

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION
Gene McCaskill, Commissioner

Appellate Case No.: 2015-001546
W.C.C. 0919909

RECEIVED

SEP 21 2015

SC Court of Appeals

Rudy Barreira Almazan, Employee

v.

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

And

S.C. Uninsured Employers Fund.....Appellant.

INITIAL BRIEF OF RESPONDENTS

Roy A. Howell, III
Kirsten L. Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Employer and
Auto Owners Insurance Co.,
Respondents

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Statement of the Issues on Appeal

- I. Does substantial evidence support the Workers' Compensation Commission's finding that the Respondents have proven all elements for reimbursement under S.C. Code Ann. § 42-1-415?
- II. Did the Workers' Compensation Commission properly conclude that S.C. Code Ann. § 42-1-415 does not require an employer to further investigate a fully-completed Certificate of Insurance?
- III. Did the Workers' Compensation Commission properly determine that Henson & Associates collected documentation of insurance on a form acceptable to the Commission pursuant to S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415?

Statement of the Case

Almazan was injured while working for Contreras Panels on September 26, 2009. Unfortunately, Contreras Panels was uninsured at the time of the accident and statutory liability was placed upon the upstream contractor, Henson & Associates. On November 12, 2013, Henson & Associates and Auto Owners Insurance ("Respondents") filed a Petition to Transfer Liability for Almazan's workers' compensation claim to the Uninsured Employers Fund ("UEF") and sought reimbursement of all benefits paid to or on behalf of Almazan pursuant to S.C. Code Ann. § 42-1-415. The matter originally came before Commissioner Andrea Roche, who issued her Decision and Order on July 8, 2014, denying the Petition.

The Respondents filed a Form 30 on July 18, 2014, seeking review and rehearing by the Workers' Compensation Commission's Appellate Panel. After a hearing on Feb-

ruary 23, 2015, the Appellate Panel issued a final Decision and Order on July 17, 2015, determining that Henson & Associates fully complied with the requirements of S.C. Code Ann. § 42-1-415 and; therefore, are entitled to transfer liability to, and are entitled to reimbursement from, the Uninsured Employers Fund. The Respondents respectfully contend that the Commission committed no abuse of discretion in determining that the documentation of insurance collected by the Respondents was “acceptable” in accordance with S.C. Code Ann. 42-1-415(B). The Respondents further contend that the Commission’s findings of fact are supported by substantial evidence in the record and the Commission properly applied the law to these facts without legal error.

Arguments

I. Substantial evidence supports the Workers’ Compensation Commission’s finding that the Respondents have proven all elements for reimbursement under S.C. Code Ann. § 42-1-415.

S.C. Code Ann. § 42-1-415 provides that when a subcontractor “has represented himself...as having workers’ compensation insurance” to a higher tier contractor, the higher tier contractor “must be relieved of any and all liability under this title.” (emphasis added). In order to transfer liability under § 42-1-415, the Respondents must prove the following:

- Documentation of insurance was collected at the time the subcontractor “was engaged to perform work;”
- Documentation of insurance was “turned over to the Commission” at the time a claim is filed by the employee;

- Documentation of insurance was on a “standard form **acceptable to the commission;**” (emphasis added).

Consistent with § 42-1-415, the Commission promulgated S.C. Code Reg. 67-415 to specify that a Certificate of Insurance “shall serve as documentation of insurance” and that the Certificate “must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.” S.C. Code Reg. 67-415 (Supp. 2007).¹ Of course, the Regulation should not be interpreted to alter or add to the simple requirements of § 42-1-415, because the Commission had no authority to do so. Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995); Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496, 499 (1943); *see also* Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (holding that “[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute.”). Therefore, Regulation 67-415 does not and cannot do more than define what, in the discretion of the Commission, is a “standard form **acceptable to the Commission.**” (emphasis added).

