DECISION AND ORDER
OF THE APPELLATE PANEL OF THE
SOUTH CARLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1200479

Dallas Paul Bessinger,

Claimant,

vs.

R-N-M Builders & Associates, LLC,

Employer,

and

FirstComp a division of Markel, Inc.,

Carrier.

Defendants.

Appellant Panel Review held in Columbia, South Carolina on June 15, 2015 per notices timely and properly served on all parties of interest

Appellate Panel Decision and Order filed August __, 2015

APPEARANCES:

Claimant represented by:
Steven D. Haymond
Harris & Graves, P.A.
P.O. Box 11566
Columbia, South Carolina 29211

Defendant FirstComp Insurance represented by:
R. Daniel Addison
Hedrick Gardner Kincheloe & Garofalo, LLP
P.O. Box 11267
Columbia, South Carolina 29211

South Carolina Uninsured Employers' Fund represented by:
Amy V. Cofield
100 Executive Center Drive, Suite 101
Columbia, South Carolina 29210

PANEL: Commissioner T. Scott Beck, Chairperson; Commissioner Susan S. Barden; Commissioner Avery B. Wilkerson, Jr.

STATEMENT OF THE CASE

This matter is before the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") upon the petitions for review by the South Carolina Uninsured Employers' Fund ("UEF") and the defendant carrier, FirstComp Insurance ("First Comp"), from a Decision and Order of Commissioner Gene McCaskill ("Single Commissioner") entered on March 31, 2015 ("Order") following an August 21, 2014, hearing in Columbia, South Carolina. The case had previously been the subject of a hearing before a single Commissioner on January 26, 2012. Following an appeal to the Appellate Panel, the prior order of the single Commissioner was vacated and the case was remanded for a hearing *de novo* by an order dated April 17, 2014. The instant review arises out of the *de novo* hearing.

This claim involves an injury to Claimant that occurred on January 4, 2012. At the hearing before the Single Commissioner, Claimant's employer did not appear and was not represented. Defendant FirstComp Insurance Company ("FirstComp") appeared to contest coverage over the claim by virtue of alleged fraud in the inducement. The South Carolina Uninsured Employers Fund ("UEF"), also appeared to contest whether it should have coverage for the claim. In his Order, the Single Commissioner found that FirstComp was not the responsible carrier as the policy it had issued to the employer was obtained by fraud. UEF sought review of the Single Commissioner's order alleging errors of law and fact. FirstComp contends that the order of the Appellate Panel remanding for a *de novo* hearing was improper and the hearing should not have proceeded.

It is the position of Claimant that he sustained an injury by accident arising out of the course and scope of his employment when he fell off a roof on January 4, 2012. Claimant's

direct employer at the time of the accident was J&L Construction ("J&L"). Claimant alleges injuries to his left hip, right arm, ribs and back. Claimant's position is that he is not at maximum medical improvement ("MMI") and he is seeking reimbursement for past causally-related medical treatment and ongoing medical treatment in accordance with S.C. Code §42-15-60. Claimant is also seeking temporary total disability benefits from the date of the accident until he was released to work on April 4, 2012. Claimant alleges an average weekly wage of $520.00 with a corresponding comp rate of $346.68.

FirstComp alleges that it is not the proper Carrier for this claim on the basis that the owners/representatives of J&L fraudulently obtained workers' compensation coverage. Specifically, FirstComp alleges that John Loughery and Emory Wilkie applied for and made fraudulent representations to an insurance agent, TaLisa Miller, in order to obtain workers' comp coverage after Claimant's injury had already occurred. When issued, the policy obtained after the accident was made retroactive to 12:01 a.m. the day of issuance. The fact that the accident had already occurred was not disclosed on the application even though Loughery and Wilkie had actual knowledge that the accident had already happened and that the company did not have workers' compensation coverage at the time. FirstComp contends that this policy, procured by fraud, is void *ab initio* and, therefore, FirstComp is not the proper carrier for this claim.

UEF contends that FirstComp's policy is effective as issued and provides coverage for the accident in question. Specifically, the UEF argues that S.C. Code Ann. §38-75-730 governs this issue and requires a Carrier to follow certain procedures in order to cancel a policy based on misrepresentations, which were not taken in this case.

