THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Commissioner Gene McCaskill
Commissioner Melody L. James
Commissioner Aisha Taylor

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SC Court of Appeals

Appellate Case No. 2015-001546
WCC File No. 0919909

Rudy Barreira Almazan, Claimant,..... Employee,

v.

Henson & Associates, Employer and Auto Owners Insurance, Carrier, ...Respondents,

And

South Carolina Uninsured Employers' Fund,.....Appellant.

BRIEF OF APPELLANT, SOUTH CAROLINA UNINSURED EMPLOYERS' FUND

Amy V. Cofield, Esq.
809 South Lake Drive
Lexington, South Carolina 29072
Telephone: 803-951-0389
Facsimile: 803-951-0398
Email: amy@cofieldlaw.com
Attorney for the Appellant, South Carolina Uninsured Employers' Fund

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STATEMENT OF ISSUE ON APPEAL

1. Has the Respondent met all necessary requirements to pass liability for a workers' compensation case to the South Carolina Workers' Compensation Uninsured Employers' Fund?

STATEMENT OF THE CASE

This appeal follows the filing of a workers' compensation claim by Rudy Almazan, "Claimant". One issue in his claim was the determination of proper employer and carrier. At a hearing before the single commissioner on April 25, 2011, it was held by Order dated January 17, 2012, among other things, that the claim was compensable. This Order also held that Contreras Panels was the immediate employer, but uninsured, Henson & Associates was the statutory employer, and Henson & Associates was properly insured by Auto Owners, "Respondent" on the date of accident.

This Order of the single commissioner was appealed to the Full Commission. On August 3, 2012, the Full Commission affirmed that Respondent was liable for the claim, but that the issue as to whether or not Respondent could transfer liability to the South Carolina Workers' Compensation Uninsured Employers' Fund "SCUEF" was not properly before the commission.

On October 30, 2103, Respondent filed a Petition to transfer liability of Almazon's claim to the SCUEF pursuant to SC Code Section 42-1-415.

It was the Respondent's position that the Employer/Carrier had met all the requirements of Section 42-1-415. It was argued that a Certificate of Insurance was properly collected from Contreras Paneling at the time Contreras Paneling was engaged to perform work at the worksite where the Claimant's accident occurred. A certificate was put into evidence and identified as a Form 25 Certificate of Insurance.

Respondents argued that the form was a standard form accepted and that it was completed properly. It was further asserted that the signature of Ray Villalovas as the authorized agent for the insurance company was satisfactory for meeting statutory requirements because the

signature on the certificate of insurance rose no red flags regarding the authority of the person signing the certificate.

It was the position of the Appellant that the Petitioner had not met the requirement of Section 42-1-4-5 and Regulation 67-415 and supportive case law.

Commissioner Andrea Roche denied the Respondent's petition to transfer liability to the SCUEF finding that Respondent remained liable for this claim. This Order was based on the following findings of fact:

1. The certificate of insurance at issue does not indicate coverage in South Carolina anywhere on its face.

2. The producer, insured and certificate holder were all shown on the certificate to be out of state.

3. Based on the case of Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E. 1, 2009) the employer should have been on notice to investigate to Confirm whether or not there was coverage in South Carolina.

4. The carrier has failed to meet the requirements of Section 42-1-415 and related case law to enable it to transfer liability to the SCUEF. Therefore, Henson & Associates, through its carrier, Respondent, shall remain liable for this claim.

5. The undersigned does not agree with the argument made by the SCUEF that the request to transfer liability should be denied based on the lack of an authorized signature. The certificate was signed, and the employer had no further duty to investigate that signature.

Respondent appealed this Order to the Full Commission. An Order was issued by the Full Commission on June 17, 2015, reversing the Single Commissioner and holding that

Respondent was relieved of all liability which was transferred to the Appellant. The Appellant timely appealed to this Court by Notice of Appeal dated July 17, 2015.

ARGUMENT

Before the enactment of Section 42-1-415, it was long-established and well-settled that a statutory employer bore absolute liability to the injured workers of a subcontractor and could not shift that liability to the Uninsured Employers' fund, even if the subcontractor was uninsured. See, generally, Miller v. Robinson Trucking, 333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998). By enacting Section 42-1-415, the legislature carved out a narrow exception to a statutory employer's absolute liability.

