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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Charles B. Simmons, Jr., Special Circuit Court Judge

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OCT 24 2013

SC COURT OF APPEALS

Case No. 2013-000575

Artemio Alvarez v. Quality HR Services, et.al.  
W.C.C. File No.: X030301  
William Brockman v. Quality HR Services, et.al.  
W.C.C. File No.: X030600  
Martha Burke v. Quality HR Services, et.al.  
W.C.C. File No.: X030681  
Lucille Dwight v. Quality HR Services, et.al.  
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Steven Cameron v. Quality HR Services, et.al.  
W.C.C. File No.: 0316901  
Ruth Harmon v. Spectrum HR, et.al.  
W.C.C. File No.:  
040613..... Respondents,

v.

South Carolina Property and Casualty  
Insurance Guaranty  
Association..... Appellant.

FINAL BRIEF OF RESPONDENTS KEITH'S WELDING SERVICE, INC.,  
AND CAPITAL CITY INSURANCE CO., INC.

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## **I. STATEMENT OF ISSUES ON APPEAL**

- I. Do the Certificates of Insurance issued to Quality HR and Spectrum HR constitute “insurance policies” as anticipated by Title 38 of the S.C. Code, thereby making the South Carolina Property and Casualty Insurance Guaranty Association responsible for these claims?
  
- II. Should the South Carolina Property and Casualty Insurance Guaranty Association be found responsible for these claims due to public policy?

## II. STATEMENT OF THE CASE

Eleven workers' compensation claims involving the alleged employees of two professional employment organizations ("the PEOs"), Quality HR Services, Inc. ("Quality") and Spectrum HR, LLC ("Spectrum"), were consolidated and a hearing was held in front of the Single Commissioner on June 26, 2008, and June 27, 2008, to determine the issues of coverage and responsibility to pay due to the insolvency of Realm National Insurance Company ("Realm"). By the time of the June 26, 2008, and June 27, 2008, hearings, both the South Carolina Uninsured Employers' Fund ("the UEF") and the South Carolina Property and Casualty Insurance Guaranty Association ("SCPCIGA") had been made parties. Following a hearing in these matters, the Single Commissioner issued the following Order on April 22, 2009:

**IT IS THEREFORE, ORDERED** Realm is estopped from denying coverage for Quality and its clients referenced in this order with dates of accident from July 22, 2003 until November 7, 2003.

It is further ordered Quality and its clients were not insured by Realm for all claims referenced in this order with dates of accident outside July 22, 2003 through November 7, 2003.

It is further ordered Spectrum and its clients were not insured by Realm for all claims referenced in this order.

It is further ordered that claims referenced in this order involving Quality with dates of accident from July 22, 2003 until November 7, 2003 are "covered claims" as contemplated in § 38-1-20 and the provisions of the Guaranty Act.

**AND IT IS SO ORDERED.**

The Single Commissioner's Order was timely appealed by various parties to the South Carolina Workers' Compensation Commission's Appellate Panel, and on January 5, 2010, the Appellate Panel issued an Order fully affirming the Single Commissioner's April 22, 2009, Decision & Order. Following the Appellate Panel's full affirmation, the cases were appealed to the South Carolina Circuit Court.

The parties were heard before the Honorable Charles B. Simmons, Jr. on August 18, 2010. Judge Simmons issued an Order remanding this case back to the Full Commission in order for it to clarify itself with respect to the following issues: (1) was estoppel properly pled before the Hearing Commissioner?; (2) were the claims "covered" with respect to S.C. Code Ann. § 38-1-20 (2009); and (3) does the doctrine of "substantial compliance" apply?

On August 30, 2012, the Full Commission issued a Supplemental Order affirming its prior order on these issues and giving further clarification and discussion. This Order was appealed by the SCPCIGA and oral argument was set before the Honorable Charles B. Simmons, Jr. for October 24, 2012. At the oral argument, the following issues were heard: (1) did the Commission err by finding that the Doctrine of *Estoppel* applied to some of the claims involved, thereby finding coverage?; and (2) did the Commission err by not finding that the Doctrine of Substantial Compliance applied to provide coverage over some of the claims involved?

