THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck; Susan S. Barden; Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

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

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.

INITIAL BRIEF OF RESPONDENT/APPELLANT IN RESPONSE TO BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF THE CASE

This matter arises originally out of a Form 50, *Request for Hearing*, filed by Dallas Paul Bessinger ("Claimant") with respect to an alleged work-related injury sustained on January 4, 2012. In his Form 50, Claimant alleged that FirstComp was the carrier with coverage for this incident pursuant to a policy of insurance issued on the date of injury. FirstComp filed a Form 51, *Answer to Request for Hearing*, asserting as an affirmative defense that the insurance policy issued by FirstComp to Claimant's employer, J&L Construction ("J&L"), was procured by fraud in the inducement and is, therefore, void *ab initio*. A hearing was held on July 18, 2012 before Commissioner Andrea C. Roche. A Decision and Order dated December 18, 2012 ("12/18/12 Order") was issued in which the Commissioner found, *inter alia*, that the FirstComp workers' compensation policy was procured by fraud and was, therefore, void *ab initio*. The Commissioner also found that the South Carolina Workers' Compensation Uninsured Employers' Fund ("UEF") was responsible for Claimant's workers' compensation benefits and medical care. UEF appealed the 12/18/12 Order to the Appellate Panel of the South Carolina Workers Compensation Commission ("Appellate Panel").

On April 17, 2014, the Appellate Panel issued a Decision and Order ("Remand Order") vacating the 12/18/12 Order and remanding the case for a "hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives." No appeal of the Remand Order was filed by FirstComp at the time as it was an interlocutory order. A subsequent hearing was set before Commissioner Gene McCaskill ("Single Commissioner") on August 21, 2014 ("*De Novo* Hearing"). On March 31, 2015, the Single Commissioner issued a Decision and Order ("3/31/15 Order") finding the FirstComp policy was procured through fraud and dismissed FirstComp from the claim. UEF appealed the 3/31/15 Order. While FirstComp did not have any objection to the ultimate decision of the Single Commissioner, UEF's appeal compelled FirstComp to appeal the 3/31/15 Order on the limited grounds that the Remand Order was improper and the 12/18/12 Order should not have been vacated. On September 3, 2015, the Appellate Panel affirmed the 3/31/15 Order in its entirety. UEF timely filed its Notice of Appeal to the Court of Appeals. FirstComp cross-appealed on the grounds that the Appellate Panel's Remand Order was improper and not in compliance with the South Carolina Workers Compensation Act, the Regulations of the South Carolina Workers Compensation Commission, or the interpretive case law of these authorities.

STANDARD OF REVIEW

"The Administrative Procedures Act ("APA") establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission." Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981)). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citation omitted). This court reviews facts based on the substantial evidence

standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). "Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact." Forrest, 373 S.C. at 306, 644 S.E.2d at 785 (citing S.C. Code Ann. §1-23-380(A)(5)). The appellate court may reverse or modify the Appellate Panel's decision only if Claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Id. at 306, 644 S.E.2d at 785-86.

STATEMENT OF THE FACTS

Pursuant to the Remand Order, the *De Novo* Hearing was convened before the Single Commissioner on August 21, 2014. Present at the hearing were counsel for Claimant, counsel for UEF, and Counsel for FirstComp, with each party having submitted evidence pursuant to their respective Form 58, *Pre-Hearing Briefs*, and APA submissions. The Single Commissioner determined that all parties had been properly notified of the hearing and the hearing would proceed. Though included on the notice for the hearing, J&L did not appear either through counsel or through its identified representatives, John Loughery and Emory Wilkie.[1] The issues for dispute at the hearing were determination of Claimant's employer, determination of the proper carrier, Claimant's compensation rate and his entitlement to temporary total disability ("TTD") benefits.

At the outset of the hearing, FirstComp objected to the basis for convening a *de novo* hearing in this matter. FirstComp argued that the Remand Order was improper on the grounds

[1] R-N-M Builders & Associates, LLC was also a named defendant/employer in this matter but no evidence was ever adduced to establish that it had any liability. While R-N-M was initially represented by counsel, its attorney eventually withdrew. R-N-M did not appear by counsel or otherwise at the *De Novo* Hearing.

that it did not contain necessary findings of fact sufficient to determine the basis for vacating the 12/18/12 Order or what, if any, error occurred in the prior hearing requiring a new hearing. The Single Commissioner found that jurisdiction was proper for him to proceed with a *de novo* hearing and that the Commission file, with the exception of self-serving declarations and unstipulated medical reports would be part of the record. UEF moved to strike certain exhibits from FirstComp's APA, specifically three deposition transcripts. The Single Commissioner took UEF's motion under advisement.

