

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Appellate Case No. 2016-001380

David Pate,

Employee, Claimant,
Respondent,

v.

TAC Logging, Inc.,

Employer,
Respondent, and

Forestry Mutual Insurance
Company,

Carrier, Appellant,

South Carolina Uninsured
Employers' Fund,

Defendant,
Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN FAILING TO FIND THAT A WORKERS' COMPENSATION POLICY CAN BE TERMINATED AFTER 10 DAYS' NOTICE OF CANCELLATION UNDER S.C. CODE OF LAWS SECTION 38-75-730 WHEN AN EMPLOYER FAILS TO PAY PREMIUMS ON A WORKERS' COMPENSATION POLICY.

- II. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN FINDING FORESTRY MUTUAL HAD AN ACTIVE POLICY OF WORKERS' COMPENSATION INSURANCE COVERING TAC ON MARCH 3, 2015, WHERE TAC FAILED TO PAY ITS PREMIUM FOR THE MONTH OF JANUARY 2015, WAS NOTIFIED OF THE SAME ON FEBRUARY 19, 2015, AND THE POLICY WAS CANCELLED BY FORESTRY EFFECTIVE MARCH 1, 2015, WHICH WAS 10 DAYS AFTER NOTICE OF THE PENDING CANCELLATION WAS PROVIDED.

- III. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN FAILING TO CONCLUDE REGULATION 67-405 IS LIMITED TO DETERMINING AN EMPLOYER'S COMPLIANCE WITH MAINTAINING WORKERS' COMPENSATION INSURANCE RATHER THAN THE AUTHORITY FOR DETERMINING THE EFFECTIVE DATE OF CANCELLATION OF A WORKERS' COMPENSATION POLICY.

- IV. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN CONCLUDING FORESTRY MUTUAL FAILED TO NOTIFY TAC'S AGENT OF RECORD REGARDING THE PENDING WORKERS' COMPENSATION POLICY CANCELLATION.

STATEMENT OF THE CASE

This appeal from the South Carolina Workers' Compensation Commission arises from a dispute regarding workers' compensation insurance coverage. Specifically, Appellant Forestry Mutual Insurance Company (hereinafter "Forestry") disputes having an active policy of workers' compensation insurance covering TAC Logging, Inc. (hereinafter "TAC") on March 3, 2015, the relevant date of accident.

On March 3, 2015, David Pate, the Employee, Claimant, and a Respondent in this matter (hereinafter "Claimant"), sustained injury by accident that arose out of and in the course of his

employment with TAC, a fact which is not disputed by the parties. As a result of this accident, Claimant alleges injuries to the hand, chest, arms, back and right shoulder. After the accident, Claimant filed a form 50 Employee's Request for Hearing on April 20, 2015, seeking benefits under the South Carolina Worker's Compensation Act. In response, Forestry timely denied coverage for the accident on the basis that TAC's policy had been canceled for nonpayment of premiums effective March 1, 2015.

A hearing on this matter was held before the Hon. Melody L. James, Commissioner (hereinafter the "single Commissioner"), on September 29, 2015. At the hearing, appearances were made by Claimant, the South Carolina Uninsured Employers Fund (hereinafter "UEF"), and Forestry. TAC failed to appear. The single Commissioner heard arguments of the parties, accepted related submissions, and heard testimony from the Claimant.

On January 29, 2016, the single Commissioner issued a Decision and Order finding and concluding that Forestry had in place a policy of workers' compensation insurance covering employees of TAC on March 3, 2015, the date of Claimant's accident. In reaching this decision, the single Commissioner concluded the controlling language with respect to the issue of coverage for Claimant's injury is contained in Regulation 67-405, as opposed to S.C. Code Ann. § 38-75-730, both of which address cancellation of insurance policies. Forestry timely appealed the findings and conclusions of the single Commissioner regarding workers' compensation insurance coverage to the appellate panel of the South Carolina Workers' Compensation Commission (hereinafter "the Commission").

A hearing was held before the Commission's appellate panel on April 8, 2016, during which arguments were put forth by Forestry and UEF. TAC failed to appear. Thereafter, on June 3, 2016, the Commission issued its Decision and Order sustaining the findings of fact and

conclusions of law of the single Commissioner. Forestry timely appealed from the Commission's decision to the South Carolina Court of Appeals.

