

APPELLATE PANEL DECISION AND ORDER  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

**RECEIVED**  
JUN 29 2016  
SC Court of Appeals

SCWCC FILE NO.: 1503345

DAVID PATE,

Employee, Claimant/Respondent,

-vs-

TAC LOGGING, INC.,

Employer/Respondent

FORESTRY MUTUAL INSURANCE COMPANY,

Carrier/Appellant,

SOUTH CAROLINA UNINSURED  
EMPLOYERS' FUND,

Defendant/Respondent.

Appellant Panel Review Held in  
Columbia, South Carolina on April 8, 2016.

Appellant Panel Decision and Order  
Filed on June 3<sup>rd</sup>, 2016.

APPEARANCES:

Claimant/Respondent represented by Christopher G. Isgett, Esquire  
of Columbia, South Carolina.

Employer/Respondent TAC Logging failed to appear.

Defendant/Respondent South Carolina Workers' Compensation  
Uninsured Employers' Fund represented by Samuel T. Brunson,  
Esquire of Florence South Carolina.

Carrier/Appellant, Forestry Mutual Insurance Company  
represented by William T. Littlejohn, Esquire of Charleston, South  
Carolina.

## STATEMENT OF THE CASE

This matter arises out of an accidental injury, which occurred on March 3, 2015 in Union County, North Carolina. On that date, the Claimant was employed by TAC Logging, Inc., a logger with its principal place of business in Florence, South Carolina. The Claimant was involved in a truck accident and suffered numerous injuries. Shortly thereafter, the Claimant filed a Form 50 listing Forestry Mutual Insurance Company as the Carrier for TAC Logging, Inc. on the date of the accident.

The Compliance Division of the South Carolina Workers' Compensation Commission is of the opinion that Forestry Mutual Insurance Company had coverage on March 3, 2015 when the Claimant was injured. However, Forestry Mutual Insurance Company has denied coverage in this case. Forestry Mutual Insurance Company filed a Notice of Cancellation with NCCI on February 19, 2015. On that notice, Forestry Mutual listed March 1, 2015, ten (10) days after the date of notification, as its effective date of cancellation. Because Forestry Mutual Insurance Company denied coverage, the South Carolina Uninsured Employers' Fund was made a party to this matter.

A Hearing was held before Commissioner Melody L. James on September 29, 2015. Appearances were made by and on behalf of the Claimant, the South Carolina Uninsured Employers' Fund and Forestry Mutual Insurance Company. The Employer, TAC Logging Inc., failed to appear. Commissioner James heard arguments of the parties, accepted documents and exhibits and heard testimony from the Claimant. Following the Hearing, Commissioner James requested that Forestry Mutual and the South Carolina Uninsured Employers' Fund present Memoranda on the question of coverage.

On January 29, 2016, Commissioner James issued a Decision and Order finding that

Forestry Mutual Insurance Company had in place a policy of Workers' Compensation covering Employees of TAC Logging on March 3, 2015, the date of the Claimant's accident. In Part VI of her Order, Commissioner James fully discussed the legal and factual basis for reaching that conclusion.

In her Order, Commissioners James made the following Findings of Fact:

**FINDINGS OF FACT:**

1. The Parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act with TAC Logging Inc. as Employer and Forestry Mutual Insurance Company as Carrier.

2. Forestry Mutual Insurance Company had in place a policy of Workers' Compensation Insurance covering Employees of TAC Logging, Inc. on March 3, 2015, the date of the Claimant's accident. Forestry Mutual Insurance Company filed a Notice of Cancellation with NCCI on February 19, 2015. Pursuant to the South Carolina Code of Laws, including Regulation 67-405(C)(1), cancellation of that policy would not be effective until March 20, 2015. The legal and factual basis for this finding is fully detailed under the subsection entitled "Discussion."

3. The Claimant, David Pate, was an Employee of the above named Employer on and prior to March 3, 2015, on which date he did sustain admitted injuries by accident to his head, chest, arms, back, and both shoulders arising out of and in the course of his employment.