The evidence submitted in the case shows that, on the morning of January 4, 2012, Claimant fell from a roof where he had been laying roofing tar paper. At the time, Claimant was an employee of J&L. At the time of Claimant's injury, J&L did not have a workers' comp insurance policy. Claimant was transported to the Orangeburg Regional Medical Center for treatment. According to the deposition testimony of the agent involved, Ms. TaLisa Miller, Mr. Loughery and Mr. Wilkie then went to Midlands Insurance Center, Inc. ("Midlands") to submit an application for insurance coverage and paid the initial premium payment in cash. The application identified Mr. Wilkie as the Manager with 100% ownership of the insured. The signatory to the application was Mr. Loughery. The application indicates that the insured is a class "5437" business and is described as "Carpentry – Installation of Ca." No prior loss history was identified. On the basis of this application, FirstComp issued policy No. WC01331654-01 to J&L with an effective date of 12:01 a.m., January 4, 2012. Ms. Miller testified at her deposition that she did not know the two gentlemen who had applied for this policy and had never done business them with before. Ms. Miller testified that the men did not inform her of a claim that had occurred earlier that day and she would not have issued the policy if they had.

The transcripts of depositions of Mr. Wilkie and Mr. Loughery were also admitted into evidence. Mr. Wilkie testified that he and Mr. Loughery went the insurance company after

Claimant was taken to the hospital. He testified that he was under the impression that they were renewing a prior policy that had lapsed. Mr. Wilkie testified that the agent was aware that an accident had occurred earlier that morning. Mr. Loughery testified that he did business under the name J&L and Claimant was working for him on the date of his accident. Mr. Loughery testified that after Claimant fell, he went to the hospital with Mr. Wilkie and then to the Midlands insurance office. He testified that the agent, Ms. Miller, had told him needed to come and make a payment to renew their policy after he has called her and told her about the accident. Mr. Loughery testified that he thought he had been insured when the accident had happened.

UEF argued that the deposition testimony of Mr. Loughery, Mr. Wilkie and Ms. Miller should be excluded based on the alleged defective notice of those depositions when they were conducted in 2012. In his 3/31/15 Order, the Single Commissioner ruled that this testimony was already part of the record of the case and was admissible.

UEF also argued that S.C. Code Ann. §38-75-730 and S.C. Code Regs. 67-405 govern the cancellation of workers' compensation insurance policies and that Commission does not have the power to find a workers' compensation policy to be void, even if procured by fraud.

Claimant testified on his behalf at the hearing. Claimant testified he was hired by J&L to do framing and he worked with five or six other employees on the job. He had been working for J&L about two months prior to his injury. On cross examination by counsel for UEF, Claimant testified that he was hired by Wilkie and Loughery and that they were J&L. Claimant's father also testified at the hearing regarding his efforts at finding someone to cover his son's injuries.

The Single Commissioner found that Mr. Wilkie and Mr. Loughery committed insurance fraud when they applied for a workers' compensation policy with full knowledge that Mr. Bessinger's accident had already occurred and they failed to disclose that fact to the agent. On the basis of that fraud, the Single Commissioner found that no binding contract for insurance

could exist. The Single Commissioner determined that to allow a contract for insurance to stand when based on fraud would undermine the foundation of the workers' compensation system. Consequently, the Single Commissioner ruled that the FirstComp policy provided no coverage over Mr. Bessinger's injury.

As discussed more fully below, the Single Commissioner properly found that the statute and regulation relied on by UEF do not govern where a policy of insurance was obtained through fraud. Consequently, these findings and conclusions of the Single Commissioner were not in error and the Order should be upheld as to these findings and conclusions.

ARGUMENTS

As noted above, FirstComp has appealed the Appellate Panel's affirmation of the 3/31/15 Order on the basis that the Remand Order was improper and the *De Novo* Hearing should not have been conducted. Without waiving any arguments relevant to that direct appeal or conceding that the *De Novo* Hearing was proper, FirstComp's position is that the issues raised on appeal by UEF are without merit and do not warrant a reversal of the Single Commissioner's 3/31/15 Order.

I. The Appellate Panel did not err in affirming the Single Commissioner's 3/31/15 Order.

In its Brief to the Full Commission, UEF raises three principal arguments with respect to the 3/31/15 Order, as affirmed by the Appellate Panel: (1) that the Single Commissioner improperly considered evidence in to the record that was already in the Commission file; (2) that the Single Commissioner erred in not excluding from the record deposition testimony of relevant witnesses; and (3) that the Single Commissioner erred in finding that the FirstComp policy was procured by fraud and void *ab initio*. For the reasons set forth below, these arguments are

without merit and the 3/31/15 Order, as affirmed by the Appellate Panel, should be affirmed as to each of these issues on appeal by UEF.

a. The Single Commissioner did not err in his interpretation of what constitutes a *de novo* hearing.

