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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2024-000533
S.C. W.C.C. File No. 1112328

Samuel Rose, Claimant,

v.

JJS Trucking and Chris Thompson Services (Statutory Employer),

and

Bridgefield Casualty Insurance Co. (Carrier for Statutory Employer)

and

South Carolina Uninsured Employers' Fund, Carriers, Defendants,

of which Chris Thompson Services and
Bridgefield Casualty Insurance are the Appellants,

and South Carolina Uninsured Employers' Fund is the Respondent.

INITIAL BRIEF OF RESPONDENT S.C. UNINSURED EMPLOYERS' FUND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

Statement of Issues on Appeal

I. Did the Appellants satisfy the requirements of S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415 to transfer liability to the Uninsured Employers Fund with undisputed evidence?

II. Did the Workers' Compensation Commission err in failing to find and conclude that Chris Thompson Services collected proper documentation of workers compensation insurance on a standard form "acceptable to the Commission" as defined by S.C. Code Reg. 67-415?

III. Did the Workers' Compensation Commission err in requiring a description of operations, locations, and coverage to document workers' compensation coverage for a South Carolina employer in contravention of the plain terms S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415?

IV. Did the Workers' Compensation Commission err in concluding that a policy number must be listed on a Certificate of Insurance when there is no legal authority or rational basis for such a requirement?

V. Did the Workers' Compensation Commission err as a matter of law in failing to find that the Appellants timely submitted the Certificate of Insurance to the Workers' Compensation Commission in accordance with S.C. Code Ann. § 42-1-415?

VI. Did the Workers' Compensation Commission err in concluding that the Petition to Transfer Liability is "premature" despite undisputed evidence that the Appellants have paid all benefits currently due to the Claimant as required by S.C. Code Ann. § 42-1-415?

VII. Did the Workers' Compensation Commission err in applying a new legal standard, in contravention of statutory authority, for collecting documentation of insurance when a subcontractor is engaged by parol agreement?

Statement of the Case

On August 10, 2011, Samuel Rose (hereinafter "Claimant") was injured in a work-related truck accident. Claimant filed a Form 50 on September 14, 2011, whereby JJS Trucking, LLC, (hereinafter "JJS") and Chris Thompson Services, LLC (hereinafter "Thompson") were named as Defendants in the claim. At the time of filing the Form 50, JJS was Claimant's direct employer and Thompson was the upstream general contractor. Subsequently, the Workers' Compensation Commission was provided with a copy of the Certificate of Insurance with an issued date of October 18, 2010. Based upon a stipulation with the UEF, it was agreed that the certificate of insurance was transmitted by Thompson to the Commission by October 18, 2011.

On January 24, 2012, a Petition was filed by Thompson to transfer liability to the South Carolina Uninsured Employers' Fund (hereinafter "UEF"). Thereafter, a hearing was held on May 15, 2012. On August 23, 2012, Commissioner Gene McCaskill ruled that "the issue of transfer of responsibility to the UEF [was] not ripe for adjudication …." On May 15, 2012, a Form 30 was filed by Thompson seeking review of Commissioner McCaskill's August 23, 2012, Order (hereinafter "August 23 Order"). Thereafter, on May 15, 2013, the Workers' Compensation Full Commission Appellate Panel issued an Order which affirmed the August 23 Order.

The Appellants appealed the Full Commission's Order to the South Carolina Court of Appeals, claiming the Commission erred as a matter of law in concluding the Petition to transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 was "not ripe." On January 28, 2015, the South Carolina Court of Appeals dismissed the appeal as interlocutory.

On August 10, 2022, after approximately seven years of litigation and corresponding appeals before the Commission and the Appellate courts, the South Carolina Court of Appeals ordered that Claimant was entitled to benefits, and Thompson tendered past due benefits and

interest to Claimant. The Court of Appeals also ordered that Claimant was entitled to additional medical benefits because there was substantial evidence in the record to support the Commission's award of future medical benefits and temporary total disability benefits.