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

> (A) ... 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.

To set forth specifically what "standard form is acceptable to the Commission" required above, the Commission, by its own Regulation (R. 67-415 (A)) established that:

> (A) For the purposes of §42-1-415, **the ACORD Form 25-S, Certificate of Insurance, as published by the ACORD Corporation, and as issued by the carrier for the insured, shall serve as documentation of insurance.** The Certificate of Insurance **must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.**

Appellants argue that the statute, in its' plain terms, has been satisfied. Respondent would have this Court believe that the sole presentation of the form to the upstream statutory employer satisfies its' requirement. It goes even further to argue that (1) the SC Workers' Compensation Commission had no authority to enact its own regulation (when clearly, the statute Section 42-1-415 mandates that the "form" must be acceptable to the commission), and (2) the written words/information on the form are irrelevant and the statutory employer has no obligation to even read it. This interpretation of the statute is incorrect.

In the case of Barton v. Higgs, (674 SE 2d 145 - SC: Supreme Court 2009) the upstream employer failed to recognize that the certificate of insurance presented to it lacked a signature from an authorized agent of the insurance company. The Court held "liability may be transferred from the higher tier contractor to defend only after the higher tier contractor has **properly documented** (emphasis added) the subcontractor's claim that it retains workers' compensation insurance. This case specifically states, that the upstream contractor "could have easily investigated the absence of the signature and determined that the immediate employer did not have a valid policy. **In our view, public funds should not be expended where Respondent could have discovered the mistake by acting in accordance with the Regulation."**

This Supreme Court decision makes it clear that a statutory employer who accepts a certificate of insurance must take the minimal steps to see that workers compensation insurance is "properly documented." Obviously, this would require one to "read" the document. The Respondent "could have discovered" the blank signature space, but didn't. In the case at bar, the Respondent could have clearly discovered that the submitted form had no indication of coverage in South Carolina as these words did not even appear anywhere on the document. To the contrary, Henson & Associates did not even read the certificate presented. Kenneth Henson testified, "I didn't personally go over there. My wife does, and she makes sure the coverages are what we need (Tr. Depo. P. 14). Wendy Henson testified that all she did was record that "it was received . . . dates of coverage, the coverage period, and put it in a file" (Tr. Depo. P. 18 L 15-18). Neither of them took "minimal steps" to even read the certificate. If they had properly documented coverage they would have plainly seen that the producer and the insured were both in Texas and that there was no indication of South Carolina coverage.

The Supreme Court reiterated this requirement in the case of Hopper v. Terry Hunt Construction, 680 S.E.2d 1, 4 (2009).

"In order to protect the privilege to transfer what would otherwise be the general contractor's responsibility, the statute (Section 42-1-415) requires the general contractor to **take minimal steps to properly document that the subcontractor has workers' compensation insurance**." Hopper v. Terry Hunt Construction, 680 S.E.2d 1, 4 (2009). In the Hopper case, there was nothing on the certificate to indicate coverage in South Carolina. The Producer, the Insured, and the Certificate Holder were all out of state. The form also had a blank space where the place of the job was never entered. Even a cursory review of the certificate showed nothing to indicate coverage in South Carolina.

The Court in Hopper was clear in stating that the blank space on the certificate presented was only one reason that liability would not transfer to the SCUEF. The policy period listed on the certificate had also expired. The Court stated "in order to transfer liability to the Fund, a general contractor may not rely upon a Certificate reflecting an expired policy as documentation of workers' compensation insurance. To interpret the language in the statute otherwise would allow a general contractor to turn a blind eye to information which is readily evident upon a cursory inspection of the Certificate. See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (recognizing that the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention). If the certificate holder had simply read the certificate it would have known the insurance had expired.

The same is true in this case.

