

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
 Canal Insurance Company,)
 Plaintiff)
 v.)
 National House Movers, LLC, Kevin E.)
 Jones, David Black, Ron Hewes, and)
 Brent Jones,)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 #2012-CP-23-06195

ORDER

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2013 DEC 30 AM 10 57

This is a non-jury, declaratory judgment action filed by Canal Insurance Company seeking a declaration that its insurance contract provides no indemnity coverage for a lawsuit filed against its insured, National House Movers, LLC. Canal's policy does not provide coverage for injuries to employees or leased workers. However, the policy does provide coverage for temporary workers as that term is defined in the insurance contract. The parties presented Joint Stipulated Facts and submitted exhibits including depositions, the insurance policy, and legal precedent from other jurisdictions. After consideration of all of the evidence presented, the Court finds that the Canal Insurance policy does provide indemnity coverage for its insured National House Movers, LLC.

STIPULATED FACTS

National House Movers, LLC, ("NHM") is a small house moving company composed of three members: Brent Jones, David Black and Ron Hewes. Mr. Hewes ("Hewes") is the sole permanent employee of NHM and conducts all of the operations to elevate or move houses. Mr. Hewes obtains casual (temporary) help only as needed for individual jobs. The temporary help provides manual labor under the direction of Mr. Hewes. Kevin E. Jones (no relation to Brent Jones), was one of the temporary employees who worked only when short term working conditions involving moving or raising a house required extra help. All other times, Ron Hewes did all of the NHM work alone.

Kevin Jones was hired by NHM for a job working on a house in Cowpens, South Carolina. Hewes initially worked on the job alone, grading the property with a tractor. When he got to a point where he needed help putting steel under the house, he contacted David Johnson who had worked with NHM before as a temporary helper. Subsequently, David Johnson asked Hewes if they needed anymore help and Hewes indicated "one more would not hurt". Johnson later contacted Kevin Jones and brought him to the jobsite.

NHM was later contracted to move a house in Gaffney, South Carolina on February 2, 2012. Jones' job was to get cable wires and telephone wires started going over the roof of the house. He was supposed to sit on the roof at the lower corner of the house and if he saw a non-electrical wire which might get hung, he was to use a piece of PVC to facilitate the wire across the roof. Mr. Hewes was walking in front of the slow moving truck. There is no eye witness to the accident, but at some point

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Kevin Jones' arm either touched or came into close contact with an overhead power line and received serious injuries.

Inasmuch as NHM had only one full-time employee, it did not qualify for workers compensation insurance. Kevin Jones initiated a tort suit against National House Movers and its principals on June 26, 2012. NHM was insured by a commercial automobile insurance policy issued by Canal Insurance Company ("Canal") which provided indemnity for "all sums an insured legally must pay as damages because of bodily injury ... caused by an accident resulting from ownership or use of a covered vehicle." Canal's policy insured the vehicle owned by NHM which was involved in the accident. Canal provided the defense of the lawsuit under a reservation of rights and on September 26, 2012, filed this declaratory judgment action contending that the insurance policy excludes coverage for this injury.

The determinative issue in the case is whether or not Kevin Jones was a temporary worker. If so, he is not an employee as defined by the Canal policy and indemnity coverage is afforded by the Canal policy. If not, he is an employee and excluded from indemnity coverage afforded by the policy.

General Contract Law

In interpreting this policy provision, the Court adheres to the general rules of contract construction. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Courts must enforce, not write, contracts of insurance. *Auto-Owners Insurance Co. v. Rhodes*, ___ S.E.2d ___ (Op. No. 27316, decided September 25, 2013, S.C. Supreme Court).

"Words in insurance contracts are to be given their ' plain, ordinary and popular meaning.' *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012) (internal citations omitted). Whether language is ambiguous is a question of law for the Court, and any ambiguous terms are to be construed liberally in favor of the insured. Id. Further, exclusionary terms in a policy are narrowly construed to the benefit of the insured. *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993)." *Hutchinson v. Liberty Life Ins. Co.*, ___ S.C. ___, 743 S.E.2d 827, 830 (2013); see also *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, ___ S.C. ___; ___ S.E.2d. ___ (Op. No. 27330, filed Nov. 13, 2013, S.C. Supreme Court).