On September 29, 2022, the Appellants refiled their Petition to Transfer Liability to the UEF. Thompson seeks to shift the responsibility for hundreds of thousands of dollars in benefits to the State of South Carolina. In a May 15, 2023, Order (hereinafter "May 15 Order"), Commissioner Avery B. Wilkerson ruled that upstream contractor Thompson was not entitled to transfer liability to the UEF.

Appellants appealed the order of Commissioner Wilkerson, and, after briefs and argument, the Full Commission Appellate Panel issued a Decision and Order on March 8, 2024 (hereinafter "March 8 Order") affirming the May 15 Order. In its Order, the Appellate Panel based their ruling, among other things, on the following findings of fact: (12) that Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (S.C. Ct. App. 1997), Hardee v. McDowell, 381 S.C. 445, 673 S.E.2d 813 (S.C. 2009), Hopper v. Terry Hunt Const., 383 S.C. 310 (2009), and Barton v. Higgs, 381 S.C. 367 (S.C. 2009) were controlling; (13) that the unpublished opinion of Almazon v. SCUEF, 2017-UP-124, offered by Thompson, was not persuasive and not controlling; (14) that Thompson did not supply the certificate of insurance to the Workers' Compensation Commission "at the time a claim is filed by the injured employee" as required by S.C. Code Ann. § 42-1-415(b), but turned it over three months later; (15) that the certificate of insurance was blank as to the description and location of operations and therefore incomplete; (16) that the certificate of insurance provided does not show where coverage applies or to what job entity, and as no written contract existed, each transaction would be a new job requiring a certificate of insurance; and (17) that the certificate of insurance only showed a binder and did not show a policy number.

Appellants now seek review of the Full Commission's March 8 Order in hopes this Court will reverse and rule contrary to otherwise binding and controlling precedent. Accordingly, the UEF requests that the Court affirm the Full Commission's March 8 denying the transfer of liability for continuing medical benefits to the UEF, as well as denial of any requirement of reimbursement for all compensation and medical benefits paid to date.

Standard of Review

The South Carolina Administrative Procedures Act governs review of the full Workers' Compensation Commission's decision. Hutson v. S.C. State Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012). The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(5). The court may affirm the decision of the agency or remand the case for further proceedings. S.C. Code Ann. § 1-23-380(5). The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380. "This Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence." Pollack v. Southern Wine & Spirits of Am., 405 S.C. 9, 14, 747 S.E.2d 430, 432 (S.C. 2013). "'Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action.'" *Id.* "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being

supported by substantial evidence." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007).

The Commission is the ultimate factfinder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006) ; Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). Where the medical evidence conflicts, the findings of fact of the Commission are conclusive. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995).

The review must be conducted by the court and must be confined to the record. S.C. Code Ann. § 1-23-380(4).

Arguments

I. Appellants have not satisfied all of the requirements of S.C. Code § 42-1-415 and S.C. Code Reg. 67-415, and the Workers' Compensation Commission did not err as a matter of law in refusing to transfer liability to the S.C. Uninsured Employers Fund because (1) the certificate was blank as to the description and location of operations and (2) the certificate did not provide the project to which coverage was to apply.

Although Appellants go to great lengths to demonstrate the Certificate of Insurance presented by JJS and accepted by Thompson was in compliance with S.C. Reg. 67-415, under South Carolina law, an incomplete ACORD Form does not constitute proper documentation in compliance with S.C. Code Ann. § 42-1-415(A). *See* Society of Prof. Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute"). In Hopper v. Terry Hunt Const., the Supreme Court of South Carolina held that an incomplete ACORD Form did not constitute proper documentation

under S.C. Code Ann. § 42-1-415 such that an upstream contractor may shift liability to the UEF. Hopper v. Terry Hunt Const., 383 S.C. 310, 680 S.E2d 1, 3 (2009). As background, Kajim, the general contractor, contracted services from Terry Hunt Construction as its subcontractor for pipe installation at a job in Greenwood, South Carolina. Id. at 2. On a previous project, Hunt provided Kajim with an ACORD Form 25-S certificate of insurance which indicated Hunt had workers' compensation insurance valid from May 2, 2002, through December 31, 2002. Id. This certificate included material information such as to the project number, subcontract number, and the claim deductible amount in the block labelled "DESCRIPTION OF OPERATIONS/ LOCATIONS." Id.