4. The Claimant has received some medical care but because of the insurance dispute which arose following his accident, that care has been limited. The Claimant has requested additional medical care for the evaluation and treatment of his injuries and I find that that request is reasonable as he has not received ongoing care and the extent of his injuries are

unknown.

5. The Claimant shall be provided an evaluation with a neurologist or other appropriate specialist for his complaints of dizziness.

6. The Claimant shall be provided follow-up evaluations for the wound to his left buttock, as well as an orthopedic evaluation for the pain in his shoulders, which were substantiated by the bilateral abrasions listed in the medical records.

7. As a result of his accident, the Claimant has received medical treatment at Carolinas Medical Center in Charlotte, at McLeod Health in Florence, at McLeod Pulmonary and Critical Care in Florence, and from Dr. Alexander Cohen and possibly others. The Carrier shall be responsible for the payment of charges associated with that care pursuant to the fee schedule of the South Carolina Workers' Compensation Act. The Claimant shall be reimbursed any out of pocket expenses he has incurred for medical care and also shall be entitled to mileage reimbursement as well. Carrier shall reimburse Claimant's group insurance for benefits it has paid on Claimant's behalf.

8. The Claimant's average weekly wage is to be held in abeyance pending calculation by the parties.

9. As a result of his injuries and accident, the Claimant was temporary totally disabled following his accident. Because of the disputed insurance coverage, his Employer paid the Claimant a salary until he was able to return to work. Upon calculation of the correct average weekly wage, the Employer shall be reimbursed for those wages paid following the Claimant's accident.

In addition, Commissioner James also made the following Conclusions of Law:

**CONCLUSIONS OF LAW**

1. Under §42-1-40, the Defendant/Employer was a covered Employer under the Act. As a result of the Defendant/Employer being subject to the South Carolina Workers' Compensation Act, the Defendant/Employer was covered by a policy of insurance issued by Forestry Mutual Insurance Company on and before the date of the Claimant's accident. Although Forestry Mutual Insurance Company filed a Notice of Cancellation of that policy on February 19, 2015, the effective date of cancellation of that policy would be on or about March 20, 2015 pursuant to South Carolina Statutory Law and Regulation 67-405 (C) (1) of the South Carolina Workers' Compensation Act. The legal and factual basis for this conclusion is fully detailed under the subsection entitled "Discussion."

2. Under §42-1-130, the Claimant was a covered Employee at the time in question.

3. Under §42-1-160, the Claimant did sustain an injury by accident arising out of and in the course of his employment on March 3, 2015. March 3, 2015 was within the period of time covered under the policy issued by Forestry Mutual Insurance Company.

4. Under §42-15-60, the Claimant has been furnished adequate and proper medical care. The Carrier, Forestry Mutual Insurance Company is responsible for charges associated with that medical care pursuant to the fee schedule of the South Carolina Workers' Compensation Commission. The Claimant shall be reimbursed any out of pocket expenses incurred by Forestry Mutual Insurance Company. In addition, the Claimant shall be entitled to mileage reimbursement. Claimant's group health insurance should be reimbursed.

The Claimant is also entitled to referrals to specialists to further evaluate the extent of his injuries and to provide treatment, which may tend to lessen the Claimant's period of disability.

5. Under §42-9-10 and §42-1-150, the Claimant was temporary totally disabled from March 3, 2015 through June 3, 2015 when the Claimant returned to work. During that period of time, his Employer paid the Claimant a salary. Upon calculation of the correct average weekly wage, the Employer is entitled to be reimbursed for those monies paid.

In her findings, Commissioner James found that Forestry Mutual was responsible for providing Workers' Compensation Benefits to the Claimant in this case. Commissioner James specifically ordered that the Carrier, Forestry Mutual Insurance Company, make the following payments:

1. Charges for medical care incurred by the Claimant causally related to his injury and accident pursuant to the fee schedule of the South Carolina Workers' Compensation Commission. The Claimant shall be reimbursed for his out of pocket medical expenses including copays, prescription, and mileage. The Carrier shall also reimburse the Claimant's group insurance carrier for payments made to providers.

