THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioner T. Scott Beck
Commissioner Susan S. Barden
Commissioner Avery B. Wilkerson, Jr.

Appellate Case No.: 2015-002092
SCWCC File No. 1200479

Dallas Paul Bessinger, ... Claimant

v.

R-N-M Builders & Associates, LLC, Employer; and
FirstComp a division of Markel, Inc., ... Carrier

of whom the South Carolina Uninsured Employers'
Fund is the ..... Appellant/Respondent

And FirstComp a division of Markel, Inc., is the ..... Respondent/Appellant

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BRIEF OF APPELLANT, SOUTH CAROLINA UNINSURED EMPLOYERS' FUND

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2. The Single Commissioner on remand erred the denial of the Motion made by the South Carolina Uninsured Employers' Fund to exclude from evidence certain deposition testimony that was not properly before the Commission.

3. The SC Workers' Compensation Commission erred in finding that workers' compensation policy can be "void ab initio" or "rescinded" contrary to the laws of the state of South Carolina that require a workers' compensation policy to be properly cancelled.

STATEMENT OF THE CASE

This matter was originally before the Workers' Compensation Commission pursuant to Form 50 and Form 51. A Hearing was held before a single Commissioner on July 18, 2012. An Order from that hearing was issued on December 18, 2012 finding that the employers' workers' compensation policy was "void ab initio" as it was procured by fraud. This matter was appealed by the South Carolina Uninsured Employers' Fund (hereinafter the "Fund"). The Full Commission issued its Order dated April 17, 2014 in which it ordered that the Order of the Single Commissioner be vacated and the matter reset for a "Hearing De Novo."

The "Hearing De Novo" was set before Commissioner McCaskill on August 21, 2014. The only testimony presented was by Claimant's attorney who presented the Claimant and his father only. The remainder of the hearing was oral arguments between FirstComp and the South Carolina Uninsured Employers' Fund. It was the position of the Fund that a hearing de novo required "A new hearing. A start from the beginning as if nothing has ever happened before." (Transcript of Hearing pp 7-8) Therefore, all parties must be notified of the hearing, witness testimony must be offered, etc.

Specifically, the Respondent offered deposition testimony which was objected to by this Appellant by way of Motion based on the fact that all parties were not noticed of the depositions and did not attend some of the depositions. Respondent argued that an objection to the admissibility of the depositions was not made at the first hearing so it was not proper to make the objections at the hearing de novo. Appellant argued that an objection to the introduction of the deposition testimony at the hearing de novo was proper.

FirstComp also appealed the Order of the Single Commissioner. In its' Form 30 dated April 14, 2015, it alleged primarily that the "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."

The second issue of relevance at the de novo hearing was whether or not a workers' compensation policy can be "void ab initio" if procured by fraud.

Commissioner McCaskill issued his Order on March 31, 2015 wherein he made 40 Findings of Fact based on information gleaned from the first hearing and the evidence submitted therein. It was held, among other things, that the hearing de novo did not invalidate or exclude any evidence that was submitted at the first hearing (even though the Order from the first hearing was vacated).

The Single Commissioner also held that the insurance policy in question had been procured by fraud, and "as such, a contract binding the two parties could not exist". It was held that "the action of FirstComp is not cancellation of the policy, it is a recession of the policy". As a result, FirstComp was not liable for the claim and was dismissed as a party.

This Order was appealed by both parties to the Appellate Panel of the South Carolina Workers' Compensation Commission.

The Order of the Appellate Panel issued on September 3, 2015 affirmed the Order of the Single Commissioner "in its' entirety" but conversely held that the policy issued by FirstComp was "void ab initio" not rescinded as was held by the Single Commissioner.

In regard to the issue regarding the "de novo hearing" the Appellate Panel found that the "hearing de novo" "is a new hearing based on the evidence in the record prior to this hearing and any evidence that is part of the record." Further, any objection to evidence becoming part of the record would have to have been addressed at the time it was first offered as it "would be improper for the Single Commissioner to go back and exclude testimony, APA's or exhibits that are already contained in the record."

Both the Fund and FirstComp have appealed this Order to this Honorable Court.

ISSUE

The SC Workers' Compensation Commission erred in its interpretation of a "Remand for a "Hearing de Novo" by allowing improper evidence submitted in the first hearing to be reconsidered in the de novo hearing without proper foundation and over proper objection which is contrary to the laws of South Carolina.