UEF contends that the Commission erred in its interpretation of a *de novo* hearing by considering deposition testimony that had been admitted into the Commission record previously without any objection from UEF. UEF argues, without citation to any controlling authority, that a remand for a *de novo* hearing requires the Commission to pretend as if the entire procedural history of the case was wiped away and the parties were not permitted to rely on established record in the case. Not only does UEF's argument lack authority, it is contrary to established law. It is common practice for reviewing courts to use the term "*de novo* hearing" when remanding for further proceedings and it has never been held that the underlying court has to pretend that otherwise probative evidence already part of the record without objection by any party has to be readmitted.

While UEF correctly points out that a *de novo* hearing is generally stated to be one "as if no trial whatsoever has been held in the first instance," the true import of this is that the court or agency on remand is not bound by the findings or conclusions of the vacated order. It does not expunge the entirety of the established record in the case. This is especially true given the express qualifying language in the Remand Order ordering the Single Commissioner to "reconsider the evidence, receive further evidence, and rehear the parties." In ordering the Single Commissioner to "reconsider the evidence," this necessarily indicates reconsideration of evidence already in the record. On its face, it does not order the Single Commissioner to expunge the entire record and start over. Similarly, ordering the Single Commissioner to "receive *further* evidence" implies that some evidence has already been received and the parties

could introduce additional relevant evidence at the subsequent hearing. Nothing in the Remand Order suggests that it was an order to expunge the record and re-receive or re-introduce evidence that is already in the case. In essence, the Remand Order authorized the Single Commissioner to hear the parties, consider the evidence already in the record, take additional evidence the parties may seek to introduce, and make any decision he saw fit on the disputed issues based on the evidence before him.

Regardless of the specifics of the Remand Order, our courts have made it very clear that the ordering of a *de novo* hearing does not allow a party to take new positions on matters that have been previously waived or contest evidence previously admitted. This Court has previously addressed this specific issue in Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005). In that case, the employer admitted the compensability of the alleged injury but denied permanent disability. The single commissioner ordered the employer to pay temporary disability and causally-related medical care. On appeal, the Full Commission vacated the single commissioner's order and remanded for a *de novo* hearing. The claimant appealed. In affirming the dismissal of the appeal as interlocutory, the Court of Appeals held that a *de novo* hearing on remand "extends only to those issues within the application of review" and did not include issues that were not litigated previously. In short, a *de novo* hearing only involves issues that were previously litigated and preserved unless specifically ordered by the reviewing court. See e.g., Bobo v. Marshane Corp., 302 S.C. 86, 89, 394 S.E.2d 2, 4 (Ct. App. 1990)(citing In re Doherty, 222 Mass. 98, 109 N.E. 887 (1915))("where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record."); Smith v. S. Carolina Dep't of Mental Health, 329 S.C. 485, 501, 494 S.E.2d 630, 638 (Ct. App. 1997), aff'd by 335 S.C. 396, 517 S.E.2d 694 (1999) ("The

Commission in its discretion may conduct a de novo hearing in which testimony from all witnesses is again taken, or the Commission may rely on the testimony previously given.")

In this case, UEF's Form 30, *Request for Commission Review*, following the 12/18/12 Order, makes no reference whatsoever to any objection as to the admissibility of any evidence and, therefore, that issue cannot be contested on remand; even at a "*de novo*" hearing. Brunson, 367 S.C. at 167, 623 S.E.2d at 873 ("Since the remand to the single commissioner is limited to those matters included in Employer's appeal to the Commission, the compensability of Brunson's contact dermatitis claim will not be relitigated."). As discussed more fully below, UEF waived any objection to the contested evidence. Up until the eve of the *De Novo* Hearing, all the parties in this case were well aware of the existence of this evidence and its relevance to the issues in this case. UEF did not raise any objection to this evidence prior to, at, or on appeal from that initial hearing.

Allowing UEF to argue against the admissibility of evidence that had been entered without objection at a prior hearing, and to which no objection was made until the eve of the *De Novo* Hearing, unfairly prejudices FirstComp who relied on UEF's waiver and acquiescence as to this evidence. Pursuant to the Remand Order, it was within the purview of the Single Commissioner at the *De Novo* Hearing to take his own view of the evidence as to properly litigated issues. It does not follow, however, that UEF may raise an untimely objection to evidence that has been readily available and at issue in the case since 2012.

