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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Circuit Court

APPEAL FROM CHARLESTON CIRCUIT COURT

Mikell Scarborough, Circuit Court Judge

Circuit Court Case No.: 2015-CP-10-06684
Appellate Case No.: 2025-001339

Palmetto Contract Services, Inc. .....Appellant,

v.

Zurich American Insurance Company of Illinois .....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the Circuit Court err as a matter of law in finding that there was no genuine issue of material fact on the issue of whether Respondent's employees were improperly classified for the purpose of determining the appropriate workers compensation premiums?**

STATEMENT OF THE CASE

This case arises out of a Summons and Complaint filed by Respondent, Zurich American Insurance Company of Illinois ("Zurich") December 11, 2015, seeking to enforce a reclassification of Respondent's, Palmetto Contract Services, Inc. ("Palmetto"), employees in determining workers compensation insurance premiums for the workers compensation insurance policy it issued to Appellant for the 2012- 2013 policy period.[1] (R., p. ___). A timely Answer was filed by Appellant on February 16, 2016. Appellant moved to Amend its Answer and after an order allowing Respondent to do so, the Amended Answer and Counterclaim was filed September 29, 2017. (R., p. ___). A Reply to the Amended Answer and Counterclaim was filed by Respondent on October 26, 2017. (R., p. ___). An issue unrelated to the issues in this appeal (the grant of a motion to strike jury trial demand) were appealed to the Court of Appeals with the Court of Appeals filing its remittitur back to the Circuit Court on August 3, 2021. On December 29, 2021, the undersigned filed his notice of appearance replacing Appellant's prior counsel, William A. Scott and the case moved forward with discovery. Respondent filed a motion for summary judgment February 12, 2025. (R., p. ___). The court issued an order dated June 20, 2025 granting Respondent's motion for summary judgment. (R., p. ___). Appellant filed a timely motion to reconsider on July 25, 2025 (R., p. ___) which was denied by an order dated July 26, 2025. (R., p. ___). A timely notice of appeal was filed by Appellant.

STATEMENT OF FACTS

This is a case involving classifications of work for the various employees working for Appellant for use in determining workers' compensation premiums in the workers' compensation insurance policy provided by Respondent. On January 12, 2012, Respondent and Appellant entered into a contract whereby Respondent agreed to provide certain workers' compensation and

[1] This workers' compensation policy also covered Deytens Boatyard, Inc. which is an affiliate company of Palmetto Contract Services, Inc. Some payroll and other documents show Deytens Boatyard, Inc. as the employer.

employer's liability insurance coverage to Appellant for which Appellant agreed to pay the premiums (the "Contract"). (R., p. ___).

Under the terms of the Contract, Respondent charges an initial premium based on projected classifications and then has the right to conduct an audit and revise the premium if certain initial classifications were not proper or if the projected time employees worked under a certain classification were not accurate. (R., p. ___). Respondent had been providing workers' compensation coverage for Appellant from at least the 2009-2010 policy year through the 2012-2013 policy year. Respondent audited the 2012-2013 workers' compensation policy for Appellant and Appellant disputed the amount Respondent claims it is owed by Appellant leading to Respondent bringing this action.

It is important to note that there were audits for policy years 2009-2010, 2010-2011 and 2011-2012. As shown below, there are very significant inconsistencies in how Respondent categorizes the same type of work in the 2012-2013 audit than they did in the prior year's audits.

Generally, work by a company's employees is to be put into a category that best describes the type of work they are doing. Many times, an employee will split time between different types of work and then it needs to be determined what portion of the employee's work is for which category of work. Other times, employees that can be considered working under Federal law, or the United States Longshore & Harbor Act ("USL&H"), will be properly categorized under a Federal code instead of a State code for exactly the same work. Both of these can substantially differentiations can significantly affect the workers' compensation premiums charged. These are the issues that are at the heart of this case.