Via an Order of February 13, 2013, Judge Simmons found that the doctrine of substantial compliance established coverage for Quality and Spectrum and remanded the case to the Commission. The SCPCIGA appealed this Order to this Court.

## STATEMENT OF THE FACTS

In 2002, American Insurance Managers, Atlanta Insurance Marketing and other companies (AIM), led by David Dennett-Smith, decided to put together a program wherein professional employment organizations (PEOs) could obtain workers' compensation insurance. AIM entered into negotiations with Alphastar, the owner of Realm. On October 2, 2002, Alphastar and AIM signed a Letter of Intent. The Letter of Intent outlined the parties' intentions that Alphastar would sell Realm to AIM and that until the sale was accomplished, Realm would appoint AIM as an agent for Realm. (R. pp. 2014-2017) After the Letter of Intent was signed, AIM began issuing certificates of insurance to various PEOs and their clients. The PEOs paid premiums and made capital contributions. AIM collected all the money paid by the PEOs. Quality HR Services, Inc. (Quality) was one of these PEOs. Under the program, Quality submitted an application, which went to both AIM and Realm and to either Roni Zinnert, underwriting manager for Realm, or Mark Sioma, president of Realm.

In November and December 2002, Realm sent letters to the PEOs and PEO clients denying coverage and disavowing the certificates of insurance. (R. pp. 998-999; R. pp. 2008-2009; R. pp. 2025-2026) On December 30, 2002, Realm filed a lawsuit against AIM in New York Federal Court. Despite the lawsuit, Realm president Mark Sioma and officers of Realm continued to bind risks and represent that the deal between AIM and Alphastar would go forward. In addition, AIM continued to pay claims at the direction of Realm until the funds ran out.

Thereafter, Alphastar and AIM entered into a Stock Purchase Agreement on March 21, 2003, to sell Realm to AIM. The parties did not consummate the sale. In the

summer of 2003, the owners of Quality personally spoke with Mark Sioma. Mr. Sioma told them that Quality had coverage with Realm. On October 10, 2003, Mr. Sioma wrote a letter to Quality advising it that Realm was denying coverage and that the certificates of insurance were issued without authority. AIM filed a lawsuit in Delaware and Alphastar filed for bankruptcy. Realm was liquidated. AIM was given a quitclaim bill of sale of Realm by the Chapter 7 Trustee of Alphastar.

Some time prior to September 16, 2003<sup>1</sup>, Keith's Welding Services, Inc. ("Respondent")<sup>2</sup> entered into a contract with Quality HR Services Inc., to serve as the licensee in an employee lease agreement or staff leasing agreement.<sup>3</sup> As a consequence of that contract, Quality became responsible for all workers' compensation claims involving specific leased employees, pursuant to S.C. Code Ann. § 40-68-70 (2007) and other contractual provisions. Furthermore, pursuant to that Section of the S.C. Code of Laws, specifically S.C. Code Ann. § 40-68-70(E) (2007), Quality became the "Employer" for workers' compensation purposes, of certain individuals who worked specifically for Keith's Welding Services, Inc. The claimants involved in this appeal were the alleged employees of the PEOs pursuant to that contract and S.C. Code Ann. § 40-68-70(E) (2007).

Upon information and belief, Quality purchased a voluntary policy from Realm with a policy number of QHR 14030-SC3, and effective dates as July 13, 2003, through November 1, 2003. By way of Certificate of Insurance, Quality HR Services Inc. represented that this policy would cover Keith's Welding Services, Inc. for workers' compensation purposes. (R. p. 2032)

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<sup>1</sup> Most-likely prior to the effective date of the policy that Quality purported to have to cover its employees, which was July 13, 2003. (See Certificate of Insurance, R. p. 2032)

<sup>2</sup> Kieth's Welding Servcies, Inc. is proceeding in this appeal as a respondent with respect to the Steve Cameron matter, only.