2. The Carrier shall also provide the Claimant with evaluation and treatment by appropriate specialist for his injuries as testified to at the Hearing.

3. Upon calculation of the Claimant's correct average weekly wage, the Carrier shall reimburse the Employer at the Claimant's compensation rate for monies paid to the Claimant as temporary total benefits by the Employer following the Claimant's accident.

Within the Statutory period, the Appellant, Forestry Mutual Insurance Company, filed an application for review in the case setting forth its assignments of errors, copies of which were furnished to all interested parties prior to the matter being heard by the Appellant Panel. In that application, Forestry Mutual respectfully submitted to the Appellant Panel that the Single Commissioner erred as follows:

1. Whether the Single Commissioner erred in finding Forestry Mutual Insurance Company had an active policy of Workers' Compensation Insurance coverage TAC logging, Inc., on March 3, 2015?

2. Whether the Single Commissioner erred in failing to find where an Employer fails to pay premiums on a Workers' Compensation Policy that the policy can be terminated within ten (10) days of Notice of Cancellation under S.C. Code Section 38-75-730?

3. Whether the Single Commissioner erred in failing to find Regulation 67-405 is limited to an Employer's Compliance with maintaining Workers' Compensation Insurance rather than the authority governing proper cancellation of a Workers' Compensation Policy.

4. Whether the Single Commissioner erred in finding Forestry Mutual Insurance Company failed to notify the Employer's Agent of Record?

In an Appellant Review, the Panel shall, pursuant to Code Section 42-17-50, review the award, weight the evidence as presented at the initial Hearing and, if good grounds be shown thereof, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. Pursuant to the Workers' Compensation Act, all parties filed Briefs. Oral argument was scheduled and delivered to the Panel on April 18, 2016. Since that time, the matter has been under study and consideration.

### **DISCUSSION**

The Compliance Division of the South Carolina Workers' Compensation Commission is of the opinion that Forestry Mutual Insurance Coverage had coverage on March 3, 2015, the date

of the Claimant's accident. Forestry Mutual Insurance Company has denied coverage in this case. Forestry Mutual filed a Notice of Cancellation with NCCI on February 19, 2015. On that notice, Forestry Mutual listed March 1, 2015, ten (10) days after the date of notification, as its effective date of cancellation.

As all are aware, the South Carolina Workers' Compensation Act was substantially modified effective July 1, 2007. Following that time, the Workers' Compensation Commission amended and added regulations to Chapter 67 to reflect the changes in Title 42. Those changes and amendments to those regulations as well as comments regarding those changes can be found in the *South Carolina State Register*, Volume 34, Issue 2 published February 26, 2010.

According to Forestry Mutual, up until 2010, Regulations 67-406 addressed the cancellation, renewal, and non-renewal of Workers' Compensation Insurance Policies. It appears that former regulation 67-406 was promulgated after July 1, 1989, when NCCI became the Commission's authorized agent for filing a report of coverage and Notice of Termination for Workers' Compensation Insurance Policies. According to Forestry Mutual, that regulation was repealed in 2010 and not replaced. Thus, the regulations no longer provide for termination, cancelation, or non-renewal of Workers' Compensation policies. However, the provisions of former Regulation 67-406 are now found under new Regulation 67-405 (C)(1).

Former Regulation 67-405 dealt with employers and insurance carriers proof of compliance. If you reviewed the former regulation in its entirety, it contains no provision regarding the effective date of termination or cancellation of an insurance policy. However, in 2010, that regulation was amended. Regulation 67-407 (C) (1) was added. That regulation required an insurance carrier to file a notice of termination with the Commission's authorized agent. It further states that such termination shall not be effective until thirty (30) days after the

receipt by the Commission's authorized agent. The language is almost identical to the termination/cancellation language found in former Regulation 67-406. According to the comments found in the State Register dealing with Regulation 67-405 (C) (1), the regulation is amended to delete references to Regulation 67-406 and Regulation 67-407, to add a reference to 67-416, and to **clarify** termination date. References to NCCI were deleted. According to the comments, those deletions were made to "reflect the possibility NCCI might not continue to be the Commission's agent."