While reserving its objections to the enforceability of the Remand Order, FirstComp contends that the Single Commissioner committed no error in considering the previous record in this matter in conjunction with holding a *de novo* hearing to reconsider that evidence and rehear the parties. As such, UEF's argument on appeal should be dismissed.

b. The Single Commissioner did not err in admitting deposition testimony.

UEF argues that the Commission erred in denying UEF's motion to exclude certain deposition testimony from the record. In particular, UEF argues that the deposition transcripts of John Loughery, Emory Wilkie and TaLisa Miller were improperly admitted by the Single Commissioner. The stated basis for this contention is UEF's belief that the original notices of deposition regarding these parties and witnesses were defective.

On appeal from an order of the South Carolina Workers' Compensation Commission, this Court's standard of review as to the admission of evidence is limited. As this Court has stated numerous times, the "Workers' Compensation Commission is allowed wide latitude of procedure and is not restricted to the strict rules of evidence adhered to in a judicial court." Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 462, 732 S.E.2d 190, 194 (Ct. App. 2012). As set forth below, UEF's argument regarding the deposition testimony at issue is without merit and the Commission committed no error in admitting the testimony.

Deposition of TaLisa Miller – TaLisa Miller's deposition was conducted on April 12, 2012. Ms. Miller was the insurance agent who sold the FirstComp policy to Claimant's employer following Claimant's accident. UEF's position is that the deposition of Ms. Miller is inadmissible in the *De Novo* Hearing because, while UEF was represented and actively participated in the deposition, there is no evidence that "all of the parties" were given notice of the deposition. In essence, UEF is taking the novel position that it can raise a notice objection on behalf of another party. Despite the fact that UEF was a party to the deposition, it now wants to argue that the testimony is inadmissible because the employer defendants allegedly did not get proper notice of the deposition.[2] It is the position of FirstComp that UEF simply does not have

[2] FirstComp admits that J&L was not provided written notice of the deposition of Ms. Miller. Nevertheless, the record shows that Mr. Wilkie and Mr. Loughery were provided verbal

standing to raise this objection or assert the rights of any other party, especially when such objection was not preserved at or near the time the deposition was conducted.

The South Carolina Rules of Civil Procedure state that a party must make objection to any error with respect to the notice of deposition "promptly" and such objections are deemed waived if not made "at the time the error could have been corrected." Rule 32(d), SCRCP; comments to Rule 32. Plainly, any objection as to the sufficiency of the notice for Ms. Miller's deposition could have been made, either by UEF or J&L, within a reasonable time up to and including the July 18, 2012 original hearing. The record in this case shows that UEF first raised this notice objection in its Motion to Strike approximately 2½ years later. By any standard, this objection to the defect in the deposition notice was not "prompt" as required by the Rules of Civil Procedure.

In its brief, UEF does not cite to any authority for its novel position that it has standing to raise a procedural objection on behalf of another defendant, especially one who had notice of and did not appear at the *De Novo* Hearing. To the extent either Mr. Loughery or Mr. Wilkie have any objection to the sufficiency of their notice under the Rules of Civil Procedure or the admissibility of that testimony, it is incumbent on them to raise those objections, not UEF. Consequently, UEF's objections as to Ms. Miller's deposition are entirely without merit.

Deposition of Emory Wilkie and John Loughery – Mr. Wilkie and Mr. Loughery were both deposed on April 11, 2012. FirstComp admits that UEF did not get written notice of these depositions. Nevertheless, as counsel for UEF admitted *on the record* at Ms. Miller's deposition the following day, he did receive verbal notice of the depositions prior to them going forward but

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notification at their depositions the day prior. Neither objected to the deposition at that time or at any time since. J&L received notice of the *de novo* hearing and did not appear, thus any objections as to the admissibility of evidence is waived by it.

was unable to attend.[3] Importantly, counsel for UEF did not object at that time to the insufficient notice, did not request that the depositions be rescheduled, and did not seek to reconvene the depositions at any time after that. As the record reflects, UEF did not object to their admissibility at the initial hearing, did not attempt to cross-examine the deponents at that hearing, and did not appeal the admissibility of those transcripts when requesting a review of the 12/18/12 Order by the Full Commission. Plainly, UEF has constructively if not expressly waived any objection it could possibly have raised to a defect in the deposition notices of these parties.

In response, UEF contends that because they did not receive written notice of the depositions that "no objection could be made." In taking this disingenuous position, UEF very conveniently omits reference to the testimony of its own attorney the next day admitting he was notified of the depositions and the subsequent 3 months until the original July 18, 2012 hearing. The record is very clear that UEF had ample time and opportunity to raise an objection to any defect in the deposition notices for Wilkie and Loughery and failed to do so. This failure to timely object to the notice of deposition is a waiver of that objection. Rule 32(d), SCRCP. UEF had further opportunity to fully cross-examine these witnesses by renoticing their depositions once the Appellate Panel issued the Remand Order. At no time between April 17, 2014 and August 21, 2014 did UEF object to these depositions or attempt to set new depositions of these individuals so that it would have the opportunity to cross-examine them.