" It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). " Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner. *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct.App.1999); *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); see *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App.1997) (" A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business.") (internal citation and quotation omitted). Construction of an ambiguous contract is a question of fact. *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437

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S.E.2d 163, 165 (Ct.App.1993). When an agreement is ambiguous, the court should seek to determine the parties' intent. *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct.App.1995). Any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981).

Canal's Insurance Contract

The parties also agreed that the relevant portions of the policy which deals with our issues are contained in the "Business Auto Coverage Form" which incorporates ISO Form IA 02 CW 0809 and consists of eleven pages. The pertinent sections of this form delineates the liability coverage (Section II, A), exclusions to the liability coverage (Section II, B), and definitions (Section V).

Canal's Business Auto Coverage Form provides liability coverage for "all sums an 'insured' legally must pay because of 'bodily injury'....to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a 'covered auto'". Section II, A. – Liability Coverage [Form IA 02 CW 0810, Page 2 of 11].

The policy contains an exclusion for bodily injury to "An 'employee' of the 'insured' arising out of and in the course of (1) Employment by the 'insured'; or (2) Performing the duties related to the conduct of the 'insured's' business." Section II, B. 4. [Form IA 02 CW 0810, Page 3 of 11].

Section V.F. specifically defines "employee" as follows:

"Employee" includes a 'leased worker'. "Employee also includes any individual, other than an employer, who is employed by an employer and who in the course of his employment directly affects commercial motor vehicle safety...'**Employee' does not include a 'temporary worker'.**" [Form IA02 CW 0810, Page10 of 11] (emphasis added).

Section V.O. specifically defines a "temporary worker" as follows:

"'Temporary worker' means a person who is **furnished to you** to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions. 'Temporary Worker' does not include a driver of a motor vehicle in your business." [Form IA 02 CW 0810, Page 11 of 11]. (emphasis added).

Section V.I. specifically defines a "leased worker" as follows:

"'Leased worker' means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the Conduct of your business. "**Leased worker' does not include a 'temporary worker'**". [Form IA 02 CW 0810, Page 10 of 11]. (emphasis added).

Canal contends that the phrase "furnished to you" necessarily requires the third party involvement of an employment entity such as an employment agency, manpower service provider or similar service. Defendants contend that the phrase does not restrict the third party to an employment agency or even a business entity. They argue that the majority view is that the term "furnished to you" only requires a third party other than the employer, irrespective of whether the entity is an individual or a business.

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The facts establish that Kevin Jones was a person who worked for NHM on only "short-term workload conditions". Therefore if Kevin Jones was not "furnished to" NHM as defined by the policy, he would be classified as an employee and precluded from indemnity coverage to NHM as provided in Section II, B.4. of the insurance policy. However, if Kevin Jones was "furnished to" NHM, he would be a "temporary worker" who is not defined as an "employee" under the policy and NHM would be entitled to indemnity protection. Canal's policy does not define the phrase "furnished to". While this phrase has not been construed in the context of an insurance policy in our state, it has engrossed significant judicial review in other jurisdictions.

Canal's insurance policy is comprised of accumulated Insurance Services Office, Inc. (ISO) forms. The temporary worker definition was added to the ISO Form IA 02 CW 0810 in 1993. *American Family Mutual Ins. Co. v. Tickle*, 99 S.W.3d 25 (Mo. Ct. App. 2003). Since that time, numerous courts have grappled with the definition and potential ambiguity of the term "furnished to you" in trying to determine whether an individual qualifies as a temporary worker under a CGL policy. These decisions do not generally focus on the meaning of "furnished" which has a plain and ordinary meaning but rather deal with who should furnish the temporary worker to satisfy the definitional phrase.