FACTS

Forestry stipulates and agrees that at one time TAC did have workers' compensation coverage under a policy written by Forestry, and the effective policy period was July 9, 2014, through July 9, 2015. APAs p. 51. However, TAC failed to pay its premium for the month of January 2015.

Thereafter, on February 19, 2015, Forestry issued a letter to TAC entitled "Confirmation of Policy Termination/Cancellation/Reinstatement Notice." In that letter, Forestry notified TAC that its policy with Forestry was being terminated effective March 1, 2015, for nonpayment of premium, nonpayment of January self-reporting premium, and missing payroll report from January 2015. APAs p. 46.

The Commission has a web-based interface for verifying employer coverage, and it confirms coverage for TAC on February 27, 2015. APAs p. 47. However, if the date March 3, 2015, is entered into the date field, no records relating to coverage are found. In other words, coverage cannot be verified for TAC for claimant's date of accident on the Commission's own website. APAs p. 48.

Additionally, the Commission has designated NCCI Holdings, Inc. and National Council on Compensation Insurance Inc. (collectively "NCCI") as its agent for the purpose of collecting proof of coverage information on South Carolina employers who have purchased workers' compensation insurance from carriers. APAs p. 51. According to a search of NCCI online records conducted on September 20, 2015, a cancellation notice was mailed to TAC on February 19, 2015, and the effective date of cancellation for nonpayment of premium was March 1, 2015. APAs p.

56.

STANDARD OF REVIEW

On appeal from an appellate panel of the Commission, the Court of Appeals can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

ARGUMENTS

The dispositive issue raised by this appeal is whether TAC had coverage on March 3, 2015, when claimant was injured, under an active policy for workers' compensation insurance underwritten by Forestry. For the reasons stated herein, TAC did not have coverage with Forestry on the relevant date of accident, so Forestry is not the carrier responsible for providing Claimant's workers' compensation benefits. Accordingly, the Commission's decision should be reversed.

1. **TAC DID NOT HAVE AN ACTIVE POLICY WITH FORESTRY ON MARCH 3, 2015 BECAUSE TAC DID NOT PAY ITS PREMIUM AND FORESTRY PROPERLY CANCELLED SUCH POLICY PURSUANT TO S.C. CODE OF LAWS SECTION 38-75-730, WHICH PERMITS WORKERS' COMPENSATION POLICIES TO BE TERMINATED AFTER 10 DAYS' NOTICE OF CANCELLATION WHEN AN EMPLOYER FAILS TO PAY PREMIUMS, AND IT WAS AN ERROR OF LAW FOR THE COMMISSION TO CONCLUDE OTHERWISE.**

At a matter of law, it was error for the Commission to conclude that TAC had coverage with Forestry on March 3, 2015, the date of accident, because Forestry complied with statutory authority when it cancelled TAC's policy on March 1, 2015, for failure to pay the premium.

- a. **Pursuant to Statutory Authority, A Policy for Workers' Compensation Insurance May Be Cancelled for Nonpayment of Premiums After 10 Days' Notice**

The rules of statutory construction support reversal of the Commission's decision. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."

Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

S.C. Code Ann. § 38-75-730 (a) reads, “[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: (1) nonpayment of premium...” The statute goes on to state, “[c]ancellation [for nonpayment 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.”

S.C. Code Ann. § 38-75-710 provides, “[t]his article applies to all property insurance and casualty insurance, as defined in section 38-1-20, except for automobile insurance and any other type of property or casualty insurance as to which there are specific *statutory* provisions of law governing cancellation, nonrenewal, or in renewal of policies.” (emphasis added). Notably, the section does not include reference to agency regulations among its exceptions. If the Legislature had intended for this article to be properly supplanted by agency regulations, such language would have been included. However, the section unambiguously provides that only statutory provisions, as opposed to agency regulations, can act as an exemption to S.C. Code Ann. § 38-75-710.

Under the applicable definition section, “casualty insurance” means each insurance against legal liability of the insured for bodily injury to or death of another person, *including workers’ compensation insurance*, and for damages to or loss or destruction of the property of another person...” S.C. Code Ann. § 38-1-20 (11) (emphasis added).

