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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Alison R. Lee

Circuit Court Judge

Appellate Case No. 2023-001663

Circuit Court Case No. 2014-CP-40-02496

South Carolina Workers' Compensation Commission, ……..Respondent,

v.

WestPoint Home, LLC, ……..Appellant.

FINAL BRIEF OF RESPONDENT

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July 9, 2024

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INTRODUCTION

This is a simple case. There are two fundamental questions. First, did the Commission act appropriately in negotiating security given by WestPoint Stevens after that company went bankrupt and advised the Commission that it was not going to make any further payment on its self-insured workers' compensation claims? Second, is the Commission properly holding those funds for the benefit of WestPoint Stevens's former employees, given the significant likelihood that some of them will present with a latent occupational disease that will require medical and disability payments in the future, in light of the fact that this security is the only money available to protect all of WestPoint Stevens former employees?

The Circuit Court answered these two questions in the affirmative, as should this Court.

STATEMENT OF THE CASE

WestPoint Home, LLC ("WestPoint Home") is the successor of an entity that purchased the assets, but not the liabilities, of WestPoint Stevens, Inc. ("WestPoint Stevens") in a bankruptcy sale in 2005. WestPoint Stevens was created by merger in 1988 when WestPoint Pepperell acquired J.P. Stevens's Abbeville, Calhoun Falls, Clemson, and Seneca plants. At that time, WestPoint Stevens became a self-insured employer under the Workers' Compensation Act. Uninsured employers are required to post security with the South Carolina Workers' Compensation Commission ("Commission") to fulfill the statutory requirement to maintain coverage for their employees. In 2003, WestPoint Stevens filed for Bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. Shortly thereafter, it amended its existing letter of credit to 1.8 million dollars to continue operating as a self-insured employer in South Carolina.

In 2005, after it was unable to confirm a reorganization plan, it liquidated its assets. A predecessor of WestPoint Home, LLC, an entity owned and controlled by American Real Estate Holding Limited Partnership, purchased some of those assets, including the Calhoun Falls, Clemson, and Seneca plants. WestPoint Home also collateralized West Point Stevens' various existing letters of credit, which included the 1.8-million-dollar letter of credit provided by WestPoint Stevens to the South Carolina Workers' Compensation Commission to cover its uninsured employer workers' comp liability for its South Carolina employees.

On August 15, 2005, WestPoint Stevens it notified the commission that "workers' compensation liabilities asserted against WestPoint Stevens were not liabilities assumed by the Purchaser" and that "no further payments will be made with respect to workers' compensation claims asserted against WestPoint Stevens, Inc." Upon receipt of this notification, the Commission, following its regular procedure, drew down the security and deposited it with the State Treasurer.

More than seven years after the Commission drew down the security, WestPoint Home first inquired about the funds that had been drawn down. Thereafter, a dispute arose as to whether WestPoint Home was a proper successor to obtain information about or to have any interest in the funds.

After several rounds of communication with WestPoint Home, the Commission filed a declaratory judgment action on April 17, 2014, regarding its obligations to provide WestPoint Home with the requested information. West Point Home counterclaimed on May 22, 2024, seeking an accounting and an order that it was entitled to receive all monies retained by the State. It thereafter amended its Counterclaim to seek interest on the funds held by the State Treasurer for WestPoint Stevens's former employees' potential claims. Ultimately, the parties reached an

agreement where WestPoint Home was given access to certain information and additional information was obtained from a third-party contractor of the Commission[1]. Thereafter, the Court conducted a bench trial regarding the disposition of the funds. The Trial Court, by Order of September 25, 2023, held that the funds were properly negotiated by the Commission and that it was proper for them to be retained so long as additional claims by former employees exposed to asbestos were actuarily possible. WestPoint Home did not file a Rule 59(e), SCRCP motion. It filed its appeal of the Circuit Court's Order on October 23, 2023. WestPoint Home's appeal also purports to appeal the Circuit Court's April 26, 2019, Order granting the Workers' Compensation Commission Summary Judgment on WestPoint's request to examine non-public records of the Commission.