Prior to beginning work on the Greenwood project, Hunt provided Kajim with another certificate of insurance. Hopper, 680 S.E.2d at 2. While the certificate showed the policy was valid from January 1, 2003, through December 31, 2003, the "DESCRIPTION OF OPERATIONS/ LOCATIONS" was blank. Id. On February 19, 2004, Timothy Hopper was injured while working for Hunt in Greenwood, South Carolina. Id. At the time Hopper was injured, Hunt did not have workers' compensation insurance because the policy lapsed. Id. This in turn caused Kajima to remain liable to pay Hopper's benefits. Id.

In ruling on whether Hunt's ACORD Form complied with S.C. Code Ann. § 42-1-415 such that Kajima could transfer liability to the UEF, the South Carolina Supreme Court held that failure to completely fill out an ACORD Form renders the document insufficient, and thus, incompatible with the strict requirements of § 42-1-415. Hopper, 680 S.E.2d at 3. The Court explained that Hunt essentially submitted an incomplete ACORD Form when it left blank the Descriptions and Operations box on the Certificate of Insurance. Id at 3. The ACORD form also lacked the type of coverage provided by the policy or the deductible amount. Id. The incompleteness of Hunt's ACORD Form had a preclusive effect on Kajim's ability to transfer liability to the UEF, because the form did not constitute proper documentation as required by S.C. Code Ann. § 42-1-415. Id.

Accordingly, the Court precluded Kajima from transferring liability to the UEF pursuant to S.C. Code Ann. § 42-1-415. Id.

Similar to the facts of Hopper, Appellants rely upon an incomplete ACORD Form in an effort to transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415. Moreover, it is clear that an incomplete ACORD Form is insufficient documentation as required by S.C. Code Ann. § 42-1-415, and failure to strictly adhere to the documentation requirements of § 42-1-415 precludes Appellants from shifting liability to the UEF. Similar to Hopper, and as applied to the facts of the present case, the ACORD Form submitted by JJS to Thompson was insufficient documentation because it was (1) blank as to the description and locations of operations and (2) did not provide the project to which coverage was to apply. While Appellants argue that a more detailed description is not necessary to properly document JJS' workers' compensation coverage, this directly conflicts with the binding precedent of Hopper, and the strict requirements of § 42-1-415, especially in light of the economic burden the Appellants wish to pass on to citizens of the State of South Carolina. Therefore, the ACORD Form presented to Thompson by JJS is insufficient documentation as required by S.C. Code Ann. § 42-1-415 in accordance with Hopper.

Appellants' argument that Hopper is factually distinguishable from the present case because "nothing about the Certificate [in Hopper] described or even suggested coverage in South Carolina" is misleading. This argument assumes that so long as a certificate of insurance on its face directly relates to a South Carolina subcontractor, the certificate may forgo material information like a description and location of operations, or a description as to what project coverage was to apply. Further, the fact that JJS' legal name is JJS Trucking of South Carolina is merely coincidental and does not control. If either of the aforementioned scenarios were true, then any upstream general contractor, like Thompson, could pass liability to the UEF so long as the subcontractor's certificate of insurance on its face references South Carolina or the general

contractor's legal name references South Carolina. This reasoning is not what the Hopper Court intended § 42-1-415 to require, and sets a dangerous precedent. Appellants also argue that the amendment to Reg. 67-415 in 2010 supersedes the decision in Hopper. No such results comes from the 2010 amendment, as Hopper stand for the proposition that in order to transfer large financial liabilities to the State, strict adherence to completion of the ACORD Form is necessary.