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[3] "I'm Tim Killen, and I represent the South Carolina Workers' Compensation Uninsured Employers' Fund, and I'm here voluntarily. My client did not receive actual – well, legal notice this -- . . . So I'm here voluntarily. I just found out about it yesterday. We did not receive – The fund did not receive notice of yesterday's two depositions until after they were underway or were just about to be underway, and I had a hearing out of town and I could not attend yesterday." Deposition of Talissa Miller, pp. 8-9.

Having failed to timely object to any defect in the notice of the depositions of Mr. Loughery and Mr. Wilkie, UEF now also argues that the depositions are nonetheless inadmissible at the *de novo* hearing because the witnesses were not present and available to be cross-examined at the hearing. It is important to note that the South Carolina Rules of Evidence do not apply in proceedings before the South Carolina Workers' Compensation Commission. See S.C. Code Ann. §1-23-330. "Great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts, and even hearsay evidence may be admissible, provided it is corroborated by facts, circumstances or other evidence." Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712, 719 (1940). Regardless of this standard, UEF's argument that this testimony is inadmissible does not take into account that these individuals are the principals for the defendant employer, J&L, and were parties to this action. As such, their testimony constitutes the statements of party opponents and is, by definition, not hearsay and cannot be excluded on that basis.

In his 3/31/15 Order, the Single Commissioner found that Mr. Wilkie and Mr. Loughery were provided notice of the *De Novo* Hearing but failed to appear. UEF concedes that the deposition testimony of these parties "may have been admissible in the first hearing only because the Defendants were in attendance and were able to be cross-examined." Initial Brief of UEF, p. 8 (emphasis in original). UEF now argues that the failure of these parties to appear requires the exclusion of their deposition testimony because they were unavailable to be cross-examined. While FirstComp believes the testimony is admissible under any circumstance, UEF's position is especially meritless given the indisputable fact that UEF did not call either of these defendants at the original hearing to cross-examine them regarding the deposition testimony that was admitted without objection. The suggestion that they have been deprived the opportunity to cross-examine these party defendants is simply not supported by the facts of this case.

For all of the above reasons, the Commission's decision to admit the sworn deposition testimony of Mr. Miller, Mr. Loughery, and Mr. Wilkie was without error.

c. The Single Commissioner did not err in finding that the FirstComp policy was obtained through fraud and, therefore, void *ab initio*.

UEF argues that the Single Commissioner erred in finding that a workers' compensation policy of insurance is void when procured through obvious and demonstrable fraud. In making this argument, it is important to note that UEF does not directly contest the factual finding that insurance fraud was committed by the employer seeking to obtain coverage for an injury that occurred before the policy was ever written. Rather, UEF contends that the finding is unsupported because the evidence of the fraud was improperly admitted. In addition, UEF contends that the carrier must be held on the risk for such a claim and its only remedy to address this blatant and obvious fraud is to follow the statutory procedure for cancellation of a policy. FirstComp asserts that the Single Commissioner made no error in reaching this conclusion and that UEF's position is contrary to established law, is counter to public policy and would undermine the workers' compensation scheme if allowed to stand.

i. Under general principles of law, a contract procured by fraud is void.

Under South Carolina law, a contract may generally be rescinded where a party has been induced by fraud into entering into the agreement. Stated more fully:

> South Carolina law allows for a contract to be rescinded for a unilateral mistake when that mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to rescission, without negligence on the part of the party claiming rescission, or when the mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement.

Scott v. Mid Carolina Homes, Inc., 293 S.C. 191, 359 S.E.2d 291 (1987). With respect to insurance contracts specifically:

> It has long been the law of this state that in order to void a policy of insurance on the ground that fraudulent representations were made in the procuring of such policy, the burden of proof rests upon the insurer to show, by clear and convincing evidence, not only that the statements complained of were untrue, but in addition thereto that their falsity was known to the applicant, that they were material to the risk, were relied on by the insurer, and that they were made with intent to deceive and defraud the company.

