack may be entitled are not addressed in the single commissioner's order" is without merit. Those "other benefits" are not in dispute. This is an accepted case and other benefits were not before the Commission.²

Furthermore, those cases that have dismissed appeals from administrative agencies as interlocutory have one common – and critical – element: the appealed order *remanded* the case to the administrative agency for further proceedings. Here, there is no pending remand nor would there be if this Court reverses.

This case as presented constitutes a final order of the Commission as defined in the case law and S.C. Code Ann. § 1-23-390 (2004). Moreover, it is immediately appealable because "review of the final agency decision would not provide an adequate remedy." *Id.*

Two recent decisions have attempted to narrow the class of cases subject to an appeal from administrative agencies. The first, Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010), dismissed an appeal from the Administrative Law Court as not immediately appealable because the ALC remanded the

²In their brief, Respondents go outside the Record on Appeal and state, "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." [Brief of Respondents, page 5]. This case was tried on November 22, 2010. Subsequent events are not part of the Record on Appeal, should not have been included in Respondents' Brief, and cannot be considered by this Court. The Rules of Appellate Practice state, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. See Davis v. Davis, 588 S.E.2d 102 (2003) (improper for appellate court to consider events which took place after trial as these facts were outside the record).

matter to the administrative agency to make a final determination of the core issue. The second, Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011), dismissed an appeal from the circuit court in which the court remanded the case back to the workers' compensation commission for further proceedings. This Court relied largely on Charlotte-Mecklenburg, as well as the Supreme Court's earlier decisions in Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) and Leviner v. Sonoco Products Co., 339 S.C. 492, 530 S.E.2d 127 (2000) (holding an order which remands a case to an administrative agency for further proceedings is not immediately appealable).

In Charlotte-Mecklenburg, two entities were competing for a single certificate of need. The ALC found both parties qualified, but remanded the case to DHEC to determine which party actually was entitled to receive the certificate of need. As the court noted, "Although the ALC decided questions of law involved in this matter, a final determination as to the certificate of need has not been made." Charlotte-Mecklenburg at 267, 692 S.E.2d at 895. Since the respondent in that case could have been awarded the certificate of need – thus mooted the appeal – the rights of the parties had not been finally determined. Conversely, in the instant case, the Commission issued a final order holding Pollack was not entitled to temporary total disability compensation, thus finally deciding that issue against him.

At first blush, Long seems to be more similar to the instant case. The difference lies in the limited scope of the issues decided. In Long, the Commission denied the claim on one issue: failure to report the injury within the ninety days allowed under S.C. Code Ann. § 42-15-20 (2010). Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011). The case had to be remanded because the Commission never reached the other critical issues in the case, to wit: "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 ” Id Even if the Court had affirmed on the notice issue, whether the employer was ultimately liable to pay benefits could not be determined until the Commission made further findings Had the Commission addressed these ancillary issues, then a decision on the merits by the Court would have been proper

In the case *sub judice*, these other issues do not need to be determined If the Court reverses, Southern Wine must pay temporary total disability compensation to Pollack, if the Court affirms, no payments are due This is a simple straightforward single issue case which was decided with finality – albeit incorrectly – by the Workers' Compensation Commission The appeal should go forward on the merits

II 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

In their Brief, Respondents frame the issue as a mere factual dispute over whether Pollack was terminated for a violation of company policy ³ The fact the Employer unilaterally ceased providing employment suitable to Pollack's post-injury capacity is undisputed and relevant – indeed

³Pollack has never conceded that his termination was legitimately for violation of company policy At best, it was a misunderstanding as to whether an accident report must be filled out even when there is no property damage – and hence no accident – to report At worst, the discharge was in retaliation for filing a workers' compensation claim Retaliatory motive can be inferred from the fact Pollack was not terminated until 13 days after being reinstated despite the purported company policy allegedly stating, “failure to report an accident will result in immediate termination ” [Tr page 32, line 15-page 33, line 5, APA page 250] See Wallace v Milliken & Co., 305 S C 118, 123, 406 S E 2d 358, 361 (1991)(“We agree with Court of Appeals that, had the discharge been motivated solely by safety concerns, [the employer] would have terminated [the employee] immediately ”)

dispositive See Smith v South Carolina Dept of Mental Health, 329 S C 485, 494 S E 2d 630 (Ct App 1997)(“As we read [§ 42-9-190], it imposes no requirement on an employer to offer suitable employment, but instead simply provides that if the employer does offer the employee a position consistent with the employee's physical capacity, the employee is not entitled to benefits for any period during which he refuses the employment ”) Once the offer of suitable employment was withdrawn – regardless of the employer’s motivation – the employer is legally required to pay temporary total disability compensation to the injured worker until he either returns to work or reaches maximum medical improvement Id

The *real* reason Southern Wine terminated Pollack is disputed, but also irrelevant as a matter of law See Smith at 485, 494 S E 2d 630 (reasons 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 ”) S C Code Ann § 41-1-80 (1996) (Any employer who discharges or demotes an employee because the employee in good faith filed a workers' compensation claim “is liable in a civil action for lost wages suffered by an employee as a result of the violation ”) Southern Wine unilaterally withdrew the offer of suitable employment 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 employment restrictions [Tr page 12, lines 15-23] As there is no *material* factual dispute, this is a legal issue over which the Court has plenary authority to reverse the Commission See Jolly v Atlantic Greyhound Corp 207 S C 1, 35 S E 2d 42 (1945)

A An employer's motivation for terminating an employee on light duty is irrelevant as the right to temporary compensation is conditioned on disability alone [in reply to Respondents' argument at pages 7-8]

Respondents argue that “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 ” [Brief of Respondents at 8] Respondents cite no legal authority for this sweeping statement. Indeed, South Carolina law is quite clear that the right to temporary compensation is conditioned on disability – not the motivation of the employer in refusing to provide suitable employment. See S C Code Ann § 42-9-190 (2007), 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) (2007), 25A S C Code Ann Reg 67-502 (2007) (defining “disability”, “return to work without restriction”, and “temporary partial incapacity”). See also, Coleman v Quality Concrete Products, Inc., 245 S C 625, 142 S E 2d 43 (1965) (temporary compensation must be paid where employee “was refused further employment in such capacity by his employer and told that the employer had no light work which he was able to perform ”)

The right to receive temporary total disability compensation is based on disability, not on employment status. An employee who becomes unemployed for any reason other than refusing employment suitable to his capacity is entitled to temporary compensation *if* – and only if – he is disabled. See S C Code Ann § 42-9-190 (2007), S C Code Ann § 42-9-200 (2007). Disability is 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 (2007). In the instant case, the fact Pollack was on light duty restrictions which prevented him from working in his

normal pre-injury job means he is deemed disabled See 25A S C Code Reg 67-502 D (2007)(“The determination [of a statement of Return to Work Without Restriction] is appropriate when there are no physical limitations on the claimant's ability to perform the same or other suitable job as the claimant performed *before* the injury ” (emphasis added)) Not only was Pollack unable to obtain other work after he was fired, his supervisor testified that any person with similar restrictions could not be hired for that position [Tr page 12, lines 4-14, page 33, line 6-page 35, line 6]

For example, assume the employer shuts down its plant and goes out of business All employees capable of working qualify for unemployment compensation An employee with an open workers' compensation claim does not automatically receive temporary disability compensation if the plant shuts down If he is not on work restrictions, he is not considered disabled and is not entitled to temporary disability compensation His status is no different than any other employee However, if the employee is under work restrictions which had been accommodated by employment suitable to his capacity, he must be paid temporary compensation

The error the Commission made was to base its ruling on the alleged reason for Pollack's termination – even though this is forbidden ground – instead of ruling based on Pollack's disability The ramifications are significant This ruling means Pollack can *never* receive temporary disability compensation An employer can make up some policy reason for terminating an injured worker – even something the employee is unaware of – and this mere allegation is enough to *forever* relieve it from liability for paying temporary benefits No matter how disabled the employee actually is, the policy violation will follow him for the remainder of his period of disability Even when his injury leaves him ineligible for unemployment compensation, unable to do his regular job, and disqualified for any work within his field, he will still be denied the very relief that the workers' compensation

system was created to provide. Nothing he can do from that point forward can change it. The punitive aspect of such a rule is antithetical to the purposes underlying workers' compensation.⁴

The Act is replete with examples of how seriously the Legislature regarded the employee's right to receive temporary compensation. Weekly benefit checks are designed to replace the injured worker's wages. As such, the Legislature included a provision requiring compensation "shall be paid periodically, promptly and directly to the person entitled thereto." S.C. Code Ann. § 42-9-220 (2007). Payments must be made on the same day of the week. S.C. Code Ann. § 42-9-230 (2007). An employer who does not make timely payments is subject to a 10% penalty. S.C. Code Ann. § 42-9-240 (2007). Illegal suspension or termination of temporary compensation requires the employer be assessed a mandatory 25% penalty. S.C. Code Ann. § 42-9-260 (G) (2007).