Here, the ACORD certificate of insurance that JJS provided to Thompson likewise is blank in the box for a description of operations and locations. As can be inferred by Hopper, the enumerated list requirements for a valid ACORD form in S.C. Reg. 67-415 is not an exhaustive list of information that makes forms valid. The opinion in Hopper does not mention that the ACORD form in that case was unsigned, undated, or issued by an unauthorized person. Nonetheless, the Court found that the form was insufficient to transfer liability to the UEF.

An inference follows, therefore, that the three requirements listed in Regulation 67-415 is not an exhaustive list of requirements for a valid form, and that other material parts of a job must be included on the form. Based on Hopper, the description of operations and locations must also be on the form to prove that the subcontractor has workers' compensation insurance in South Carolina. Hopper thus indicates that the description of operations and locations is a material part of a subcontractor's job. Therefore, the form submitted by JJS is insufficient to shift liability to the UEF because the description of operations and location box on the form is blank.

The Single Commissioner correctly ruled that (1) the certificate of insurance provided was blank as to the description and location of operations, and that (2) the certificate of insurance did not provide the project to which coverage was to apply. The certificate of insurance provided to Thompson by JJS is incomplete and improper documentation, and the Appellants are barred from shifting liability to the UEF.

II. Chris Thompson Services did not collect proper documentation of workers compensation insurance on a standard form "acceptable to the Commission."

Appellants claim that a certificate of insurance need only meet the requirements of S.C. Code Reg. 67-415, calling it a "governing regulation." Regulations do not control statutes, and the argument that S.C. Code Reg. 67-415 (A)(2) controls is incorrect because it alters the document requirement of S.C. Code Ann. § 42-1-415 as interpreted in Hopper. Specifically, S.C. Reg. 67-415(A)(2) states that an ACORD Form "is acceptable documentation of insurance, provided the Certificate of Insurance indicates a valid South Carolina address for the insured, is dated, signed, and issued by an authorized representative of the insurance carrier for the insured." S.C. Code Ann. Regs. 67-415 (1997, as amended). However, as explained in Hopper, a certificate of insurance in insufficient documentation within the meaning of S.C. Code Ann. § 42-1-415 when it fails to include a description and location of operations, and when it fails to provide the project to which coverage was to apply. To limit a certificate of insurance to only what is set out in S.C. Reg. 67-415(A)(2) would alter the documentation requirement of S.C. Code Ann. § 42-1-415 as specified by the South Carolina Supreme Court in Hopper. *See* Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995); Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496, 499 (1943); *See also* Society of Prof. Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute").

Therefore, S.C. Reg. 67-415(A)(2) cannot limit the required material elements necessary for proper documentation of a subcontractor's certificate of insurance pursuant to S.C. Code Ann. § 42-1-415.

III. Proper Documentation of Workers' Compensation Insurance for a South Carolina employer requires a complete ACORD Form including description of operations, locations or coverage, which Chris Thompson Services failed to obtain.

As noted above in Argument I, based upon S.C. Code Ann. § 42-1-415, in order "to transfer liability to the Fund, the high-tier contractor must collect documentation of insurance on a standard form acceptable to the commission." A completed ACORD Form would include a description of operations, and the location of coverage, which Appellants failed to obtain. In spite of Appellants' long discourse on ACORD Forms, Hopper clearly requires a completed form, and one specifically completed as relates to descriptions of operations and locations of coverage. That a prior ACORD Form included such a description of operations shows that this was a relevant issues for the Court to review.

Appellants argue that the name" JJS Trucking, LLC" is sufficient to meet the requirement of a description of operations for a proper ACORD form. JJS and Thompson had the opportunity to describe their relationship properly within the ACORD form, but did not do so. Appellants argue that "workers compensation coverage must be coextensive with JJS Trucking's entire liability in the state as a matter of law." If this were the case, there would be no need for any description or location of coverage, but this is a clear requirement under South Carolina statues and case law. Hopper requires, for workers compensation coverage, a completed ACORD form, and JJS and Thompson could have simply obtained a completed form including a description of the work being done by JJS.