FACTS

WestPoint Stevens was a textile manufacturer that utilized natural and asbestos fibers in its manufacturing processes in textile mills that operated in South Carolina and employed South Carolina Workers. WestPoint Stevens was a self-insured employer pursuant to *S.C. Code Ann.* §42-5-20.

The South Carolina Workers' Compensation Commission was created to ensure that an employee injured on the job in South Carolina receives the proper medical care and compensation for his or her injuries. (R. p.128, lines 15-18). The Commission also ensures that employers have proper coverage to pay for claims. (R. p.128, line 20-p. 129, line 1.1). Self-insured employers are required to post security for their claims with the commission. Acceptable forms of security

[1] This was after the Court entered Summary Judgment on this claim in favor of the Workers' Compensation Commission on April 26, 2019.

include either a surety bond or letter of credit. (R. p.130, lines 13-19). The Commission utilizes a formula to ascertain the required amount of surety, but that formula operates for an ongoing business. (R. p.120, line 11-p. 131, line 16). Occupational illnesses are treated differently. Once an occupational illness is diagnosed, there is a two-year window to file a claim. (R. p. 132, lines 5-8).

In the event that an insolvent company has claims in excess of their surety amount, then the injured worker has no funds from which he or she can be compensated (R. p. 134, lines 7-9). When a self-insured goes bankrupt, the Commission draws down the letter of credit to calculate potential future claims based on the type of business that the industry or manufacturing plant is. (R. p.134, lines 17-20).

The Commission drew down WestPoint Stevens' letter of credit because they notified the Commission that they were not going to be responsible for payment of further Workers' Compensation Claims. (R. p.135, line 22-p. 136, line 1.1). The Memorandum of Understanding that the Commission relied upon expressly provides that "The Commission may, at any time, draw on the Letter of Credit if needed to pay any workers' compensation claim and claims administration expenses which are the responsibility of the Employer." (R. p. 225). The Exhibit also provides that "If the Commission is notified that the Letter of Credit is being canceled or will not be renewed and a new letter of credit or surety bond acceptable to the Commission is not filed with the Commission, the Commission may, at its discretion, draw on the Letter of Credit" (R. p.225).

The Commission was familiar with the type of business conducted by WestPoint Stevens and knew that it had potential claims for exposure to respiratory claims for inhaled organic or inorganic fibers. (R. p.136, lines 16-19). The Commission interpreted the correspondence from

WestPoint Home that said " no further payments will be made with respect to the Workers' Compensation claims asserted against WestPoint Stevens, Inc. as meaning that the letter of credit would not be renewed and that the Commission had to draw down the letter of credit to ensure that the funds would be set aside for any future claims to be paid. (R. p.137, lines 18-19).

Currently, the Commission has 450 claims filed for occupational diseases with dates of exposure dating back to the 1950s. Those cases are currently pending before the Commission. (R. p.138, lines 18-22). The Commission gets no benefit from holding the funds from the Letter of Credit – only the potential claimants who may suffer from these occupational diseases. (R. p.140, lines 10-11).

WestPoint did not object to the drawdown of the Letter of Credit in 2005 and first inquired about it in 2013. (R. p.141, line 15-p. 64, line 13, p. 579). The Commission is bound by statute and regulations to ensure that funds are available to pay for claims by employees, including claims for occupational illnesses like byssinosis and asbestosis. (R. p.143, lines 7-23).