The South Carolina Workers’ Compensation Act (hereinafter “the Act”) does not contain

specific *statutory* provisions governing cancellation of workers' compensation policies for nonpayment of premiums, a fact uncontroverted by the parties, nor are there any effective regulations promulgated by the Commission that specifically address this procedure. So, reading S.C. Code Ann. §§ 38-75-710, 730 and 38-1-20 (11) together unambiguously provides that these sections are the applicable authority governing the procedure for canceling a workers' compensation policy for nonpayment of premiums by virtue of the fact there is no specific statutory provisions providing otherwise.

b. Forestry Properly Terminated TAC's Policy on March 1, 2015, Which was Done After 10 Days' Notice of Cancellation for Failure to Pay the Premium

Forestry agrees that at one time TAC did have coverage, and the effective policy period was July 9, 2014 through July 9, 2015. However, TAC failed to pay its premium for the month of January 2015. Thereafter, on February 19, 2015, Forestry issued a letter to TAC entitled "Confirmation of Policy Termination/Cancellation/Reinstatement Notice." Within the letter, TAC was notified that coverage provided by the policy was being terminated effective March 1, 2015, which was after the expiration of 10 days, for nonpayment of the January 2015 premium. APAs p. 46. Notice of cancellation was also sent on February 19, 2015, to NCCI. APAs p. 56.

Consistent with this chronology, on the Commission's website interface for verifying employer coverage, it confirms coverage for TAC on February 27, 2015. APAs p. 47. However, if the date March 3, 2015, is entered into the date field, no records relating to coverage are found. In other words, coverage cannot be verified for that date on the Commission's own website. APAs p. 48. Additionally, a Proof of Coverage Analyst with NCCI confirmed the above chronology of events. APAs pp. 51-7. In sum, the procedure followed by Forestry and NCCI regarding cancellation and reporting of the same was not arbitrary, but was in accordance with South

Carolina statutory law.

Pursuant to S.C. Code Ann. § 38-75-730, TAC's policy with Forestry was properly canceled on March 1, 2015, after notice of the proposed date of cancellation was given on February 19, 2015, to the proper parties, and it was therefore error for the Commission to conclude that TAC still had an active policy with Forestry on March 3, 2015, the date of accident. Accordingly, the Commission's decision regarding coverage should be reversed.

2. THE COMMISSION ERRED, AS A MATTER OF LAW, IN FAILING TO CONCLUDE REGULATION 67-405 IS LIMITED TO DETERMINING AN EMPLOYER'S COMPLIANCE WITH MAINTAINING WORKERS' COMPENSATION INSURANCE RATHER THAN THE AUTHORITY GOVERNING THE EFFECTIVE DATE OF CANCELLATION OF A WORKERS' COMPENSATION POLICY.

In further discussing the reasoning behind finding an active policy with Forestry on the date of accident and in Finding of Fact #2 and the first Conclusion of Law numbered 5, the Commission concludes that Regulation 67-405(C)(1) is the applicable authority requiring a passage of 30 days' post notice of cancellation for nonpayment of premiums before the cancellation becomes effective. In doing so, the Commission further concludes that Regulation 67-405(C)(1) and S.C. Code Ann. § 38-75-730 are not in conflict. This is an error of law and should be reversed.

First and foremost, as discussed in detail above, S.C. Code Ann. §§ 38-75-710 and 38-75-30 are the applicable provisions governing effective date of cancellation of a workers' compensation insurance policy for nonpayment of premiums because there are no other specific statutory provisions addressing this area. Regulation 67-405 cannot govern the applicable effective date of cancellation because it is not a statutory provision.

Second, the error of this decision is apparent by the fact that Regulation 67-405(C)(1) is in direct conflict with S.C. Code Ann. § 38-75-730. Regulation 67-405 (C)(1) provides if "... [t]he

insurer cancels the policy, the employer's insurer shall immediately notify the commission's authorized agent that it no longer insures the employer. (1) A workers' compensation insurance carrier shall file a notice of termination in accordance with R. 67-416. Such termination shall not be effective until 30 days after receipt by the commission's authorized agent."