The courts agree. Temporary compensation is considered a vested property right. Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987). An injured worker cannot be deprived of workers' compensation benefits without due process of law. See U.S. CONST. amend. XIV, Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (1991) (holding that terminating temporary compensation benefits of incarcerated worker would unconstitutionally deprive him of a property

⁴Sixty years ago, the late Strom Thurmond wrote the definitive description of workers' compensation:

Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results. Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

interest without due process of law)

The issue is not whether the employer *could* have offered suitable employment, but whether they actually offered it. Shifting the blame for the Employer's unilateral withdrawal of employment to the employee is simply improper. Once that work is no longer available – regardless of the reason – the only consideration is whether the employee is considered disabled. Here, Pollack obviously is disabled as a matter of law. If Pollack had been able to meet *all* the requirements and perform *all* the *regular* duties of his job, then temporary compensation would not be payable. The same rule would apply if the termination was simply a general layoff or even if the employer had gone out of business. For that matter, the same rule would apply even if he were terminated in retaliation for filing a workers' compensation claim. The reason the employer no longer provides suitable employment makes no difference. This Court should reverse the Appellate Panel and find Pollack shall be paid temporary total disability compensation from the date his employment with Employer ceased.

B South Carolina's public policy prohibits employers from evading liability for temporary compensation by terminating injured workers [in response to Respondents' argument at pages 8-11]

Respondents argue that "Holding that an employer is never allowed to terminate any employee under a work restriction would lead to the absurd result that injured workers can take advantage of their protected status by choosing to violate company policy whenever they please without consequence." [Brief of Respondents at 9]. The idea that someone would willingly get himself fired is both absurd and insulting to the hard working citizens of South Carolina - particularly in today's economy. No reasonable person would willingly take a 1/3 pay cut plus lose his family's health insurance and retirement contributions.

Moreover, such an idea absolutely does not apply to this case. Pollack had been employed as a supervisor for Southern Wine & Spirits for 10 years. He has a family to provide for. There was no incentive whatsoever for him to jeopardize his job. His cooperation with filling out the accident report and taking a drug test demonstrate his desire to remain employed – even more so if he was on “thin ice.” Conversely, Southern Wine & Spirits has *every* economic incentive to fire him. As Pollack cannot physically do his job, he is not worth the wages he was paid. And, if it relieves them from liability for both wages and temporary compensation, why wouldn’t they fire him?

Respondents never responded directly to Appellant’s argument that the “Commission lacks statutory authority to make findings on why an employee was terminated – or to bar compensation on this ground.” [Brief of Appellants at pages 8-13]. The Court should treat the failure to respond to these arguments with citation to legal authority as a confession that the Commission lacked statutory authority to deny Pollack’s request for temporary compensation. See Turner v. South Carolina Dept. of Health and Environmental Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008) (holding failure to respond to argument was confession that Commission ruled incorrectly and remanding for specific findings consistent with reversal), First Union Nat’l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant’s position is correct), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997). Even if the Court finds that Respondents’ argument is sufficient, the complete lack of citation to any authority shows that the argument has no merit.

The only argument made is to shift the blame to Pollack, thereby reverting to the conclusory argument that an employee fired for cause is forever barred from receiving temporary compensation.

Pollack is disabled within the meaning of the Act. As such, his entitlement to temporary compensation stems from his disability. See Last v MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (1991) (the loss of earning capacity caused by the physical injury is the pertinent measure of compensable disability.”) Cf. 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).

Respondents also argue that North Carolina law does not apply. [Brief of Respondents at 10]. The parties actually agree that North Carolina law does not apply – albeit from different ends of the spectrum. Respondents contend South Carolina law completely bars payment of temporary compensation to an employee fired for allegedly violating a company – regardless of whether his work restrictions prevent him from working “in the same or any other employment.” S.C. Code Ann. § 42-1-120 (2007). Appellant contends North Carolina law does not apply for the public policy reasons stated by the Commission in its earlier Beckworth decision, as well as the different requirements for payment of compensation in North Carolina. Unlike North Carolina, South Carolina has no requirement that an employee seek comparable employment as a precondition of receiving temporary compensation. Cf. McRae v. Toastmaster, Inc., 597 S.E.2d 695, 699 (N.C. 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.”)

Respondents note, “South Carolina law does not distinguish when temporary benefits are available.” [Brief of Respondents at 11]. This argument is correct insofar as South Carolina does not require a showing that the employee “is not able to find work after termination because of his

work restrictions ” [Brief of Respondents at 11] North Carolina has this requirement because it is a *vocational rehabilitation* state rather than a *maximum medical improvement* state In North Carolina, compensation can continue indefinitely – even past maximum medical improvement – if the employee cannot be returned to work after undergoing vocational rehabilitation services ⁵ In South Carolina, “workers’ compensation benefits accrue along a time continuum temporary total disability benefits are available from the date of injury through the date of maximum medical improvement, post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member ” Smith v NCCI, Inc., 369 S C 236, 631 S E 2d 268 (Ct App 2006)

Under our law, there are three elements to a claim for temporary disability compensation (1) partial incapacity as a result of the injury, (2) no work offered suitable to the employee’s capacity, and (3) the employee is not at MMI See S C Code § 42-9-190 (2005), S C Code Ann § 42-9-260 (B)(1)(1996), 25A S C Code Ann Reg 67-504 (2007), Martin v Rapid Plumbing, 369 S C 278, 631 S E 2d 547 (Ct App 2006)(the Workers’ Compensation Act “requires employers to pay temporary total disability to an employee who has ‘been out of work due to a reported work related injury’ for eight days ”), *quoting* S C Code § 42-9-260(A) (Supp 2006) Pollack proved each of these elements He has a partial incapacity as he is under ongoing work restrictions [APA p 32]

⁵North Carolina amended its statutes in 2011 to insert a 500-week limitation on temporary compensation However, the amendment retained the right to lifetime compensation unless “the employer has proven by a preponderance of the evidence that the employee no longer has a total loss of wage-earning capacity ” N C Gen Stat § 97-29 (2011) The employer could make this proof by showing that despite medical restrictions, the employee had not engaged in vocational rehabilitation or had not attempted to work or find work Furthermore, an employer could suspend temporary total compensation even before MMI if the employee refused to look for work while receiving vocational rehabilitation services N C Gen Stat § 97-32 2(g) (2011)

He is currently treating with a neurosurgeon and has not been placed at MMI And, as of June 15, 2010, no work has been offered suitable to his capacity The employer's motivation for refusing to offer suitable employment is not one of the elements Having proven the elements, Pollack is entitled to temporary total disability benefits as a matter of law ⁶ See Kinsey v. Champion American Service Center, 268 S C 177, 232 S E 2d 720 (1977)(when only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts)

Pollack would also be entitled to temporary compensation under North Carolina law First off, even if he was terminated for cause, the cause never rose to the level of *misconduct* The North Carolina Supreme Court held "the critical area of inquiry into the circumstances of an injured employee's termination is to determine from the evidence whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform " McRae v. Toastmaster, Inc , 597 S E 2d 695, 699 (2004)(emphasis in original) As Pollack willingly filled out an accident report when informed of his misapprehension regarding no property damage accidents, there is no evidence

⁶The North Carolina Supreme Court explained how the issues in this case involve conclusions of law rather than findings of fact