The respondent's Actuary, Mr. Burkhalter, explained how there is a substantial likelihood of future latent claims to be assessed against WestPoint Stevens by its former employees. His testimony is uncontroverted[2]. He testified that the average latency period of work-exposed mesothelioma is 43.4 years. (R. p.180, lines 22-24) (R. p.185, lines 14-17). To a reasonable degree of actuarial certainty, there are a minimum of 1,929 employees covered by the WestPoint Stevens Workers Compensation liability who are still living and who were exposed to asbestos at the plants in question. (R. p.184, lines 12-13). Mr. Burkhalter testified that there is a 98.6% chance that a 20-year-old employee in one of those plants in 2005 who was exposed to asbestos could have mesothelioma and not know about it. Going forward to 2030, there is still a 90.8% chance that the

[2] Mr. Burkhalter's complete report is included in the record as Trial Exhibit 50.(R. p. 879-886)

disease will remain latent. Even going to the year 2045 there is still about a 50% chance that employees may have the disease, but that it is still latent. (R. p.186, line 6-p. 187, line 6). He concludes that there are "thousands of workers that worked at these plants that were exposed to asbestos and are still alive. And that just the fact they might not have had claims in 16 years that's not an indication that they're not out there. Our statistics show that's to be expected. So, we can't quantify the chance of one of these claims popping up. We can only say that there are a lot of people out there that were exposed. And if they were to contract it, it is very, very likely that sitting here today, we wouldn't know about it." (R. p.187, lines 7-21). He also notes that there is little credibility that with the latency that mesothelioma has, that past experience over a number of years has any actuarial credibility. (R. p.188, lines 2-6).

There are several undisputed facts. The Commission drew down on the Letter of Credit after receiving notice from WestPoint Stevens that it was not paying for any additional Workers' Compensation Claims (R. p.569). The letter of credit was issued originally by NationsBank, which was succeeded by Bank of America. The letter was amended on August 1, 2003 (Trial Exhibit 15)(R. p.227), to increase the aggregate amount to $1,800,000.00. On August 15, 2005, WestPoint Stevens wrote the South Carolina Workers' Compensation Commission a letter that stated, "Please be advised that pursuant to the Sale Order and APA[3], workers' compensation liabilities asserted against the Debtors were not liabilities assumed by the Purchaser. Therefore, no further payments will be made with respect to workers' compensation claims asserted against WestPoint Stevens, Inc.". (R. p.586) The Commission drew down the entire letter of credit after receiving this notice. Funds were placed in a WestPoint Stevens Trust Fund Account 41F170000 in the office of the South Carolina State Treasurer. on August 17, 2005.

[3] "APA" i.e. Asset Purchase Agreement (R. p.260-334)

Between 2005 and 2013, claims totaling over one million seven hundred thousand dollars were paid for WestPoint Stevens employees. (R. p.607). Four claims were made for Asbestosis in 2011[4]. (R. p.638, p.640, p.642, p.643). There have been no other claims since 2011. With interest, the balance in the fund held by the treasurer was $1,698,630.50 at the end of FY2022 (R. p.668). Claims amounting to $1,709,438.31 were incurred on the claims run provided by the independent administrator[5]. After the drawdown, the first contact from WestPoint home was alleged to be a telephone call in 2012. (R. p.943). The first written inquiry from WestPoint Home was dated February 22, 2013. (R. p.578).

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable but is determined by the nature of the underlying issue." *Felts v. Richland Cnty.,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) Here, the Appellant seeks a declaration of rights under statute and regulation as well as an accounting. As to questions of law, this court's standard of review is de novo." *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n,* 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019). Our standard of review extends to correct errors of law, but we will not disturb the trial court's factual findings as long as they have reasonable support in the record. *Seago v. Horry Cnty.*, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008). "In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Smith v. Auto-Owners Ins. Co*., 377 S.C. 512, 515, 660 S.E.2d 271, 272 (Ct. App. 2008) "We will not disturb the trial court's findings of fact unless those findings are wholly unsupported by the evidence or

[4] While demonstrating that latent claims are likely to arise, none of these claims were charged against the self-insured WestPoint Stevens, because it was determined that they originated in the Whitmire Plant, which was not a part of the self-insured group.

[5] This report includes claims that predate the drawdown. (R. p. 601-607)

controlled by an erroneous conception or application of the law." *Id*. "However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." *Auto-Owners Ins. Co. v. Rhodes,* 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013).