The Contract entered into between Respondent and Appellant was similar to contracts entered into between Assurance Company of America, a subsidiary of the Plaintiff, and/or

Respondent, for the years 2009 - 2010, 2010 - 2011, and 2011 - 2012. For each of the aforesaid policy periods, Respondent and/or Assurance agreed to provide coverage under NCCI Class Codes 3040, 3040U, 6824F, 6834. 7842 and 8810. (see generally deposition of Armando Lantigua, R., p. ___; specifically, p.16, l 10 – p. 27, l. 15, R., p. ___). During each of these policy periods. Respondent and/or Assurance charged Appellant premiums and assigned employees to the different class codes. In connection with the policy period for 2012-2013, Respondent represented that it would provide insurance and invoice Appellant based on the class codes set forth in the agreement, as it had done during the previous three policy periods.

On or around April 4, 2013, after the policy period, a policy period with no workers' compensation claims being reported, Respondent performed an audit of Appellant's books. The audit was performed by Evelyn Wyatt on behalf of Respondent. (R., p. ___). The audit summary separated the work performed by Appellant into different work categories corresponding to the difference class codes, including workers under class codes 3040, 6824F, 8742, and 8810, as it had done during the previous years. (R., p. ___). The audit summary was provided to Appellant on or around April 4, 2013. (R., p. ___).

Two days later, on or around April 6, 2013, Respondent revised the audit summary and took all of the labor originally classified under 3040 and 6834 and added it under code 6824F and made a minor change to the work under class code 8810. Below is a summary of the changes from the revised audit. (R., p. ___).

Class Code	Estimate	Original Audit	% change	Revised Audit	Prem. Rate Per $1K
3040()	$100,000	$626,538	-100%	$0	13.62
3040(F/U)	$20,000	$0	-100%	$0 (Removed)	23.02
6824(F)	$50,000	$132,479	+1410%	$754,904	**27.42**
6834()	$460,000	$0	-100%	$0	8.35
8742()	$50,000	$36,356	-27%	$36,356	1.04
8810()	$100,000	$199,320	+103%	$203,433	.59

During the policy periods of 2009-2010, 2010-2011, 2011-2012, Respondent took the position that class code 3040 did apply to Appellant boatyard employees. In 2012, Assurance Company of America, a subsidiary of Respondent, filed a complaint, case no. 2012-CP-10-284, in which it took the position that a portion of Appellant's operations were covered under class code 3040. (R., p. ___).

On or around June 18, 2013, Respondent invoiced Appellant $158,744.00, as a result of the revised audit and the change from the categorizing work under 6824F as opposed to 3040. (R., p. ___). Note how much higher the premium rate per $1,000 of wages is for code 6824F as opposed to 6834 and 3040. The premium rate for 6824F is more than three times the rate for 6834 and more than twice the rate for 3040 giving Respondent a large financial incentive to want to move as much payroll as possible to the 6824F code. This case does not involve a dispute over the classification of the clerical and sales employee, but only the boatyard workers. A 30(b)(6) representative of Respondent was deposed May 25, 2022 and provided testimony that Respondent itself has believed that the correct classification codes are not as they as claiming in this case. (See Depo. of A. Lantigua as Exhibit "A" with exhibits to the deposition) (R., p. ___).

Appellant took the position that the amount claimed by Respondent is incorrect due to inaccuracies in the audit, audit worksheets, and labor codes. Specifically, Appellant's machine shop workers should have been more appropriately classified under code 6832 (Machine Shop NOC) instead of code 3040 (Iron or Steel Fabrication/Ironworks). Appellant's machine shop works in connection with jobs on "pleasure craft" (recreational vessels) on the yard, so payroll generated for this work should be assigned to the overall yard Boat Building or Repair, State Code 6834. Respondent had a small amount out of state payroll (out of state jobs) on commercial vessels where payroll was classified under 6824F. Appellant contends this amount should be assigned to

state act code 6834 instead because Appellant's policy did not include Federal Act coverage on employees outside the State of South Carolina. Only South Carolina is shown on the policy USL&H Endorsement, so only USL&H claims in South Carolina are covered. (See affidavit of William R. Deytens, Jr.) (R., p. ___).

STANDARD OF REVIEW

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the nonmoving party is entitled to judgment as a matter of law. Cunningham ex. Rel Grice v. Helping Hands, Inc. 352 S.C. 485, 575SE2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences that can be reasonably drawn from the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Cunningham, at 491. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Id.

Even when there is no dispute as to the evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied. Wilson v. Style Crest Products, Inc. 367 S.C. 653, 627 S.E.2d 733 (S.C. 2006).