Based on the record and evidence and testimony presented at the hearing, the Single Commissioner made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Claimant alleges that he sustained an injury by accident arising out of and within the course and scope of his employment on January 4, 2012.

2. The Claimant alleges injuries to his left hip, right arm, ribs and back.

3. This hearing arises out of a remand from the Full Commission on April 17, 2014.

4. The Order of the appellate panel reads, "IT IS THEREFORE ORDERED that the Decision and Order of the single Commissioner is **Vacated** and this matter is **Remanded** to the Jurisdictional Commissioner for a hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives." (Appellate Panel Order, p. 6)

5. As to jurisdiction, Mr. Addison, representing FirstComp Insurance, takes the position that, while he did not object to going forward with this hearing, he states on the record, "I'm objecting to the jurisdiction in terms of us not having a clear understanding from the Full Commission as to exactly what this Commissioner is supposed to be doing today ..." (Hearing Transcript, p. 6) "They have not indicated what was deficient with Commissioner Roche's Order in any way, shape or form. There's not anything saying she screwed up and, therefore, we're sending the hearing back for a de novo hearing. There's none of that. It was just essentially a wiping of the – it's like taking a dry erase board and wiping it off and saying do this again. And I don't know that the Full Commission can necessarily do that. I'm not saying that they don't have the jurisdictional power to make a decision, but I don't know that it's a proper decision." (Hearing Transcript, pp. 6 -7)

6. Ms. Cofield's position as to jurisdiction, "... we know exactly what the Full Commission directed. A trial *de novo*. A new hearing. A start from beginning as if nothing has ever happened before." (Hearing Transcript, pp. 7 -8)

7. Mr. Haymond did not speak to jurisdiction.

8. As to jurisdiction, the Full Commission was clear in its Order. They vacated the Order of the single commissioner and remanded to the Jurisdictional Commissioner for a hearing *de novo*. They instructed me to reconsider the evidence, receive further evidence, and rehear the parties or their representatives.

9. A plain reading of their Order provides very specific direction. The evidence in this case is the evidence. Their instruction for a *de novo* hearing arrives out their decision to vacate the Decision and Order of the single Commissioner. It does not invalidate or exclude any evidence that is part of the record.

10. This is a new hearing based on the evidence in the record prior to this hearing and any evidence that the parties wished to offer at this hearing.

11. Therefore, evidence that is now part of the record exists is that – part of the record. Any objection to its becoming part of the record would have to have been addressed at the time it was first offered. It would be improper for me to go back and exclude testimony, APAs or exhibits that are already contained in the record.

12. If it were the intention of the Full Commission for me to do that, there would have been specific instruction as to what would be excluded from my consideration. They did not so instruct. Quite the contrary, my instructions are to reconsider the evidence. A plain reading of that instruction is to reconsider all the evidence as it exists in the record.

13. Given the instructions of the Full Commission, the only parts of the file I am not to consider are the Order of the single Commissioner which has been vacated and the Findings of Fact and Conclusions of Law of the Full Commission which would necessarily recite the findings of the single hearing Commissioner.

14. I have not read and thus cannot consider the order of the single hearing Commissioner nor have I read the Findings of Fact and Conclusions of Law of the single hearing Commissioner.

15. Additionally, beyond the compensability of the alleged work-related accident, there is the question at bar as to who is the responsible party.

16. It is the position of Mr. Addison on behalf of his client that the Claimant, who is an employee of J&L, allegedly fell off the building where he was working. John Loughery and Emory Wilkie then go to Midlands Insurance Center, Inc. to obtain a workers' compensation policy after the alleged accident. The application identifies Mr. Wilkie as the Manager with 100% ownership of the insured. The signatory to the application was John Loughery. Claimant's accident earlier that day was never disclosed. The policy was bound around 2:30 PM on January 4, 2012. At the applicants' insistence, the policy was issued with an effective date of 12:01 AM, January 4, 2012.

17. Given this scenario, it is the position of Mr. Addison on behalf of his client that when FirstComp learned of the timeline and the fact the issuance of the policy was after the alleged work-related accident, the carrier declared the policy to be void pursuant to fraud.

