

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

The Honorable Avery B. Wilkerson, Commissioner

Appellate Case No. 2013-001322
W.C.C. 1112328

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

v.

JJS Trucking, LLC, Unisured Employer, and
Chris Thompson Services, LLC, Upstream Contractor, and
Bridgefield Casualty Ins. Co., Carrier, and South Carolina
Uninsured Employers' Fund,.....Defendants,

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 Ins. Co., Carrier are the.....Appellants.

FINAL BRIEF OF THE APPELLANTS

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Statement of the Issues on Appeal

- I. Did the Workers' Compensation Commission err as a matter of law in concluding that the request to transfer liability to the Uninsured Employers' Fund is not "ripe" for adjudication?
- II. Did the Workers' Compensation Commission err as a matter of law in failing to transfer continuing liability to the Uninsured Employers Fund?

Statement of the Case

On December 6, 2011, the Claimant filed a Form 50 alleging various injuries by accident on August 20, 2011. (R. p. 23). The Form 50 named the Claimant's direct employer, JJS Trucking, LLC, and its upstream contractor, Chris Thompson Services, LLC, as Defendants in the claim. The Appellants, Chris Thompson Services and Bridgefield Casualty, denied the claim by Form 51 and also filed a Petition to Transfer Liability to the South Carolina Uninsured Employers Fund (UEF) on January 24, 2012. (R. p. 25, p. 27-55)

A hearing was held in Summerville, South Carolina on May 15, 2012 before Commissioner Gene McCaskill. Following that hearing, Commissioner McCaskill issued a Decision and Order dated August 23, 2012 (R. pp. 1-11), where he found and concluded, *inter alia*,

1. *Samuel Rose was an employee of JJS Trucking on August 10, 2011.*
2. *On August 10, 2011, Samuel Rose sustained an injury by accident to his head, knee, leg back and neck arising out of and in the course of his employment with JJS Trucking.*

5. *As a result of his accident, Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reaches maximum medical improvement.*
6. *As a result of his accident, Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier.*
7. *On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.*
8. *On August 10, 2011, JJS Trucking was operating without proper insurance as required by the Workers' Compensation Act.*
9. *On August 10, 2011, JJS Trucking was operating as a subcontractor for Chris Thompson Services, LLC. Chris Thompson Services, LLC, is an "upstream employer" pursuant to §42-1415.*
10. *Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.*

CONCLUSIONS OF LAW

1. *On August 10, 2011 Samuel Rose was an "employee" of JJS Trucking as defined in S.C. Code Ann. § 42-1-130 (1976).*

4. *Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 pursuant to § 42-9-10 until such time as he is able to return to work.*
5. *Claimant is entitled to medical treatment causally related to his injury pursuant to §42- 15-60...*
6. *Claimant was an employee of JJS Trucking which, at the time of his accident, was an uninsured subcontractor. Pursuant to § 42-1-415(A) Chris Thompson Services, LLC, as the higher tier contractor, shall pay all benefits due the Claimant under the Workers' Compensation Act.*
7. *Chris Thompson Services, LLC, asserted in its pleadings and at the Hearing that liability for this claim should be transferred to the South Carolina Uninsured Employer's Fund. § 42-1415 only permits the higher tier contractor to petition the Commission to transfer responsibility for benefits to the UEF after it has paid all benefits due the Claimant under the Act. The evidence in the record indicates that Claimant has not received all benefits he is due under the Act from Chris Thompson Services, LLC, or its carrier. Therefore, the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time.*
8. *Chris Thompson Services, LLC is entitled to credit for any compensation paid to the Claimant prior to the date of this Order...*

The Appellants, Chris Thompson Services and Bridgefield Casualty filed a Form 30, seeking review and reversal of Commissioner McCaskill's Decision and

Order by the Workers' Compensation Commission's Appellate Panel. (R. pp. 72-84). On May 15, 2013, the Appellate Panel issued an Order summarily affirming Commissioner McCaskill's conclusion that the Petition for Transfer of Liability was "not ripe for adjudication," without any discussion. (R. pp. 12-22).

The Appellants respectfully contend that the Workers' Compensation Commission erred as a matter of law in concluding that the Petition to Transfer Liability to the UEF was "not ripe" and in failing to actually transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 based upon the undisputed evidence in the record and the applicable law.

Facts

Chris Thompson testified that JJS Trucking was operating as a subcontractor of Chris Thompson Services, LLC, at the time in question. (R. p. 96). Chris Thompson Services engaged JJS Trucking to haul woodchips from a sawmill in Summerville to a paper mill in North Charleston on a regular basis, beginning in 2008. (R. pp. 96-97). Mr. Thompson testified that he obtained a Certificate of Insurance from JJS Trucking at the time his relationship with the JJS Trucking began in 2008 and that he has requested and obtained updated Certificates of Insurance from JJS Trucking on a yearly basis since that time to insure that JJS Trucking had continuous workers' compensation coverage. (R. p. 97).

