

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Commissioner

RECEIVED

AUG 16 2013

SC Court of Appeals

Appellate Case No. 2013-001322
WCC File No. 1112328

Samuel A. Rose, Claimant,.....Respondent,

v.

JJS Trucking, LLC, Uninsured Employer, and
Chris Thompson Services, LLC, Upstream Contractor,
And Bridgefield Casualty Insurance Company, Carrier,
And South Carolina Uninsured Employers' FundDefendants,

Of whom JJS Trucking, LLC, Uninsured Employer, and
The South Carolina Uninsured Employers' Fund are Respondents,

And

Chris Thompson Services, LLC, Upstream Contractor,
and Bridgefield Casualty Insurance Co., Carrier are the Appellants.

INITIAL BRIEF OF RESPONDENT, SC UNINSURED EMPLOYERS' FUND



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STATEMENT OF ISSUES ON APPEAL

1. Whether or not the Commission correctly ordered that the issue of transferring liability to the SC Uninsured Employers' Fund was not ripe for adjudication.
2. Whether or not the Appellant met all requirements of SC Code Ann. §42-1-415 to transfer liability to the SC Uninsured Employers' Fund which is denied.

STATEMENT OF THE CASE

This matter was before the Single Commissioner pursuant to a Form 50 filed by the Claimant as a result of an alleged injury by accident on August 10, 2011. A Form 51 and an amended Form 51 was filed by Kirsten Barr on behalf of Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company. A Form 51 was also filed by the SC Uninsured Employers' Fund (hereinafter "UEF"). Both Defendants denied each and every allegation.

On January 24, 2012, Defendant Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Petition to Transfer Liability to the SC Uninsured Employers' Fund pursuant to SC Code Ann. §42-1-415. The UEF filed a Return to the Petition denying that Petition had met all requirements of SC Code Ann. §42-1-415.

A hearing was held in this matter on May 15, 2012 before Commissioner McCaskill and an Order was issued on August 23, 2012. The Order held, among other things, that the Claimant's accident was a compensable injury and awarded the Claimant temporary total benefits beginning August 10, 2011, and continuing until he reached maximum medical improvement and further ordered a medical evaluation. The Commissioner held that JJS Trucking (immediate employer) was operating as a subcontractor for Chris Thompson Services, LLC, and as such, Chris Thompson Services, LLC was an upstream employer pursuant to §42-1-415. The Commissioner found Chris Thompson Services, LLC liable to pay the Claimant benefits in which he was due under the Act as JJS Trucking was uninsured at the time of the accident. Finally, as to the Petition to Transfer Liability to the SC Uninsured Employer's Fund, the Commission ruled that it was not ripe for adjudication because the higher tier contractor had not "paid all benefits due to the Claimant under the Act". Chris Thompson Services, LLC and its carrier, Bridgefield Casualty Insurance Company appealed this Order by Form 30 filed on September 5, 2012. A Full Commission hearing was held on January 23, 2013 and Order issued

on May 15, 2013 affirming the Order of the Single Commissioner. This appeal followed.

FACTS

At the hearing, it was the Claimant's testimony that he was injured on August 10, 2011 while an employee at JJS Trucking, LLC who was subcontracting for Chris Thompson Services, LLC. When the Claimant discovered that JJS Trucking, LLC did not have any workers' compensation insurance, he attempted to go upstream to Chris Thompson, the statutory employer, but benefits were denied. The Claimant alleged his compensation rate to be \$433.34. Because none of his medical bills have been paid, the Claimant sought a finding of compensability, entitlement to medical treatment and payment of medical bills as well as temporary total benefits. The Claimant stipulated that he had recently been receiving \$75.00 per from Chris Thompson Services, LLC.

It was the position of Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company, that the Claimant was a direct employee of JJS Trucking who was subcontracting for Chris Thompson Services. This Defendant disputed the severity or permanency of any injury or the need for future treatment. Appellant argued that they were entitled pursuant to §42-1-415 to transfer liability to the UEF. This argument was based on a certificate of insurance dated October 18, 2010 (Appellant's APA 6, p. 39).

The SC Uninsured Employers' Fund denied that the carrier was entitled to transfer liability to the UEF as all the statutory and legal requirements of SC Code Ann. §42-1-415 had not been met.

ARGUMENT

The carrier in this instance petitioned to transfer liability to the South Carolina Uninsured Employers' Fund pursuant to §42-1-415. For the reasons set forth herein, the Petition for Transfer of Liability was properly denied.