18. As such, FirstComp is not and cannot be the carrier in this case.

19. It is Ms. Cofield's position on behalf of her client, the UEF, that there is nothing in the Workers' Compensation Act that permits that policy from being void *ab initio*. The statute section that controls is S.C. Code §38-75-720. Under this section no insurance policy or renewal thereof may be cancelled by the insurer prior to the expiration of the term stated in the policy except for non-payment of premium or material misrepresentation of fact which if it had been known to the company would have caused the company not to issue the policy.

20. I find Mr. Addison's argument more persuasive.

21. Insurance fraud has clearly been perpetrated here. As such, a contract binding the two parties could not exist. A binding contract, which an insurance policy is, cannot be created when the facts are perverted by criminal fraud.

22. The issuance of an insurance policy is a contract by which the insurer assumes risk. That is not what happened here. In this case, Mr. Wilkie and Mr. Loughery attempted to obtain a policy which would obligate the issuer to assume liability for an accident that had already happened.

23. The action of FirstComp is not cancelation of the policy, it is a recession of the policy.

24. Ms. Cofield's position is predicated on the cancelation of a lawful contract. That is not the case here. We need not get to the question of cancelation. Given its fraudulent foundation, the policy could not exist to be canceled. This fraudulent foundation far exceeds the aforementioned "misrepresentation of fact" and, as such, permits the rescission of the policy.

25. The General Assembly never intended nor did it provide a way for employers to circumvent the Workers' Compensation Act by allowing employers, after an injury has already occurred, to then secure workers' compensation insurance to pay for work related accidents. To do so, would undermine the very foundation of the workers' compensation system.

26. When the evidence is viewed as a whole, the Claimant sustained injuries to his left hip, right arm, ribs and back in a work-related accident on January 4, 2012.

27. When the evidence is viewed as a whole, the Claimant's injuries are compensable in that they were arising out of and within the course and scope of his employment.

28. The Claimant has an average weekly wage of $520.00 with a corresponding compensation rate of $346.68.

29. The Claimant is entitled to TTD from 01/04/12 – 04/04/12.

30. The Claimant is entitled to payment for all medical care and treatment incurred to date.

31. The Claimant is also entitled to a return visit to the authorized treating physician to assess his condition relative to this accident.

32. Should the authorized treating physician determine additional medical care and treatment is necessary, the Claimant would be entitled to treatment the authorized treating physician would provide or direct.

33. If the Claimant is at MMI, the authorized treating physician is to provide the date of MMI and a final impairment rating(s) which will allow for final resolution of this claim.

34. When the evidence is viewed as a whole, the employers in this case are John Loughery and Emory Wilkie operating as J&L Construction, LLC.

35. Based on the facts in evidence and by applying the applicable law to those facts, FirstComp is not the carrier in this case. Mr. Wilkie and Mr. Loughery attempted to obtain workers' compensation coverage through FirstComp. That attempt was fraudulent in that the injury had already occurred and the policy was rescinded by FirstComp.

36. FirstComp is dismissed from this claim.

37. As such, the claim is assigned to the Workerss Compensation Uninsured Employers' Fund. Nothing in this order deprives the UEF of its right to seek indemnification from the Employer and/or other wrongdoers found to be liable.

38. As to Ms. Cofield's Motion of August 15, 2014, the issues raised by that motion are addressed above and the motion is denied.

39. Until the Claimant returns to the authorized treating physician, the Claimant is not at MMI and all other issues are to be held in abeyance. All other issues are to be held in abeyance.

CONCLUSIONS OF LAW

1. Under §42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.

2. Under §42-1-130, Claimant Dallas Paul Bessinger was a covered employee.

3. Under §42-1-140, J&L Construction was a covered employer.

4. Under §42-3-150, there was an employer/employee relationship between Claimant and J&L Construction.

5. Under §42-17-20, venue in Richland County, South Carolina, was proper and agreed to by the parties.

6. Under §-1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.

7. Under §42-1-160, Claimant, Dallas Paul Bessinger, sustained a compensable injury by accident arising out of and in the course of his employment.

8. Under §42-1-40, Claimant's average weekly wage is $520.00 yielding a compensation rate of $346.68.

9. Under §42-9-30, Claimant is entitled to temporary total disability for the injury from the date of his accident, January 4, 2012 through April 4, 2012.

