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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Commissioner

Appellate Case No. *2015-000673*

WCC File No. 1112328

Opinion No. 5291 (S.C. Court of Appeals filed January 28, 2015)

Samuel A. Rose, Employee/Claimant.....Respondent,

vs.

JJS Trucking, LLC, Chris Thompson Services, LLC, Upstream Contractor,
Bridgefield Casualty Insurance Company, Carrier, and South Carolina Uninsured
Employers' Fund..... Defendants,

Of whom Chris Thompson Services, LLC and Bridgefield Casualty Insurance
Company are Petitioners,

And

JJS Trucking, LLC and The South Carolina Uninsured Employers' Fund are
..... Respondents.

**RETURN OF RESPONDENT,
SOUTH CAROLINA UNINSURED EMPLOYERS' FUND,
TO PETITION FOR WRIT OF CERTIORARI**

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INDEX

Certificate of Counsel1

Questions Presented1

Statement of the Case.....1

Arguments.....3

 1. THE COURT OF APPEALS PROPERLY ORDERED THAT PETITIONERS’
 APPEAL MUST BE DISMISSED AS THERE HAS BEEN NO FINAL
 JUDGMENT AS REQUIRED BY THE ADMINISTRATIVE PROCEDURES
 ACT (APA)3

Conclusion8

CERTIFICATE OF COUNSEL

Counsel for the Respondent, the South Carolina Uninsured Employers' Fund hereby certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on February 27, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err as a matter of law in dismissing the Petitioners' Appeal?
2. Does the refusal by the Court of Appeals to hear the Petitioners' appeal deprive the Petitioners of an adequate remedy?

STATEMENT OF THE CASE

This matter was before the Single Commissioner pursuant to an amended Form 50 (A. p. 23) filed by the Claimant as a result of an alleged injury by accident on August 10, 2011. A Form 51 and an amended Form 51 (A. p. 24) was filed by Kirsten Barr on behalf of Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company. A Form 51 (A. p. 25) was also filed by the SC Uninsured Employers' Fund (hereinafter "UEF"). Both Defendants denied each and every allegation.

On January 24, 2012, Defendant Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Petition to Transfer Liability to the SC Uninsured Employers' Fund pursuant to SC Code Ann. §42-1-415. The UEF filed a Return to the Petition denying that Petitioner had met all requirements of SC Code Ann. §42-1-415, S.C. Reg. 67-415 and relative case law.

A hearing was held in this matter on May 15, 2012 before Commissioner McCaskill and an Order was issued on August 23, 2012 (A. p. 1). The Order held, among other things, that the

Claimant's accident was a compensable injury by accident and awarded the Claimant temporary total benefits beginning August 10, 2011, and continuing until he reached maximum medical improvement and further ordered a medical evaluation. The Commissioner held that JJS Trucking (immediate employer) was operating as a subcontractor for Chris Thompson Services, LLC, and as such, Chris Thompson Services, LLC was an upstream statutory employer pursuant to §42-1-415. The Commissioner found Chris Thompson Services, LLC, as statutory employer, was liable to pay the Claimant benefits in which he was due under the Act as JJS Trucking was uninsured at the time of the accident. As to the Petition to Transfer Liability to the SC Uninsured Employer's Fund, the Commission ruled that it was not ripe for adjudication because the higher tier contractor had not "paid all benefits due to the Claimant under the Act". The Single Commissioner did not address the remaining requirements of §42-1-415 that must be established in order to transfer liability. Chris Thompson Services, LLC and its carrier, Bridgefield Casualty Insurance Company appealed this Order by Form 30 filed on September 5, 2012 (A. p. 72). A Full Commission hearing was held on January 23, 2013 and Order issued on May 15, 2013 (A. p. 12) affirming the Order of the Single Commissioner.