IV. The certificate obtained by Chris Thompson Services is deficient as it does not include a policy number.

Appellants argue that a policy number is not necessary for proper documentation of insurance because a policy number is not an enumerated requirement of S.C. Reg. 67-415. Although S.C. Reg. 67-415 does not specifically require documentation of a policy number, Barton

v. Higgs clearly requires that a statutory employer, like Thompson, must take the minimal steps to ensure the workers compensation insurance provided by its subcontractor is "properly documented." This includes documentation of a policy number. In the Barton case, the South Carolina Supreme Court ruled it was improper to transfer liability from the upstream contractor to the UEF because the certificate of insurance was unsigned. Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145 (2009). The Court explained by the express language of S.C. Code Ann. § 42-1-415, "to transfer liability to the Fund, the high-tier contractor must collect documentation of insurance on a standard form acceptable to the commission" with the certificate of insurance serving "as documentation of insurance." Id. Further, for a certificate of insurance to serve as proper documentation, as that term is used in S.C. Code Ann. § 42-1-415, "the Certificate must be dated, signed, and issued by an authorized representative of the insurance carrier" in accordance with S.C. Reg. 67-415 Id. at 147.

When taking the requirements of both S.C. Code Ann. § 42-1-415 and S.C. Reg. 67-415 in conjunction, "liability may be transferred from the higher tier contractor to the [UEF] only after the higher tier contractor has **properly documented** the subcontractor's claim that it retained workers' compensation insurance." Id. (emphasis added). An upstream contractor may not transfer liability when it "could have easily investigated the absence of the signature and determine that [the subcontractor] did not have a valid policy." Id.

Like Barton, Thompson as the statutory employer must do more than just simply accept a certificate of insurance from its subcontractor but must "read" the document and ensure the entire document is properly filled out. If Chris Thompson had read JJS' certificate of insurance, he would have clearly discovered the missing policy number. Like the reasoning in Barton, any blank on a certificate of insurance renders the certificate incomplete, this includes a missing policy number.

Additionally, Thompson's reliance on statements made by Greg Hudson, as an agent of Travelers Insurance, is not enough to support the veracity of the certificate of insurance and its declarations regarding the workers' compensation coverage of JJS. Since the Appellate Panel correctly ruled that because the certificate of insurance provided by JJS only showed a binder and not a policy number, the Appellants are barred from shifting liability to the UEF.

V. The certificate of insurance obtained by Chris Thompson Services was not timely submitted to the Worker's Compensation Commission as it was not submitted "at the time the claim was filed by the injured employee."

According to the May 15 Order, "Thompson did not supply the certificate of insurance to the Workers' Compensation Commission '**at the time the claim was filed by the injured employee**' as required by S.C. Code Ann. § 42-1-415 but turned it over 3 months later." (emphasis added). Based upon the plain language of S.C. Code Ann. § 42-1-415(B), Appellants are not excused from providing the certificate of insurance to the Workers' Compensation Commission. Appellants failure to comply with this statutory requirement precludes any transfer of liability to the UEF.

S.C. Code Ann. § 42-1-415(B) reads: "To qualify for reimbursement under this section, the higher tier … contractor … must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation . . . must be turned over … **at the time a claim is filed by the injured employee**." S.C. Code Ann. § 42-1-415 (1976, as amended) (emphasis added). The statutory language should be interpreted based upon its literal and plain meaning. *See* Charleston County Sch. Dis. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) (The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature); In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995) (Where the statute's

language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning).