ARGUMENT

The circuit court erred as a matter of law in finding that there was no genuine issue of material fact on the issue of whether respondent's employees were improperly classified for the purpose of determining the appropriate workers compensation premiums.

A. The contradictions among Respondent's own audits from 2009-2013 along with a genuine dispute as to how much of the payroll should be allocation to boat repair

creates genuine issues of material fact for a fact finder to determine. As a result, summary judgment was not appropriate.

As early as the 2009-2010 audit conducted by an outside vendor, Overland Solutions, Respondent noted that there was work being performed in categories 6834, 6824F, and 3040 as well as the sales and office categories. (R., p. ___). Respondent reviewed the audit and raised no discrepancies to Overland or Appellant (See Depo. of A. Lantigua, p. 25, l. 16 – p. 27, l. 15 with exhibits referenced therein. (R., p. ___). This 2009-2010 audit also notes that "there is an interchange of labor between these codes and that the insured's payroll reflects time and payroll assigned to each classification. (See Depo. of A. Lantigua, p. 29, l. 19 – p. 30, l. 1, with exhibits referenced therein (R., p. ___). Respondent believes the operations since 2009 have been consistent from then through the audit period involved in this case (See Depo. of A. Lantigua, p. 23, l. 14 - 20, with exhibits referenced therein (R., p. ___). This 2009-2010 audit classifies the vast majority of the boatyard work under code 3040 which is completely inconsistent with Respondent's position in this case that all of the boatyard work should be classified under the most expensive category, 6824F. (R., p. ___).

Ms. Lantigua testified that Respondent's auditor, Evelyn Wyatt, conducted an in person audit at Appellant's facility on April 4, 2013 and produced an audit largely consistent with the prior year's audits allocating most of the boatyard work to category 3040 (See Depo. of A. Lantigua, p. 32, l. 12 – p. 33, l. 10, Ex. 5 (R., p. ___). Two days later, after her supervisor, Mr. Lantigua, opines on what he believes are the proper classifications, Ms. Wyatt produces a modified audit that contradicts these classifications of the boatyard workers and four prior years-worth of audits by Respondent by categorizing all of the boatyard workers into 6824F. (See Depo. of A. Lantigua, p. 33, l. 11 – p. 35, l. 18, Ex. 6 (R., p. ___).

The explanation for the modified audit two days later given by Mr. Lantigua is that the whole company should be categorized into one category and not the individual employees. (See Depo. of A. Lantigua, p. 34, l. 6 – p. 35, l. 3, (R., p. ___). If all of the employees of Appellant should be classified as one as Mr. Lantigua stated, even the clerical and sales employees should have been lumped into 6824F, but that's not what Respondent did. Even the modified audit broke out the clerical and sales employees into different categories contradicting Mr. Lantigua's reasoning for lumping the boatyard workers into a single category. It is hard to imagine that Overland and Respondent both engaged in dividing the boatyard employees work into different categories for four years prior and they were all wrong. Mr. Lantigua went so far as to acknowledge that it is important for Respondent to be consistent with how employees are classified from year to year to the same employer. (See Depo. of A. Lantigua, p. 35, l. 19 – 23 (R., p. ___). This shows that there are two auditors within Respondent, Overland and Ms. Wyatt, who disagree with Mr. Lantigua and Respondent's current position creating a legitimate conflict as to the proper classification of the boatyard workers for a fact finder to determine. On page 10-11 of its order, the trial court simply holds that "Zurich has offered a meaningful factual basis on which this Court can find for Zurich on... (2) Palmetto's failure to pay Zurich as agreed...". No explanation is offered to refute this argument or to explain why there is no genuine issue of material fact on this issue. Simply having a factual basis would be sufficient at a trial, but not for summary judgment. As a result, a genuine issue of material fact exists for a fact finder to determine, summary judgment should not have been granted, and this court should reverse the trial court's grant of summary judgement, its denial of Appellant's motion to reconsider, and remand this case for trial.

B. The new USL&H definition of employee excludes most of Respondent's boatyard work. The definition went into effect the month this policy period began and Respondent

did not consider this change in the law when categorizing all of Respondent's workers into the 6824F category.