Mr. Thompson identified the October 18, 2010 Certificate of Insurance contained in the Record as the one presented to him in October 2010 to verify that JJS Trucking's workers' compensation coverage was current. (R. p. 97, p. 141). This Certificate shows that JJS Trucking had workers' compensation

coverage through Travelers Insurance for the period from October 8, 2010 through October 8, 2011. (R. p. 141). The Certificate of Insurance shows Chris Thompson Services as the Certificate Holder and the Certificate is signed by David W. Hayes, whom Mr. Thompson identified as the owner of the Producer, the Swamp Fox Agency. (R. p. 97, p. 141). Mr. Thompson testified that after receiving this Certificate of Insurance, he was never given any reason to believe that JJS Trucking did not have workers' compensation coverage until after the Claimant's accident. (R. p. 98).

The record reveals that Travelers Insurance did, in fact, insure JJS Trucking for a period after the Certificate of Insurance was issued, but the policy lapsed without notice to Chris Thompson Services by any person or entity. (R. p. 159). Cedric Smalls, the owner of JJS Trucking, confirmed that he did not ever inform Chris Thompson Services that his workers' compensation insurance had lapsed and further testified that Chris Thompson would not allow him to work as a subcontractor if his workers' compensation insurance ever lapsed. (R. p. 132, p. 139).

At the time of the hearing before Commissioner McCaskill, the Appellants were voluntarily paying weekly temporary total disability compensation to the Claimant, as reflected on the Form 18. (R. p. 117). However, prior to the hearing before Commissioner McCaskill, the Claimant had not yet proven the extent of his alleged injuries or his entitlement to any medical or compensation benefits. In fact, all parties, including the UEF, denied the claim in its entirety.

Arguments

- I. The Workers' Compensation Commission erred as a matter of law in concluding that the request to transfer liability to the Uninsured Employers' Fund is not "ripe" for adjudication.

Chris Thompson Services and its carrier petitioned the Commission for a transfer of liability to the Uninsured Employers' Fund ("UEF") pursuant to S.C. Code Ann. § 42-1-415. (R. p. 27-55). According the terms of § 42-1-415,

"upon the submission of documentation to the commission that a ... subcontractor has represented himself to a higher contractor...as having workers' compensation insurance at the time the ...subcontractor was engaged to perform work, the higher tier...contractor...must be relieved of any and all liability under this title." (emphasis added).

The record is clear that JJS Trucking "represented himself" to Chris Thompson Services "as having workers' compensation insurance" at the time he was engaged to perform work and yearly thereafter, most recently on October 18, 2010. The Hearing Commissioner made a specific finding regarding this representation, which was not appealed or otherwise disturbed by the Appellate Panel and is now the law of the case: "*On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.*" (Finding of Fact #7, R. p. 8).

Under the plain terms of the statute, having submitted proper documentation that JJS Trucking had represented itself as having workers'

compensation coverage, along with a Petition to Transfer Liability, the Appellants should be “relieved of any and all liability” without further delay. According to S.C. Code Ann. § 42-1-415,

“In the event that employer is uninsured ... 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.” (emphasis added).

Prior to the hearing before Commissioner McCaskill, the Appellants had paid and were continuing to pay the Claimant temporary total disability compensation benefits. (R. p. 117). However, the Claimant had not yet proven his entitlement to any other medical or compensation benefits. Following the May 15, 2012 Hearing, Commissioner McCaskill awarded the Claimant continuing compensation and medical benefits, which, of course, were not due before this award was made on August 23, 2012. Prior to the August 23, 2012 Decision and Order, the Appellants had paid all benefits “due” to the Claimant under the Act at that time.

Having awarded the Claimant additional benefits pursuant to the August 23, 2012 Decision and Order, the Commission went on to conclude in the same Order that the “Claimant has not received all benefits he is due under the Act” and; therefore, the Petition to Transfer Liability was not “ripe.” Respectfully, the

Appellants' Petition was not contingent, hypothetical, or abstract and; therefore, to suggest that it was not "ripe" was an error of law. See Colleton County Taxpayers Ass'n v. Sch. Dist. Of Colleton County, 371 S.C. 224, 242, 638 S.E.2d 685 , 694 (2006) (stating that "an issue that is contingent, hypothetical, or abstract is not ripe for judicial review."); Hitter v. McLeod, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980) (declining to rule on an issue that was not "ripe" for adjudication, noting it "presents [the court] with nothing more than a vehicle for rendering an advisory opinion").