The job on which Almazan was injured began in April 2009. (Smith APA #2, p. 35; H.T. p. 100, l. 22). Prior beginning work, Contreras was required to provide a Certificate of Insurance to Henson and Associates. (H.T. p. 100, l. 22; Killen APA #2, p. 20; Killen APA #2, p. 26). Contreras provided Henson with a Certificate of Insurance dated

¹ Note that S.C. Code Reg. 67-415 was amended after the accident in this case; therefore, the current version regulation is not applicable. The applicable regulation contains absolutely no requirement that the Certificate of Insurance specify coverage in South Carolina.

April 23, 2009. (Smith APA #3, p. 38). The Certificate of Insurance dated April 23, 2009 was provided before the work began and was issued directly by Associates Benefits to Henson. (H.T. p. 101, l. 13). Prior to the expiration of the first Certificate of Insurance, a second certificate was obtained and dated May 8, 2009. (H.T. p. 102, l. 21; APA #8, p. 88). The May 8, 2009 Certificate of Insurance lists the Insurance Company of Pennsylvania as the workers' compensation carrier. (H.T. p. 102, l. 21; APA #8, p. 88). None of these facts are in dispute.

Kenneth Henson, President of Henson & Associates, believed that Contreras Paneling had workers' compensation coverage in South Carolina, as the Certificate specifies the York High School project in the description of operations. (H.T. p. 103, l.15). The York High School project is where Almazan was injured and is, of course, in South Carolina.

Because the Henson collected a Certificate of Insurance at the time the subcontractor, Contreras, was engaged to perform work, because the Certificate was signed and dated, and because the Certificate was turned over to the Commission prior to the adjudication of Almazan's claim, the Commission determined that the Respondents collected documentation of insurance "on a standard form acceptable to the Commission" and further found and concluded that the Respondents have met all of the statutory requirements of S.C. Code Ann. § 42-1-415 and are entitled to transfer liability to, and reimbursement from, the UEF. Here, the Commission's findings of fact on the statutory elements are the law of the case, as the UEF has raised no argument on appeal regarding their propriety. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding that a finding becomes the law of the case when neither party has ap-

pealed that finding).; Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (holding that “[a]n unappealed ruling is the law of the case and requires affirmance.”); *see also* Fields v. Monroe Ltd. P’ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned.”); and First Sav. Bank v. McLean, 314 S.C. 361, 363 444 S.E.2d 513, 515 (1994) (stating an issue is abandoned where the appellant fails to provide argument or supporting authority).

The Respondents further contend that the Workers’ Compensation Commission’s findings of fact on the essential elements of § 42-1-415 are supported by substantial evidence. Under the Administrative Procedures Act, it is well-settled that the Workers’ Compensation Commission is the ultimate fact finder in a workers’ compensation claim. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the commission. DeBruhl v. Kershaw Co. Sheriff’s Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990). An appellate court must affirm the findings made by the commission if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The substantial evidence test “need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.” Instead, a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

Because the Commission’s findings of fact are supported by substantial evidence in the record and are otherwise the law of the case, the Respondents respectfully request

that the Workers' Compensation Commission's final Decision and Order dated July 17, 2015 be affirmed by the Court of Appeals in accordance with the Administrative Procedures Act.

II. The Workers' Compensation Commission properly concluded that S.C. Code Ann. § 42-1-415 does not require an employer to investigate a fully-completed Certificate of Insurance.

The Respondents' right to transfer liability to the UEF is a statutory one and is governed by S.C. Code Ann. § 42-1-415. The statute imposes no affirmative duty upon an employer to investigate a fully-completed Certificate of Insurance. Nevertheless, the UEF argues that Henson had an obligation to investigate whether the Certificate of Insurance was for a policy that provided coverage in South Carolina. The Workers' Compensation Commission properly concluded that the UEF's investigation argument was without merit under the specific facts of the case.

The plain language of S.C. Code Ann. § 42-1-415 does not require employers to investigate a fully-completed Certificate of Insurance. In the case at bar, each and every section of the Certificate of Insurance was completed: *the name of the producer, the name of the insured, the name of the insurance company, the date, the policy number, the policy dates, the policy limits, the description of operations, the name of the certificate holder, and an authorized representative's signature*. The fact that the Certificate of Insurance was fully completed clearly distinguishes the present case from that of Barton v. Higgs, 674 S.E.2d 145 (2009), which is cited by the UEF.

