

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Aisha G. Taylor, Gene McCaskill and Susan S. Barden

WCC File No. 1200329

Juan Yslas, Jr., Employee,

Appellant,

v.

Juan Yslas, Employer, Riverport Insurance,
Alleged Carrier for the Employer; Full Circle Construction,
Alleged Statutory Employer, and the South Carolina
Uninsured Employers' Fund.

Respondents.

INITIAL BRIEF OF RESPONDENT RIVERPORT INSURANCE

Allison M. Carter
Willson, Jones, Carter & Baxley, PA
421 Wando Park Boulevard, Ste. 100
Mount Pleasant, South Carolina 29464
(843) 284-1083
Attorney for Respondent Riverport Insurance

Other Counsel of Record:

O. Edworth Liipfert, III, Esquire
Griffith, Sadler & Sharp, PA
PO Box 570
Beaufort, South Carolina 29901
(843) 521-4242
Attorney for Respondent South Carolina Uninsured Employers' Fund

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SC Court of Appeals

James H. Moss, Esquire
Moss, Kuhn & Fleming, P.A.
P.O. Drawer 507
Beaufort, SC 29901
(843) 524-3373
Attorney for Appellant

Weston Adams, Esquire
McAngus Goudelock & Courie, LLC
P.O. Box 12519
Columbia, SC 29211
(803) 227-2322
Attorney for Respondent Full Circle Construction

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THERE WAS ENOUGH EVIDENCE IN THE RECORD TO WARRANT THE REFERRAL OF APPELLANT TO THE SOUTH CAROLINA ATTORNEY GENERAL’S OFFICE TO DETERMINE WHETHER OR NOT FRAUD OR SOME OTHER VIOLATION HAS BEEN COMMITTED DUE TO THE INFORMATION SUBMITTED BY APPELLANT IN HIS APPLICATION OF INSURANCE FOR A WORKERS’ COMPENSATION POLICY?

STATEMENT OF THE CASE

Appellant Juan Yslas, Jr. is the sole proprietor of a construction business. Appellant purchased a workers’ compensation policy from Riverport Insurance (“Riverport”) in which he excluded himself from coverage and failed to disclose that he employed several workers. On January 16, 2012, Appellant injured his ankles and legs while performing a construction job. Appellant alleged that he was a statutory employee of the upstream contractor, Full Circle Construction, LLC (“Full Circle”). On January 18, 2012, Appellant filed a Form 50 with the South Carolina Workers’ Compensation Commission which identified Full Circle as his employer and requesting all available benefits. Claimant’s Form 50 (Jan. 18, 2012). Appellant

filed a Form 50 requesting a hearing on May 16, 2012. Claimant's Form 50 (May 16, 2012). Full Circle's carrier denied the claim and added Riverport and the South Carolina Uninsured Employers Fund as parties to the claim under the theory that the Claimant was either covered by the Riverport policy or was uninsured. Motion to Add (May 31, 2012). This motion was granted by the Commission. Administrative Order (June 18, 2012). Riverport filed a Form 51 denying coverage on the basis that the Appellant had excluded himself from coverage. Riverport Form 51 (July 2, 2012).

A hearing before Single Commissioner Wilkerson was held on July 8, 2012, to determine whether Appellant was entitled to benefits under the South Carolina Workers' Compensation Act ("Act"). Appellant argued that Riverport should provide him coverage or, in the alternative, that he was a statutory employee of Full Circle. Single Commissioner Order, pp. 5-6 (Oct. 12, 2012). The Single Commissioner found that Appellant would have been a statutory employee of Full Circle but for the fact that he had excluded himself from coverage under his own policy. *Id.* at p. 20, Finding of Fact 25 (October 12, 2012). The Single Commissioner also referred the Appellant to the South Carolina Attorney General's Office to determine whether he committed fraud in failing to disclose that he did, in fact, have employees on his payroll at the time he applied for workers' compensation insurance. *Id.* at p. 20, Finding of Fact 23 and at p. 21, Conclusion of Law 4 (October 12, 2012).