10. That the policy of insurance from FirstComp was procured by fraud by Claimant's Employer and is, therefore, void *ab initio* and provides no coverage over the injury in this case.

11. Under South Carolina law, a contract may generally be rescinded where a party has been induced by fraud into entering into the agreement. See Scott v. Mid Carolina Homes, Inc., 293 S.C. 191, 359 S.E.2d 291 (1987). An insurance contract may be voided under similar circumstances. See Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 563 S.E.2d 331 (2002). In order to void an insurance contract based on fraud, our courts have required the insurer to show: (1) the statement was false; (2) the falsity was known to the applicant; (3) the statement was material to the risk; (4) the statement was made with the intent to defraud the insurer; and (5) the insurer relied on the statement when issuing the policy. Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 269, 616 S.E.2d 737, 739 (Ct. App. 2005). Intent to defraud "may be inferred when there is no other reasonable or plausible explanation for the applicant's false representation." Floyd v. Ohio General Ins. Co., 701 F.Supp. 1177, 1190 (D.S.C. 1988) In addition, an insurer has the right to rely on an applicant's answer when "a fact is specifically inquired about, or a question so framed as to elicit a desired fact, a full disclosure must be made." Government Employees Insurance Co. v. Chavis, 254 S.C. 507, 513. 176 S.E.2d 131, 134 (1970).

12. In this case, each of these elements has been satisfied. The application for insurance contained numerous false statements, including the omission of Claimant's injury, the nature of the work performed by the applicants, and the ownership of the company. The evidence clearly shows that, at the time the application was prepared, Mr. Wilkie and Mr. Loughery knew of Claimant's injury and had knowledge of the falsity of the information in the application. The materiality of the false representations is self-evident. Disclosure of prior claims and the nature of the work to be performed are matters at the very heart of a contract for workers' compensation coverage. The intent to defraud is likewise self-evident based on the materiality of the false statements and omissions, *particularly in light of the timing of the application*.

13. By its plain language, S.C. Code Ann. § 38-75-730 "governs the cancellation of insurance policies" and lays out the steps necessary to do so, such as providing ten days of written notice to the insured and the agent of record. See S.C. Code Ann. § 38-75-730(b). By referencing only an insurer's right to *cancel*, it is evident that the § 38-75-720 was not intended to alter or eliminate an insurer's right to *rescind* a contract obtained through fraud. The difference, which is key to this issue, has been explained by our Supreme Court as follows:

> [C]ancellation refers to the termination of the policy prior to the end of the policy period, and termination refers to the expiration of policy by the lapse of the policy period. *Rescission is not merely a termination of contractual obligation but is abrogation or undoing of it from the beginning, which seeks to create a situation the same as if no contract ever had existed*....The cancellation of a liability

insurance policy operates prospectively and is to be distinguished from rescission which destroys the policy as void ab initio.

Chavis, 254 S.C. at 516, 176 S.E.2d at 135 (emphasis added).

14. The purpose of S.C. Code Ann. §38-75-730 is to prevent arbitrary cancellations of insurance contracts. By it's terms, the statute authorizes cancellation for such reasons as failure to pay premiums, a substantial change in the risk assumed, breaches of contractual duties, loss of the insurer's reinsurance and material misrepresentations. S.C. Code Ann. § 38-75-730 addresses situations far different than the intentional concealment of an existing claim to fraudulently procure a policy of insurance to cover that claim.

15. FirstComp is dismissed from this claim.

16. Pursuant to S.C. Code Ann. §42-15-60, Claimant is entitled to a return visit to the authorized treating physician to assess his condition relative to this accident and to receive additional medical care and treatment as recommended unless and until the physician determines Claimant to be at maximum medical treatment.

Request for Review

Within the statutory period, UEF filed a Form 30, *Request for Commission Review*, putting forth the following questions presented:

1. Did the Single Commissioner err in his interpretation of a Remand by the Full Commission for a "Hearing de novo" as demonstrated in Findings of fact (FOF #3, 4, 6, 7, 9, 10, 11, 12, 13, and 14) when such findings are clearly erroneous and contrary to the laws of South Carolina.