ARGUMENT

I. The Commission properly negotiated the Letter of Credit

More than seven years after the Commission drew the funds from the Bank of America letter of credit to protect former South Carolina employees of a bankrupt WestPoint Stevens entity, its successor WestPoint Home first inquired about the use of the funds. The Commission's Executive Director explained the decision during the trial that the Commission "drew down the credit because there was no guarantee there would be any money in the future because the company was nonexistent anymore" [sic]. (R. p.109, lines 16-18). Mr. Cannon goes on to indicate that the Commission's policy is to draw down the letter of credit when the company went out of business. (R. p.110, lines 4-5). The Commission's internal policy is rational, consistent with the Commission's statutory and regulatory authority, and acts to fulfill the Commission's obligations relating to uninsured employers because there is no source of funds beyond that security to pay all future claims. Regulation 67-1505 A gives the Commission wide latitude in determining the amount of a reserve and the basis enumerated by the Commission here of the actuarial likelihood of a substantial number of potential claim surely demonstrates that the present amount held, as Mr. Cannon testified is proper considering that the regulation provides that "The amount of the bond is determined by the commission based on an analysis of the total self-insurance program including but not limited to an analysis of the applicant's excess insurance, loss history and financial condition." WestPoint Stevens has many potential claims and a limited pot of money to service claims that can go many years in the future.

Two sections of Regulation 67-1507 D further illustrate the propriety of the Commission's decision to negotiate the letter of credit. First, the Commission, as Mr. Cannon testified, interpreted the letter stating that WestPoint Stevens was no longer going to pay for any claims as an indication that the self-insurer was not going to continue to comply with its obligations. Moreover, that was the only information provided contemporaneously. Additionally, Regulation 67-1507 D(5) allows the Commission to exercise the letter of credit at any time "if the proceeds are needed for payment of a claim that occurred during the self-insured period." Here, the Commission made that determination based on the nature of WestPoint Stevens business, the exposure of its plant employees to organic and inorganic dusts and the substantial likelihood that such exposure, in the Commission's experience, would lead to substantial latent claims in outlying years. The undisputed actuarial testimony at the trial affirms the wisdom of this judgment and the fact that more funds than were then available might be needed for claims that might arise as late as 2045. (R. p.186, line 25-p187, line 6).

Here, WestPoint Home does not dispute that the Commission properly drew down a part of the security to pay claims. However, it questions the Commission's right to draw down all of the security upon bankruptcy to ensure that potential claimants' interests are protected—its very purpose in managing the insolvent employer's funds and claims. Based on the facts and law in this record, the Commission acted within its rights and pursuant to its legal obligations in negotiating the Letter of Credit and holding the proceeds.

II. WestPoint Home's claims are untimely.

The Commission never asserted that WestPoint Home, LLC is liable for any claims made by WestPoint Stevens employees. Instead, the reason for negotiating the letter of credit is that

WestPoint Home is not a successor employer to WestPoint Stevens. In attempting to recover the funds negotiated, WestPoint Home seeks the benefits of being a self-insured employer without any of the responsibilities that attach to that role.

At the time that the money was drawn down, WestPoint Stevens did not object nor did WestPoint Home, LLC. It waited for seven plus years and then sought to reverse WestPoint Stevens (and its other predecessor's) acquiescence to the negotiation of the letter of credit by the Commission.

At best, its argument is that the Commission breached an implied contract created by the MOU. Notably, the MOU was not assigned to WestPoint Home. The document was not under seal and its rights to make that claim expired three years after the letter of credit was negotiated.

The alleged breach stems on the meaning of Section 4 of the MOU (R. p.225) which provides "The Commission may, at any time, draw on the Letter of Credit if needed to pay any workers' compensation clam and claims administration expense which are the responsibility of the Employer." Appellant argues that this language should be interpreted not to apply to future claims – the clear language does not state that. Moreover, the statute of limitations in this matter would be three years. "An action for breach of contract must be brought within three years from the date an action accrues." *S.C. Code Ann*. §15-3-530(1) "The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008). Thus, any claim that the letter of credit was improperly negotiated is time-barred.

III. The Commission's retention of the funds in the State Treasurer's custody is proper because there is a substantial likelihood of latent occupational injury claims against WestPoint Stevens.