The Legislature did not repeal Regulation 67-406 without replacing it. The Regulation was simply recodified under Regulation 67-405(C)(1). The purpose of the new regulation was to **clarify** the thirty (30) day termination date. Based upon that termination date, Forestry Mutual had insurance coverage on March 3, 2015 when the Claimant's accident occurred.

Forestry Mutual contends that because Regulation 67-406 was repealed in 2010, the Commission must look to other statutory provisions to determine the effective date of a policy cancellation. Forestry Mutual contends that Code Section 38-75-730 governs the effective date of cancellation of a Workers' Compensation Insurance Policy. Section 38-75-730 (A) reads " 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 one of the following reasons: 1. Non-payment of premium...". The statute goes on to say " cancellation for non-payment of premium is not effective unless written notice of cancellation has been delivered or mailed to the insured and the agent of record, if any, **not less** than ten days prior to the proposed effective date of cancellation." South Carolina Code Section annotated §38-75-730 (B). Thus, Forestry Mutual argues that March 1<sup>st</sup> is the proper date of cancellation.

The Carrier, Forestry Mutual, contends that Regulation 67-405 is for compliance

purposes only as evidenced by the title of the Regulation. The text contains no such limitation. Although the title and headings are part of the Statute, they may not be construed to limit the plain meaning of the text. Brotherhood of Railroad Trainmen v. Baltimore & O.R. CO., 331U.S 519,67 S.Ct. 1387, 9 L.Ed. 1646 (1947). For interpretative purposes, the title of a statute and heading of a section are of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain. Id.: See generally 2A Sutherland Statutory Construction §47-03(1992). Garner v. Houck The text of Regulation 67-405 is not limited to compliance and contains no ambiguity.

The Carrier, Forestry Mutual also contends that the Statute (§38-78-730) and the Regulation are inconsistent and irreconcilable with each other and thus, the Statute should be used to determine the proper date of cancellation. The Statute and the Regulation are not inconsistent or irreconcilable with each other. The Statute provides that the mailing be “not less” than ten days prior to the effective date of cancellation. The Commission’s Regulation has expanded the effective date of cancellation to require a thirty day effective date after the filing with the Commission’s agent. (In this case the Notice and filing are February 19, 2015). Had the Regulation sought to regulate and effective date less than ten days, it would have been inconsistent and irreconcilable. However, thirty days, as provided for in Regulation 67-405 (C) (1) is “not less” than ten days as provided for in the Statute and thus consistent with the Statute.

Forestry Mutual Insurance Company offered no witnesses but only documentary evidence at the Hearing held on September 29, 2015. According to those documents, Forestry Mutual filed a Notice of Cancellation with NCCI on February 19, 2015. An affidavit was introduced into evidence by Forestry Mutual Insurance Company showing that NCCI received that Notice of Cancellation electronically. A certified mail return receipt was later entered into

evidence showing that the insured, TAC Logging received the notice of cancellation of on February 24, 2015.

However, §38-75-730 (B) also requires that written Notice of Cancellation be delivered or mailed to the insured **and the Agent of Record** not less than ten days proposed effective date of cancellation: The Notice of cancellation shows Swamp Fox Agency, Inc. to be the producer of the policy. Forestry Mutual as offered no evidence to show that that agency was properly notified pursuant to the statute. Even assuming that Notice of Termination was properly filed with NCCI, the other requirements of the statute must be met for cancellation to be effective. In Larsons Workers' Compensation Law, the authors conclude the requirements for cancelling a Workers' Compensation Insurance Policy are exacting and strictly construed because of the essential role of insurance in the compensation process and the serious potential effects of non insurance on both Employer and Employee....” Nine, Arthur Larson and Lex Larson, Larsons Workers' Compensation Law Section 150.3 (2005). Insurers failure to strictly comply with the Statutes and Regulations renders a termination ineffective. Here, Forestry Mutual has not shown that Notice of Cancellation was mailed to the insurance agent. Thus, cancellation is not effective.