2. Did the Single Commissioner err in Finding of Fact #19 that "First Comp is not and cannot be the carrier in this case", when such finding is clearly erroneous in view of the reliable, probative and substantial evidence and by the laws of South Carolina.

3. Did the Single Commissioner err in Finding of Fact #17, 18, 21 and 22 that Mr. Addison's arguments regarding the existence of an insurance contract procured by fraud can be "void ad ibnitio" [sic] or "rescinded" when such finding is clearly erroneous in view of the reliable, probative and substantial evidence of the case and contrary to the laws of South Carolina.

4. Did the Single Commissioner err in Findings of Fact 1 - 40 and Conclusions of Law 2 - 5 and 6 - 16 when such findings are based on "evidence" submitted at a previous hearing, some of which were objected to, and were not gleaned from a hearing de novo as demanded by the Order of the Full Commission?

5. Did the Single Commissioner err in Finding of Fact #22 that "a contract binding two parties could not exist. A binding contract, which an insurance policy is, cannot be created when the facts are perverted by criminal fraud" which is contrary to any evidence submitted at this de novo hearing and contrary to the laws of South Carolina.

6. Did the Single Commissioner err in Finding of Fact #23 that "In this case, Mr. Wilkie and Mr. Loughery attempted to obtain a policy which would obligate the issuer to assume liability for an accident that had already happened" when such finding of fact was not based on any evidence presented in the de novo hearing, but instead, from a previous hearing which is contrary to the laws of South Carolina.

7. Did the single Commissioner err in Finding of Fact #17, 18, 19, 21, 22, 23, 24, 25, 26, 36, 38, 39 and Conclusions of Law 10, 11, 12, 13 and 14 that all indicate that a workers' compensation policy can be "void ab initio" or "rescinded" when such finding is against the law of South Carolina.

FirstComp, in its Form 30, *Request for Commission Review*, set forth the following issues for review:

1. The Commission erred in proceeding with the hearing as the order of the Appellate Panel remanding the case for a new hearing was invalid and contrary to the APA and Commission Regulations as the Appellate Panel's order lacked specific and definite findings to support remanding the matter for new hearing, failed to articulate any basis for the remand, and remanded the case in a manner not prescribed under the controlling statutory authority.

2. The Single Commissioner erred in Findings of Fact No. 9 and 10 by finding that the Full Commission was clear in its order when the order of the Full Commission contained to findings whatsoever in support of its order to vacate the prior order and remand the case for a de novo hearing.

Decision and Order

All proffered testimony and documentary evidence has been taken and delivered to the individual members of the Appellate Panel for their study and consideration. In addition, the parties have briefed and orally argued their positions before the Panel.

In an Appellate Panel review under S.C. Code Ann. § 42-17-50, the Commission's Appellate Panel shall review the award, weigh the evidence presented at the initial hearing, and,

if good ground be shown therefore, make its own findings and conclusions consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the record in this case, the Commission, by unanimous vote, has determined that all of the Single Commissioner's Findings of Fact and Rulings of Law are correct as stated. The Hearing Commissioner's Order is affirmed in its entirety, and the Commissioner's Findings of Fact and Rulings of Law, as adopted below, are hereby the law of this case.

Based upon the evidence in the record, including the testimony at the hearing, and the Commission's file, the Appellate Panel makes the following:

FINDINGS OF FACT

1. The Claimant alleges that he sustained an injury by accident arising out of and within the course and scope of his employment on January 4, 2012.

2. The Claimant alleges injuries to his left hip, right arm, ribs and back.

3. This hearing arises out of a remand from the Full Commission on April 17, 2014.

4. The Order of the appellate panel reads, "IT IS THEREFORE ORDERED that the Decision and Order of the single Commissioner is **Vacated** and this matter is **Remanded** to the Jurisdictional Commissioner for a hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives." (Appellate Panel Order, p. 6)

5. As to jurisdiction, Mr. Addison, representing FirstComp Insurance, takes the position that, while he did not object to going forward with this hearing, he states on the record, "I'm objecting to the jurisdiction in terms of us not having a clear understanding from the Full Commission as to exactly what this Commissioner is supposed to be doing today ..." (Hearing Transcript, p. 6) "They have not indicated what was deficient with Commissioner Roche's Order

in any way, shape or form. There's not anything saying she screwed up and, therefore, we're sending the hearing back for a de novo hearing. There's none of that. It was just essentially a wiping of the – it's like taking a dry erase board and wiping it off and saying do this again. And I don't know that the Full Commission can necessarily do that. I'm not saying that they don't have the jurisdictional power to make a decision, but I don't know that it's a proper decision." (Hearing Transcript, pp. 6 -7)