The Respondent's argue that because every blank had been filled in on the Certificate, that alone was sufficient to have met the requirements necessary to transfer liability and differentiate its case from that of Hopper (Supra). This reasoning defies common sense. Suppose, for example, the "Producer" was Mickey Mouse in Orlando, Florida, and the Certificate Holder was Santa Claus in the North Pole? IF the Contractor had taken the minimal step of reading the Certificate, he would have been on notice of a problem. The problem being that the producer and the insured were both in Texas. The Certificate Holder was in North Carolina and the "Description of Operations/Locations" box only listed "York High School and Tech Center". Did the Producer in Texas believe York High School and Tech Center was in Texas or North Carolina where the certificate holder was located?

A simple review of the documents shown, just as in the Hopper case, would clearly show that every party is located outside of South Carolina and nothing on the Certificate indicates coverage in South Carolina. Shouldn't this lack of information be sufficient to put an employer on notice that he should take "minimal steps" to simply verify the existence of coverage? As set forth in Hopper, "the Statute §42-1-415 requires the general contractor to take minimal steps to properly document that the subcontractor has Workers' Compensation Insurance."

It could not have been the intent of the legislature when enacting Section 42-1-415 or the SC Workers' Compensation Commission in promulgating Regulation 67-415 for a statutory employer to relieve itself of liability and pass it to the state of South Carolina by simply having the immediate employer hand over a form. The form must be complete. The words on the form matter and they must indicate coverage in South Carolina. Coverage any other place in the world doesn't matter if there's no coverage in South Carolina. Taking "minimal steps" includes the necessity of actually reading the form.

In 2010 the SC Workers' Compensation Commission amended its Regulation 67-415 to make it perfectly clear that the certificate "indicates a valid South Carolina address for the insured, is dated, signed and issued by an authorized representative of the insurance carrier for the insured". For an out of state employer the ACORD Form 25-S must be accompanied by the following statement, "South Carolina is a named state in Section 3A or 3C of the declaration page of the insured's policy". (Regulation 67-415 as amended effective February 26, 2010). This amendment certainly clarifies the intent of the statute and regulation as to demonstrate coverage in South Carolina.

CONCLUSION

The Respondent has failed to meet the "minimal" requirements necessary to transfer liability in this workers' compensation case to the Appellant. Therefore, the Order of the SC Workers' Compensation Commission must be reversed.

COFIELD LAW FIRM

BY: _____

Amy V. Cofield
809 South Lake Drive
Lexington, South Carolina 29072
Telephone: (803) 951-0389
Facsimile: (803) 951-0398
Email: amy@cofieldlaw.com
Attorney for the Appellant, South Carolina Uninsured Employers' Fund

August 17, 2015
Lexington, South Carolina

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PROOF OF SERVICE

I, Ami M. Meetze, certify that I have served the **Brief of the Appellant, South Carolina Uninsured Employers' Fund, and Designation of Matter** by depositing a copy of same in the United States Mail, postage prepaid, on this 17th day of August, 2015, addressed to as follows:

VIA EMAIL - jkitchings@sccourts.org
AND VIA REGULAR US MAIL
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Trask & Howell, LLC
Roy Allen Howell, III, Esq.
PO Box 2167
Mt. Pleasant, South Carolina 29465

Smith & Griffith, LLP
John Preston Griffith, Esquire
PO Box 2866
Anderson, South Carolina 29622

South Carolina Workers' Compensation Commission
Attn: Amy Bracy, Judicial Director
Post Office Box 1715
Columbia, South Carolina 29202-1715

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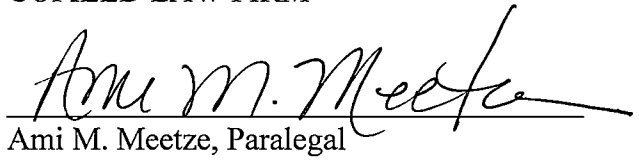
BY: 

Ami M. Meetze, Paralegal
809 South Lake Drive
Lexington, South Carolina 29072
Telephone: (803) 951-0389
Facsimile: (803) 951-0398
Email: ami@cofieldlaw.com
Paralegal for Amy V. Cofield, Attorney for the Appellant, South Carolina Uninsured Employers' Fund

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Lexington, South Carolina