ARGUMENT

There were numerous issues arising from the very first hearing before Commissioner Roche that gave rise to the first Full Commission appeal. So many issues were raised by the Form 30 and the arguments before the Full Commission that it should have been no surprise that the parties needed to "start over". There were issues as to the naming of the correct parties, notices not given to the direct employers, no findings as to who the immediate employer was, etc. This, of course, was paramount to a finding that the South Carolina Uninsured Employers' Fund was liable for any benefits.

A hearing de novo is one defined by West Law Dictionary as, "meaning "from the new". When a court hears a case de novo, it is deciding the issues without reference to the legal conclusions or assumptions made by the previous court to hear the case." This case is tried as if being retried for the first time. The judge should not consider anything previously decided. "A trial de novo is one in which "the whole case is tried as if no trial whatsoever had been had in the first instance." Blizzard v. Miller, 306 S.C. 373, 412 S.E.2d 406 (1991). A hearing de novo, "as if no trial whatsoever has been held in the first instance" requires a party to present admissible evidence at the time of the hearing.

The hearing Commissioner at the de novo hearing failed to have a proper hearing. The Claimant testified as well as his father. FirstComp presented no testimony. There were only oral arguments made by FirstComp and the South Carolina Uninsured Employers' Fund. The Commissioner committed fatal error by determining that he could consider all matter already "in the record". There were many issues that were initially on appeal to the Full Commission that were never addressed by either the full commission or on the remand. All the issues were not addressed because the Commissioner never had a proper "de novo hearing" to determine all issues.

ISSUE

The Single Commissioner on remand erred the denial of the Motion made by the Fund to exclude from evidence certain deposition testimony that was not properly before the Commission.

ARGUMENT

Prior to this "De Novo" hearing the Fund made objections by way of Motion objecting to FirstComp's Form 58 and Pre-Hearing Brief dated August 11, 2014 that indicated it would be to submitting some deposition testimony that had been submitted into evidence at the very first Single Commission Hearing. FirstComp argued that the evidence that it sought to submit at the de novo hearing was automatically admissible because objections to it were not made at the initial hearing. The Appellant strongly disagrees with this position. It was ordered that there be a hearing de novo. All evidence must be admissible when presented for introduction into evidence at the "new" de novo hearing.

A review of the South Carolina Rules of Civil Procedure clearly state under Rule 30(b) that "A party desiring to take deposition of any person upon oral examination shall give **ten (10) days notice in writing** to every other party to the action. . ." South Carolina Rules of Civil Procedure Rule 32(a) states that "**Use of Depositions.** At the trial or upon the hearing of a motion of an interlocutory proceeding, any First, a hearing de novo, "as if no trial whatsoever has been held in the first instance" requires the Defendant to present admissible evidence at the time of the hearing. The Fund made objections to FirstComp's Form 58 that was submitted into evidence as it contained information as to the findings of the Single Hearing Commission in 2012. FirstComp argued that the deposition testimony it desired to submit at the hearing on remand was automatically admissible because objections to it were not made at the initial hearing. This is false. This is ordered to be a hearing de novo. All evidence must be admissible when presented for introduction into evidence at the new hearing.

A deposition, or any part of a deposition, under the rules of evidence may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the rules of evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

The first deposition transcript that FirstComp sought to admit into evidence was that of a witness by the name of Talisa Miller. Talisa Miller was alleged to be an agent of the Carrier. FirstComp has presented absolutely no information regarding proper notice to all of the parties of the deposition of Talisa Miller. In fact, it is clear from the transcript that the parties at attendance of the deposition were Claimant's Attorney, Steven D.

Haymond, FirstComp's Attorney, R. Daniel Addison, and Attorney for the Fund, Timothy B. Killen. There has been no evidence submitted by FirstComp that proper notice of this deposition was served on the Employer/Defendants, J&L Construction, LLC or R-N-M Builders & Associates, LLC or their respective attorneys.

Depositions cannot be used against a Defendant without the opportunity to cross-examine. If Talisa Miller had been subpoenaed to the Hearing then the alleged Employers/Defendants would have been noticed and an opportunity to cross examine whether or not the Employers/Defendants chose to attend the hearing. Without proof of notice to the Employers/Defendants of Talisa Miller's deposition, that deposition may not be used in a Hearing against the Employer/Defendants. It is hearsay and the Employers/Defendants have not had the opportunity to cross-examine.

