

Ami Meetze

From: Lindler, Kellie [klindler@wcc.sc.gov]
Sent: Wednesday, March 11, 2015 10:44 AM
To: 'Steve Haymond' (SDH@harrisgraves.com); 'amy@cofieldlaw.com'; Daniel Addison; Lee E. Dixon
Cc: ami@cofieldlaw.com; CHURLEY@hedrickgardner.com; G. Branch
(GBranch@harrisgraves.com)
Subject: Bessinger Dallas - order instructions 1200479

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03/13/2015

SC Court of Appeals

Additional/Amended directives are in BOLD>.

ADMENDED REQUEST FOR PROPOSED ORDER

This document is not an Order. It is a request for a proposed Order. The undersigned reserves the right to modify or delete any portion of this document.

WCC File Number: 1200479
Date of Hearing: 08/21/14
Place of Hearing: Richland County

CLAIMANT: Dallas Bessinger
EMPLOYER: R N M Builders & Associates, LLC
CARRIER: None or Unknown / WC Uninsured Employers Fund

Claimant's Attorney: Steven D. Haymond
Defendants' Attorney: WC Uninsured Employers Fund – Amy V. Cofield
Firstcomp Insurance Company – R. Daniel Addison

DOI: 01/04/12

AWW: see below CR: see below

Court Reporter: Kim Power

PO Box 2403
Lexington, SC 29071
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(803) 622-9057

FINDINGS OF FACT AND DIRECTIVES

Mr. Addison, please draft the order consistent with the below findings and return to this office within 30 days.

1. The Claimant alleges that he sustained an injury by accident arising out of and within the course and scope of his employment on 01/04/12.
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 04/17/14.
4. The Order of the appellate 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.
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..." "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 go 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." (transcript, pages 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."
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 falls off the building where he is 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 01/04/12. At the applicants’ insistence, the policy was issued with an effective date of 12:01 AM, 01/04/12.
17. Given this scenario, it is the position of Mr. Addison on behalf of his client that when Firstcomp learned of timeline and the fact the issuance of the policy was after the alleged work-related accident, the carrier declares 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 inito. The statute section that controls is §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 rescission 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 01/04/12.
27. When the evidence is viewed as a whole, the Claimants' 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 and 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 Workers' 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 08/15/14, 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.**

INSTRUCTIONS: Please let our office know if you have difficulty obtaining a transcript or cannot complete the order within this timeframe. Draft the Order consistent with the above substance of the preceding Findings of Fact. You may also add additional Findings of Fact consistent with the above ruling. The Order should include biographical information regarding the Claimant's work history and previous medical history, if relevant to the case.

If you need a transcript, order it **immediately** from the court reporter listed above. Provide a copy of the proposed Order to opposing counsel or *pro se* claimant before or at the same time one is submitted to the Commission.

When submitting the proposed Order to the Commission, please email only to klindler@wcc.sc.gov. The Commission no longer needs hard copies of the proposed order unless the claimant is *pro se*.

Matters to include in the Order:

1. APA Submissions
2. Stipulations
3. Statement of the Case (contentions of the parties – stated concisely)
4. Evidence of the Case (synopsis of the evidence – including testimony and medical reports)
5. Findings of Fact [numbered] (Do **not** delete any of the above findings.) The prevailing party may add to support the decision, except regarding credibility unless you have been so instructed.
6. Conclusions of Law (cite applicable statutory sections and case law)
7. Award

Do not address credibility in the Order, unless it has been addressed in the preceding Order Notes.

Commissioner Gene McCaskill
South Carolina Workers' Compensation Commission
1333 Main Street
Columbia, South Carolina 29201

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