On October 26, 2012, Appellant filed a Form 30 requesting Full Commission review. Appellant's Form 30 (October 26, 2012). The only issue related to Riverport concerned the issue of the referral to the Attorney General's office as Appellant did not appeal the findings that he was excluded from coverage on the Riverport Policy. In his Form 30, Appellant argued that there was no evidence to warrant the referral to the Attorney General's office. *Id.* After hearing

oral argument on May 20, 2013, the Full Commission upheld the Conclusion of Law that the Appellant should be referred to the South Carolina Attorney General's office based on his failure to disclose his payroll and number of employees. Full Commission Order, pp. 18-19, Findings of Fact 6, 7, 11, 13 and 15; p. 20, Conclusion of Law 4 (August 21, 2013). Appellant appealed to this Court arguing that the Appellant honestly completed the application of insurance which was covered by Riverport and presumably that he should therefore not be referred to the Attorney General's office.

STATEMENT OF THE FACTS

On or about November 14, 2011, Appellant applied for a workers' compensation policy through Peoples Choice Insurance Company. Fernandez Dep. p. 10, l. 17-p. 11, l. 22; Single Commission Hrg Tr., p. 66, l. 1-23 (July 8, 2012). The Appellant alleges in his Brief that he cannot read or write but this is disputed in the evidence in the record. Ms. Fernandez with Peoples Choice assisted the Appellant in completing the application. Fernandez Dep. p. 5, l. 19-p. 7, l. 11. The application was done electronically on November 21, 2011, with Ms. Fernandez asking Appellant for the information necessary to complete the application. Fernandez Dep. p. 16, l. 18-p. 20, l. 10. The issued policy indicated that the Appellant had excluded himself from coverage. Riverport APA, Ex. D, pp. 29-31; pp. 34-37 (circled numbers). The application also indicated that the Appellant had no employees and no payroll. *Id.* at p. 35. Ms. Fernandez testified that the application was done on November 14, 2011, and was signed by the Appellant and submitted on November 21, 2011. Fernandez Dep. p. 20, l. 25- p. 22, l. 14. She verified that the Appellant told her he did not have any employees. *Id.* at p. 12, l. 13-p. 13, l. 5.

At the Single Commission hearing in this matter, the Appellant testified and presented evidence that he did in fact have at least six employees on the date the application was submitted.

Riverport APA, Ex. D, p. 12; Single Commission Hrg. Tr. p. 44, l. 23-p. 45, l. 10; p. 63, l. 22-p. 65, l. 8; p. 69, ll. 19-24. The Appellant admitted that on the date of the accident he had 6 employees but that he told Ms. Hernandez on the same date that he was going to hire one or two people. *Id.* at p. 69, ll. 14-24.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(5)(Supp. 2010). *Gray v. Club Group, Ltd.*, 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act “mandates that the commission take the evidence, judge the credibility and weight of the evidence, and from that judgment determine the facts of the case.” *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 440 S.E.2d 401, 403 (Ct. App. 1994). The Full Commission is the ultimate fact finder in workers’ compensation cases. *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 729 (1989).

Under §38-55-570 of the South Carolina Code Annotated, any person, insurer, or authorized agency having reason to believe that another has made a false statement or misrepresentation or has knowledge of a suspected false statement or misrepresentation shall, for purposes of reporting an investigation, notify the insurance fraud division of the office of the Attorney General of the knowledge or belief and provide any additional information within his possession relative thereto. S.C. Code Ann. §38-55-570.

ARGUMENTS

The Commission correctly held that the appellant should be referred to the South Carolina Attorney General's office to determine whether or not fraud or some other violation has been committed and to determine if prosecution is appropriate based upon the evidence in the record.

It is Riverport's position that the Commission correctly referred the Appellant to the S.C. Attorney General's office for a determination as to whether Appellant committed fraud in the application of insurance. In this case, the Appellant fully admitted that he had six employees on the date he submitted the application. He also admits that he did not give this information to the agent who submitted the application, instead, he told her he was going to hire one or two people.

Clearly §38-55-570 not only gives the Commission the right to refer this claim to the Attorney General's Office, it gives them the duty to do so. The questions as to whether or not the Appellant did commit fraud in obtaining insurance in this case will be determined by the Attorney General's Office, not the Workers' Compensation Commission. However, it is clear that the Commission has the authority and duty to notify the Insurance Fraud Division in cases in which they believe it is warranted.