On October 21, 2003, Steve Cameron (“Claimant”) sustained an injury by accident while allegedly working for either Quality or Respondent Keith’s Welding Services, Inc.<sup>4</sup>

On or around October 23, 2003, Quality submitted an invoice to Keith’s Welding Services, Inc. to cover certain expenses, included but not limited to, workers’ compensation benefits “for pay period ending 10/18/03.” Claimant was listed on the attachment to that invoice as one of the leased employees from whom Quality was responsible. (R. pp. 2027-2028)

Additionally, Quality represented itself to Keith’s Welding that it had workers’ compensation insurance coverage through Realm. To the extent that it is determined that Keith’s Welding was in some fashion a potential statutory employer, per S.C. Code Ann. § 42-1-415 (1997), Respondents have obtained the appropriate Certificate of Insurance to relieve them of any and all liability in that regard. (R. p. 2032).

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<sup>3</sup> Respondents maintain their denial that Claimant was working for Keith’s Welding Services, Inc. on the day of the accident. Rather, Defendants believe and maintain that he was working directly for Quality.

## STANDARD OF REVIEW

The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

Thus, “review is limited to deciding whether the Commission’s decision is unsupported by substantial evidence or is controlled by some error of law.” Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

Where the issue is solely a matter of law and the facts are not disputed the case becomes a question of law for the Court. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999)

## ARGUMENTS

### I.

#### **THE CERTIFICATES OF INSURANCE ISSUED TO QUALITY AND SPECTRUM CREATED POLICIES FOR PURPOSES THE INSURANCE LAW IN SOUTH CAROLINA.**

The primary issue before this Court is whether insurance and/or coverage existed for some or all of the claims involved in these appeals for the alleged employees of the PEOs during the insolvency of Realm. If coverage is found, the SCPCIGA will likely ultimately be found responsible for them; however, if coverage is not found and the PEOs are found to have been uninsured employers, the UEF will likely be responsible. The Commission essentially, “carved out” a portion of these claims with injury dates between July 22, 2003, and November 7, 2003, using the Doctrine of *Estoppel* in order to find insurance and/or coverage during these dates. With respect to the issue of coverage by *Estoppel*, Respondent Keith’s Welding joins with Respondent the UEF, and reiterates the arguments made by it in its June 20, 2013, Initial Respondent’s Brief.

In order to decide the issue of coverage, an analysis of whether the certificates of insurance issued to Quality and Spectrum, described supra, created “insurance policies” for purposes of Title 38 of the S.C. Code is necessary. Appellant hinged its argument in its Brief on the assertion that no “insurance policies” were issued or in existence at the time of the accidents involved in order for the claims to be considered “covered claims,” pursuant to S.C. Code Ann. § 38-31-60(b) (2007), stating, “Therefore, it is fundamental under the Guaranty Act that to establish a covered claim, there must first exist coverage and a policy of insurance ... Rather, SCPCIGA contends that coverage and issuance of a policy of insurance are fundamental pre-requisites to establishing a ‘covered claim’ under

the Guaranty Act.” (See Brief of Appellants’ pp. 32 &33, citing and quoting S.C. Code Ann. §38-31-20(8) (2009)) Unfortunately, Appellant placed the entire emphasis of its analysis under Title 38 on S.C. Code § 38-31-20(8) (2009)and ignored the rest of Title 38. “In construing a statute, the court looks to its language as a whole in light of its manifest purpose.” (Simmons v. City of Columbia, 280 S.C. 163, 165, 311 S.E.2d 732, 733 (1984)). Therefore, Appellant’s analysis is faulty.

S.C. Code Ann. § 38-1-10 (2007) states, “This title may be cited and known as ‘The Insurance Law.’” A review of Title 38 in its entirety gives a better understanding of its purposes as well as the legislative intent behind the term, “covered claim.” For instance, S.C. Code Ann. § 38-1-20 (2009) states, in part:

- (12) “Certificate of insurance” means a memorandum copy, complete or abbreviated, of an insurance contract.
- (25) “Insurance” means a contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies. The term “insurance” included annuities.
- (45) “Policy” means a contract of insurance.
- (46) “Premium” means payment given in consideration of a contract of insurance.