Forestry Mutual contends that Commissioner James concluded that the language contained in Regulation 67-405 C(1) controlled the cancellation of a Workers' Compensation Insurance Policy as opposed to South Carolina Section Code Section 38-75-730 found in the Code Section relating to insurance coverage in general. Commissioner James made no such finding or reached any such conclusion. Instead, Commissioner James determined that the Statute (§38-78-730) and the Regulation 67-405 C(1) are not inconsistent or irreconcilable with each other. The Statute provides that the mailing or notification be “not less” than ten (10) days

prior to the effective date of cancellation. The Commissions Regulation has expanded the effective date of cancellation to require a thirty (30) day effective date after the filing with the Commissions Agent. Had the Regulation sought to regulate an effective date less than ten (10) days, it would have been inconsistent and irreconcilable. However, thirty (30) days, as provided in Regulation 67-405 C(1) is not less than ten (10) days as provided for in the Statute and thus consistent with the Statute.

This issue was raised back in 2010 following the proposed promulgation of Regulation 67-405 C (1). A Proposed Change to the Regulation was made at that time. A Public Hearing was held and an Opportunity for Public Comment was allowed. Following the above, the Commission concluded that there was no conflict between the language of Code Section 38-75-703 and Regulation 67-405 C(1). Thus, no change was made to the Regulation and the promulgation process for the proposed regulation change was terminated. **(See Attachment A Report of Chairman, T. Scott Beck.)**

It is clear from the above that Regulation 67-405 C (1) governs the cancellation of a Workers' Compensation Insurance Policy consistent with the provisions of §38-75-703. Pursuant to that Regulation, Forestry Mutual's Effective date of cancellation would be thirty (30) days after February 19, 2015 or March 20, 2015. Thus, Forestry Mutual had in place a policy of insurance on the date of the Claimant's accident.

The Appellant Panel, by unanimous vote, has determined all of the Hearing Commissioners Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the Law of the Case and: and therefore, the Order is sustained in its entirety.

**The Appellant Panel hereby finds:**

**FINDINGS OF FACT:**

1. The Parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act with TAC Logging Inc. as Employer and Forestry Mutual Insurance Company as Carrier.

2. Forestry Mutual Insurance Company had in place a policy of Workers' Compensation Insurance covering Employees of TAC Logging, Inc. on March 3, 2015, the date of the Claimant's accident. Forestry Mutual Insurance Company filed a Notice of Cancellation with NCCI on February 19, 2015. Pursuant to the South Carolina Code of Laws, including Regulation 67-405(C)(1), cancellation of that policy would not be effective until March 20, 2015. The legal and factual basis for this finding is fully detailed under the subsection entitled "Discussion."

3. The Claimant, David Pate, was an Employee of the above named Employer on and prior to March 3, 2015, on which date he did sustain admitted injuries by accident to his head, chest, arms, back, and both shoulders arising out of and in the course of his employment.

4. The Claimant has received some medical care but because of the insurance dispute which arose following his accident, that care has been limited. The Claimant has requested additional medical care for the evaluation and treatment of his injuries and we find that that request is reasonable as he has not received ongoing care and the extent of his injuries are unknown.

5. The Claimant shall be provided an evaluation with a neurologist or other appropriate specialist for his complaints of dizziness.

6. The Claimant shall be provided follow-up evaluations for the wound to his left

buttock, as well as an orthopedic evaluation for the pain in his shoulders, which were substantiated by the bilateral abrasions listed in the medical records.

7. As a result of his accident, the Claimant has received medical treatment at Carolinas Medical Center in Charlotte, at McLeod Health in Florence, at McLeod Pulmonary and Critical Care in Florence, and from Dr. Alexander Cohen and possibly others. The Carrier shall be responsible for the payment of charges associated with that care pursuant to the fee schedule of the South Carolina Workers' Compensation Act. The Claimant shall be reimbursed any out of pocket expenses he has incurred for medical care and also shall be entitled to mileage reimbursement as well. Carrier shall reimburse Claimant's group insurance for benefits it has paid on Claimant's behalf.