To warrant the granting of a Petition to Transfer Liability, the Carrier must meet **all** statutory and legal requirements. §42-1-415 provides:

(A) Notwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section. In the event that employer is uninsured, regardless of the number of employees that employer has, the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due under this title. The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund...

(B) To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

(C) The knowing and willful falsifying of information contained in standard forms submitted pursuant to this section must be considered fraud as provided by law. Knowing and willful failure to notify, by certified mail, the higher tier subcontractor, contractor, or project owner who originally was provided documentation of workers' compensation coverage of a lapse in coverage within five days after the lapse is considered fraud and

subject the contractor or subcontractor who represented himself as having workers' compensation insurance to the penalties for fraud by law. Additionally, a contractor or subcontractor who knowingly and willfully falsely documents workers' compensation insurance or knowing and willfully fails to provide notice of lapse in workers' compensation coverage as specified in this section, or any contractor or subcontractor who refuses to reimburse the Uninsured Employers' Fund for a claim paid on its behalf shall suffer the revocation of his license or certificate as a contractor or residential home builder under applicable provisions of Title 40; provided, however, notwithstanding any other provision of law, the license or certificate of a contractor or residential home builder shall be revoked for a period of two years when the contractor or subcontractor knowingly and willfully falsely documents workers' compensation coverage as specified in this section. Upon expiration of the two-year revocation period, or when the license or certificate of any contractor or subcontractor is revoked for refusal to reimburse the Uninsured Employers' Fund for a claim paid on its behalf, the licensing entity of the contractor or subcontractor may reissue the license or certificate of the contractor or residential home builder in the same manner as any other revoked license.

The Commission, by its own Regulation (R. 67-415 (A)) established that:

(A) For the purposes of §42-1-415, the ACORD Form 25-S, Certificate of Insurance, as published by the ACORD Corporation, and as issued by the carrier for the insured, shall serve as documentation of insurance. The Certificate of Insurance must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.

The right of a statutory employer, such as Chris Thompson Services, LLC, to avoid liability under the statute, depends upon compliance with the specific terms and conditions imposed for transferring liability. Herein, Chris Thompson has failed to comply with statutory and legal requirements and is not entitled to transfer liability to the UEF. Cincinnati Ins. Co. v. South Carolina Second Injury Fund, 297 S.C. 372, 377 S.E.2d 130 (Ct. App. 1989).

Appellant argues that the Single Commissioner erred in finding that the carrier was not entitled to pass liability to the UEF as it had not paid “all benefits due” and therefore, the issue was not ripe for adjudication. The intrinsic problem with this argument is that being “ripe for adjudication” is not the only part of SC Code Ann. §42-1-415 that is crucial for the carrier to establish to pass liability to the Fund. It is only the first step.

First, Respondent would counter that the finding of the Single and Full Commission was proper and must be affirmed. Support of this is set forth below.

Second, even if this court disagrees with the finding by the Commission, the carrier has failed to prove, and the Commission has failed to find any findings of fact that all statutory and legal requirements of SC Code Ann. §42-1-415 have been met. If this Court were to reverse the Commissioner’s Order, then the only remedy is to remand the case to the Commission for proper findings of fact as to all the statutory and legal requirements to transfer liability.

Prior to the enactment of §42-1-415, it was long-established and well-settled that a statutory employer bore absolute liability to the injured workers of a subcontractor and a statutory employer and could not shift that liability to the Uninsured Employers’ Fund, even if the subcontractor was uninsured. See, generally, Miller v. Robinson Trucking, 333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998); S.C. Code Ann. Section 42-1-400, Annotations 1 –6; and Section 42-1-410, Annotations 1 – 3. By enacting Section 42-1-415, the legislature carved out a narrow exception to a statutory employer’s absolute liability. This exception provides remedy and relief to statutory employers misled or defrauded into believing a subcontractor is insured. The language of Section 42-1-415 clearly sounds in fraud ----- “. . . subcontractor has

represented himself . . . as having insurance . . . knowing and willful falsifying . . .,” and subsection (c) provides for criminal and administrative penalties. This exception creates a new liability on the State, and should be carefully applied. Unisys Corp. v. S.C. Budget and Control Brd., 346 S.C. 158, 551 S.E.2d 263 (2001). It should be given a strict, narrow application, based on the wrong it attempts to relieve, but should not lead to an absurd result. Miller, supra.

South Carolina Law, in interpreting §42-1-415, has demonstrated that it was not the intent of the Legislature to create a liability for the state without requiring a defrauded statutory employer to exercise the minimally-reasonable steps of reading the certificate and reacting accordingly before liability can be transferred to the South Carolina Uninsured Employers’ Fund.