Bridgefield Casualty Insurance Company appealed this matter to the South Carolina Court of Appeals. The South Carolina Court of Appeals issued Opinion Number 5291 on January 28, 2015, holding that the issues raised by the Petitioners were not immediately appealable because the Commission had "not yet ruled on the merits of Samuel Rose's entire claim for benefits."

This Petition for Writ of Certiorari was filed on March 30, 2015.

ARGUMENT

The Court of Appeals properly ordered that Petitioners' Appeal must be dismissed as there has been no final judgment as required by The Administrative Procedures Act (APA).

Section 1-23-390 of the APA governs appellate review. It provides, "An aggrieved party may obtain a review of a final judgment of the Circuit Court or the Court of Appeals . . . "This issue was clarified in the Bone v. U.S. Food Services case (Bone v. U.S. Food Services, 404 S.C. 67, 744 S.E.2d 552) where it was held that "there is no enforceable judgment at this stage as the Commission is tasked with further obligations in determining Bone's compensation and in setting forth a final award that constitutes an executable judgment . . . is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment." Supra at 559. Also see the Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dept of Health & Env't'l Control case (Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dept of Health & Env't'l Control 387 S.C. 265, 276, 692, S.E.2d 894-895).

Similarly, in the case at bar there are many outstanding issues to be determined by the Workers' Compensation Commission including determinations as to when the Claimant reached maximum medical improvement or sustained any permanent disability. The parties have in fact, just recently (April 21, 2015) appeared before the Workers' Compensation Commission on other issues involving this claim. Clearly, indicative of the fact that there has been no final judgment in this matter.

The Petitioners' argument that it will have no remedy at law if the case is not dismissed is without merit. The Court of Appeals was correct in finding that Petitioners' could seek reimbursement after a final decision. Petitioners' were not prevented in making its arguments in

its appeal to the Full Commission. Only on appeal from the Full Commission is there required to be a final judgment.

Also without merit is the argument that Petitioners' have paid "all benefits due" at the time of the initial hearing. The Order establishes that Petitioners' had paid only a portion of the Temporary Total disability payments that were due, and had paid a fraction of the past medical benefits due and arising on behalf of the Claimant. Further, the Commission awarded further medical treatment.

The initial issue presented in this appeal stems from the application of §42-1-415 of the SC Workers' Compensation Commission. The Statutory Employer and its Carrier, Petitioners' herein, filed a Petition to transfer its liability to the SC Uninsured Employers' Fund.

To warrant the granting of a Petition to Transfer Liability, the Carrier must meet **all** statutory and legal requirements. §42-1-415 provides in part:

(A) Notwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section. In the event that employer is uninsured, regardless of the number of employees that employer has, the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due under this title. The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund...

(B) To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

The right of a statutory employer such as Chris Thompson Services, LLC to avoid liability under this statute, depends upon compliance with the specific terms and conditions imposed for transferring liability. Herein, Chris Thompson has failed to comply with all of the statutory and legal requirements and is not entitled to transfer liability to the UEF. Cincinnati Ins. Co. v. South Carolina Second Injury Fund, 297 S.C. 372, 377 S.E.2d 130 (Ct. App. 1989).

The Single Commission ordered that the Petitioners' were not entitled to transfer liability to the Uninsured Employers' Fund as they had not paid "all benefits due" and therefore, the issue was not ripe for adjudication. This finding was affirmed by the Full Commission. The other requirements mandated by §42-1-415 were never addressed. The Commission did not need to address those requirements as the very first requirement of "paying all benefits due" had not been met.

Respondent asserts that the finding of the Single and Full Commission was proper and must be affirmed. Support of this is set forth below.

Chris Thompson Services has failed to meet the requirements as set forth in §42-1-415 in the following ways:

1. §42-1-415(A) requires the upstream contractors to initially pay **all benefits** due to the subcontractor's injured employee. Then, the contractor may petition to transfer the responsibility of future payments to the Fund. The purpose of this section is principally concerned with protecting a subcontractor's injured employee in need of treatment and benefits

pending a court determination of liability that could take months or years. The Statutory Employer's failure to take care of the Claimant herein may have caused the Claimant's condition to deteriorate and ultimately causing further costs than necessary.