By enacting S.C. Code Ann. § 38-75-730, the Legislature determined that failure to pay premiums is a serious enough breach of an insurance agreement that a shorter time period for cancellation by an insurance carrier is warranted and permissible, specifically after 10 days' notice. In mutually exclusive fashion, the Regulation 67-405(C)(1) does not allow workers' compensation carriers the benefit of cancellation with 10 days' notice, but requires at least 30 days instead. Under well-established doctrine, an agency charged with administering a statute or regulation is given deference when interpreting a statute or regulation, unless such an interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Partners v. S.C. Dep't of Health & Env'tl. Control*, 411 S.C. 16, 766 S.E.2d 707, 718 (S.C. 2014) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984)).

Here, the regulation clearly conflicts with a timeframe permitted by statute, and to interpret the regulation otherwise is simply incorrect. As an example, the statute allows a carrier to cancel a workers' compensation policy for nonpayment of premiums 14 days after notice is provided. The regulation does not allow that. Accordingly, this direct conflict is properly resolved in favor of using the statutorily permissive 10-day notice timeframe as opposed to the expanded 30 days required by the regulation.

Additionally, until 2010, Regulation 67-406 addressed cancellation, renewal, and nonrenewal of workers' compensation insurance policies. However, our state legislature repealed this regulation on February 26, 2010. *See* 34 S.C. Reg. 2 (February 26, 2010). Former Regulation

67-406(F) read, “[t]o cancel workers’ compensation insurance coverage, not to renew workers’ compensation insurance coverage, or to reinstate a workers’ compensation insurance policy, the insurance carrier shall file with the NCCI an NCCI form WC 890609A.” That regulation also provided, “[i]nsurance expiration, termination or cancellation shall not be effective until 30 days from the date of receipt by NCCI of the NCCI form.” R. 67-406(F)(2). In repealing this regulation and not replacing it, our legislature removed any and all provisions within the Act governing the effective date for canceling a workers’ compensation insurance policy. As a result, the Commission must look to S.C. Code Ann. § 38-75-730 for determining the permissible effective date of policy cancellation, specifically for nonpayment of premiums.

Furthermore, when looking at Regulation 67-405 in its entirety, which is entitled “Employers and Insurance Carriers, Proof of Compliance,” it becomes clear the substance of subsection (C)(1) addresses compliance in the context of an employer’s legal obligation to carry workers’ compensation insurance when subject to the Act. The regulation provides that every employer operating under the Act shall file with the commission proof of its compliance with the insurance provisions of the Act. R. 67-405(A). The regulation explains the various methods for employers, whether insured or self-insured, to maintain compliance with insurance provisions of the Act. R. 67-405(B). When read in context with the other subsections, subsection (C)(1), which does not even mention the consequences of failure to pay premiums, merely allows an *employer* who fails to renew a policy or whose policy has been canceled to remain in compliance with the Act and its regulations, i.e. not subject to being fined for lack of coverage, within the provisions requiring workers’ compensation insurance, for up to 30 days. This section does not mean, for coverage purposes, that an employer still necessarily has active insurance within that period.

The Commissioner’s interpretation and application of Regulation 67-405 incorrectly finds

that it does not conflict with the statute, and that it sets a 30 day notice minimum before cancellation for non-payment of premiums. Such an interpretation is untenable and overlooks the context of the statute and regulation in issue. Accordingly, the decision should be reversed.

3. THE COMMISSION ERRED, AS A MATTER OF LAW, IN CONCLUDING FORESTRY FAILED TO NOTIFY TAC'S AGENT OF RECORD REGARDING THE PENDING WORKERS' COMPENSATION POLICY CANCELLATION.

Although the Commission relied on the 30-day notice minimum contained in Regulation 67-405 as the controlling language in determining TAC had coverage on the date of accident, the Commission reasoned even if S.C. Code Ann. § 38-75-730 applied to the present facts, the cancellation is not effective because Forestry had not shown that notice of cancellation was mailed to the insurance agent. This reasoning is flawed because it incorrectly assumes the insurance agent is the "agent of record."

Section 38-75-730(b) states, "[c]ancellation [for nonpayment 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." (emphasis added).