We note that the Commission's majority additionally erred when it included a conclusion of law under the aegis of its findings of fact In the final sentence of finding of fact number nine, the Commission's majority stated that "[p]laintiff's failure to perform the UPC labeler position under the facts of this case *constitutes a failure to accept a suitable position reasonably offered by her employer* ' (Emphasis added [by the North Carolina Supreme Court]) While the issue of whether plaintiff failed to perform her duties is a question of fact, the determination of whether plaintiff's failings constituted a constructive refusal to accept suitable employment is a question of law The distinction is significant, as an appellate court's standard of review of the Commission's findings of fact is markedly different from its standard for reviewing the Commission's conclusions of law Thus, we urge commissioners to exercise care when differentiating between the two entities in the future McRae v. Toastmaster, Inc , 597 S E 2d 695, 703 n 3 (N C 2004)

of *unwillingness* – and thus no misconduct sufficient to bar his claim

Even if misconduct is shown, North Carolina courts inquire as to “whether plaintiff has countered by demonstrating that her failure to perform her post-injury duties or to procure commensurate work from other employers was due to her work-related injuries ” Id The court further noted that even if “efforts toward finding subsequent commensurate employment may have been compromised by both market conditions and her lack of work experience [n]either circumstance may serve as a means for defendant to sidestep its benefit obligations ” Id If the claimant can show that the work-related injury prevented him “from finding alternative commensurate employment he is entitled to continued benefits ” Id This rule is more restrictive than South Carolina’s rule, but is at least closer to our public policy than the draconian, unfair and unreasonable rule promulgated by Respondents and the Commission in this case

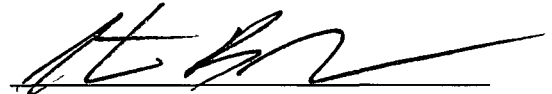
Pollack has been looking for work since he was fired He has not found any work within his restrictions [Tr page 12, lines 8-14] Sonny Blocker testified Southern Wine would not be able to hire a person for Pollack’s job who was under the same restrictions [Tr p 35, lines 3-6] The Department of Labor and Workforce denied his claim for unemployment compensation because his restrictions rendered him unavailable for work This evidence proves Pollack’s continuing unemployment is due to his work restrictions, thus entitling him to continued benefits should North Carolina law be applied to this case

No matter whether current South Carolina law is followed or North Carolina law is adopted, the Commission committed an error of law in denying Pollack’s claim for temporary total disability benefits As such, the Court should reverse the Decision and Order of the Appellate Panel and find Pollack is legally entitled to receive temporary compensation from the date of his termination

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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stephen@samuelslawfirm.net

Attorney for Appellant

Columbia, South Carolina
May 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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,

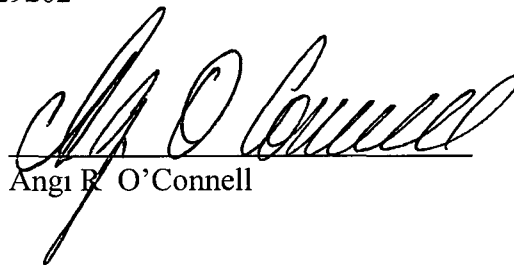
v

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

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B Samuels and I have served the **Initial Reply 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 **May 7, 2012**, addressed as follows

Cynthia C Dooley, Esquire
Carmelo B Sammataro, Esquire
Attorney for Respondents
Turner Padgett Graham & Laney, P A
Post Office Box 1473
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Angi R O'Connell

Columbia, South Carolina

May 7, 2012



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May 7, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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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 original and one copy of **Initial Reply Brief of Appellant** for filing in the above-referenced matter. Please file the original and return the clocked copy to me via our courier.

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

Thank you for your assistance 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 Cynthia Dooley, Esquire
Carmelo B. Sammataro, Esquire
Mr. Darren L. Pollack

The South Carolina Court of Appeals

Darren L Pollack, Employee, Appellant,

v

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

Appellate Case No 2011-200466

Trial Court Case No 1007936

ORDER

The time for serving and filing the appellant's initial reply brief is hereby extended until June 27, 2012

FOR THE COURT

BY V. Claude Allen, Deputy
CLERK

Columbia, South Carolina

cc
Carmelo Barone Sammataro
Cynthia C Dooley
Stephen Benjamin Samuels

FILED
W. Carter 6/13/12

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

**MOTION FOR EXTENSION OF TIME TO FILE
INITIAL REPLY BRIEF OF APPELLANT AND DESIGNATION OF MATTER**

Appellant, by and through his undersigned attorney hereby moves this Honorable Court for for a 21-day extension in which to file the **Initial Reply Brief of Appellant and Designation of Matter to be included in the Record on Appeal** The Brief and Designation of Matter are currently due on April 16, 2012 If the Motion is granted, the due date will be extended to May 7, 2012 As grounds for granting this Motion, Appellant would show additional time is needed as the Respondents' Brief was not received in the mail until April 9, 2012 Further, Respondents raise a new issue of appealability which will require additional research and writing time

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SC Court of Appeals



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Attorney for Appellant

Columbia, South Carolina
April 13, 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

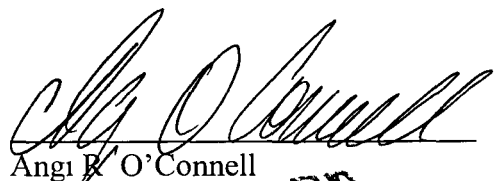
PROOF OF SERVICE

I certify that I am the paralegal to Stephen B Samuels and I have served the **Motion for Extension of Time to File Initial Reply Brief of Appellant and Designation of Matter** 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 **April 13, 2012**, addressed as follows

Cynthia C Dooley, Esquire
Carmelo B Sammataro, Esquire
Attorney for Respondents
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Post Office Box 1473
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Columbia, South Carolina

April 13, 2012



Angi R O'Connell

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SC Court of Appeals



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April 13, 2012

VIA HAND DELIVERY

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms Gee

Please find enclosed the original and six copies of **Motion for Extension of Time to File Initial Reply Brief of Appellant and Designation of Matter** for filing in the above-referenced matter. I have also enclosed our firm's check in the amount of Twenty-Five (\$25.00) Dollars as payment of the required filing fee.

By copy of this letter and enclosure to Carmelo Sammataro, counsel of record for the Respondents, we are serving him with a copy of our **Motion for Extension of Time to File Initial Reply Brief of Appellant and Designation of Matter** as indicated by the attached Proof of Service.

I thank you for your assistance 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
Mr Darren L Pollack

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W C C File No 1007936

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SC Court of Appeals

Darren L Pollack, Employee

Appellant,

v

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

Respondents

RESPONDENTS' DESIGNATION OF MATTER TO
BE INCLUDED IN THE RECORD ON APPEAL

Respondents propose the following to be included in the Record on Appeal

- 1 Form 50 dated July 3, 2010,
- 2 Form 51 dated July 27, 2010,
- 3 Appellant's Form 30 dated January 21, 2011,
- 4 Single commissioner Order dated January 7, 2010,
- 5 Full Commission Order dated September 19, 2011,
- 6 November 22, 2010 hearing transcript, and
- 7 APA 250 and 255

Counsel for Respondents certifies that this Designation contains no matter that is irrelevant to this appeal

April 5, 2012

By

A handwritten signature in black ink, appearing to read "Carmelo B. Sammataro", is written over a horizontal line.

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Carmelo B Sammataro

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In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W C C File No 1007936

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APR 05 2012

SC Court of Appeals

Darren L Pollack, Employee

Appellant,

v

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

Respondents

PROOF OF SERVICE

I certify that I have this 5th day of April 2012 served a copy of RESPONDENTS
SOUTHERN WINE & SPIRITS OF AMERICA AND SPECIALTY RISK SERVICES
INITIAL BRIEF and DESIGNATION OF MATTER TO BE INCLUDED IN THE
RECORD ON APPEAL by United States mail to

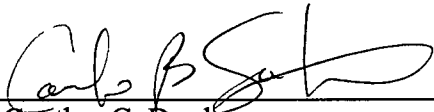
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Samuels Law Firm, LLC
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Ms Virginia L Crocker, Judicial Director
S C Workers' Compensation Commission
P O Box 1715
Columbia, SC 29202-1715

(Signature page to follow)

April 5, 2012

By



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April 5, 2012

VIA HAND DELIVERY

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Clerk, SC Court of Appeals
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APR 05 2012

SC Court of Appeals

Re Darren L Pollack v Southern Wine & Spirits of America and Specialty Risk Services
Case Tracking No 2011200466
W C C File No 1007936
TPGL File No 2920 688