A. WestPoint Home, LLC misinterprets the Workers' Compensation Act.

There are two relevant sections in the Act applicable to filing claims for an occupational disease such as byssinosis or mesothelioma. *S. C. Code Ann. §42-15-40* provides that " ... . however, for occupational disease claims the two-year period does not begin to run until the employee concerned has been diagnosed definitively as having an occupational disease and has been notified of the diagnosis. This statute recognizes the latent nature of certain occupational diseases and the fact that they can take many years to appear after an employee is infected[6]. WestPoint Home suggests that this time is limited by *S.C. Code Ann*. §42-11-70, which it incorrectly characterizes as a "statute of repose." That section reads:

> § 42-11-70 Time in which disease must have been contracted.
>
> Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

WestPoint Home attempts to conflate the time for contracting the disease enumerated in *S.C. Code Ann.* §42-11-70 with the time for making a claim; those dates are not the same. The statutory framework provides that the evidence must show that an employee contracted a pulmonary disease arising out of the inhalation of organic or inorganic dusts within two years after the last exposure.

[6] The uncontroverted testimony in the record before the court is that Mesothelioma (an occupational disease related to asbestos exposure, has an average latency period of 43.4 years – meaning that an employee can contract the disease and be unaware that he or she has it for more than four decades.

However, since that is an occupational disease, the statute of limitations does not run until two years after he or she is definitively diagnosed with the disease, presumably with that diagnosis dating the onset of the disease to have been within two years of the last exposure to the dusts.

The plain reading of the statutes coupled with the uncontroverted actuarial information in the record demonstrate the profound need for the Commission to retain the funds on deposit to cover potentially serious occupational disease claims until actuarial data demonstrates that no such claims are likely to arise. Our Courts have ruled consistently with this interpretation. In *McCraw v. Mary Black Hosp*. 350 SC 229 565 S.E 2d 286 (2002 our Supreme Court affirmed the Court of Appeals in noting that the Statute of limitations requires that the employee be: (1) "diagnosed definitively as having an occupational disease," and (2) "notified of the diagnosis," *McCraw, supra,* at 350 S.C. 235-236 The cases interpreting Section 42-11-70 all relate to when the employee allegedly contracted the disease – not when it was diagnosed and further support the Commission's and the Lower Court's interpretation of the statutes. *See. e.g. Spires v. Mt. Vernon Mills, Columbia, Div*., 277 S.C. 300, 286 S.E.2d 379 (1982) finding that the employee contracted the disease within two years but waited six years after diagnosis to file a claim, that he was barred by the normal statute of limitations and *Parker v. Asbestos Processing, LLC*, 201 U.S.Dist. LEXIS 115094 (D.S.C. June 30, 2015 *aff'd sub. Nom, Southern v. Sishoff*, 675 Fed Appx. 239 (4th Cir. 2017) where in a legal malpractice case, the court held that the plaintiffs did not contract asbestosis within two years after the last date of exposure. Notably, that case is distinguishable, because the Court's holding was dicta, and the issue was one of legal malpractice rather than the administration of the Workers' Compensation Act. There the Fourth Circuit acknowledged that there was no South Carolina law on the statute and substituted its judgment. Notably, that decision is neither

correct nor persuasive. The only reasonable construction of the statutes is that *S.C. Code §42-11-70* is not a statute of repose.

B. Constructing 42-11-70, as WestPoint suggests, is antipathetic to the Statutory Scheme of Workers' Compensation.

The Workers' Compensation Act is a comprehensive scheme created to provide compensation to employees injured by accidents arising out of and in the course of their employment. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980). "The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015). (citing *Wigfall v. Tideland Utils., Inc*., 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003)).