Claimant was injured on August 10, 2011. Claimant filed his claim on or about September 14, 2011. It was stipulated that Thompson did not turn over the certificate of insurance from JJS to the Commission until October 18, 2011, one month after filing and 3 months after the accident. Accordingly, the certificate of insurance from JJS was not turned over to the Commission for a total of thirty-four (34) days from the date the claim was filed. However, S.C. Code Ann. § 42-1-415(B) clearly and unambiguously requires a party in Appellants position to have submitted the certificate of insurance on September 8, 2011, because the certificate of insurance "must be turned over … **at the time a claim is filed by the injured employee**," which was September 14, 2011. Therefore, to find that Appellants acted in compliance with S.C. Code Ann. § 42-1-415(B) when it submitted JJS' certificate of insurance to the Commission thirty-four days after Claimant filed his workers compensation claim would impose another meaning not intended by the legislature when it drafted subsection (B). *See* Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995) (Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning).

Therefore, since the Commissioner correctly ruled that Appellants failed to submit the certificate of insurance in accordance with S.C. Code Ann. § 42-1-415(B), they are barred from shifting liability to the UEF.

VI. The petition to transfer liability is premature.

Appellants argue that the petition to transfer liability to the UEF is not premature. Appellants claim that because all benefits due and owing to Claimant have been paid to date, and,

further, because S.C. Code Ann. § 42-1-415 only requires payment of benefits presently due, the petition to transfer liability is not premature. However, this is incorrect because Appellants have conceded that Claimant is receiving ongoing medical care that will require payment by Appellants, and thus, all health benefits of Claimant have not been paid to date, will be due, and continue to accrue as of the time the Petition to Transfer was filed (Initial Brief of Appellants, p. 30).

In Tillotson v. Keith Smith Builders, the South Carolina Court of Appeals explained that "[i]mportantly, in keeping with the statutory employee doctrine, § 42-1-415(a) requires the upstream contractor initially **pay all benefits due** to the subcontractor's injured employee. The contractor may then petition to transfer responsibility of future payments to the Uninsured Employers' Fund." Tillotson v. Keith Smith Builders, 357 S.C. 544, 593 S.E.2d 621, 624 (S.C. Ct. App. 2004). It is clear that Claimant's health benefits have not been paid to date and that future health benefits will be due because Claimant continues to receive medical care.

Therefore, the petition to transfer liability to the UEF is premature because all of Claimant's health benefits have not been paid to date, are still due, and are not current as of the time the Petition to Transfer was filed.

VII. In accordance with S.C. Code Ann. § 42-1-415(b), Chris Thompson services was required to reverify JJS Trucking' had proper documentation of insurance when it *engaged* JJS Trucking as its subcontractor for work completed on August 10, 2011.

In pertinent part, S.C. Code Ann. § 42-1-415(B) states that documentation of insurance "must be collected at the time the contractor or subcontractor is engaged to perform work." Appellants argue that JJS provided documentation of insurance to Thompson when Thompson originally engaged JJS to perform work and that since the only job JJS ever performed for Thompson was hauling loads from a lumber mill in Summerville to a paper mill in Charleston and, further, the terms of the job never changed, Thompson met the statutory requirements under

subsection (B) because documentation of insurance was collected by Thompson from JJS. Appellants argue Thompson engaged JJS in 2008, and that some ongoing contract was established that continued up to and past the date of injury. There is no evidence of the terms of this ongoing contract, as the terms of the contract were never memorialized into a written contract, and they are not within the record, so every time Thompson engaged JJS as its subcontractor in hauling a load from a lumber mill in Summerville to a paper mill in Charleston, Thompson was required to reverify JJS had documentation of insurance because each job was a new engagement.