6. Ms. Cofield's position as to jurisdiction, "... we know exactly what the Full Commission directed. A trial *de novo*. A new hearing. A start from beginning as if nothing has ever happened before." (Hearing Transcript, pp. 7 -8)

7. Mr. Haymond did not speak to jurisdiction.

8. As to jurisdiction, the Full Commission was clear in its Order. They vacated the Order of the single commissioner and remanded to the Jurisdictional Commissioner for a hearing *de novo*. They instructed the Single Commissioner to reconsider the evidence, receive further evidence, and rehear the parties or their representatives.

9. A plain reading of the Full Commission's order provides very specific direction. The evidence in this case is the evidence. Their instruction for a *de novo* hearing arrives out their decision to vacate the Decision and Order of the single Commissioner. It does not invalidate or exclude any evidence that is part of the record.

10. This is a new hearing based on the evidence in the record prior to this hearing and any evidence that the parties wished to offer at this hearing.

11. Therefore, evidence that is now part of the record exists is that – part of the record. Any objection to its becoming part of the record would have to have been addressed at

the time it was first offered. It would be improper for the Single Commissioner to go back and exclude testimony, APAs or exhibits that are already contained in the record.

12. If it were the intention of the Full Commission for the Single Commissioner to do that, there would have been specific instruction as to what would be excluded from my consideration. They did not so instruct. Quite the contrary, the Single Commissioner's instructions were to reconsider the evidence. A plain reading of that instruction is to reconsider all the evidence as it exists in the record.

13. Given the instructions of the Full Commission, the only parts of the file the Single Commissioner was not to consider were the order of the single Commissioner which had been vacated and the Findings of Fact and Conclusions of Law of the Full Commission which would necessarily recite the findings of the single hearing Commissioner.

14. The Single Commissioner states in his Order that he did not read and thus could not consider the order of the single hearing Commissioner nor had he read the Findings of Fact and Conclusions of Law of the prior single hearing Commissioner.

15. Additionally, beyond the compensability of the alleged work-related accident, there is the question at bar as to who is the responsible party.

16. It is the position of Mr. Addison on behalf of his client that the Claimant, who is an employee of J&L, allegedly fell off the building where he was working. John Loughery and Emory Wilkie then go to Midlands Insurance Center, Inc. to obtain a workers' compensation policy after the alleged accident. The application identifies Mr. Wilkie as the Manager with 100% ownership of the insured. The signatory to the application was John Loughery. Claimant's accident earlier that day was never disclosed. The policy was bound around 2:30 PM

on January 4, 2012. At the applicants' insistence, the policy was issued with an effective date of 12:01 AM, January 4, 2012.

17. Given this scenario, it is the position of Mr. Addison on behalf of his client that when FirstComp learned of the timeline and the fact the issuance of the policy was after the alleged work-related accident, the carrier declared the policy to be void pursuant to fraud.

18. As such, FirstComp is not and cannot be the carrier in this case.

19. It is Ms. Cofield's position on behalf of her client, the UEF, that there is nothing in the Workers' Compensation Act that permits that policy from being void *ab initio*. The statute section that controls is S.C. Code §38-75-720. Under this section no insurance policy or renewal thereof may be cancelled by the insurer prior to the expiration of the term stated in the policy except for non-payment of premium or material misrepresentation of fact which if it had been known to the company would have caused the company not to issue the policy.

20. The Appellate Panel finds Mr. Addison's argument more persuasive.

21. Insurance fraud has clearly been perpetrated here. As such, a contract binding the two parties could not exist. A binding contract, which an insurance policy is, cannot be created when the facts are perverted by criminal fraud.

22. The issuance of an insurance policy is a contract by which the insurer assumes risk. That is not what happened here. In this case, Mr. Wilkie and Mr. Loughery attempted to obtain a policy which would obligate the issuer to assume liability for an accident that had already happened.