FirstComp also sought to introduce the depositions of John Loughery and Emory Wilkie. Despite objections by the Fund to the admission of these depositions, proof of service of Notice of Depositions was not given pursuant to the South Carolina Rules of Civil Procedure. Appearances at that Deposition were Claimant's Attorney, Steven D. Haymond and FirstComp's Attorney, R. Daniel Addison. Not only was proper notice not provided to the Fund or to the Employers/Defendants, but it is clear that no one from the Fund was even present.

FirstComp argued that this deposition testimony was admissible into a hearing de novo because no one objected to it at the first hearing. The depositions taken of the two alleged Employees, John Loughery and Emory Wilkie, may have been admissible in the first hearing only because the Defendants were in attendance and were able to be cross-examined. However, just because they were admissible at the initial hearing, did not

make them admissible in the de novo hearing. The evidence must be admissible at the time they are introduced into evidence.

It is very interesting that FirstComp would cite Rule 32(d)(1) South Carolina Rules of Civil Procedure which states that "All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the parties giving the notice." The initial problem being that there was **NO NOTICE GIVEN**, therefore, no objection could be made.

ISSUE

The SC Workers' Compensation Commission erred in finding that workers' compensation policy can be "void ab initio" or "rescinded" contrary to the laws of the state of South Carolina that require a workers' compensation policy to be properly cancelled.

ARGUMENT

FirstComp argues that the workers' compensation policy it issued was void ab initio as it was procured through fraud. The Fund makes the argument that even if the workers' compensation policy was procured through fraud, S.C. Code Ann. §38-75-730 makes it clear that even policies procured by fraud must be properly cancelled and are never void ab initio. (S.C. Code Regs. 67-405)

At the hearing de novo, when FirstComp should have presented any evidence it had regarding the allegations of fraud, there is absolutely no witness to testify regarding how or when a policy was procured. There were absolutely no witnesses present for this hearing to testify for FirstComp whatsoever. Therefore, without further argument

FirstComp has failed to make a case regarding any fraud much less of how its policy should be void ab initio.

CANCELLATION OF WORKERS' COMPENSATION POLICIES

The Fund asserts that an insurance company licensed to do business in South Carolina must adhere to the statutory scheme insofar as it relates to the cancellation or rescission of insurance policies. In particular, S.C. Code Ann. §38-75-730 governs the cancellation of workers' compensation insurance policies.

FirstComp alleges that it may declare a workers' compensation insurance policy void ab initio as part of a proceeding brought by a Claimant against its insured[1]. According to FirstComp it is entitled to do so because the insurance agreement was induced by fraud on the part of John Loughery and Emory Wilkie. This argument is flawed.

FirstComp claims that S.C. Code Ann. §38-75-730 does not apply to workers' compensation policies. However, S.C. Code Ann. §38-1-20 (11) clearly states "'Casualty insurance' means each insurance against legal liability of the insured for bodily injury to or death of another person, including workers' compensation insurance . . ."

S.C. Code Ann. §38-75-730, in specifying its requirement for cancellation, contemplates the precise types of actions that FirstComp complains of herein. Specifically, cancellation for a "material misrepresentation of fact which, if known to the company, would have caused the company not to issue the policy" is "not effective unless written notice of cancellation has been delivered or mailed to the insured and the

[1] FirstComp did not bring its own action to have the policy declared void ab inito, but has only asserted this as a defense.

agent of record, if any, not less than thirty days prior to the proposed effective date of cancellation." S.C. Code Ann. §38-75-730; Fund APA Submissions, page 29.

Terms of cancellation also appear in the policy itself, and these also require a notice period prior to cancellation. The insurer did not reserve a right to rescission or right to void its contract.