The concept of workers' compensation is "founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer—employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of employment." *Parker*, *id* at 275 S.C. 69-70, 267 S.E.2d 526 (quoting *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 530-31, 115 S.E.2d 57, 66 (1960)) (internal quotation marks omitted). "The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee." *Id*. "This quid pro quo approach to [workers'] compensation has worked to the advantage of society as well as the employee and the employer." *Id.*

It would be an anathema to the statutory scheme of workers' compensation to interpret *S.C. Code Ann*. §42-11-70 as a statute of repose barring an occupational claim for a respiratory disease like mesothelioma two years after the employee ceased work – because the disease would likely never manifest itself in that time. The Court has held that "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."; *Eagle Container Co. v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-96 (2008) (HN8 "'Words in a statute must be construed in context,' and 'the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.'" (*quoting S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n,* 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991))).

Moreover, Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute. *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993)

The plain reading of the statute means that it should be interpreted as follows. An employee must file a claim for an occupational disease affecting the employee's respiratory system as a result of exposure to dusts withing two years after diagnosis. That diagnosis must include a finding that he or she contracted the latent disease within two years of exposure. Such an interpretation addresses the realities of these diseases and the nature of the Workers' Compensation act. It provides a cogent test and a reasonable basis for interpretation. The scheme proposed by the Appellant does neither. Adopting the interpretation advocated by appellant violates the basis rules of statutory construction.

C. *Because WestPoint Stevens is a self-insured employer, if the Commission does not hold the funds, there is no source for an employee diagnosed with one of these conditions to obtain benefits.*

S.C. Code Ann. §42-5-10 requires "[e]very employer who accepts the compensation provisions of this title shall secure the payment of compensation to his employees in the manner provided in this chapter." *S.C. Code Ann.* § 42-5-10 (1976, as amended). Section 42-5-20(A)(1) provides two methods to secure the payment of compensation. First, an employer may purchase an insurance policy from an authorized insurance company.[7] Second, it permits an employer to furnish proof of their financial ability to pay directly by qualifying as a self-insurer. Individual employers may self-insure, or a group of employers in businesses of a similar nature may pool together to create a self-insurer fund. The third way an employer may secure compensation payment is limited to government entities that can participate in the State Accident Fund. *S.C. Code Ann.* § 42-7-10.

Self-insurers are governed by Article 15 of the Regulations of the South Carolina Workers' Compensation Commission. In order to comply with the requirement under § 42-5-10 to secure the payment of compensation, the regulations give self-insurers several options. They may establish a reserve account[8], post a security bond[9], pledge securities[10], or secure an irrevocable letter of credit[11]. Each of these methods ensures that there is security available from some third entity in the event the employer becomes unable to pay, such as when it becomes bankrupt.

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[7] Employer may purchase insurance on the open market from a licensed agent. Employers who are unable to purchase a policy on the open market can qualify to obtain coverage through the SC Department of Insurance's Assigned Risk Program.
[8] S.C. Code Ann. Regs 67-1504 (2023)
[9] Reg. 67-1505
[10] Reg. 67-1506
[11] Reg. 67-1507

Self-insurers have no sovereign-backed guarantee. In the event that a self-insurer goes bankrupt or is otherwise unable to meet its payment obligations, the security under Regs. 67-1504-1507 is the only means to pay claimants their benefits. There is no Guaranty Association for self-insurers. *See* § 42-5-20(C). Once the application to become self-insured has been approved, each self-insured individual employer and fund is required to meet specific annual obligations to remain active in the self-insured program.

- File a Form 10 (§ 42-5-190)
- Submit their GAAP financial statements for analysis of the self-insureds financial condition 90-120 days after the close of their FY (R.67-1510)
- Subject to an audit for all self-insured documents submitted for the past 2 years (R.67-1511)
- Maintain a letter of credit or surety bond (R.67-1505 or R.67-1507)
- Maintain excess insurance (R.67-1503)

A bankrupt self-insured employer does not fulfill these annual requirements, which is why the Commission negotiates the surety to protect the former employees.

The Commission has followed its policy, and the funds are properly maintained by the Treasurer's Office.

D. WestPoint Home failed to demonstrate that the funds held by the Commission are not necessary to satisfy future workers' compensation claims filed by Employees of WestPoint Stevens.