The standard definition of the word "furnish" is "to provide or supply with what is needed, useful or desirable." Webster's Third New International Dictionary of the English Language, 923 (2002). The general legal definition of "furnish" is "to supply, provide or equip, for accomplishment of a particular purpose." Black's Law Dictionary, 675 (6th Ed., 1990). The term "furnished to" nor the word "furnished" is defined anywhere in the Canal policy.

Law Relating to "furnished to you"

The vast majority of jurisdictions have concluded that the phrase "furnished to you" is not ambiguous and necessarily means that a third party is involved in "furnishing" the temporary worker to the employer. See *AMCO Ins. Co. v. Dorpinghaus*, No. 05-1296, 2007 WL 313280 (D.Minn. Jan. 11, 2007); *Bornreger v. Smith*, 811 N.W.2d 447 (Wis.Ct.App. 2012); *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528 (Ky. 2005); *Carl's Italian Restaurant v. Truck Ins. Exchange*, 183 P.3d 636 (Colo.App.2007); *Gavan v. Bituminous Casualty Corp.*, 242 S.W.3d 718 (Mo. 2008); *General Agents Ins. Co. of America, Inc. v. Mandrill Corp, Inc.*, 243 Fed.Appx. 961 (6th Cir.(Tenn.) 2007); *Lafayette Insurance Co. v. Roberts*, 2013 WL 3961173 (Tenn.Ct.App., filed July, 2013); *Monticello Ins. Co. v. Dion*, 836 NE2d 1112 (Mass.App.Ct. 2005); *Nautilus Ins. Co. v. Gardner*, 2005 WL 664358 (E.D.Pa. March 21, 2005); *Para v. Markel Intern. Ins. Co. Ltd.*, 300 Fed.Appx 317 (5th Cir.(Tx.) 2008); *Rhiner v.Red Shield Ins.*, 208 P.3d 1043 (Or Ct.App. 2009); *Mendenhall v. Property & Cas. Ins. Co. of Hartford*, 375 S.W.3d 90 (MO. 2012); *Nationwide Mut. Ins. Co. v. Allen*, 850 A.2d 1047 (Conn.App.2004); *Nick's Brick Oven Pizza v. Excelsior Ins.*, 853 N.Y.S.2d 870 (Sup. Ct. 2008); *Northland Cas. Co. v. Meeks*, 530 F.2d 869 (8th Cir.(Ark.) 2008).

A few jurisdictions have found ambiguity in the temporary worker definition. These courts conclude that virtually anyone can "furnish" the temporary worker to the employer including the worker and the employer themselves. See *Nick's Brick Oven Pizza v. Excelsior Ins.*, 853 N.Y.S.2d 870 (Sup. Ct. 2008); *Bituminous Cas. v. Ross*, 413 F.Supp2d 740 (N.D.W.Va. 2006); *Ayers v. C&D Contractors*, 237 F.Supp.2d 764 (W.D.Ky. 2002); *National Indemnity v. Landscape Mgt.*, 963 So.2d 361 (Fla.App 4 Dist. 2007); *American Family Mut. Ins v. As One*, 189 S.W.3rd 194 (Mo. App. 2006) [But note that this decision was overruled by the Missouri Supreme Court in *Gavan v. Bituminous Casualty Corp.*, 242 S.W.3d 718 (Mo. 2008). [An *en banc* (5-3) decision with the dissent advocating adhering to the finding of ambiguity.]

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Only a few courts have construed the definition of "furnished" to require involvement of a temporary service or entity as argued by Canal. *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528 (Ky. 2005); *Burlington Ins. Co. v. De Vesta*, 511 F.Supp.2d 231 (Conn. D.Ct.2007); *AMCO Ins. Co. v. Dorpinghaus*, 2007 WL 313280 (USD Ct. Minn.). However, as indicated above, the clear majority of courts have not restricted the third party involvement to some type of employment or staffing agency. In fact, to impose this requirement would amount to rewriting the contract. The policy definition simply does not say "Temporary worker" means a person who is furnished to you *by an employment-type agency...*" More importantly, it is unreasonable to assume that any person would glean this restriction from the words provided in the policy. Because the policy is silent as to who must furnish a temporary employee, this Court also adopts the majority rule that any third person or entity is sufficient to furnish the temporary worker.