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 policy, our courts have required the following elements:

> (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) (citing Strickland v. Prudential Ins. Co. of Am., 278 S.C. 82, 86-87, 292 S.E.2d 301, 304 (1982))

In this case, the Commission found that each of these elements has been established. The Commission specifically found that the application omitted any disclosure of prior losses. The Commission found that the evidence clearly shows that, at the time the application was prepared, Mr. Wilkie and Mr. Loughery both knew of Claimant's injury and had knowledge of the falsity of the information in the application. The Commission found that false representations were material and that the intent to defraud was self-evident based on the materiality of the false statements and omissions, particularly in light of the timing of the application. See Floyd v. Ohio General Ins. Co., 701 F.Supp. 1177 (D.S.C. 1988) ("Under South Carolina law, an intent to deceive may be inferred when there is no other reasonable or plausible explanation for the applicant's false representation."). The Commission also found that FirstComp had relied on these statements in issuing the policy based on the material misrepresentations and omission. Government Employees Insurance Co. v. Chavis, 254 S.C. 507, 513. 176 S.E.2d 131, 133–134 (1970) ("Where a fact is specifically inquired about, or a question so framed as to elicit a desired

fact, a full disclosure must be made, and the insurer has the right to rely upon the answer."). Based on these findings, the Commission properly found that the FirstComp policy was obtained through fraud and was void *ab initio*, consistent with the general law in South Carolina.

ii. S.C. Code § 38-75-730 does not abrogate the general rule.

UEF contends that S.C. Code Ann. §38-75-730 alters the general law of South Carolina and precludes a finding that an insurance contract issued under fraudulent circumstances is void *ab initio*. S.C. Code Ann. §38-75-730 provides: "No insurance policy or renewal thereof *may be canceled by the insurer* prior to the expiration of the term stated in the policy, except for one of the following reasons:...(2) material misrepresentation of fact which, if known to the company, would have caused the company not to issue the policy." S.C. Code Ann. §38-75-730(a) (emphasis added). In order to *cancel* a contract for insurance under § 38-75-730(a), certain procedures must be followed, including providing ten days written notice to the insured and the agent of record. S.C. Code Ann. §38-75-730(b). Thus, the plain language of S.C. Code Ann. §38-75-730 establishes that it only controls the "cancellation" of policies of insurance (including workers' compensation policies). This statute simply does not address or preclude those situations where the law allows an insurer to void or rescind a policy.

"Rescission" is defined as a party's "unilateral unmaking of a contract for a legally sufficient reason . . ." Black's Law Dictionary, 1308 (7th Ed. 1999). Our courts have held that the unmaking of a contract is distinguished from the cancellation of a contract. To "cancel" a contract is to "terminate a promise, obligation, or right." Id. at 197; see also S.C. Code Ann. §38-75-720(3) (defining "cancellation" as "termination of a policy at a date other than its expiration date."). A cancellation works prospectively; a rescission is retrospective. By its terms, S.C. Code Ann. §38-75-730 limits the rights of an insurer to unilaterally "cancel" a

contract under certain circumstances. By referencing only an insurer's right to cancel, it is evident that the law was not intended to abrogate an insurer's right to rescind a contract obtained through fraud. As explained by our Supreme Court:

> In the case of U.S. Fidelity & Guaranty Co. v. Security Fire & Indemnity Co., 248 S.C. 307, 149 S.E.2d 647, we held that cancellation 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.* Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532. The cancellation of a liability insurance policy operates prospectively and is to be distinguished from rescission which destroys the policy Ab initio.

Chavis, 254 S.C. at 516, 176 S.E.2d at 135 (emphasis added). A plain reading of S.C. Code Ann. §38-75-730 illustrates that this section was intended to prevent arbitrary cancellations of insurance contracts. By its terms, it 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. No court has defined "material misrepresentations" as used in S.C. Code Ann. §38-75-730 but the language of the statute evidences an intent to cover circumstances where an insured conceals or misrepresents material facts that would cause an insurer to refrain from issuing a policy because of the affect those misrepresentations would have on the level of risk being assumed by the insurer; for example, the applicant has an unusual claims history, prior cancellations for non-payment, or the applicant employs a class of workers that carrier ordinarily does not cover. These are instances where the facts would be material to an insurer in choosing to issue a policy but would likely fall under the provisions of S.C. Code Ann. §38-75-730. The situations covered by this section are far different from the intentional concealment of an existing claim in order to fraudulently procure a policy of insurance to cover that claim.

In this case, the record is clear that the application for insurance was made after Claimant's accident and was not disclosed on the application or to the agent. Based on this evidence, the Commission properly found that this concealment of a prior known claim constitutes insurance fraud and is grounds for rescission and voiding of the policy.

iii. Claimant's cited authority is not applicable.