WestPoint Home's argument is premised on its theory that the Commission should treat a bankrupt self-insurer in the same manner that it treats a continuous self-insurer, which is liable for every claim presented. Here, the Commission must determine what claims may be filed in the future and protect the interests of the former employees of the bankrupt entity, which has no liability for any claims moving forward beyond the fund created by the security. The record before the court is bereft of evidence to support the claim that there will be no future claims.

WestPoint Home's argument is an example of an *Ad Ignorantiam* fallacy. The entire basis of its argument is that because there have been no new claims in the last sixteen years, there will be no new claims in the future. The latency period of these types of illnesses suggests an actuarial probability that claims will arise. On the date of trial, the expert testified that this likelihood is almost a certainty. "If we go forward in time to 2030, there's a 96.8 percent chance that if he were here today, we would not know [that he had mesothelioma]. (R. p.186, line 25-p. 187, line 1). The only evidence in the record is that there are likely to be claims, and the Commission needs to hold the funds until that likelihood becomes statistically insignificant.

IV. Sovereign Immunity Bars WestPoint Home from any entitlement to pre-judgment interest.

Chief Justice Costa Pleicones noted in a concurring opinion in *EllisDon Contsr., Inc. v. Clemson University* 391 S.C. 552, 556,557, 707 S.E.2d 399, 402 (2011) disposed of the issue of pre-judgment interest against the State which is applicable to the Workers' Compensation Commission here. He wrote:

> It is well settled that the doctrine [of sovereign immunity] bars recovery of interest against the State "unless [the State has been] bound by an act of the Legislature or by a lawful contract of its executive officers . . . *Monarch Mills v. S.C. Tax C'n*., 149 S.C. 219, 146 S.E. 870 (1929) *see also, e.g. Div. of Gen. Serv. v. Ulmer*, 256 S.C. 523, 183 S.E.2d 315 (1971).
>
> In 1985, this Court prospectively abrogated the doctrine of sovereign immunity insofar as that doctrine had insulated state and local governments from tort liability. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). *McCall* included Appendix A, a list of 122 cases, and provided that these cases were "overruled to the extent that they hold that an action may not be maintained against the State without its consent." Although *Monarch Mills* and *Ulmer* are on that list, their holdings that the State is not liable for prejudgment interest except when bound by statute or by contract remain unaffected as the right to this interest is not a matter of tort liability.

Notably, no subsequent case has challenged this opinion, so as a matter of law and precedent, WestPoint Home cannot recover prejudgment interest against the Commission.

V. WestPoint Home has abandoned any appeal of the Circuit Court's 2019 Order

WestPoint Home purported to appeal the Circuit Court's grant of summary judgment to the Commission in its request for documents[12]. That appeal was not argued in its brief. Our courts have long held that "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) . Since WestPoint Home failed to brief or even mention the issue in its brief, it has abandoned this appeal.

CONCLUSION

Based on the foregoing, this Court should affirm the Circuit Court's order.

Respectfully submitted:

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[12] In its Notice of Appeal, WestPoint Home, LLC purports to appeal "the interlocutory order dated April 26, 2019." See Notice of Appeal, (ROA P.). The interlocutory order is not mentioned in WestPoint's brief.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

s/ J. Keith Roberts
J. Keith Roberts
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Columbia, South Carolina
July 9, 2024

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July 9, 2024

VIA E-FILING
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: WestPoint Home, LLC, Appellant v. South Carolina Workers' Compensation Commission, Respondents.
Appellate Case No. 2023-001663
Our File No. 2246971

Dear Ms. Kitchings,

Enclosed herewith please find the electronic copy of the Final Brief of the Respondent for the above matter. The bound and unbound copies are being delivered to the Court today. Kindly advise if you require anything else to complete our timely filing in this matter.

Thank you for your attention to this matter.

Sincerely,

MONTGOMERY WILLARD, LLC

Michael H. Montgomery

Enclosures: Final Brief Respondent

Cc: Todd Carroll,Esq. (via E-mail)
Herbert Beigel, Esq. (via E-mail)
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