In Barton, the Certificate of Insurance had no signature whatsoever and the Court

held that the upstream contractor could not reasonably rely on an unsigned Certificate of Insurance. Essentially, the Court concluded that it was arbitrary for the Commission to determine that an unsigned Certificate of Insurance was “acceptable” when such a determination conflicted with the Commission’s own regulation. However, Barton does not support the UEF’s contention that Henson was *required* to investigate a fully completed Certificate of Insurance. In fact, such an interpretation would have been beyond the scope of the Court’s authority when neither § 42-1-415, nor Reg. 67-415 requires any investigation into a complete and reasonable Certificate of Insurance, the specific provisions of a workers compensation policy, or whether the policy provided coverage in South Carolina. *See City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) (stating that “[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”).

If the Legislature had intended to require a Certificate Holder to do more than “collect documentation,” the Legislature would have explicitly included such a requirement in the statute. However, the only requirements imposed on employers are codified at S.C. Code Ann. § 42-1-415(B):

“To qualify for reimbursement under this section, the higher tier subcontractor or project owner must collect documentation of insurance as provided in subsection (A)² on a standard form **acceptable to the commission**. The documentation

² Subsection A does not impose any additional requirements regarding the proper

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.” (emphasis added).

Therefore, because the Legislature mandated no such investigation requirement, it is not even within the authority of the Courts or the Commission – by regulation or otherwise – to impose additional requirements or to amend this clear and unambiguous statute. *See Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (holding that “[t]he Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation.”) (internal citations omitted); *see also City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) (stating that “[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.”); *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language).

The UEF appears to further rely on *Hopper v. Terry Hunt Construction*, 383 S.C. 310, 680 S.E. 2d 1, (2009) in support of their argument that Henson was required to do more to satisfy the requirements of § 42-1-415 to the satisfaction of the Commission in order to transfer liability. However, the UEF’s reliance on *Hopper* is also misplaced. In

documentation of insurance and the “standard form acceptable to the commission” is the Acord Form Certificate of Insurance.

Hopper, the Supreme Court explained:

“We find **substantial evidence** in the record to support the Commission’s finding that Kajima failed to comply with the requirements of § 42-1-415(A). The Description of Operations box on the Certificate of Insurance was left blank and unlike the previous Certificate of Insurance that Kajima accepted, this Certificate contained no information regarding the coverage that the policy provided, the deductible amount, or the project to which the policy applied. In failing to fill out the entire Accord Form, Hunt essentially submitted an incomplete document purporting to show that it had a workers’ compensation policy, which Kajima accepted. In our view, accepting an incomplete Acord Form does not constitute proper documentation.” *Id.* at p 3. (emphasis added).

Obviously, Hopper is a substantial evidence case, which requires great deference to the Commission’s findings of fact. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (“a judgment upon which reasonable men might differ will not be set aside”). Therefore, the issue before the Hopper Court was not a legal question, but was merely a question of whether there was substantial evidence to support the Commission’s finding of fact that the documentation of insurance was insufficient (*i.e.*, whether it was an abuse of discretion for the Commission to determine that the documentation was not “acceptable”). More importantly, the Court’s suggestion that “an incomplete Acord Form does not constitute proper documentation” — does not support the UEF’s argument in

this case. Here, Henson relied upon a fully completed Certificate of Insurance. Every section of the Certificate of Insurance was completed and fully documented that Contreras had workers' compensation insurance for the York High School project where Almazan was injured. No section of the Certificate was left blank, which was the issue in Hopper.

Because the Workers' Compensation Commission properly concluded that S.C. Code Ann. § 42-1-415 does not require Henson to investigate whether there really was a policy or whether the policy provided coverage in South Carolina, the Workers' Compensation Commission's Decision and Order should be affirmed. Henson was only required to collect the documentation on the required forms as set forth in § 42-1-415(A) and Reg. 67-415(A) and; therefore, met all of the statutory and regulatory requirements for a transfer of liability to the satisfaction of the Commission and; therefore, the Commission's Order should be affirmed.