The Courts in North Carolina have already addressed this issue. Oxendine v. TWL, Inc., 184 N.C. App. 162, 645 S.E.2d 864 (N.C. App 2007); Fund APA Submissions, page 31. According to the North Carolina Court of Appeals, "a workers' compensation insurance contract will therefore never be void ab initio, but must be cancelled in the manner prescribed by N.C. Gen. Stat. §58-36-105 [the insurance policy cancellation section]." Oxendine v. TWL, Inc., 184 N.C. App. 162, 165, 645 S.E.2d 864, 866 (N.C.App. 2007); Fund APA Submissions, page 31. Further, the N.C. Court of Appeals pointed out that the N.C. Code Section, like S.C. Code Ann §38-75-730, "contemplates the very sort of 'material misrepresentation or non disclosure of a material fact in obtaining the policy' . . . [and] it clearly governs our review of this matter." Oxendine v. TWL, Inc., 184 N.C. App. 162, 166, 645 S.E.2d 864, 866 (N.C.App. 2007); Fund APA Submissions, page 31; also see J. Bend v. Shamrock Services, 59 So.3d 153, 36 Fla.L.Weekly D430 (Fla.App.1 Dist. 2011) and Cruz v. New Millenium Construction & Restoration Corp., 793 N.Y.S.2d 548, 17 A.D.3d 19 (N.Y. Sup. Ct. App. Div 3rd Dept. 2005).

To support its position that a workers' compensation insurance policy may be declared void ab inito, FirstComp cites Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 563 S.E.2d 331 (2002). However, that case is distinguishable from the instant matter because it concerned a first-person health insurance policy. That case centers on S.C. Code Ann. §38-71-40, which states:

> "The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery there under unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of risk or hazard assumed by the insurer."

(emphasis added). "This chapter," as referenced in that section, is Chapter 71, or "Accident and Health Insurance." The case at bar, however, is not a first-person policy. It insures a third party who was not a party to any fraud.

Workers' compensation insurance policies are specifically excluded from Chapter 71: "Nothing in this chapter applies to or affects . . . any policy of workers' compensation insurance . . ." S.C. Code Ann. §38-1-20(1) ("'Accident and health insurance' means insurance of human beings against death or personal injury by accident . . . but not including coverages required by the Workers' Compensation Law of this State.") S.C. Code Ann. §38-1-20(11) ("'Casualty insurance' means each insurance against legal liability of the insured for bodily injury to or death of another person, including workers' compensation insurance . . .").

This distinction is significant not only because it is statutorily based, but also because it affords protection to the injured employee, who is not at fault in this action and against whom there is not allegation of fraud. As noted by the South Carolina Supreme Court, a workers' compensation insurance policy is a contract or agreement between the

insurer and the person or persons entitled to compensation benefits. Carter v. Boyd Const. Co., 255 S.C. 274, 280, 178 S.E.2d 536, 539 (1971). The Claimant, as a party to the agreement, can't be denied benefits due to the fraudulent actions of the Employers, especially where a policy was in place at the time of the accident.

Even if a workers' compensation insurance policy could be declared void ab inito, then FirstComp must show, by clear and convincing evidence, that the Claimant – the other party to the contract, per the Supreme Court – committed fraud in seeking to obtain benefits. Because the Claimant would be the party entitled to the benefits, actions by the employer(s), whether fraudulent or not, cannot affect his entitlement to benefits under the policy. Here, the injured party/Claimant is a third party beneficiary not a party to the fraud.

It has been repeatedly established by the South Carolina Courts that "the law strictly construes insurance policies against the drafter and in favor of coverage for the insured." General Acc. Ins. Co. v. Safeco Ins. Companies, 314 S.C. 63, 72 443 S.E.2d 813, 818 (Ct. App. 1994) (citing South Carolina State Budget & Control Bd., Div. of Gen. Servs., Ins. Reserve Fund v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991)). The Policy at issue was drafted and signed by FirstComp and therefore, terms and language of the policy are to be construed in favor of the insured, the business entity formed by Emory Wilkie and John Loughery. The policy itself does not allow for the type of "relief" sought by FirstComp.

As its primary support for its position, FirstComp cites the 1970 case of Government Employees Insurance Co. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970). Chavis does not involve a casualty or workers' compensation insurance policy. Chavis is a case involving the rescission of an automobile insurance policy. Chavis was decided under former law (S.C. Code Ann. §76-750-51 (1962)), and it also predates the effective statute herein.

FirstComp asserts that requiring it to provide benefits to the injured Claimant, should he be entitled to any, would not "comport with the clear policy of South Carolina in refusing to sanction fraudulent conduct . . ." This argument overlooks a number of issues.