Id.

Thus, under Title 38, a “policy” is defined as a “contract of insurance.” The parties do not dispute the fact that certificates were issued to Quality and Spectrum naming Realm as the carrier. Nowhere in Title 38 is it required that a workers’ compensation insurance contract be executed or memorialized with any specific language or in any specific form. These certificates issued to Quality and Spectrum referenced specific policy numbers, coverage periods, coverage amounts, and also named Realm as

the carrier. These certificates amounted to “abbreviated” memorandums of the insurance contracts to which they referred, as anticipated by S.C Code § 38-1-20(25) (2009). In addition, the certificate itself acknowledged that a policy is in existence by stating, “This certificate does not amend, extend or alter the coverage afforded by the policies below.” (R. p. 2032)

There is no dispute among the parties that premiums were paid by Quality and Realm. Premiums, as defined by S.C. Code Ann. § 38-1-20(46) (2009), could not have been paid without a policy in existence, as the definition of “premium” states that they are “given in consideration” of a contract of insurance.

In Metcalf v. Unites States Fidelity & Guaranty Co., 269 S.C. 309, 237 S.E.2d 370 (1977), a situation analogous to the facts of this case on appeal existed. In Metcalf, the issue was whether insurance coverage existed at the time of a motor vehicle accident after the “policy was certified pursuant to the requirements of the South Carolina Motor Vehicle Safety Responsibility Act” by the insurer in order for the driver to obtain a valid drivers’ license (this Act required the insured to give proof of “financial responsibility”). (Id., 311) The insurer attempted to argue that no coverage existed due to a clause in the policy that excluded automobiles owned by a member of the insured’s household (the automobile driven by the insured on the accident date was owned by his wife). The Supreme Court, in reversing the lower court’s finding that no coverage existed stated:

Respondents certified that it had issued an operator’s policy of insurance to the insured ‘as required by the financial responsibility law and regulations of this State.’ The statue required proof of responsibility on all automobiles operated by the insured. The effect of respondent’s certificate was to certify that the policy provided the statutory coverage and, having so certified, is now barred from asserting that the required coverage does not exist under the policy issued.

Id., 312, *emphasis added*.

Metcalf clearly stands for the rule that the issuance of a certificate by an insurer stating that insurance is in existence *and relied upon by those other than the insured* constitutes a contract for insurance or a policy. Appellant's position is contrary to the very definition of "insurance," per S.C. Code Ann. § 38-1-10(25) (2007). Realm undertook to provide indemnification to either Quality or Spectrum if an accident occurred and premiums were collected.

## II.

### **PUBLIC POLICY REQUIRES THAT THE S.C.P.C.I.G.A. BE RESPONSIBLE.**

In the case at hand, S.C. Code Ann. § 42-1-415 (1997) requires upstream employers to obtain proof of workers' compensation insurance from any downstream contractor in order to obtain reimbursement from the UEF, much like the South Carolina Motor Vehicle Safety Responsibility Act required proof of financial responsibility in order to obtain a drivers' license in Metcalf. The implication is that, but for the insurer certifying the policy in Metcalf, the at-fault driver would not have been able to obtain drivers' license, and the ensuing accident may have been avoided.

Likewise in the instant case, the intention of S.C. Code Ann. § 42-1-415 (1997) is to prevent general contractors from hiring uninsured subcontractors, thereby hopefully preventing accidents without insurance coverage from occurring. In addition, the requirement of a certificate of insurance encourages subcontractors to obtain insurance because the inability to produce a certificate of insurance to a general contractor precludes many from being hired for the job sought, thereby furthering its objective.