Contrary to the Commission's reasoning, evidence in the record, the conduct of Forestry, and more importantly, the conduct of the Commission, points to NCCI as being the proper "agent of record" for purposes of providing notice of cancellation. After all, the Director of Coverage and Compliance with the Commission confirmed that the documents included with the affidavit from NCCI, which include documentation that Forestry provided notice to NCCI on February 19, 2015, that it was going to cancel TAC's policy for nonpayment of premiums effective March 1, 2015, were the very same documents reviewed by his department to determine coverage. APAs

p. 51-57.¹ And as a practical matter, it makes sense that NCCI is the true “agent of record” for cancellation purposes, as they are the body charged with providing information to employees, their attorneys, and the public in general relating to the coverage status of a given company on a given date. *See, e.g.*, APAs pp. 47-8. Furthermore, no party to this claim, nor the Director of Coverage and Compliance with the Commission, disputes the portion of the affidavit contained in Forestry’s Exhibit E, which states the Commission has designated NCCI as its agent for the purpose of collecting proof of coverage information for employers in South Carolina. Accordingly, in addition to providing notice to TAC, Forestry did in fact notify the appropriate “agent of record” for the purposes of fulfilling the notice requirements of S.C. Code Ann. § 38-75-730.

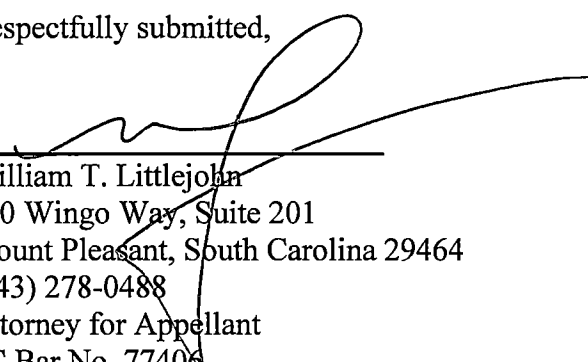
In sum, the record demonstrates that Forestry complied with the notice requirements of Section 38-75-730(b), such that the Commission’s reasoning Forestry failed to notify the employer’s agent of record was an error law.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the South Carolina Workers’ Compensation Commission.

August 15, 2016

Respectfully submitted,



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¹ See page 8 of the single Commissioner’s Decision and Order dated January 29, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

Case No. 2016-001380

David Pate,

Respondent,

v.

TAC Logging, Inc.,

Respondent,

Forestry Mutual Insurance
Company,

Appellant,

South Carolina Uninsured
Employers' Fund,


Respondent.

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on David Pate by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2016, addressed to his attorney of record, Christopher Isgett, Post Office Box 1505, Columbia, South Carolina 29202, to the South Carolina Uninsured Employers' Fund, by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2016, addressed to the attorney of record, Samuel Brunson, 521 West Evans Street, Florence, South Carolina 29501, to TAC Logging, Inc. by depositing a copy of it in the United States Mail via Certified Mail, postage prepaid, on August 16, 2016, addressed to TAC Logging, Inc., 1807 Osprey Drive, Florence, South Carolina, 29501, to the South Carolina Court of Appeals by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2016, addressed to The Honorable Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211.

August 16, 2016



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August 16, 2016

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SC Court of Appeals

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Columbia, South Carolina 29211

Re: David Pate, Employee, Claimant, Respondent, v. TAC Logging, Inc., Employer, Respondent, and Forestry Mutual Insurance Company, Carrier, Appellant, South Carolina Uninsured Employers' Fund, Defendant, Respondent.

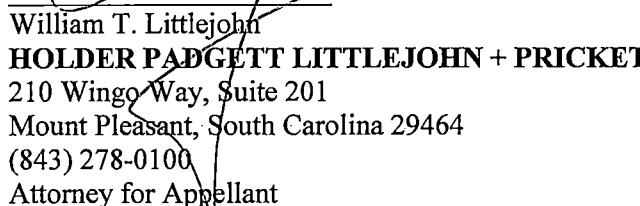
Appellate Case No. 2016-001380

Dear Ms. Kitchings:

Enclosed for filing in the above referenced case are the following documents:

- (1) Initial Brief of Appellant
- (2) Designation of Matter to be Included in the Record on Appeal; and
- (3) Proof of service of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on the Respondents.

Sincerely,



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