Furthermore, it is wholly illogical to interpret S.C. Code Ann. § 42-1-415 as requiring anything other than payment of benefits presently due at the time the Petition is filed and the hearing is held. In fact, the language of S.C. Code Ann. § 42-1-415 clearly contradicts the Commission's interpretation (*e.g.*, requiring a petitioner to pay all benefits that may become due in the future as a condition precedent to the transfer of continuing), as the statute plainly states that the higher tier contractor may "petition the commission to transfer liability for continuing compensation and benefits to the Uninsured Employers' Fund." (emphasis added). By employing this language, "continuing compensation," the legislature clearly envisioned that additional benefits may be due in the future ("liability for continuing compensation"); however, if compensation is current as of the time of the Petition and hearing on that Petition, the Petition should be considered "ripe" for adjudication. Having paid all benefits that were "due" at the time the Petition was made in this case and at the time the hearing was held, the Appellants respectfully contend that the Commission should have transferred liability for "continuing compensation" to the UEF.

II. The Workers' Compensation Commission erred as a matter of law in failing to transfer continuing liability to the Uninsured Employers Fund.

According to the South Carolina Supreme Court,

“Under section 42-1-415(A), a statutory employer is no longer directly liable for workers' compensation payments whenever documentation is presented to the commission that a contractor or subcontractor represented himself to the statutory employer as having workers' compensation insurance.”

Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E.2d 766 (1999). Here, the Commission conclusively found that JJS Trucking, the subcontractor, represented himself to the statutory employer, Chris Thompson Services, as having workers' compensation insurance and this finding is the law of the case. (R. p. 8).

The Appellants further contend that proper documentation of this representation was provided to the Workers' Compensation Commission in accordance with S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415. In fact, the evidence regarding this documentation is undisputed, rendering the issue one of law that can be decided by the Court of Appeals. See Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000) (holding that where the essential facts are undisputed, the question before the appellate court is one of law).

In particular, it is undisputed that the record contains an Acord Form 25-S, Certificate of Liability Insurance, which was collected by Chris Thompson Services, indicating that JJS Trucking had workers' compensation coverage from October 8, 2010 through October 8, 2011 through Travelers. (R. p. 141). Pursuant to S.C. Code Reg. 67-415, the

“Acord Form 25-S, Certificate of Insurance... 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.”

See also Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145 (2009) (holding that if the Certificate of Insurance is dated, signed, and issued by an authorized representative of the carrier, it “shall serve as documentation of insurance” for purposes of S.C. Code Ann. § 42-1-415.).

Here, it is undisputed that the Certificate of Insurance submitted by the Appellants shows a valid South Carolina address for JJS Trucking: *137-A Gordon Street, Charleston, SC 29403*. (R. p. 141). It is undisputed that the Certificate of Insurance is dated: *October 18, 2010*. (R. p. 141). Finally, it is undisputed that the Certificate of Insurance is signed and issued by an authorized representative of Travelers Insurance: *David W. Hayes, owner of the Swamp Fox Agency, the producer of the policy*. (R. p. 141). In fact, Travelers Insurance stipulated that it covered JJS Trucking, as stated on the October 18, 2010 Certificate of Insurance at the time the Certificate was issued. (R. p. 141).

Chris Thompson Services reasonably relied on this Certificate of Insurance and it is undisputed that Chris Thompson Services was never given any notification of a lapse in coverage or other reason to believe that JJS Trucking did not have workers' compensation insurance. (R. p. 97). JJS Trucking admits that it did not notify Chris Thompson Services of this lapse prior to the Claimant's accident. (R. p. 139). Therefore, because the evidence on the seminal elements of S.C. Code Ann. § 42-1-415 is undisputed, the Appellants respectfully request that the Court of Appeals conclude that "responsibility for continuing compensation and benefits" should be transferred to the UEF in accordance with the mandatory language of § 42-1-415.

Conclusion

Based upon these arguments, the Appellants respectfully request that the Workers' Compensation Commission's Decision and Order be reversed and that the Court of Appeals conclude that the Appellants are entitled to transfer liability for continuing benefits to the Uninsured Employers' Fund in accordance with S.C. Code Ann. § 42-1-415.

Respectfully submitted,

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October 22, 2013
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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 Ins. Co., Carrier are the.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of the Appellants complies
with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated
August 13, 2007, requiring redaction of personal data identifiers.

October 22, 2013



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and

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

PROOF OF SERVICE

The undersigned hereby certifies that Samuel A. Rose, the South Carolina Uninsured Employers' Fund, and JJS Trucking, LLC were served with three (3) bound copies of the Final Brief of the Appellants this 23rd day of October 2013, by depositing the same in the United States Mail, first class postage prepaid, addressed to their attorneys of record, as follows:

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