First, FirstComp was reckless and negligent in the issuance of the policy. For reasons known only to FirstComp and its agent, this policy was issued where Emory Wilkie was the named applicant and listed as the sole owner of the business, but where John Loughery – not Emory Wilkie – signed the application. Then FirstComp named the insured as "E&W Construction, LLC," which doesn't even exist. Then, after the accident and after proper cancellation of the policy, FirstComp issued a refund check to Emory Wilkie alone. (Fund APA submissions page 28).

Even further evidence of negligence is obvious and the reason the parties are arguing this issue: FirstComp backdated the policy. Clearly, backdating an insurance policy is a negligent business practice. It is axiomatic that insurance is a policy against contingencies, not against that which is already past. However, for whatever reason, this is what FirstComp chose to do. The solution was simple: FirstComp could have made the policy effective at the time of contracting or subsequent thereto. However, they did not.

If a workers' compensation insurance could be void ab initio (which the Fund denies), the negligence of FirstComp plays a role in whether they could be successful. That's because the party seeking rescission, especially a sophisticated party like FirstComp cannot do so where it was negligent in the formation of the contract. In fact,

> "a court will not rescind a contract solely on the basis of unilateral mistake unless the party opposing rescission induced the mistake "by fraud, deceit, misrepresentation, concealment, or imposition . . . , without negligence on the part of the party claiming rescission, or where mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement."

State Accident Fund v. South Carolina Second Injury Fund, 388 S.C. 67, 77, 693 S.E.2d 441, 446 (Ct.App. 2010) (quoting Truck South, Inc. v. Patel, 339 S.C. 40, 49, 528 S.E.2d 424, 429 (2000)).

No one has alleged that the Claimant committed any fraud. According to the Supreme Court, he is a party to this contract, and as a party, he would be entitled to benefits under the policy – not Emory Wilkie or John Loughery. Further, if FirstComp were defrauded by Emory Wilkie and/or John Loughery, FirstComp can find relief at law, where it can sue the parties for its damages or audit and charge additional premiums.

CONCLUSION

The Single Commissioner committed grave error in failing to conduct a proper hearing de novo. Therefore, the order on appeal must, once again, be set aside and the matter remanded for a full hearing de novo as defined in South Carolina law.

The entire order on appeal resulted from an improper hearing and subsequent order, and therefore, the legal conclusion, as to whether or not a policy was procured from fraud and whether or not a policy can be "void ab initio" are completely without substance or merit and must be reversed. Even if it were a proper hearing and order the finding that a workers' compensation policy can be "void ab initio" must be reversed.

Respectfully Submitted,

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By: _____

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December 3, 2015
Lexington, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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And FirstComp a division of Markel, Inc., is the ..... Respondent/Appellant

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PROOF OF SERVICE

I certify that I have served the **Brief of Appellant, South Carolina Uninsured Employers' Fund and Designation of Matter to be Included in the Record on Appeal** by depositing a copy of same in the United States Mail, postage prepaid, on this 3rd day of December, 2015, addressed to the following:

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December 3, 2015

VIA HAND DELIVERY
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Dallas Paul Bessinger v. R-N-M Builders & Associates, LLC and FirstComp a division of Markel, Inc. and South Carolina Uninsured Employers' Fund
Appellate Case No.: 2015-002092
Our File No.: 42.16

Dear Mrs. Kitchings:

Please find enclosed herewith the following original documents for filing in the above-referenced matter:

1. Brief of Appellant, South Carolina Uninsured Employers' Fund;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service of the Brief of the Appellant and Designation of Matter.

I have also enclosed herewith one (1) copy of the above-referenced documents. I would respectfully request that you please file the originals in your usual fashion and return a time-stamped copy of each of the enclosed documents to me in the self-addressed stamped envelope I have enclosed for your convenience.

By carbon copy of this letter, I am hereby serving all parties with a copy of the enclosed documents.

Thank you in advance for your assistance in this matter. If you have any questions regarding the enclosures or need additional information, please don't hesitate contacting me.

Sincerely,

Amy V. Cofield

Amy V. Cofield

/amm
Enclosures

cc: Ms. Amy Bracy, Judicial Director (with copy of enclosures)
South Carolina Workers' Compensation Commission
Steven D. Haymond, Esq. (with copy of enclosures)
R. Daniel Addison, Esq. (with copy of enclosures)