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SC Court of Appeals

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 1508997

Armando Fuentes, Employee,

Claimant/Respondent,

-v-

Mays Contracting Company, LLC, Employer
and Builders Mutual Insurance Company, Carrier,

Defendants/Appellants,

And

Jose M. Ortiz Mendoza DBA Ortiz
Construction, Employer, and Riverport Insurance
Company, Carrier,

Defendants/Respondents.

Appellate Panel Review held in Columbia, South Carolina,
on September 19, 2016 per notices timely and properly
served on all parties of interest.

Appellate Panel Decision and Order filed
November 15th, 2016.

APPEARANCES:

Claimant/Respondent represented by Naert and DuBois, LLC,
by Joseph DuBois of Hilton Head, South Carolina.

Defendants/Appellants Mays Contracting Company, LLC
and Builders Mutual Insurance Company represented by
Holder, Padgett, Littlejohn & Prickett, LLC by
William T. Littlejohn of Charleston, South Carolina.

Defendant/Respondent Riverport Insurance Company
Represented by Horton Law Firm, P.A. by
Michael A. Farry, of Greenville, South Carolina.

STATEMENT OF CASE

The parties were heard by Commissioner Aisha Taylor on February 9, 2016. On June 1, 2016, Commissioner Taylor issued the following Order:

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, as Amended, with Jose M. Ortiz Mendoza DBA Ortiz Construction as Employer.
2. On June 30, 2015, Mays Contracting Company, LLC, subcontracted with Jose M. Ortiz Mendoza DBA Ortiz Construction to perform roofing work on a house in Newberry, South Carolina (Deposition Testimony of Thaddeus Everett Mays, APA p. 66-79).
3. On June 30, 2015, Armando Fuentes was employed by Jose M. Ortiz Mendoza DBA Ortiz Construction at an average weekly wage of \$500.00, resulting in a compensation rate of \$333.33.
4. On June 30, 2015, Armando Fuentes sustained an injury by accident to his right foot, right leg, and ribs arising out of and in the course of his employment with Jose M. Ortiz Mendoza DBA Ortiz Construction.
5. Riverport Insurance Company initially provided workers' compensation insurance coverage to Jose M. Ortiz Mendoza DBA

Ortiz Construction with an effective policy period from 1-11-15 to 1-11-16 (APA #3, p. 75).

6. On April 15, 2015, Riverport Insurance Company received notice from National Council Compensation Insurance (NCCI) that Jose M. Ortiz Mendoza had been identified as being ineligible for assigned risk coverage under the workers' compensation plan for the reason that Jose M. Ortiz Mendoza had an undisputed premium or other monetary obligation on a prior/current workers' compensation policy (APA#3, p. 96).

7. On April 15, 2015, National Council Compensation Insurance (NCCI) instructed Riverport Insurance Company to initiate cancellation of the assigned risk policy (APA #3, p. 96).

8. Pursuant to notice and instructions from NCCI, Riverport Insurance Company on April 15, 2015 issued and sent to Jose M. Ortiz Mendoza DBA Ortiz Construction NOTICE OF CANCELLATION OF WORKERS' COMPENSATION POLICY with the effective cancellation date of April 30, 2015 due to Employer being identified as having undisputed premium or other monetary obligation on a prior workers' compensation policy (APA #1, p. 1).

9. Defendants, Mays Contracting, LLC, and its Carrier, Builders Mutual Insurance Co. rely on the case of Crews vs. Crews, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010) to support their contention that Riverport Insurance Company failed to properly cancel the policy of insurance it provided to Jose M. Ortiz Mendoza DBA Ortiz Construction, and therefore Riverport Insurance Company remained on the risk as the Workers' Compensation Insurance Carrier for Jose M. Ortiz Mendoza DBA Ortiz Construction at the time of Armando Fuentes' accident on June 30, 2015.

10. I find Crews vs. Crews, *supra*, is distinguishable from the case before the Commission. Crews dealt with a subsequent policy written by the same carrier, which served as the basis for holding the carrier (Liberty Mutual) could not cancel either policy without giving Crews a reasonable opportunity to cure. In the present case before the Commission, Riverport Insurance did not have the ability to give Jose M. Ortiz Mendoza DBA Ortiz Construction an opportunity to cure any failure to cooperate with an audit report of a prior insurance carrier.