Dear Ms Kitchings

Enclosed please find the originals and one copy each of the Initial Brief, Designation Of Matter To Be Included In The Record On Appeal and Proof Of Service of Respondents regarding the above-reference matter Please file the original filings and return clocked copies to me via our office courier Thank you for your assistance with this matter, and please contact me if you have any questions

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P A


Carmelo B Sammataro

CBS/tj

Enclosures

cc Stephen B Samuels, Esquire
Ms Virginia L Crocker, Judicial Director
(w/encs)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

Darren L Pollack, Employee

Appellant,

v

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

Respondents

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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 FACTS

Pollack was a Drivers' Supervisor for Southern Wine & Spirits, where he worked for about ten years (November 22, 2010 Hr'g Trans , p 22, 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 (*Id* , p 6, 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 (*Id* , p 13, 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 (November 22, 2010 Hrg Trans , p 7, 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 (*Id* , p 7, lines 23-27) 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" (*Id* , p 17, lines 14-18, APA p 250) Mr Richardson informed Southern Wine & Spirits of the accident because his supervisor, Pollack, elected not to do so in violation of company policy (November 22, 2010 Hrg Trans , p 18, lines 13-17)

Pollack was suspended with pay pending an investigation (November 22, 2010 Hrg Trans , p 9, lines 20-23) Following a routine drug and breathalyzer test, Pollack

was reinstated (November 22, 2010 Hrg Trans , p 11, lines 1-6) Thirteen days after being reinstated, Pollack was terminated (*Id* , p 11, lines 14-15)

Pollack concedes he understood Southern Wine & Spirits' policy and that failing to comply with the policy would result in termination (November 22, 2010 Hrg Trans , p 18, line 23 - p 19, 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 (November 22, 2010 Hrg Trans , p 23, lines 5-8) Mr Blocker testified Pollack was called to investigate accidents, and he was aware of the company's policy (*Id* , p 26, line 19 - p 27, 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 (*Id* , p 28, lines 21-29, p 37, lines 7-12) The decision to terminate Pollack came from Miami through Southern Wine & Spirits' human resources department (*Id* , p 28, 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 (*Id* , p 35, lines 12-22)

TABLE OF AUTHORITIES

State Cases

<i>Beckworth v Palmetto Restaurant Group</i> , S C Wrk Comp Comm’n , 2010 WL 6274217 (2010)	8
<i>Brunson v American Koyo Bearings</i> , 367 S C 161, 623 S E 2d 870 (Ct App 2005)	5
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<i>Last v MSI Const Co , Inc</i> , 305 S C 349, 409 S E 2d 334 (1991)	8
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<i>Maley v Thomasville Furniture Co</i> , 214 N C 589, 200 S E 438	12
<i>Peagler v Atlantic Coast Line R Co</i> , 232 S C 274, 101 S E 2d 821 (1958)	12
<i>Tatnall v Gardner</i> , 350 S C 135, 564 S E 2d 377 (Ct App 2002)	5

Other Authorities

S C Code Ann § 1-23-330	12
S C Code Ann § 1-23-380, -390	5
S C Code Ann § 42-9-260	8
S C Code Reg 67-502	7, 10
Rule 201(a), SCACR	5
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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 (November 22, 2010 Hrg Trans , p 6, 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 (*Id* , p 35, lines 12-22) The single commissioner found Mr Blocker’s testimony very credible (January 7, 2011 Order, p 11, Finding of Fact no 3) “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 (November 22, 2010 Hrg Trans , p 7, lines 15-19) Pollack left the lot and went back to the company warehouse (*Id* , p 7, lines 23-27) Mr Richardson informed Southern Wine & Spirits of the accident because Pollack, Mr Richardson's supervisor, had not (*Id* , p 18, 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 " (November 22, 2010 Hrg Trans , p 17, lines 14-18, APA p 250) 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 (November 22, 2010 Hrg Trans , p 28, lines 21-29, p 37, lines 7-12) As previously discussed, the single commissioner found Mr Blocker's testimony very credible (January 7, 2011 Order, p 11, Finding of Fact no 3)

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 (November 22, 2010 Hrg Trans , p 13, lines 10-23) In fact, Pollack admitted he was already on "thin ice" with Respondents at the time of the vehicle collision (*Id* , p 13, 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 (November 22, 2010 Hrg Trans , p 28, 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 (September 19, 2011 Order, p 7, Finding of Fact no 21). 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.

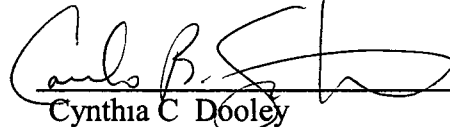
CONCLUSION

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

TURNER, PADGET, GRAHAM & LANEY, P A

April 5, 2012

By

A handwritten signature in black ink, appearing to read 'Cynthia C. Dooley', is written over a horizontal line.

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April 17, 2012

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Carmelo B Sammataro, Esquire
Turner, Padget, Graham
& Laney, P A
P O Box 1473
Columbia, SC 29202

Re Pollack, Darren v Southern Wine
Case #2011200466

Dear Counsel

The following Order has been endorsed on your Motion for an Extension in the above entitled case on appeal

'Granted

John Cannon Few C J
For the Court

By s/ Jenny Abbott Kitchings
Clerk

April 17, 2012 "

Please be advised the Respondents' Initial Brief and Designation of Matter must be served and filed by April 25, 2012

Very truly yours,

V. Claire Allen, Deputy
CLERK

IAK/jt

cc Stephen Benjamin Samuels, Esquire

FILED
184/17/12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W C C File No 1007936

RECEIVED

MAR 08 2012

SC Court of Appeals

Darren L Pollack, Employee

Appellant,

v

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

Respondents

**RESPONDENTS SOUTHERN WINE & SPIRITS
OF AMERICA AND SPECIALTY RISK
SERVICES' MOTION FOR EXTENSION OF TIME
TO FILE THEIR INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

Pursuant to Rule 224 of the South Carolina Rules of Appellate Practice, Respondents Southern Wine & Spirits of America and Specialty Risk Services hereby move this Court for an Order granting an extension of time during which to file their Initial Brief and Designation Of Matter To Be Included In The Record On Appeal For the reasons set forth below, Respondents request an additional period of thirty days from March 9, 2012, during which to file these documents

The additional time requested is warranted given the complexity of the legal issues presented The thirty-day extension will not prejudice Appellant or affect his legal

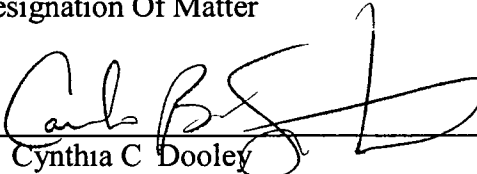
3/6/12 2m
4/9/12

rights Undersigned counsel for Respondents has spoken with counsel for Appellant,
who consents to the requested extension

Respondents intend to work diligently and to file their Initial Brief and
Designation Of Matter as soon as practicable However, for the reasons stated above,
Respondents respectfully request that the Court grant an extension of time during which
they may file their Initial Brief and Designation Of Matter

March 8, 2012

By



Cynthia C Dooley

Carmelo B Sammataro

TURNER PADGET GRAHAM & LANEY P A

Post Office Box 1473

Columbia, SC 29202

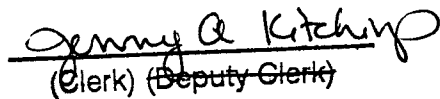
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ATTORNEYS FOR RESPONDENTS

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By


(Clerk) (Deputy Clerk)

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

PROOF OF SERVICE

I certify that I have this 8th day of March 2012 served a copy of RESPONDENTS
SOUTHERN WINE & SPIRITS OF AMERICA AND SPECIALTY RISK SERVICES
MOTION FOR EXTENSION OF TIME TO FILE THEIR INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL by
United States mail to

Stephen B Samuels, Esquire
Samuels Law Firm, LLC
P O Box 50349
Columbia, SC 29250-0349

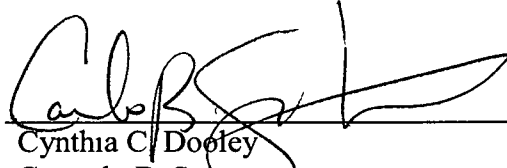
Ms Virginia L Crocker, Judicial Director
S C Workers' Compensation Commission
P O Box 1715
Columbia, SC 29202-1715

(Signature page to follow)

RECEIVED
MAR 08 2012
SC Court of Appeals

March 8, 2012

By

A handwritten signature in black ink, appearing to read 'Carmelo B. Sammataro', is written over a horizontal line.