23. The action of FirstComp is not cancelation of the policy, it is a recession of the policy.

24. Ms. Cofield's position is predicated on the cancelation of a lawful contract. That is not the case here. We need not get to the question of cancelation. Given its fraudulent foundation, the policy could not exist to be canceled. This fraudulent foundation far exceeds the aforementioned "misrepresentation of fact" and, as such, permits the rescission of the policy.

25. The General Assembly never intended nor did it provide a way for employers to circumvent the Workers' Compensation Act by allowing employers, after an injury has already occurred, to then secure workers' compensation insurance to pay for work related accidents. To do so, would undermine the very foundation of the workers' compensation system.

26. When the evidence is viewed as a whole, the Claimant sustained injuries to his left hip, right arm, ribs and back in a work-related accident on January 4, 2012.

27. When the evidence is viewed as a whole, the Claimant's injuries are compensable in that they were arising out of and within the course and scope of his employment.

28. The Claimant has an average weekly wage of $520.00 with a corresponding compensation rate of $346.68.

29. The Claimant is entitled to TTD from 01/04/12 – 04/04/12.

30. The Claimant is entitled to payment for all medical care and treatment incurred to date.

31. The Claimant is also entitled to a return visit to the authorized treating physician to assess his condition relative to this accident.

32. Should the authorized treating physician determine additional medical care and treatment is necessary, the Claimant would be entitled to treatment the authorized treating physician would provide or direct.

33. If the Claimant is at MMI, the authorized treating physician is to provide the date of MMI and a final impairment rating(s) which will allow for final resolution of this claim.

34. When the evidence is viewed as a whole, the employers in this case are John Loughery and Emory Wilkie operating as J&L Construction, LLC.

35. Based on the facts in evidence and by applying the applicable law to those facts, FirstComp is not the carrier in this case. Mr. Wilkie and Mr. Loughery attempted to obtain workers' compensation coverage through FirstComp. That attempt was fraudulent in that the injury had already occurred and the policy was rescinded by FirstComp.

36. FirstComp is dismissed from this claim.

37. As such, the claim is assigned to the Workerss Compensation Uninsured Employers' Fund. Nothing in this order deprives the UEF of its right to seek indemnification from the Employer and/or other wrongdoers found to be liable.

38. As to Ms. Cofield's Motion of August 15, 2014, the issues raised by that motion are addressed above and the motion is denied.

39. Until the Claimant returns to the authorized treating physician, the Claimant is not at MMI and all other issues are to be held in abeyance. All other issues are to be held in abeyance.

Based upon the evidence in the record, including the testimony at the hearing, and the Commission's file, the Appellate Panel makes the following:

CONCLUSIONS OF LAW

1. Under §42-3-180, the Commission has jurisdiction over the parties to hear the issues in dispute.

2. Under §42-1-130, Claimant Dallas Paul Bessinger was a covered employee.

3. Under §42-1-140, J&L Construction was a covered employer.

4. Under §42-3-150, there was an employer/employee relationship between Claimant and J&L Construction.

5. Under §42-17-20, venue in Richland County, South Carolina, was proper and agreed to by the parties.

6. Under §-1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.

7. Under §42-1-160, Claimant, Dallas Paul Bessinger, sustained a compensable injury by accident arising out of and in the course of his employment.

8. Under §42-1-40, Claimant's average weekly wage is $520.00 yielding a compensation rate of $346.68.

9. Under §42-9-30, Claimant is entitled to temporary total disability for the injury from the date of his accident, January 4, 2012 through April 4, 2012.

10. That the policy of insurance from FirstComp was procured by fraud by Claimant's Employer and is, therefore, void *ab initio* and provides no coverage over the injury in this case.