The evidence in this case establishes that Kevin Jones was only employed by NHM for short-term working conditions. It is also uncontroverted that David Johnson suggested, contacted and transported Kevin Jones to NHM for the job in which he was injured. It was stipulated that David Johnson was neither a permanent employee nor a member of NHM and that David Johnson "brought Kevin Jones to NHM." There is no evidence that David Johnson was an agent of NHM and such a conclusion is inconsistent with his manual labor temporary position. In fact, the Florida Court of Appeals has held that even another employee can furnish a temporary worker under this same policy provision. See *National Indemnity Company of the South v. Landscape Management Company, Inc.*, 963 So.2d 361 (Fla.App. 4 Dist. 2007) (also finding that the relevant policy provision was susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, the insurance policy was considered ambiguous.) . The Court therefore finds that Kevin Jones was a temporary worker as defined by the Canal policy on February 2, 2012, inasmuch as he was furnished to NHM by David Johnson, a third person.

Canal raises an additional argument that Kevin Jones was an employee of NHM under South Carolina common law citing evidence of NHM's right to control Jones. Canal also cites policy language in the policy defining an employee as any individual "who in the course of his employment directly affects commercial motor vehicle safety." However, even if Jones is classified as an employee by any other provision in the policy, Canal's temporary worker exception contractually excludes Jones as an employee: "'Employee' does not include a 'temporary worker'." Section V.F. [Form IA02 CW 0810, Page10 of 11]

Conclusion

This Court is persuaded that the Canal policy definition of a temporary worker is not ambiguous and can be interpreted by referencing the terms of the entire contract. As found by the vast majority of jurisdictions that have considered this policy provision, in its plain and ordinary meaning, the definition of "temporary worker" does require the involvement of some third party who "furnishes" the temporary worker to the insured. The Court further finds that the policy does not restrict the furnisher of a temporary worker to an employment agency or entity. Any other interpretation would effectively either delete the "furnished to" language from the policy or rewrite the definitional phrase. Courts must enforce, not write, contracts of insurance. *Auto-Owners Insurance Co. v. Rhodes*, ___ S.E.2d ___ (Op. No. 27316, decided September 25, 2013, S.C. Supreme Court).

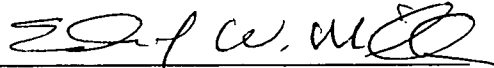
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The Court therefore finds that because Kevin Jones was furnished by a third party to NHM for short-term workload conditions, Jones was a "temporary worker" within the meaning of the policy. NHM is therefore entitled to indemnity coverage provided in the Canal policy for the claim which has been filed against NHM by Kevin Jones.

Attorney's Fees

NHM also sought attorney fees and costs associated in the defense of the declaratory judgment action instituted by Canal. Our courts have consistently held that where an insured is successful in the defense of a declaratory judgment action brought by his insurer in an effort to relieve itself of coverage under the policy, attorney's fees incurred by the insured are recoverable against the insurer. *Hegler v. Gulf Insurance Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *State Auto Property & Casualty Insurance Company v. Reynolds*, 350 S.C. 108, 564 S.E.2d 677 (S.C.App. 2002). The court is required to consider six factors when determining a reasonable attorney's fee. *Clardy v. Bodolosky*, 679 S.E.2d. 527 (S.C.App 2009). NHM and its counsel shall submit to the Court and to Canal's counsel, all evidentiary matter necessary for the court to make a determination of a reasonable attorney's fee. Canal shall have 30 days after NHM's filing to file any evidentiary matter contesting the amount of the attorney's fee request.

IT IS SO ORDERED.



Judge Edward W. Miller
Circuit Court Judge

Dated: 12/27, 2013