Cynthia C. Dooley

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March 8, 2012

HAND DELIVERY

The Honorable Tanya Gee
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re Darren L. Pollack v. Southern Wine & Spirits of America and Specialty Risk Services

Case Tracking No. 2011200466

W C C File No. 1007936

TPGL File No. 2920 688

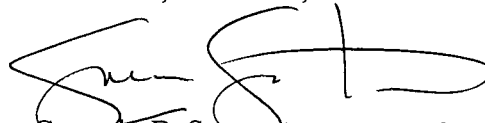
Dear Ms. Gee

Enclosed please find the original and seven copies of Respondents Southern Wine & Spirits of America and Specialty Risk Services Motion For Extension Of Time To File Their Initial Brief And Designation Of Matter To Be Included In The Record On Appeal regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service and our check for the filing fee. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P A



Carmelo B. Sammataro

CBS/tj
Enclosures

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MAR 08 2012

SC Court of Appeals

BUSINESS LITIGATION SOLUTIONS

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March 8, 2012

Page 2

cc Stephen B Samuels, Esquire
 Ms Virginia L Crocker, Judicial Director
 (via regular mail, w/enc)

The South Carolina Court of Appeals

Darren L Pollack, Employee,

Claimant/Appellant,

v

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

Defendants/Respondents

Appellate Panel
Richland County
Trial Court Case No 1007936

ORDER

For good cause having been shown, the time for serving and filing the Respondents' Initial Brief and Designation of Matter in the above entitled matter is hereby extended until March 9, 2012

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc Stephen Benjamin Samuels, Esquire
Cynthia C Dooley, Esquire
Carmelo B Sammataro, Esquire

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2-14-12 LAR

TURNER PADGET

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February 6, 2012

HAND DELIVERY

The Honorable Tanya Gee
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re Darren L Pollack v Southern Wine & Spirits of America and Specialty Risk
Services

Case Tracking No 2011200466

W C C File No 1007936

TPGL File No 2920 688

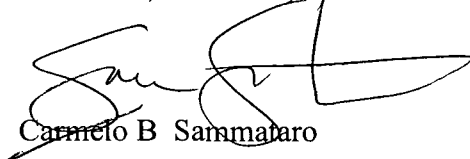
Dear Ms Gee

On behalf of Respondents Southern Wine & Spirits of America and Specialty Risk Services, I write to respectfully request a thirty-day extension of time to file and serve an Initial Brief and Designation of Matter in the above-referenced action. A thirty-day extension of the original February 8, 2012 deadline would establish the new deadline for service and filing as March 9, 2012. Our check for the \$25.00 filing fee is enclosed. It would be greatly appreciated if you would return a clocked copy of this letter to me via our office courier. Thank you for your attention to this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P A



Carmelo B Sammataro

CBS/tj
Enclosure

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FEB 06 2012

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SC Court of Appeals

2-8-12
3-9-12

February 6, 2012

Page 2

cc Stephen B Samuels, Esquire
Ms Virginia L Crocker, Judicial Director
(w/enc)

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

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal

- 1 Form 50
- 2 Form 51
- 3 Defendants' Form 58
- 4 Transcript of Hearing, pages 1-36
- 5 Order dated January 7, 2011
- 6 Order dated September 19, 2011
- 7 APA Submissions pages 1-74, 252-255

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JAN 09 2012
SC Court of Appeals

I certify that this designation contains no matter which is irrelevant to this appeal

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Stephen B. Samuels', written over a horizontal line.

Stephen B Samuels
SAMUELS LAW FIRM, LLC
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ATTORNEY FOR APPELLANT

January 7, 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,

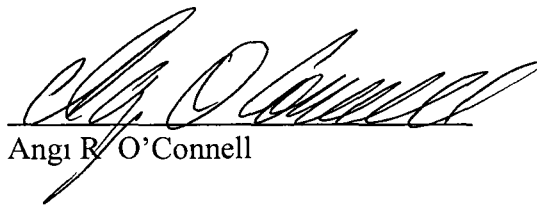
v

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

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B Samuels and I have served the **Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal** 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 **January 9, 2012**, addressed as follows

Cynthia C Dooley, Esquire
Carmelo B Sammataro, Esquire
Attorney for Respondents
Turner Padgett Graham & Laney, P A
Post Office Box 1473
Columbia, South Carolina 29202


Angi R. O'Connell

Columbia, South Carolina

January 9, 2012

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JAN 09 2012

SC Court of Appeals



Stephen B. Samuels, Attorney at Law

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January 9, 2012

VIA HAND DELIVERY

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms. Gee

Please find enclosed the original **Initial Brief of Appellant** and **Designation of Matter to be Included in the Record on Appeal** for filing in the above-referenced matter.

By copy of this letter and enclosures to Cindy Dooley and Sam Sammataro, counsel of record for the Respondents, we are serving them with our **Initial Brief of Appellant** and **Designation of Matter to be Included in the Record on Appeal** 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 Cynthia C. Dooley, Esquire
Carmelo B. Sammataro, Esquire
Mr. Darren L. Pollack

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JAN 09 2012

SC Court of Appeals

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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Attorney for Appellant

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JAN 09 2012

SC COURT OF APPEALS

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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.

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

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" [Order, Finding of Fact 1].

Pollack timely appealed to the Appellate Panel of the Full Commission on January 21, 2011

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

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 [APA p 32]

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 [APA p 54-56]

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." [Tr p 7, 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." [Tr p 7, 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. [Tr p 8, 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." [Tr p 8, 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. [Tr p 9, 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." [Tr p 9, 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." [Tr p 28, 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.” [Tr p 10, lines 1-9] Pollack duly complied and filled out an accident report [Defense APA p 252-254]

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. [Tr p 10, 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.” [Tr page 31, line 25-page 32, 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. [Tr page 11, 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. [Tr page 11, 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. [Tr page 32, line 4-page 33, 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. [Tr page 12, 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. [Tr page 12, 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. [Tr page 12, 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. [Tr p 35, 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 [FC Order, p 7 (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 [APA p 32, [Tr p 33, lines 6-10] These restrictions disqualified him from working in his occupation [Tr page 33, lines 11-page 35, 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.” [FC Order, page 7, 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 [Tr page 12, 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 [Tr p 35, 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 [Tr p 12, 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.” [Tr. page 6, 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. Blocker testified that once he “explained to [Pollack] that he violated the policy, [Pollack] completely complied with it at that point in time.” [Tr. page 31, line 25-page 32, 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." [FC Order, page 7, finding of fact 21]. 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 [APA p 255] 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 [Form 58]

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 " [Tr page 3, 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 " [Tr page 4, 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 " [SC Order, page 11, 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.")

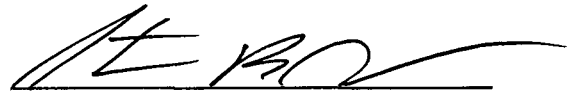
The improper admission of Richardson's hearsay statement was manifestly prejudicial to Pollack. The single commissioner *explicitly* stated that the statement was "*relevant and highly probative on the main issue at hand*," thus confirming that it was *the* dispositive evidence in his

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 Michaeu 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,



Stephen B Samuels
Samuels Law Firm, LLC
1527 Blanding St
P O Box 50349
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm net

Attorney for Appellant

Columbia, South Carolina
January 7, 2012



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
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January 9, 2012

Stephen Benjamin Samuels, Esquire
Samuels Law Firm, LLC
P O Box 50349
Columbia, SC 29250

Re Pollack, Darren v Southern Wine
2011200466

Dear Mr Samuels

The following Order has been endorsed on your Second Motion for Extension of Time to File Initial Brief of Appellant and Designation of Matter in the above entitled case on appeal

"Granted

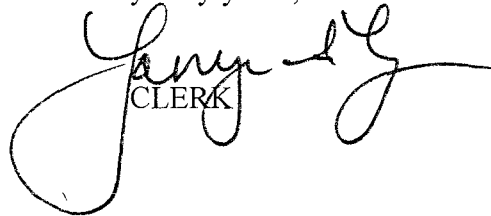
John Cannon Few C J
For the Court

By s/ V Claire Allen
Deputy Clerk

January 09, 2012 "