Contrary to the assertion of UEF, North Carolina has not addressed the issue of a carrier's right to rescind a policy procured by intentional fraud. The case of Oxendine v. TWL, Inc., 645 S.E.2d 864 (N.C. Ct. App. 2007) is readily distinguishable from the case at hand. In Oxendine, the insurer attempted to cancel a policy that was effective from March 2002 through March 2003 due to "underwriting reasons." The opinion does not specify what the particular "underwriting reason" was. The insurer sent a notice of cancellation to the insured on November 25, 2002 but failed to send the notice in the manner prescribed by statute. The claimant was injured in an accident that occurred on January 31, 2003. The North Carolina court found that the statutory procedure had not been followed and that "underwriting reasons" was not sufficient to constitute a "precise reason" as required by the N.C. statute. The court further concluded that the statutory cancellation provisions dealing with "material misrepresentations" contemplated the very sort of issues raised by the insured in that case. The North Carolina Court simply was not faced with the question of whether they would permit recovery under a policy fraudulently obtained to include an accident that had already occurred. Similarly, none of the other authorities cited by Claimant address the fraud at issue in this case; rather, they address situations where the misrepresentations went to concealment of the level of risk being assumed by the insurer and, therefore, are inapplicable.

iv. Legal precedent supports a finding that a policy of workers' compensation insurance is void if procured by fraud.

In arguing that the Commission erred, UEF has not produced any authority to demonstrate that South Carolina has abrogated an insurer's generally acknowledged right to void a workers' compensation policy that was obtained through outright fraud with the intent of covering a claim that occurred prior to the issuance of the policy. The applicability of the general rule, as set forth above, in the workers' comp context is expressly recognized in Larson's treatise on Workers' Compensation:

> The only situation in which the insurance would be defeated for all purposes by act of the employer is that in which the insurance is absolutely *void ab initio*, rather than voidable; this would occur if the employer attempted to insure against an accident that had already occurred, by pre-dating the insurance and fraudulently concealing the known existence of an accident within the period so covered.

9 Larson's Workers' Compensation Law, § 150.02[4] (Rev. 2007). Furthermore, this rule has been adopted by courts in other jurisdictions that have addressed this precise issue. See e.g., Star Insurance Co. v. Neighbors, 138 P.3d 507 (Nev. 2006) (Holding that a workers' compensation policy "procured by fraud for the purpose of creating the obligation to compensate a pre-existing loss is void from the beginning."); Matlock v. Hollis, 109 P.2d 119 (Kan. 1941) ("[t]he conclusion is inescapable that the concealment of the injury went to the very heart of the contract, made it void at its inception, and no one can predicate any rights upon it."); Hunt v. Aetna Casualty and Surety Co., 387 P.2d 405 (Colo. 1963) (Holding no workers' comp coverage for accident concealed by employer when ordering the policy); Century Indemnity Co. v. Jameson, 131 N.E.2d 767 (Mass. 1956) (Holding that ordinary principles of nondisclosure apply in voiding workmen's comp policy ordered by owner after accident without disclosure); Lima v. Industrial Acc. Com., 1 Cal. App. 2d 43 (Cal. App. 1934) (Affirming industrial commission's finding that policy that was antedated by fraud to cover accident was not binding on carrier).

Based on the above authorities, and the general law of this State, there is no basis for excluding workers' compensation carriers from the principal that a policy procured by fraud is void and unenforceable.

v. UEF's position is contrary to public policy.

The position argued by UEF would produce absurd results and is contrary to the public policy of this State. Adopting the rule as argued by UEF would have the perverse incentive of encouraging employers to engage in fraud, i.e., obtaining workers' comp policies only after a claim arises, knowing that the carrier would be responsible for the claim regardless of the circumstances of the procurement of the policy. Indeed, under the position of UEF, a workers' comp carrier could never absolve itself of liability for a claim that occurred prior to the issuance of a policy. Under UEF's interpretation of S.C. Code Ann. §38-75-730, the only recourse for an insurer who found itself victim of fraud would be to assume liability for an existing claim that was willfully and fraudulently concealed from the carrier and to initiate cancellation procedures. Those procedures, however, would only cancel the policy as to future claims.

There is no doubt that there are presumptions under South Carolina law such as those cited by UEF that lean in favor of coverage for the faultless injured worker but, like all presumptions, it can be overcome. UEF argues that rescission should not apply to a workers' compensation policy because the injured claimant is deemed to be a party to the contract and insurance policies are construed in favor of coverage for the insured. While this may be true with respect to validly issued policies, the same cannot be said of fraudulently obtained policies that are issued after the employee is injured. In such a case, while the employee is certainly innocent of the fraud, he is no worse position given that his employer had no workers' compensation policy at all at the time of his injury. Conversely, the carrier is significantly

prejudiced and harmed if forced to cover a claim that occurred prior to the issuance of the policy and about which it had no notice or acceptance of the risk.