Although it is not for the Workers' Compensation Commission to make a determination as to whether or not fraud was committed in this case, there is more than ample evidence in this case to warrant the referral. The Appellant appears to be arguing that he cannot read or write very well and that should somehow exclude him from any question of committing fraud. It is interesting to note that the cites given by the Appellant's attorney to give credibility to the fact that the Appellant cannot read or write are predominantly attorney arguments and testimony from the Appellant's son, Juan Yslas, III. Single Commission Hrg. Tr. p. 26, ll. 4-22; p. 27, ll. 2-17; p. 121, ll. 4-15; p. 128, ll. 4-9; p. 135, ll. 1-14. One of the cites used to support the fact that

the Appellant cannot read or write is actually documented coaching from the Appellant's attorney. At the hearing the Appellant was questioned as to why his son was writing a proposal for him, and the Appellant answered "well, because I tell him what I charge." Single Commission Hrg. Tr. p. 88, ll. 18-20. The Appellant's attorney then stated "you can't read and write." At that point the Appellant testified "I -- and I can't read none, you know, so I can't write." Single Commission Hrg. Tr. p. 88, ll. 21-24. There was an objection from one of the Respondent's attorneys as to the Appellant's attorney coaching the witness and the single Commissioner actually told the Appellant's attorney that he could not tell the witness what to say. Single Commission Hrg. Tr. p. 88, ll. 23-25 and p. 89, ll. 1-5.

Additionally, the Appellant was asked based on his deposition and at the hearing in this matter about a policy exclusion which was included in a copy of the policy that had been mailed to him from Riverport. The exclusion states as follows "this policy does not cover bodily injury to any person described in the schedule. The premium basis for the policy does not include the remuneration of such persons. You will reimburse us for any payment we must make because of bodily injury to such persons." Riverport APA, Ex. F, p. 82. The only person listed in the schedule is "Juan Yslas." *Id.* At his deposition in this matter, the Appellant was asked if he had read this exclusion. He testified that he had not read it. He was then asked if he had read it would he have understood that it meant that he was excluded. He was questioned as follows,

Q. Do you think if you had read that you would have understood what that mean?

A. Yeah.

Q. And what does it mean?

A. It is talking about, you know, they don't include me. It only includes an employee, Juan Yslas, III. Is that what it means?

Q. I am asking you what you think it means.

A. I think that's the way that I understand it. I don't know.

Q. You think it means that it did not include you in coverage?

A. Yeah. The way it sounds.

Juan Yslas, Jr., Dep. p. 100, ll. 4-16.

At the hearing in this matter the Appellant was again asked if he had read that exclusion would he have understood it, and he stated that he could not remember. He was asked "would you have understood it if you had read it?" He answered, "probably some of it you know." Single Commission Hrg. Tr. p. 78, ll. 7-9. When questioned about why he admitted in the deposition that if he had read the exclusion he would have understood it and why he did not state that at the hearing, the Appellant could not give an explanation. Single Commission Hrg. Tr. p. 79, l. 13 - p. 82, l. 13. Clearly the Appellant was able to read an insurance policy exclusion at his deposition and explain what it meant, which certainly indicates that he did not have as much trouble reading as he was trying to get the Commissioner to believe at the hearing.

Additionally, the Appellant testified based on his deposition and at the hearing that he went to school in Florida until approximately the tenth grade. Juan Yslas, Jr., Dep. p. 20. He was also asked to read a written proposal and stated that he could understand what he was reading because he had been working with it for so many years. Juan Yslas, Jr., Dep. p. 21, ll. 4-8. Therefore, it is extremely clear that the Appellant did not have nearly as much of a problem reading as he was trying to show to the Commission. Additionally, while the Appellant may further argue that the reason he did not commit fraud was because he had trouble reading or writing, that certainly would not preclude a referral to the Attorney General's Office for them to investigate this matter.

The main factual issue which necessitated the referral to the Attorney General's Office was the fact that the Appellant, through his own testimony, admitted that on the date he signed the application for insurance, he had six employees, which he failed to disclose to the agent who was filling out the application. The agent in question was Hispanic and testified that the Appellant preferred to speak to her in English. Fernandez Dep. p. 32, ll. 12-22. She testified that she got all of the information to fill out the application from the Appellant. *Id.* at p. 11, l. 1-p. 13, l. 19; p. 17, l. 7-p. 20, l. 24. She also testified that she spoke Spanish and the Appellant never told her that he had any employees, but that his business was "just him." Fernandez Dep. p.6, ll. 10-14, p. 12, ll. 6-10. Even if the Appellant had a problem reading or writing, he cannot explain why there would have been miscommunication between him and the agent when she was Spanish speaking and he could have spoken to her in Spanish.