III. The Workers' Compensation Commission properly determined that Henson collected proper documentation of insurance on a form acceptable to the Commission pursuant to S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415.

The Workers' Compensation Commission granted the Respondents' Petition to Transfer Liability to the UEF based on the finding that Henson collected proper and adequate documentation of insurance from Contreras. The applicable statute, S.C. Code Ann. § 42-1-415, requires only that the documentation be "on a standard form **acceptable**

to the Commission.” (emphasis added). Here, in the discretion of the Workers’ Compensation Commission, the documentation of insurance collected by Henson was clearly “acceptable to the commission.” This discretionary judgment, which the Legislature reserved to the Commission, was neither arbitrary, nor capricious, and is otherwise supported by substantial evidence in the record and the applicable law. *See Palmetto Alliance, Inc., v. S.C. Public Service Comm’n*, 282 S.C. 430 436, 319 S.E.2d 695, 698 (1984) (holding that appellate review of a discretionary judgment of an administrative agency “is confined to determining if that discretion has been abused.”) (internal citations omitted); *see also* 73A C.J.S. Public Administrative Law and Procedure § 223a (1983) (for the proposition that an exercise of discretion by an administrative agency will not be disturbed unless there was an abuse of discretion evidenced by a showing that the agency action was arbitrary or unlawful).

However, the UEF essentially argues that the Commission’s judgment on the acceptability of the documentation of insurance should be ignored and that the Court of Appeals should substitute its judgment on this issue. According to the UEF, because the Certificate of Insurance did not specify that the “York High” project listed in the description of operations was the very same “York High” project Henson and Contreras were working on in York, South Carolina, the Court of Appeals should conclude that the Certificate is not “acceptable to the Commission” as a matter of law. This argument is simply without merit.

At the time in question, there existed no statute or regulation requiring that a Certificate of Insurance state that the policy provided coverage in South Carolina. While S.C. Code Reg. 67-415 was amended on February 26, 2010 (the year after Almazan’s

work accident) to require South Carolina be named in a Certificate for an out of state employer, this regulation simply does not apply in the case at bar. In fact, this amendment is clear indicia that no such statement was required prior to that amendment on February 26, 2010, otherwise, no amendment would have been necessary.

Furthermore, the Commission found, based on substantial evidence that Henson reasonably relied on the Certificates of Insurance they collected from Contreras as showing coverage for the York High project in South Carolina.³ Despite the UEF's allegations to the contrary, the record contains the testimony of Wendy Henson, the company's office manager, who clearly stated that when she receives a Certificate of Insurance, she reads it, records that it was received, records the dates of coverage, and places the Certificate in a project file under the contractor's name. (W. Henson deposition p.18, lines 13—18; p.25, lines 8—10). Ms. Henson further testified that, looking at the face of the Certificate of Insurance she collected from Contreras, there was not anything that gave her pause to believe that it was not a valid Certificate of Insurance. (W. Henson deposition p. 13, lines 4-8). Instead, Ms. Henson relied upon the Certificates of Insurance provided by

³ After Almazan was injured, it was revealed that the Certificates of Insurance Contreras provided to Henson were fraudulent. Basically, the insurance agency in Texas issued Certificates showing coverage for the York High School project when in fact there was never any policy. While the UEF speculates that if Henson contacted the producer in Texas, it may have learned that the policy did not provide coverage in South Carolina, this is not only pure speculation, but it defies common sense to suggest that an agency that would go to the lengths of producing such a detailed Certificate would undermine its own fraudulent scheme by admitting that the scope of the scheme did not extend to South Carolina.

Contreras in making the decision to allow Contreras do work on the York High project in South Carolina. (W. Henson deposition p. 13, lines 9—12). This testimony is corroborated by the testimony of Kenneth Henson, as well as his sworn affidavit.