Please be advised the Appellant's Initial Brief and Designation must be served and filed on or before January 11, 2012

Very truly yours,


CLERK

TAG/jt

cc Cynthia C Dooley, Esq
Carmelo B Sammataro, Esq

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,

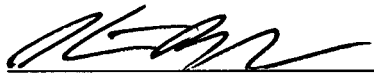
v

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

**SECOND MOTION FOR EXTENSION OF TIME TO FILE
INITIAL BRIEF OF APPELLANT AND DESIGNATION OF MATTER**

Appellant, by and through his undersigned attorney hereby moves this Honorable Court for for a second 30-day extension in which to file the **Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal** The Brief and Designation of Matter are currently due on December 12, 2011 If the Motion is granted, the due date will be extended to January 11, 2012 As grounds for granting this Motion, Appellant would show additional time is needed as the undersigned attorney is a sole practitioner with numerous matters pending before this Court, many of which require the filing of briefs

RECEIVED
DEC 12 2011
SC Court of Appeals



Stephen B Samuels
Samuels Law Firm, LLC
1527 Blanding St
P O Box 50349
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

Attorney for Appellant

Columbia, South Carolina
December 12, 2011

GRANTED
JOHN D. HIGGINS, CLJ
FOR THE COURT

By V. Claude Allen
(Clerk) (Deputy Clerk)

FILED

1-9-12

8/12/11
11/11/12

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

PROOF OF SERVICE

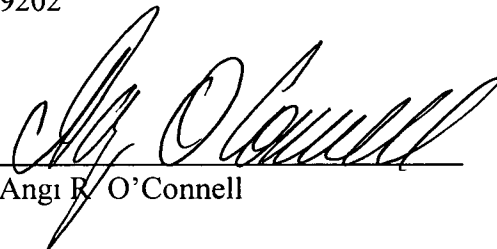
RECEIVED

DEC 12 2011

SC Court of Appeals

I certify that I am the paralegal to Stephen B Samuels and I have served the **Second Motion for Extension of Time to File Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal** 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 **December 12, 2011**, addressed as follows

Cynthia C Dooley, Esquire
Attorney for Respondents
Turner Padget Graham & Laney, P A
Post Office Box 1473
Columbia, South Carolina 29202


Angi R. O'Connell

Columbia, South Carolina

December 12, 2011



Stephen B Samuels, Attorney at Law

PO Box 50349 • Columbia SC 29250-0349
1527 Blanding Street • Columbia SC, 29201
803-779-4000 office, 803-779-4004 facsimile
www.SamuelsLawFirm.net

December 12, 2011

VIA HAND DELIVERY

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms Gee

Please find enclosed the original and six copies of **Second Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter** for filing in the above-referenced matter. I have also enclosed our firm's check in the amount of Twenty-Five (\$25.00) Dollars as payment of the required filing fee.

By copy of this letter and enclosure to Cynthia Dooley, counsel of record for the Respondents, we are serving her with a copy of our **Second Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter** as indicated by the attached Proof of Service.

Thank you for your assistance 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 Cynthia C Dooley, Esquire
Mr Darren L Pollack

RECEIVED

DEC 12 2011

SC Court of Appeals

The South Carolina Court of Appeals

Darren L. Pollack, Employee,

Claimant/Appellant,

v

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

Defendants/Respondents

Appellant Panel
Richland County
WCC File No 201007936

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until December 12, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY ✓ Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc Stephen Benjamin Samuels, Esquire
Cynthia C. Dooley, Esq
Carmelo B. Sammataro, Esq

FILED
SI 11/02/11

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

**MOTION FOR EXTENSION OF TIME TO FILE
INITIAL BRIEF OF APPELLANT AND DESIGNATION OF MATTER**

Appellant, by and through his undersigned attorney hereby moves this Honorable Court for for a 30-day extension in which to file the **Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal** The Brief and Designation of Matter are currently due on November 9, 2011 If the Motion is granted, the due date will be extended to December 9, 2011 As grounds for granting this Motion, Appellant would show additional time is needed as the undersigned attorney is a sole practitioner with numerous matters pending before this Court, many of which require the filing of briefs

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NOV 09 2011

SC Court of Appeals



Stephen B Samuels
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stephen@samuelslawfirm net

Attorney for Appellant

Columbia, South Carolina
November 9, 2011

11-10-11
12-12-11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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SC Court of Appeals

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

WCC File No 1007936

Darren L Pollack, Employee,

Appellant,

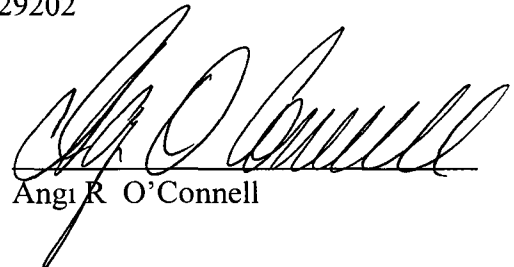
v

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

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B Samuels and I have served the **Motion for Extension of Time to File Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal** 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 **November 9, 2011**, addressed as follows

Cynthia C Dooley, Esquire
Attorney for Respondents
Turner Padget Graham & Laney, P A
Post Office Box 1473
Columbia, South Carolina 29202


Angi R O'Connell

Columbia, South Carolina

November 9, 2011



Stephen B Samuels, Attorney at Law

PO Box 50349 • Columbia SC 29250-0349
1527 Blanding Street • Columbia SC, 29201
803-779-4000 office, 803-779-4004 facsimile
www.SamuelsLawFirm.net

November 9, 2011

VIA HAND DELIVERY

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms. Gee

Please find enclosed the original and six copies of **Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter** for filing in the above-referenced matter. I have also enclosed our firm's check in the amount of Twenty-Five (\$25.00) Dollars as payment of the required filing fee.

By copy of this letter and enclosure to Cynthia Dooley, counsel of record for the Respondents, we are serving her with a copy of our **Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter** as indicated by the attached Proof of Service.

Thank you for your assistance 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 Cynthia C. Dooley, Esquire
Mr. Darren L. Pollack

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NOV 09 2011

SC Court of Appeals

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

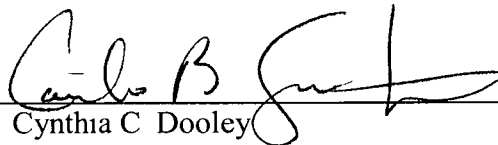
Respondents

NOTICE OF APPEARANCE

You will please take notice that Carmelo B Sammataro of Turner, Padget, Graham & Laney, P A hereby enters an appearance as counsel of record for Respondents in the above-captioned matter The Clerk of Court is requested to add the name of Carmelo B Sammataro to the list of attorneys representing the Respondents Attorneys for all other parties are requested to make this change to their service lists for any filings related to this matter

October 12, 2011

By



Cynthia C Dooley

Carmelo B Sammataro

TURNER PADGET GRAHAM & LANEY P A

Post Office Box 1473

Columbia, SC 29202

Phone (803) 254-2200

Fax (803) 799-3957

ATTORNEYS FOR RESPONDENTS

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OCT 14 2011
SC Court of Appeals

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

PROOF OF SERVICE

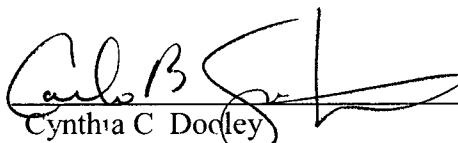
I certify that I have this 12th day of October 2011 served a copy of a Notice of
Appearance by United States Mail to

Stephen B Samuels, Esquire
Samuels Law Firm, LLC
P O Box 50349
Columbia, SC 29250-0349

Ms Virginia L Crocker, Judicial Director
S C Workers' Compensation Commission
P O Box 1715
Columbia, SC 29202-1715

October 12, 2011

By


Cynthia C Docley

Carmelo B Sammataro
TURNER PADGET GRAHAM & LANEY P A
Post Office Box 1473
Columbia, SC 29202
Phone (803) 254-2200
Fax (803) 799-3957

ATTORNEYS FOR RESPONDENTS

RECEIVED
OCT 14 2011
SC Court of Appeals

TURNER PADGET

TURNER PADGET GRAHAM & LANEY PA

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

Carmelo B Sammataro

E mail CSammataro@TurnerPadget.com

Writer s Direct Dial (803) 227 4253

Writer s Direct Fax (803) 400 1532

October 12, 2011

The Honorable Tanya Gee
Clerk, SC Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Darren L Pollack v Southern Wine & Spirits of America and Specialty Risk
Services
W C C File No 1007936
TPGL File No 2920 688