At the time of the hearing, the Carrier had only recently started paying some minimal temporary total benefits. It had not paid the correct amount due, and it had not provided medical treatment.

2. A cursory review of the certificate of insurance presented by the Statutory Employer shows that the certificate only indicates a "Binder" of insurance, not a policy (A. p. 148). An insurance binder is only a temporary issuance of proof of insurance that will "bind" or cover you temporarily until a formal policy is issued. The certificate of insurance is dated ten (10) months prior to the Claimant's date of injury and no binder could remain in effect for that period of time.

3. The certificate of insurance is blank in the "description of operations" box, contrary to the requirements as set forth in the Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E.2d 1 (2009), where the Court declared that in order to transfer liability the certificate of insurance presented to the upstream contractor must be fully completed. In this case, the ACCORD Form was incomplete, the Court held that the Employer "submitted an incomplete document purporting to show that it had workers' compensation policy... In our view, accepting an incomplete ACCORD Form does not constitute proper documentation." The Court specifically stated that one of the omissions on the certificate of insurance in the Hopper case was the section for "Description of Operations."

4. §42-1-415 provides “documentation must be ... turned over to the Commission at the time a claim is filed by the injured employee”. The Claimant filed his claim on or about September 8, 2011. The Statutory Employer/Carrier, filed a Form 51 on October 7, 2011 wherein Chris Thompson raised §42-1-415 as a defense. However, documentation was not provided to the Commission until the following year on January 24, 2012, when it filed a Petition to Transfer Liability (A. p. 112-115).

5. There is no evidence that the immediate employer participated in any fraud upon the statutory employer by giving the statutory employer a “BINDER” of coverage. The intent of Section 42-1-415 is to prove a statutory employer relief when “documentation of insurance” has been given (through fraud). Here, the statutory employer never even received documentation of insurance, only a binder. The immediate employer never fraudulently represented to the upstream that he had “coverage”.

Even if this court disagrees with the finding by the Commission and the Court of Appeals, the carrier has failed to prove, and the Commission has failed to find any findings of fact that all statutory and legal requirements of SC Code Ann. §42-1-415 have been met. If this Court were to reverse the Order of the Court of Appeals, then the only remedy is to remand the case to the Commission for proper findings of fact as to all the statutory and legal requirements to transfer liability.

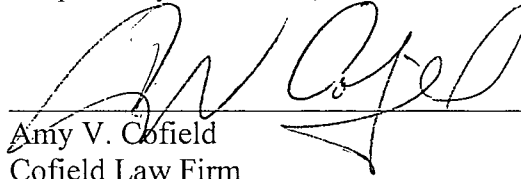
Even if Petitioners’ were successful in this argument before the Court, the case would need to be remanded for a determination as to whether all of the requirements of §42-1-415 had been met. Clearly, each request was not met.

CONCLUSION

The Single Commission only ruled upon only one prong of the several requirements of §42-1-415 even if the appeal had not been dismissed because of the lack of finality below the underlying application of §42-1-415 would require the matter to be remanded for further findings. Clearly, piecemealing of issues serves no purpose.

The Court of Appeals ruling that the case does not result from a final judgment below and is dismissed must be affirmed.

Respectfully Submitted,



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April 29, 2015
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And

JJS Trucking, LLC and The South Carolina Uninsured Employers' Fund are
..... Respondents.

PROOF OF SERVICE

The undersigned, Amy V. Cofield, hereby certifies that I have on this 29th day of April, 2015 served a copy of the within and foregoing **RETURN OF RESPONDENT, SOUTH CAROLINA UNINSURED EMPLOYERS FUND TO PETITION FOR WRIT OF CERTIORARI**, by depositing same in United States Mail, First Class Postage Prepaid and addressed as follows:

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April 29, 2015
Lexington, South Carolina