For example, in the recent case of Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145(2009), the upstream employer failed to recognize that the certificate of insurance presented to it lacked a signature from an authorized agent of the insurance company. The Court held “liability may be transferred from the higher tier contractor to defend only after the higher tier contractor has properly documented the subcontractor’s claim that it retains workers’ compensation insurance. This statutory scheme provides an ultimate safety for general contractors against the subcontractors act of fraud.” The Barton Order explained that the upstream contractor “could have easily investigated the absence of the signature and determined that the immediate employer did not have a valid policy. In our view, public funds should not be expended where Respondent could have discovered the mistake by acting in accordance with the Regulation.”

In another case, Hopper v. Terry Hunt Construction, 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007) aff’d, 383 S.C. 310, 680 S.E.2d 1 (2009), the Court declared that in order to transfer

liability the certificate of insurance presented to the upstream contractor must be fully completed. In this case, the ACCORD Form was incomplete, the Court held that the Employer “submitted an incomplete document purporting to show that it had workers’ compensation policy... In our view, accepting an incomplete ACCORD Form does not constitute proper documentation.” The Court specifically stated that one of the omissions on the certificate of insurance in the Hopper case was the section for “Description of Operations.”

Chris Thompson Services, LLC, has failed to meet the requirements as set forth in §42-1-415 in the following ways:

1. §42-1-415(A) requires the upstream contractors to initially pay **all benefits** due to the subcontractor’s injured employee. Then, the contractor may petition to transfer the responsibility of future payments to the Fund. The purpose of this section is principally concerned with protecting a subcontractor’s injured employee in need of treatment and benefits pending a court determination of liability that could take months or years. The Statutory Employer’s failure to take care of the Claimant herein may have caused the Claimant’s condition to deteriorate and ultimately causing further costs than necessary. The purpose of the statute has not been served.

At the time of the hearing, the Carrier had only recently started paying some minimal temporary total benefits. It had not paid the correct amount due, and it had not provided medical treatment.

2. Once the Single Commissioner issued its order, then the carrier should have paid what was due and then it could petition the court to transfer liability. A cursory review of the certificate of insurance presented by the Statutory Employer shows that the certificate only

indicates a “Binder” of insurance, not a policy. An insurance binder is only a temporary issuance of proof of insurance that will “bind” or cover you temporarily until a formal policy is issued. The certificate of insurance is dated 10 months prior to the Claimant’s date of injury and no binder could remain in effect for that period of time. Obviously, the Statutory Employer took no steps to ensure any policy was ever subsequently issued to the Employer, which contradicts the findings in the Barton case.

3. The certificate of insurance is blank in the “description of operations” box, contrary to the requirements as set forth in the Hopper case as set forth above.

4. §42-1-415 provides “documentation must be ... turned over to the Commission at the time a claim is filed by the injured employee”. The Claimant filed his claim on or about September 8, 2011. The Statutory Employer/Carrier, filed a Form 51 on October 7, 2011 wherein Chris Thompson raised §42-1-415 as a defense. However, documentation was not provided to the Commission until the following year on January 24, 2012, when it filed a Petition to Transfer Liability.


5. There is no evidence that the immediate employer participated in any fraud upon giving the statutory employer a “BINDER” of coverage. The intent of Section 42-1-415 is to prove a statutory employer relief when “documentation of insurance” has been given (through fraud). Here, the statutory employer never even received documentation of insurance, only a binder. The immediate employer never fraudulently represented to the upstream that he had “coverage”.

CONCLUSION

Based on the arguments set forth herein, Respondent respectfully requests that the Decision and order of the SC Workers' Compensation Commission be affirmed. In the alternative, if this Court finds that this single requirement of §42-1-415 was met and that the issue was ripe for adjudication, then this matter must be remanded to the Commission for proper and full findings of fact as to the remaining requirements set forth in statute and law in order to determine whether or not the carrier can to pass liability to the UEF.

South Carolina Workers' Compensation
Uninsured Employers' Fund

BY: _____


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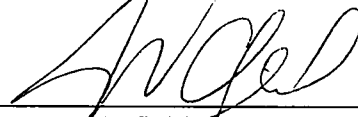
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

The Respondent, SC Uninsured Employers' Fund, propose the following be included in
the Record on Appeal:

1. Amended Return to Carrier's Petition to Transfer Liability dated May 3, 2012
2. Pre-hearing Brief and APA Submissions on behalf of the SC Uninsured Employers' Fund dated April 16, 2012

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

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Uninsured Employers' Fund

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PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of Respondent and Designation of Matter on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2013 addressed to their attorneys of record as follows:

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