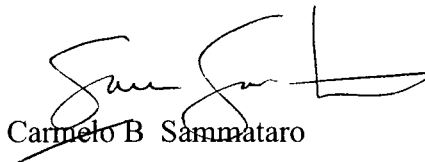
Dear Ms Gee

Enclosed please find the originals and one copy each of the Notice of Appearance and Proof of Service regarding the above-referenced matter Please file the original documents and return clocked copies to me via the enclosed envelope Thank you for your assistance with this matter, and please contact me if you have any questions

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P A



Carmelo B Sammataro

CBS/tj

Enclosures

cc Stephen B Samuels, Esquire
Ms Virginia L Crocker, Judicial Director
(w/enc)

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OCT 14 2011
SC Court of Appeals

BUSINESS LITIGATION SOLUTIONS

Bank of America Plaza 17th Floor 1901 Main Street (29201) PO Box 1473 Columbia SC 29202
Phone (803) 254 2200 Fax (803) 799 3957 turnerpadget.com



Stephen B Samuels, Attorney at Law

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1527 Blanding Street • Columbia SC, 29201
803-779-4000 office, 803-779-4004 facsimile
www.SamuelsLawFirm.net

October 12, 2011

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms Gee

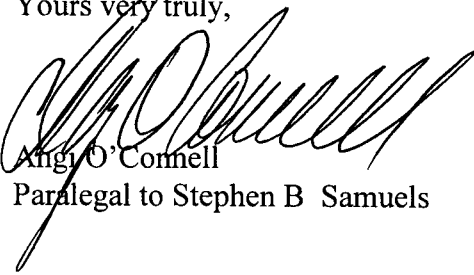
Please be advised that we received the transcript in the above matter on Tuesday, October 11, 2011. Accordingly, our Appellant's Brief and Designation of Matter to be Included in the Record on Appeal will be due no later than November 9, 2011.

By copy of this letter to Cindy Dooley, we are advising counsel for the Respondents of this communication.

Please feel free to contact us should there be any questions. Thank you.

With kind regards, I am

Yours very truly,



Angie O'Connell
Paralegal to Stephen B Samuels

/aro

cc Cynthia C Dooley, Esquire
Mr Darren L Pollack

RECEIVED

OCT 13 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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October 14, 2011

Stephen Benjamin Samuels, Esquire
Samuels Law Firm, LLC
P O Box 50349
Columbia, SC 29250

Re Pollack, Darren v Southern Wine
Case #2011200466

Dear Mr Samuels

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

According to the Order being challenged on appeal, the caption of this matter should appear as follows:

Darren L. Pollack, Employee,

Claimant/Appellant,

v

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

Defendants/Respondents

All future filings must feature the above caption.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5) SCACR, also please advise the Court in writing upon receipt of the transcript.

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,


Tanya A. Gee
CLERK

TAG/jt

cc Cynthia C. Dooley, Esquire
Virginia Crocker



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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October 13, 2011

Stephen Benjamin Samuels, Esquire
Samuels Law Firm, LLC
P O Box 50349
Columbia, SC 29250

Re Pollack, Darren v Southern Wine
Case #2011200466

Dear Mr. Samuels

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/jt

cc Cynthia C. Dooley, Esquire
Virginia Crocker

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

ORDER

— — —

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions, 1 documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts:

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court: 2

Social Security Numbers. If a social security number must be included, only the last four digits or last number should be used.

Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.

Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.

Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file redacted documents under seal, together with redacted versions for the public file. The sealed redacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that filed for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains a juvenile's name, a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e. In the Interest of John S. a Juvenile).

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings *supra* must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim or any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED

s/Jean H. Toal C J

s/James E. Moore J

s/John H. Waller, Jr. J

s/E. C. Burnett III J

s/Costa M. Pleicones J

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 SCACR; Rule 402(n) SCACR; and Rule 403(l) SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402 SCACR requires many of these personal identifiers to be disclosed.



Stephen B Samuels, Attorney at Law

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October 3, 2011

Ms Nellie Vance
Creel Court Reporting
1230 Richland Street
Columbia, SC 29201

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

Dear Ms Vance

The above referenced workers' compensation claim was heard before the Appellate Panel of the SC Workers' Compensation Commission on July 18, 2011. The Order instructions indicate that you were the court reporter for this hearing.

I request that you provide me with a transcript of the proceedings. I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

Yours very truly,

Stephen B Samuels

SBS/aro

cc The Honorable Tanya Gee
Cynthia C Dooley, Esquire

PM - 10/3/11
POS - 10/3/11

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,

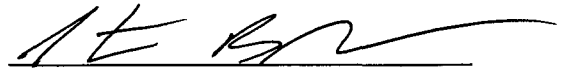
Appellant,

v

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

NOTICE OF APPEAL

Darren L Pollack appeals the Decision and Order of the South Carolina Workers' Compensation Commission dated September 19, 2011



Stephen B Samuels
Samuels Law Firm, LLC
1527 Blanding St
P O Box 50349
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(803) 779-4000
stephen@samuelslawfirm net

Attorney for Appellant

Columbia, South Carolina
October 3, 2011

RECEIVED

OCT 03 2011

SC Court of Appeals

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

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B Samuels and I have served the Notice of Appeal upon the Respondents and the South Carolina Workers' Compensation Commission by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **October 3, 2011**, addressed as follows

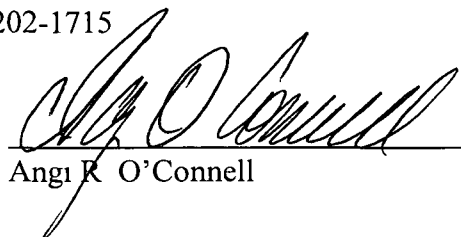
Cynthia C Dooley, Esquire
Attorney for Respondents
Turner Padget Graham & Laney, P A
Post Office Box 1473
Columbia, South Carolina 29202

Virginia Crocker, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

RECEIVED

OCT 03 2011

SC Court of Appeals



Angi R O'Connell

Columbia, South Carolina
October 3, 2011



Stephen B Samuels, Attorney at Law

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October 3, 2011

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms. Gee

Enclosed for filing are an original and one copy of the Notice of Appeal in the above case.
Also enclosed are the following:

- 1 Proof of service upon the Respondent,
- 2 A copy of the orders which are to be challenged on appeal,
- 3 A filing fee of \$100.00, and
- 4 A copy of our letter to the Court Reporter requesting the transcript and confirming that we agree to pay the per page charge as provided by Rule 607, SCACR.

Please have the copy of the Notice of Appeal clocked in and returned to my courier.

Yours very truly,

Stephen B. Samuels
Attorney for Appellant

SBS/aro

Enclosures

cc w/encl Cynthia C. Dooley, Esquire
Virginia Crocker, SCWCC
Mr. Darren L. Pollack

RECEIVED

OCT 03 2011

SC Court of Appeals

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W C C FILE NO 1007936**

DARREN L POLLACK

EMPLOYEE
CLAIMANT/APPELLANT,

-V-

SOUTHERN WINE & SPIRITS OF AMERICA

EMPLOYER
DEFENDANT/RESPONDENT

AND

SPECIALTY RISK SERVICES INC

CARRIER
DEFENDANT/RESPONDENT

Appellate Panel Review held in Columbia,
South Carolina on July 18, 2011, per notices
timely and properly served on all parties of interest

Appellate Panel Decision and Order filed
_____ 9/19 _____, 2011

APPEARANCES

Claimant/Appellant represented by Stephen B. Samuels, Esquire of
Samuels Law Firm, LLC, of Columbia, South Carolina

Defendants/Respondents represented by Cynthia C. Dooley, Esquire of
Turner Padgett Graham & Laney, P A, of Columbia, South Carolina

RECEIVED

OCT 03 2011

SC Court of Appeals

STATEMENT OF THE CASE

The parties were heard by Commissioner Derrick L. Williams November 22, 2010. On January 7, 2011, he issued the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

- 1 Claimant violated company policy while on light duty status, which was for cause. Moreover, I find that, even before his compensable work related accident, he was essentially close to being terminated for violating other company policies.
- 2 Even on light duty, a claimant must comply with company policy. Claimant does not have the right to hide behind restrictions from a physical standpoint, while not following set company policy. In this case, claimant blatantly decided not to report his own accident, even when he was onsite to investigate and make a report of a fellow employee's accident.
- 3 I find Mr. Blocker's testimony to be very credible.
- 4 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.
- 5 As a result of the preceding Findings of Fact, claimant's request for temporary total disability benefits is denied.
- 6 All issues held in abeyance pending further hearings.