11. Under South Carolina law, a contract may generally be rescinded where a party has been induced by fraud into entering into the agreement. See Scott v. Mid Carolina Homes, Inc., 293 S.C. 191, 359 S.E.2d 291 (1987). An insurance contract may be voided under similar circumstances. See Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 563 S.E.2d 331 (2002). In order to void an insurance contract based on fraud, our courts have required the insurer to show: (1) the statement was false; (2) the falsity was known to the applicant; (3) the statement was material to the risk; (4) the statement was made with the intent

to defraud the insurer; and (5) the insurer relied on the statement when issuing the policy. Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 269, 616 S.E.2d 737, 739 (Ct. App. 2005). Intent to defraud "may be inferred when there is no other reasonable or plausible explanation for the applicant's false representation." Floyd v. Ohio General Ins. Co., 701 F.Supp. 1177, 1190 (D.S.C. 1988) In addition, an insurer has the right to rely on an applicant's answer when "a fact is specifically inquired about, or a question so framed as to elicit a desired fact, a full disclosure must be made." Government Employees Insurance Co. v. Chavis, 254 S.C. 507, 513. 176 S.E.2d 131, 134 (1970).

12. In this case, each of these elements has been satisfied. The application for insurance contained numerous false statements, including the omission of Claimant's injury, the nature of the work performed by the applicants, and the ownership of the company. The evidence clearly shows that, at the time the application was prepared, Mr. Wilkie and Mr. Loughery knew of Claimant's injury and had knowledge of the falsity of the information in the application. The materiality of the false representations is self-evident. Disclosure of prior claims and the nature of the work to be performed are matters at the very heart of a contract for workers' compensation coverage. The intent to defraud is likewise self-evident based on the materiality of the false statements and omissions, *particularly in light of the timing of the application*.

13. By its plain language, S.C. Code Ann. § 38-75-730 "governs the cancellation of insurance policies" and lays out the steps necessary to do so, such as providing ten days of written notice to the insured and the agent of record. See S.C. Code Ann. § 38-75-730(b). By referencing only an insurer's right to *cancel*, it is evident that the § 38-75-720 was not intended

to alter or eliminate an insurer's right to *rescind* a contract obtained through fraud. The difference, which is key to this issue, has been explained by our Supreme Court as follows:

> [C]ancellation refers to the termination of the policy prior to the end of the policy period, and termination refers to the expiration of policy by the lapse of the policy period. *Rescission is not merely a termination of contractual obligation but is abrogation or undoing of it from the beginning, which seeks to create a situation the same as if no contract ever had existed*....The cancellation of a liability insurance policy operates prospectively and is to be distinguished from rescission which destroys the policy as void ab initio.
>
> Chavis, 254 S.C. at 516, 176 S.E.2d at 135 (emphasis added).

14. The purpose of S.C. Code Ann. §38-75-730 is to prevent arbitrary cancellations of insurance contracts. By it's terms, the statute authorizes cancellation for such reasons as failure to pay premiums, a substantial change in the risk assumed, breaches of contractual duties, loss of the insurer's reinsurance and material misrepresentations. S.C. Code Ann. § 38-75-730 addresses situations far different than the intentional concealment of an existing claim to fraudulently procure a policy of insurance to cover that claim.

15. FirstComp is dismissed from this claim.

16. Pursuant to S.C. Code Ann. §42-15-60, Claimant is entitled to a return visit to the authorized treating physician to assess his condition relative to this accident and to receive additional medical care and treatment as recommended unless and until the physician determines Claimant to be at maximum medical treatment.

ORDER OF THE APPELLATE PANEL

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, based on review of the record as a whole and the oral arguments of the parties made before the Appellate Panel, the Appellate Panel adopts the findings, conclusions and orders of the Single Commissioner

verbatim, and in their entirety. The Appellate Panel hereby affirms the following orders of the Single Commissioner:

ORDER

IT IS THEREFORE ORDERED that Claimant sustained a compensable injury to his left hip, right arm, and back on January 4, 2012, for which he is entitled to reimbursement and/or payment of past causally-related medical expenses; ongoing medical treatment pursuant to S.C. Code §42-15-60 at least until Claimant reaches MMI; and temporary total disability for the injury from the date of his accident, January 4, 2012 through April 4, 2012 at the compensation rate of $346.68. **IT IS FURTHER ORDERED THAT** the policy issued by FirstComp to J&L was *void ab initio* and no coverage existed at the time of Claimant's January 4, 2012 injury and FirstComp is dismissed from this case. **ACCORDINGLY, IT IS ORDERED THAT** UEF provide Claimant's benefits under the Act in accordance with this Order.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

T. Scott Beck, Chairman

Susan S. Barden, Commissioner

Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on September 3, 2015