As noted by the Commission, the position argued by UEF would undermine the very foundation of the workers' comp system. The entire insurance industry is grounding on the principal of pooled risk. Every covered employer in South Carolina participates by obtaining workers compensation coverage and spreading their risk across the state with every other employer and their annual premiums pool together to cover those compensable claims that occur during the policy period. If, however, an employer were given leave (as UEF would have it) to simply wait for an injury and then go out and obtain a policy to cover that injury (whether through outright fraud or not), the resources available would quickly dry up as premiums would only be paid in the event of an accident and the exposure for those claims would almost certainly exceed the premiums paid. Such a scheme could never survive and is plainly contrary to good public policy and the sound administration of the insurance industry as a whole and the S.C. Workers' Compensation system in particular. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("However, a court must reject a statute's interpretation leading to absurd results not intended by the Legislature.")

In support of its position that FirstComp should be held responsible for a fraudulently concealed claim, UEF contends that FirstComp was reckless and negligent in the issuance of its policy. It's only evidence in support of this claim are certain irregularities in the information about the insured in the policy; information provided by the insured in the application. UEF further makes the wholly unsupported contention that backdating of the policy to 12:01 a.m. on the day the policy is issued constitutes a negligent business practice that should negate FirstComp's right to rescind a fraudulently obtained policy. With all due respect to counsel for UEF, such a contention is unsupported in law and has no basis in fact before the Commission or

this Court. Counsel for UEF is not an expert on the insurance industry and is not competent to testify regarding her opinions as to the conduct of an insurance carrier and the industry standard for issuance of insurance policies. As Ms. Miller testified in her deposition, in the voluntary insurance market, policies are issued to go into effect on the day they are issued. See Miller Depo, p. 82, l. 19-24. As evidenced by the records in this case, the policy was issued on January 4, 2012 and was, therefore, effective as of the start of that day; i.e. 12:01 a.m. This practice, whether implemented by choice of the carrier or by standard practice in the industry has never been found to be improper, is not prohibited under South Carolina law, and there is no competent testimony in the record upon which a finding of negligence can be based. The policy in this case was issued based on the representations of the applicant and it would be patently inequitable to hold the carrier liable when those representations are made with intent to commit a fraud against the carrier. It may serve UEF's position to unilaterally declare an insurance underwriting practice to be "negligent," but there is basis for such a finding in this case.

II. Conclusion.

For all the above reasons, FirstComp contends that the Commission did not err in finding that the FirstComp policy in this case was procured through fraud and was thus void *ab initio*. The contentions of UEF on appeal are based on an incorrect reading of S.C. Code Ann. §38-75-730; are counter to the general rules of contract law; are contrary to the greater weight of legal authority; and are contrary to the public policy of South Carolina.

Consequently, without waiving its objections to the validity of the Remand Order, the 3/31/15 Order of the Single Commissioner should be affirmed as to all issues raised by UEF on appeal.

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December 28, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck; Susan S. Barden; Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

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

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.

PROOF OF SERVICE

This is to certify that a copy of the foregoing **Initial Brief** of **Respondent/Appellant in Response to Brief of Appellant/Respondent** has been served upon the flowing by placing the same in the United States mail, first class postage pre-paid, addressed as shown below on the 28th day of December, 2015.

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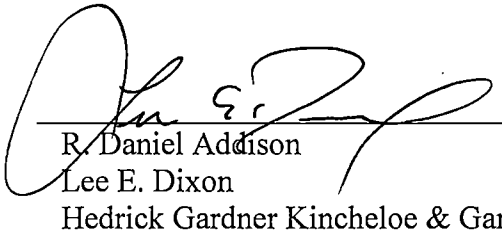

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RE: **Dallas Paul Bessinger, Claimant v. R-N-M Builders & Associates, LLC, Employer, and FirstComp a divisiobn of Markel, Inc., Carrier, Of Whom the South Carolina Uninsured Employers' Fund is the Appellant/Respondent, And FirstComp, a division of Markel, Inc., is the Respondent/Appellant**
WCC File No.: 2015-002092
Claim No.: FSC900085974
Our File: 00243L.00028

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Respondent/Appellant in Response to Brief of Appellant/Respondent in a Workers' Compensation case in the above referenced matter. Also enclosed is the Proof of Service.

By copy of this letter I am herewith serving a copy of the enclosed on opposing counsel, unrepresented parties, and the lower administrative tribunal.

Very sincerely yours,

R. Daniel Addison

RDA/aes
Enclosures
cc: Amy Bracy (w/ encl.)
Amy V. Cofield, Esq. (w/ encl.)
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