In his Brief, the Appellant's attorney indicates that he would welcome a referral to the Attorney General's Office for an investigation as to the legality of ghost policies and how they are being used by the insurance industry of the state. However, it is very clear that the Appellant in this case knew exactly what he was doing. The Appellant in this case was using someone else's insurance policy in the first place. He used an insurance policy of a friend of his named Naun Ruiz, but was told by Naun Ruiz that he was going to return to Mexico and he had to get his own insurance. Single Commission Hrg. Tr. pp. 59-60. The Appellant was told by the general contractor that he had to get his own workers' compensation insurance to finish the job. Single Commission Hrg. Tr. p. 101. He additionally testified that he could not have afforded to pay \$6,300.00 on the date that he obtained the insurance, which would have been the cost if he had disclosed his six employees. Single Commission Hrg. Tr. p. 84. However, the most egregious evidence of fraud in this case again comes from the Appellant's own testimony and

documents. He submitted payroll records to indicate that he had six employees beginning on November 15, 2011, and continuing during the job with Full Circle. Riverport APA, Ex. D pp. 12-23; Single Commission Hrg. Tr. pp. 61-65. The testimony is unequivocal that on November 21, 2011, the Appellant had six employees. The Appellant testified that on November 21, 2011, he told the agent that he was going to hire one to two people. Single Commission Hrg. Tr. p. 64, l. 4-p. 65 l. 8; p. 68, l. 8-p. 69 l. 24. He admitted several times at the hearing and in his deposition that he did not tell the agent that he had any employees on November 21, 2011, when in fact he had six employees. Riverport APA, Ex. D, p. 12; Single Commission Hrg. Tr. p. 69, p. 104; Juan Yslas Jr., Dep. p. 93.

Therefore, even if the Appellant did have trouble reading or writing in the English language, there is absolutely no explanation as to why he lied to the agent in question on the date that he signed the application. He himself testified that he told her he had no employees and yet he had six. His rationalization for this is that he told her he was going to hire one or two, but he could not explain why he lied and said he had none when in fact he had six. The only motivation for doing this is to keep the policy at a minimum limits policy with a \$750.00 premium versus a \$6,300.00 premium. He needed this policy to finish the job and he did anything he needed to do to get it, including lying about the fact that he had no employees.

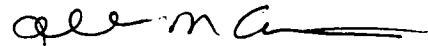
CONCLUSION

Therefore, the Appellant should be investigated for insurance fraud to keep these kinds of practices from occurring in the future. Business owners should not be allowed to lie to get minimum limit policies when they have more than four employees. There is not a determination

by the Workers' Compensation Commission that the Appellant committed fraud only a referral to the Attorney General's Office for investigation of same.

Therefore, the Respondent Riverport respectfully requests that the Commission's Findings that the Appellant be referred to the Attorney General's Office for investigation as to whether he committed insurance fraud be affirmed.

Respectfully Submitted,



Allison M. Carter, Esquire
WILLSON, JONES, CARTER & BAXLEY
421 Wando Park Boulevard, Ste. 100
Mt. Pleasant, SC 29464
(843) 284-1083
**ATTORNEY FOR RESPONDENT
RIVERPORT INSURANCE**

Mt. Pleasant, South Carolina
March 17, 2014

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Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent Riverport Insurance and Designation of Matter on Appellant and Respondents by depositing a copy of the document in the United States mail, first class postage prepaid, on March 17, 2014, addressed to Appellant's counsel of record, James H. Moss, Esquire, P.O. Drawer 507, Beaufort, SC 29901, Respondent Full Circle Construction's counsel of record, Weston Adams, Esquire, P.O. Box 12519, Columbia, SC 29211 and Respondent South Carolina Uninsured Employers' Fund's counsel of record, O. Edworth Liipfert, Esquire, P.O. Drawer 570, Beaufort, SC 29901.

March 17, 2014



Allison M. Carter
Willson, Jones, Carter & Baxley, PA
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
(843) 284-1083
Attorneys for Respondent
Riverport Insurance

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mlb

WILLSON JONES CARTER & BAXLEY, P.A.
ATTORNEYS AT LAW
421 WANDO PARK BOULEVARD, SUITE 100
MOUNT PLEASANT, SC 29464

neopostSM

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SOUTH CAROLINA COURT OF APPEALS
P.O. BOX 11629
COLUMBIA, SC 29211

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