8. The Claimant's average weekly wage is to be held in abeyance pending calculation by the parties.

9. As a result of his injuries and accident, the Claimant was temporary totally disabled following his accident. Because of the disputed insurance coverage, his Employer paid the Claimant a salary until he was able to return to work. Upon calculation of the correct average weekly wage, the Employer shall be reimbursed for those wages paid following the Claimant's accident.

**The Appellant Panel hereby concludes:**

**CONCLUSIONS OF LAW**

Accordingly, as provided in the South Carolina Code of Laws (1976, as amended), §42-17-40, it is the determination of this Commissioner:

5. Under §42-1-40, the Defendant/Employer was a covered Employer under the Act. As a result of the Defendant/Employer being subject to the South Carolina Workers'

Compensation Act, the Defendant/Employer was covered by a policy of insurance issued by Forestry Mutual Insurance Company on and before the date of the Claimant's accident. Although Forestry Mutual Insurance Company filed a Notice of Cancellation of that policy on February 19, 2015, the effective date of cancellation of that policy would be on or about March 20, 2015 pursuant to South Carolina Statutory Law and Regulation 67-405 (C) (1) of the South Carolina Workers' Compensation Act. The legal and factual basis for this conclusion is fully detailed under the subsection entitled "Discussion."

6. Under §42-1-130, the Claimant was a covered Employee at the time in question.

7. Under §42-1-160, the Claimant did sustain an injury by accident arising out of and in the course of his employment on March 3, 2015. March 3, 2015 was within the period of time covered under the policy issued by Forestry Mutual Insurance Company.

8. Under §42-15-60, the Claimant has been furnished adequate and proper medical care. The Carrier, Forestry Mutual Insurance Company is responsible for charges associated with that medical care pursuant to the fee schedule of the South Carolina Workers' Compensation Commission. The Claimant shall be reimbursed any out of pocket expenses incurred by Forestry Mutual Insurance Company. In addition, the Claimant shall be entitled to mileage reimbursement. Claimant's group health insurance should be reimbursed.

The Claimant is also entitled to referrals to specialists to further evaluate the extent of his injuries and to provide treatment, which may tend to lessen the Claimant's period of disability.

5. Under §42-9-10 and §42-1-150, the Claimant was temporary totally disabled from March 3, 2015 through June 3, 2015 when the Claimant returned to work. During that period of time, his Employer paid the Claimant a salary. Upon calculation of the correct average weekly wage, the Employer is entitled to be reimbursed for those monies paid.

**ORDER**

**IT IS THEREFORE ORDERED**, that the Order of the Single Commissioner filed in the above caption matter on January 29, 2016 is affirmed in its entirety and shall constitute an Order of the Panel of the South Carolina Workers' Compensation Commission.

The Carrier, Forestry Mutual Insurance Company shall make the following payments:

1. Charges for medical care incurred by the Claimant causally related to his injury and accident pursuant to the fee schedule of the South Carolina Workers' Compensation Commission. The Claimant shall be reimbursed for his out of pocket medical expenses including copays, prescription, and mileage. The Carrier shall also reimburse the Claimant's group insurance carrier for payments made to providers.

2. The Carrier shall also provide the Claimant with evaluation and treatment by appropriate specialist for his injuries as testified to at the Hearing.


3. Upon calculation of the Claimant's correct average weekly wage, the Carrier shall reimburse the Employer at the Claimant's compensation rate for monies paid to the Claimant as temporary total benefits by the Employer following the Claimant's accident.

The South Carolina Uninsured Employers' Fund is not a necessary party to this action as the Employer was covered by a policy of Workers' Compensation Insurance on the date of the Claimant's accident. Thus, the South Carolina Uninsured Employers' Fund is dismissed with prejudice.

**AND IT IS SO ORDERED,**

BY:   
T. Scott Beck, Commissioner

BY:   
Gene McCaskill, Commissioner

BY:   
Aisha Taylor, Commissioner

Columbia, South Carolina

6/1, 2016

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JUN 29 2016

SC Court of Appeals

**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 Kim Falls on June 3, 2016**