In Hardee v. McDowell the Supreme Court of South Carolina held that based on the express language of S.C. Code Ann. § 42-1-415(B), the phrase "engaged to perform work" meant that each time a subcontractor is hired to work, the general contractor must collect proof of workers' compensation insurance from the subcontractor, and that failure to collect such proof precludes a general contractor from transferring liability to the UEF. Hardee v. McDowell, 381 S.C. 445, 673 S.E.2d 813 (S.C. 2009). Specifically, the Court explained "[t]hus, if a contractor enters into a contract to hire a subcontractor for one job in January and then enters into another contract to hire the subcontractor for a second job in February, the contractor should verify that the subcontractor still has insurance coverage at the time of the February hiring." Id. 381 S.C. at 453, 673 S.E.2d at 817. Appellants attempt to distinguish the holding in Hardee from the facts of this case by arguing that JJS was not hired for one job in **one location** in January and then a second job in **another location** in February. (emphasis added). However, the location of JJS's operations is not dispositive because the holding in Hardee is not contingent upon the location of where the subcontractor was engaged to perform work, just that the subcontractor was engaged to work on a separate date. Similarly, the fact the terms of the agreement between JJS and Thompson were never modified is not dispositive because the holding in Hardee is not limited to situations where the terms of an agreement remain consistent.

In his November 14, 2011, deposition, Sedric Smalls testified that Thompson "would provide a trailer … and he pays me by the ton to carry each load." (APA p. 29) (Dep. Of Sedrick Smalls p. 5, lines 22-24). Claimant testified that he was paid per the load, and that his trips varied, indicating that each trip was a different job (Transcript of May 15, 2012, hearing, p. 21, l.3-8; p.30, l. 4-8; p.42, l.7-11). Smalls owns his truck, and Thompson provided a trailer for each load, indicating that each load was a separate job.

Since no written agreement existed between JJS and Thompson, Thompson was required to collect a certificate of insurance from JJS every time it engaged JJS to perform work. Thompson testified at the hearing of May 15, 2012, and at no time does he define Thompson's relationship with JJS in any way other than piecemeal hauling of woodchips from a sawmill to a paper mill (Transcript of May 15, 2012, hearing, p. 48, l. 23-24).

In Hardee, the Court cites *Black's Law Dictionary* to derive the meaning of "to engage" as engaging someone for employment for wages or other payment. *See Black's Law Dictionary* 570 (8th ed.2004) (defining "engage" as [t]o employ"); (defining "hire" as "[t]o engage the labor or services of another for wages or other payment"). To "engage" means "to engage someone for employment," and this includes "to engage the **labor or services of another for wages or other payment**." Thompson paid JJS by the ton to carry each load, which occurred periodically in the three to four years Thompson used JJS as its subcontractor (Transcript of May 15, 2012, hearing p. 30, l. 4-6; p. 42, l. 7-8). Each time Thompson hired JJS to carry a load, a new engagement was created such that Thompson was required to obtain documentation of insurance by JJS pursuant to S.C. Code Ann. § 42-1-415(B). Smalls paid Claimant per load, indicating that he was not on a regular, long-term, schedule of employment, and that each job was subject to change based on the needs of Thompson. In fact, his loads did vary each week based on the needs of Thompson. Thus, there was variance in his work schedule, and each load constituted a different job. Furthermore,

the fact that the trailer was serviced by Thompson indicates that the claimant's truck was not consistently connected with Thompson's trailer.

While given the opportunity at the original hearing, Appellants have failed to prove a single long-term relationship with JJS, as opposed to a series of separate engagements. While an oral agreement is enforceable, its terms must be defined. Payment by the load indicates that each load is a separate engagement. Appellants have failed to define the agreement between Thompson and JJS, but wish to benefit from their favorable conjecture as to its terms, to the detriment of the UEF.

The Commissioner correctly ruled that Appellants are precluded from transferring liability to the UEF because each transaction was a new job which required Thompson to obtain documentation of insurance from JJS, and Thompson failed to obtain such documentation related to the August 10, 2011, subcontractor work of JJS.

CONCLUSION

Based on the foregoing, the Respondent, South Carolina Uninsured Employers' Fund, respectfully requests that the Full Commission Appellate Panel's Decision and Order of March 8, 2024, be affirmed in its entirety.

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September 5, 2024