Had Quality and Spectrum never been issued the certificates of insurance that created coverage, the accidents that are the subjects of this appeal would likely have been covered by workers' compensation insurance because the client companies of Quality and Spectrum would not have hired them, rather opting to use PEOs who could show workers' compensation insurance. Thus, even if coverage by *Estoppel* does not apply, the reliance on these certificates by third parties should be found to have created coverage.

S.C. Code § 42-7-200, which created the UEF, states, in part, "This fund is created to ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees in accordance with this section." (*Id.*, *emphasis added*) Conversely, S.C. Code Ann. § 39-31-20(8) (2009) states that "covered claims" involve "insolvent insurers." With respect to the claims involved in this appeal, the PEOs paid premiums and thought that they had acquired coverage for their employees and were not in violation of the Workers' Compensation Act; however, Realm was an admitted "insolvent insurer," as anticipated by Title 38. But for the insolvency of Realm, this appeal would likely have never come before this Court because Realm most-likely would have paid these claims, as they had paid past claims involving the employees of Quality and Spectrum. Thus, it was the insolvency of Realm that has caused undue delay in the resolution of 11 claims for nearly nine years. Respondents submit that this situation represents precisely what S.C. Code § 38-31-20 and the creation of the SCPCIGA was intended to prevent.

In addition, S.C. Code Ann. § 42-7-200 (2007) gives the UEF the power to attempt to recoup some of the monies paid on claims due to employers failing to obtain coverage by giving it the right of attachment against the assets of said uninsured

employers. Conversely, the SCPCIGA is funded by taxes paid by its members who are required to join the Association in order to legally write insurance in South Carolina. Thus, the members of the SCPCIGA have opted to assume the risk that its co-members may, unfortunately, become insolvent when they choose to write insurance in this jurisdiction and join the Association.

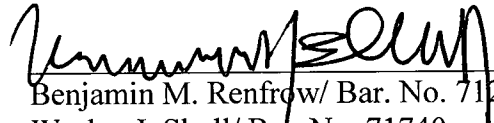
In the instant cases, the PEOs had already paid insurance premiums to Realm. Attachment proceedings against them by the UEF would effectually require them to pay twice for these accidents due only to Realm's insolvency. In fact, it would have been out of these premiums that Realm paid its taxes to Appellant in anticipation that it or a co-member would become insolvent. In addition, S.C. Code Ann. § 38-31-90 (2007) gives Appellant the right to seek repayment against any assets left of Realm, the insolvent insurer in this case. The UEF does not have such power. It would be wholly unfair to place the burden of Realm's insolvency on the UEF, a fund not created for or equipped to deal with this situation, who would ultimately seek enforcement against the PEOs who have already paid their premiums in anticipation that work accidents could occur. The result would be a windfall to Appellant and its members.

The Circuit Court was correct in weighing the policy-driven reasons in determining if the doctrine of substantial compliance applies to this case and if Appellant should be the fund ultimately responsible.

## CONCLUSION

Coverage should be found for the claims that occurred during the specified period from between July 22, 2003, and November 7, 2003, due to coverage by *Estoppel*, as argued by the UEF. However, insurance policies covering these claims should also be found by interpreting the certificates of insurance issued to the PEOs, coupled with the acts of Mark Sioma, who was an agent of Realm, and the fact that claims under these policies had already been paid. In addition, several policy-driven reasons indicate that coverage should be found.

For the above reasons, the Circuit Court should be affirmed with respect to the coverage issues in this claim.



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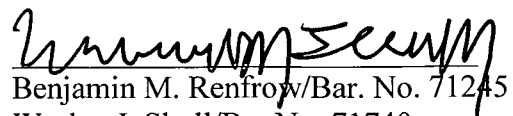
South Carolina Property and Casualty  
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The undersigned certifies that the Respondent's Final Reply Brief complies with Rule 2011(b) of the South Carolina Appellate Court Rule.

  
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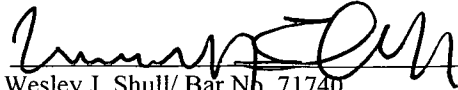
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