While the UEF likens this to a case where a Certificate is issued to Mickey Mouse by Santa Claus, there was nothing odd or unusual about the Certificate of Insurance *sub judice* and, the Certificate, on its face, gave Henson no reason to doubt the veracity of the information contained therein or doubt that the “York High” project listed on the Certificate was the York High project they were working on in South Carolina. Therefore, Henson’s reliance on the Certificate of Insurance as documenting valid workers’ compensation coverage for their subcontractor in South Carolina was specifically found to be reasonable by the Workers’ Compensation Commission based upon substantial evidence in the record. *See Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994) (holding that circuit court judges are not at liberty to decide a case as if there had been no decision by the Workers’ Compensation Commission); *DeBruhl v. Kershaw Co. Sheriff’s Dept.*, 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990) (holding that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel and it is not the task of the court to weigh the evidence as found by the commission).

Because the Commission’s did not abuse its statutory discretion in determining that the documentation of insurance collected by Henson was “acceptable” and because this determination is otherwise supported by substantial evidence and the applicable law, the Respondents respectfully request that the Court of Appeals affirm the Decision and Order of the Workers’ Compensation Commission.

Conclusion

Based upon the arguments herein above, the Respondents, Henson & Associates and Auto Owners Insurance, respectfully request that the July 17, 2015 Decision and Order of the Workers' Compensation Commission be affirmed by the Court of Appeals.

Respectfully submitted,

TRASK & HOWELL, L.L.C.
P. O. Box 2167
Mt. Pleasant, SC 29465

By *Kirsten L. Barr*

Roy A. Howell, III, SC Bar #11888
Kirsten L. Barr, SC Bar #15525
Attorneys for the Respondents, Henson &
Associates and Auto Owners Insurance
Company

September 16, 2015
Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION
Gene McCaskill, Commissioner

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And

S.C. Uninsured Employers Fund.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Employee, Rudy Barreira Almazan, and the South Carolina Uninsured Employers Fund were served with a copy of the attached Initial Brief of the Respondents and Designation of Matter this 16th day of September 2015, by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the counsel of record, as follows:

John Griffith, Esq.
P.O. Box 2866
Anderson, SC 29622

Amy V. Cofield, Esq.
809 South Lake Drive
Lexington, SC 29072

September 16, 2015

Kirsten L. Barr

Roy A. Howell, III, SC Bar #11888
Kirsten L. Barr, SC Bar #15525
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Employer and
Auto Owners Insurance Co.,
Respondents

HAROLD E. TRASK
ROY A. HOWELL, III
KIRSTEN L. BARR
JAMIE C. GUERRERO
WILLIAM H. LYON



TRASK & HOWELL, L.L.C.
Workers' Compensation Defense

PHONE
(843) 881-4228
FAX
(843) 881-8784

JILL W. KING
D. ALAN WESTERLUND, JR.
GEOFFREY L. WENDT

763 JOHNNIE DODDS BOULEVARD
P. O. Box 2167
MT. PLEASANT, SC 29465

E-MAIL
KBARR@TRASK-HOWELL.COM
DIRECT DIAL: (843) 881-1027

September 16, 2015

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

SEP 21 2015

SC Court of Appeals

Re: Rudy Barreira Almazan v. Henson & Associates, Inc.
W.C.C. File No.: 0919909
Appellate Case No.: 2015-001546
Carrier File No.: 36-2229-10
Date of Accident: September 26, 2009

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Brief of the Respondents and Designation of Matter, with accompanying Proof of Service, in the above-referenced matter. By copy of this letter, I am serving the other counsel of record with a copy of these documents. If you should have any questions, please do not hesitate to contact me.

Yours very truly,

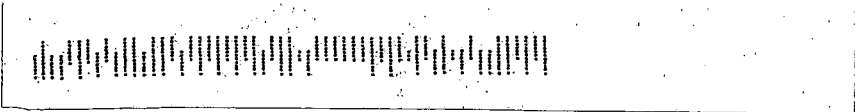
Kirsten L. Barr

KLB/ekb/les

Enc.

cc: Iris Harris, Auto Owners Insurance Company (w/enc.)
Kenneth Henson, Henson & Associates, Inc. (w/enc.)
John Preston Griffith, III, Esq. (w/enc.)
Amy V. Cofield, Esq. (w/enc.)

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TRASK & HOWELL LLC
P.O. Box 2167
MT. PLEASANT, SC 29465

**The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211**

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