Another reason why Respondent's determination of the classification of the boatyard workers is incorrect is the fact that Respondent did not consider the change in the law that went into effect January 30, 2012 changing who is considered an employee under the USL&H when making its decisions. Mr. Lantigua testified that he believed all of the boatyard employees were under the Federal act, or USL&H, because Appellant qualified as a USL&H company due to its location and activities. (See Depo. of A. Lantigua, p. 42, l. 23 – p. 48, l. 23, (R., p. ___). The verbiage for the State category for boatyard workers, 6834, and the Federal category 6824F, as set forth in the Scopes Manual are verbatim with the only difference being State employees are classified under 6834 and USL&H employees are classified under 6824F. (R., p. ___). As stated above, there is a significant difference in the premiums for the State and Federal categories with the Federal category requiring much higher premiums. Mr. Lantigua reasoned that because the boatyard employees were under the USL&H, the proper category would be 6824F instead of the much less expensive, 6834. (See Depo. of A. Lantigua, p. 43, l. 10 – p. 45, l. 14, (R., p. ___).

20 CFR §701.502, effective January 30, 2012, the month the Contract was entered into, excluded from Longshoremen's and Harbor Workers' Compensation individuals when the individual's date of injury is after February 17, 2009, the injury is covered under a State workers' compensation law, and the individual is employed to: 1) building any recreational vessel under 65 feet in length, or 2) repairing any recreational vessel, or 3) dismantling any recreational vessel to repair it. (See exhibit 7 to depo. of A. Lantigua, (R., p. ___). Mr. Lantigua testified that he did not consider this law when deciding to classify all of Appellant's boatyard employees as Federal under the USL&H. (See Depo. of A. Lantigua, p. 51, l. 3 – 14, (R., p. ___). Mr. Lantigua went onto

testify that Appellant did repair work on both recreational and commercial vessels and Respondent's own description of operations as show in Ex. 1 to Mr. Lantigua's deposition states, "Insured performed a small amount of work on commercial boats." (R., p. ___). Despite acknowledging that most of Appellant's work is on recreational boats, Respondent made no effort to allocate boatyard work payroll between recreational vessels and commercial vessels. (See Depo. of A. Lantigua, p. 55, l. 4 – 7 (R., p. ___). (See affidavit of William R. Deytens, Jr. (R., p. ___). Because it is undisputed that most of Appellant's boatyard work is on recreational boats, these employees are excluded from USL&H and should properly be categorized as 6834 (State Code) and not 6824F (Federal Code). This creates at least reasonable inferences for a fact finder to determine that lumping all of Appellant's boatyard employees into the Federal category 6824F is not correct. Again, on page 10-11 of its order, the trial court simply holds that "Zurich has offered a meaningful factual basis on which this Court can find for Zurich on... (2) Palmetto's failure to pay Zurich as agreed...". No explanation is offered to refute this argument or to explain why there is no genuine issue of material fact on this issue. As stated above, simply having a factual basis would be sufficient at a trial, but not for summary judgment. For these reasons, a genuine issue of material fact exists for a fact finder to determine, summary judgment should not have been granted, and this court should reverse the trial court's grant of summary judgment, its denial of Appellant's motion to reconsider, and remand this case for trial.

CONCLUSION

Two auditors within Respondent that Respondent's expert admits are well qualified to classify employees properly, Overland and Evelyn Wyatt, disagree with Respondent's expert and Respondent's new classification position creating a legitimate conflict as to the proper classification of the boatyard workers for a fact finder to determine.

Respondents own expert, Armando Lantigua, conceded that his decision to categorize Appellant's employee under the Federal category 6824F was based on a fundamental misunderstanding of the law that had recently changed. 20 CFR §701-502, effective January 30, 2012, excluded employees repairing recreational vessels from the Federal classification and Mr. Lantigua did not realize this change when making his determination. Respondent' own description of Appellant's work is that the vast majority of Appellant's work is recreational boat repair. As a result, the proper classification for Appellant's boat workers is 6834 (State code) and not 6824F (Federal code). For these reasons, there is a genuine issue of material fact for a fact finder to consider, this court should reverse the grant of summary judgment in Respondent's favor and remand this case for trial.

Respectfully submitted,

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