CONCLUSIONS OF LAW

- 1 Claimant failed to prove that he is entitled to temporary disability benefits. See Findings of Fact Nos. 1 through 5.

ORDER

IT IS, THEREFORE, ORDERED that the claimant's request for temporary total disability benefits is denied. No hearing costs are assessed in this matter.

Within the statutory period, counsel for Claimant filed a Form 30 Request for Commission Review, setting forth seven grounds for review, copies of which were furnished to all interested parties prior to oral argument presented to the Appellate Panel July 18, 2011. All proffered testimony has been taken, and, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel of the Full Commission and has since been under study and consideration.

By appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

- 1 In denying claimant's request for temporary total disability compensation
- 2 In finding that an employer can evade temporary total disability compensation by terminating an employee under a medical restriction
- 3 In barring claimant from receiving temporary total disability without any legal authority for his ruling
- 4 In failing to make findings as to whether Claimant was still disabled and therefore unable to obtain employment suitable to his capacity
- 5 In issuing an order with insufficiently detailed findings of fact and conclusions of law to support the ruling
- 6 In prospectively barring Claimant from receiving temporary total disability for an indefinite period

7 In overruling Claimant's hearsay objection to an unsworn statement of an available witness on the grounds that the statement was relevant and highly probative to the main issue

In conducting its review, the Appellate Panel must weigh the evidence presented at the initial hearing and, if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner *See* S C Code Ann § 42-17-50 Based upon its review of the record evidence and consistent with applicable statutory and common law precedent, the Appellate Panel hereby affirms the hearing commissioner's Order dated January 7, 2011, in its entirety

Based upon a review of the foregoing, we hereby enter the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended
- 2 The hearing commissioner's order sets forth sufficient findings of fact that are supported by the substantial record evidence in this matter We are not persuaded that additional findings of fact are necessary regarding Claimant's alleged on going disability as that issue is neither relevant to nor necessary for a determination of the question presented in this appeal
- 3 Claimant was employed by Southern Wine & Spirits for approximately ten years and was a Driver Supervisor at the time of his termination [July 18, 2011 Hr'g Trans p 22 lines 18 23]

- 4 On March 31, 2010 Claimant suffered an admitted injury to his back Claimant had lifting restrictions of 15 pounds beginning April 5, 2010, and Defendants accommodated Claimant's restrictions at all times beginning April 5 2010, until he was terminated for cause on June 15, 2010 [*Id* p 6, lines 8-15]
- 5 Prior to his work-related injury, Claimant had various disciplinary write-ups at work, including a disciplinary issue relating to the failure to submit absence forms and another issue relating to Claimant s failure to follow protocol for servicing a company vehicle which lead to engine damage [*Id* , p 13 lines 10 23, APA p 256]
- 6 Claimant conceded he was on thin ice with his employer [July 18, 2011 Hr g Trans p 13 lines 17 21]
- 7 On May 27, 2010, Claimant responded to an accident in a parking lot involving a company vehicle assigned to driver Jessie Richardson that occurred when Claimant went to leave the lot and his vehicle brushed the side of Mr Richardson s vehicle [*Id* p 7 lines 15-19]
- 8 Southern Wine's employer statement reads "all accidents and incidents with the vehicle must be reported whether or not there is damage to the company vehicle, another vehicle, or other property All accidents in a Company vehicle, at fault or not, must be immediately reported to the Driver Supervisor Failure to report an accident will result in immediate termination " [*Id* p 17, lines 14 18, APA p 250]
- 9 Southern Wine s policy is that if there is any accident or incident, it must be immediately reported to a supervisor [July 18, 2011 Hr'g Trans , p 23, lines 5-8]
- 10 Claimant was called to investigate accidents, and he was aware of the company's policy [*Id* , p 26 line 19-p 20 line 1]

- 11 Mr Richardson informed Southern Wine & Spirits of the accident because while his supervisor Claimant herein, was required to do so, he did not [*Id* , p 18 lines 13-17]
- 12 Sonny Blocker, Plant Manager for Southern Wine & Spirits, 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 Claimant was terminated for failing to report the accident as required by company policy [*Id* , p 28 lines 21-29, p 37, lines 7 12]
- 13 The single commissioner found Mr Blocker's testimony very credible and we discern no basis in the record to disagree with the single commissioner's conclusion
- 14 Claimant was terminated for cause stemming from multiple violations of company policies/procedures and violation of safety rules [APA p 250]
- 15 Mr Blocker also testified that other employees have been terminated for not reporting an accident [July 18 2011 Hr'g Trans p 31, lines 7 8]
- 16 Claimant conceded he understood Southern Wine & Spirits policy stating that failure to comply with the policy would result in termination [*Id* , p 18 line 23 p 19, line 9]
- 17 Pursuant to S C Code Reg 67-505(C)(2), employers are not required to pay temporary total disability benefits when the claimant is able to return to work at limited duty and the employer provides limited duty work consistent with claimant's restrictions Nothing in this regulation can be read for the proposition that an employer may never terminate for cause an employee who is otherwise entitled to received temporary total disability payments
- 18 Southern Wine & Spirits accommodated Claimant's restrictions from April 5, 2011 until his termination for cause on July 11, 2011 Substantial record evidence supports the

hearing commissioner's determination that, but for Claimant's termination for reasons unrelated to his previous work-related injury, Southern Wine & Spirits would have continued to accommodate Claimant's restrictions [*Id.* p. 35, lines 12-22]

19 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.

20 Claimant was not out of work due to his accepted injury or for the employer's failure to accommodate the work restrictions necessitated thereby. Rather, Claimant was out of work for violating multiple company policies that led to his termination for cause.

21 The decision of the single commissioner is supported by sufficient legal authority inasmuch as South Carolina law is clear that Claimant is not entitled to temporary total disability payments in light of Southern Wine & Spirit's accommodation of light duty restrictions and his subsequent termination for cause. *See* S.C. Code § 42-9-260. However, even under the North Carolina law 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.

CONCLUSIONS OF LAW

1 We reject Claimant's contention that the admission and consideration by the single commissioner of the unsworn statement of Mr. Jessie Richardson (APA p. 255)

constitutes reversible error. To the contrary, it is clear that the South Carolina Rules of Evidence do not apply in workers' compensation proceedings. See S.C. Code Ann. § 1-23-330(1). Moreover, great liberality is afforded to the hearing commissioner in accepting or rejecting the introduction of evidence in proceedings such as this. *Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 70, 528 S.E.2d 667 (2000) (citation omitted). Because Mr. Richardson's statement is probative of the question presented and because it is supported and corroborated by additional record evidence, we decline to reverse the decision admitting into evidence.

- 2 We conclude that Claimant's termination was for cause and not for purposes of evading payment of temporary total disability benefits and, therefore, affirm the decision of the single commissioner denying benefits. Claimant is not entitled to temporary total disability benefits pursuant to § 42-9-60 because Claimant is not out of work due to a work-related injury. Rather, he is out of work for violating company policy that led to a lawful termination. See Findings of Fact numbers 2-21. 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.

ORDER

IT IS THEREFORE ORDERED that the Order of the hearing commissioner denying Claimant's request for temporary total disability benefits is hereby affirmed in its entirety.

AND IT IS SO ORDERED

Full Affirmation

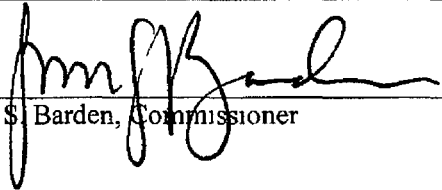
Concur



T. Scott Beck, Commissioner



G. Bryan Lyndon, Commissioner



Susan S. Barden, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause and has received receipt postage paid in the United States addressed to the attorney or attorneys for said parties.

This 19 day of September 2001
By Valerie D. Deller

Administrative Assistant to the Commissioner

Cynthia C. Dudley
Stephen B. Samuels