11. I further find Crews is distinguishable from the present case before the Commission based on the Court's reliance in Crews on the lack of "rules with this precise language in the record." In the present case before the Commission, there is evidence in the record with the precise language explaining the basis on which cancellation was made. See Notice from NCCI (National Council Compensation Insurance) to Riverport Insurance Company dated April 15, 2015 (APA #3, p. 96) and Notice of Cancellation of Workers' Compensation Policy dated and sent to Jose M. Ortiz Mendoza DBA Ortiz Construction April 15, 2015 (APA# 1, p. 1).

12. Riverport Insurance Company properly cancelled the workers' compensation insurance policy insuring Jose M. Ortiz Mendoza DBA Ortiz Construction with the effective date of cancellation being April 30, 2015 and is therefore dismissed from this claim (APA #1, p. 1).

13. On June 30, 2015, Armando Fuentes was working for Jose M. Ortiz Mendoza DBA Ortiz Construction and on that date Jose M. Ortiz Mendoza DBA Ortiz Construction did not have any workers' compensation insurance coverage.

14. Based upon the analysis as set forth in the Findings of Fact above together with the preponderance of the evidence in the record, I find Builders Mutual Insurance Company, workers' compensation carrier for Mays Contracting Company, LLC, is the workers' compensation carrier liable for the workers' compensation benefits due Armando Fuentes as a result of compensable job injury he sustained June 30, 2015 while working for Jose M. Ortiz Mendoza DBA Ortiz Construction.

15. Builders Mutual Insurance Company as the liable workers' compensation insurance carrier shall pay for all causally related medical treatment to Claimant's right foot, right leg, and ribs.

16. Builders Mutual Insurance Company as the liable workers' compensation insurance carrier shall pay to Claimant temporary total disability benefits at the rate of \$333.33 per week from the date of accident of June 30, 2015 through the present and continuing.

CONCLUSIONS OF LAW

Accordingly, as provided in Section 42-17-40, S.C. Code Ann., it is the determination of this Commissioner:

1. Under Section 42-17-160, Claimant sustained an injury by accident to his right foot, right leg, and ribs arising out of and in the course of his employment with Jose M. Ortiz Mendoza DBA Ortiz Construction.

2. Under Section 42-15-60, Claimant is entitled to receive medical treatment causally related to his injuries to his right foot, right leg, and ribs.

3. Under Section 42-9-260, Claimant shall receive temporary total compensation payments of \$333.33 per week from the date of accident of June 30, 2015 through the present and continuing.

4. Under Section 42-1-410, Builders Mutual Insurance Company, as the workers' compensation insurance carrier for the contractor, Mays Contracting Company, LLC, is the liable workers' compensation insurance carrier for the workers' compensation benefits due Armando Fuentes as a result of the injury by accident arising out of and in the course of his employment with Jose M. Ortiz Mendoza DBA Ortiz Construction on June 30, 2015.

ORDER

IT IS ORDERED that Builders Mutual Insurance Company shall pay to Armando Fuentes temporary total compensation benefits at the rate of \$333.33 per week from June 30, 2015 through the present and continuing.

IT IS FURTHER ORDERED that Builders Mutual Insurance Company shall be responsible for all causally related medical treatment to Armando Fuentes' right foot, right leg, and ribs arising out of his compensable job injury on June 30, 2015.

IT IS FURTHER ORDERED that any determination as to permanency is premature as Armando Fuentes has not reached

maximum medical improvement.

No hearing costs are assessed in this instance.
IT IS SO ORDERED.

Within the statutory period, counsel for Defendants/Appellants Mays Contracting Company, LLC, and Builders Mutual Insurance Company filed Request for Commission Review (Form 30) setting forth grounds for review, copies of which were furnished to all interested parties prior to oral argument scheduled before the Appellate Panel of the Full Commission on September 19, 2016. Prior to oral argument, the Commission received Briefs filed by counsel for Armando Fuentes, Claimant/Respondent; Mays Contracting Company, LLC, and Builders Mutual Insurance Company, Defendants/Appellants; and Riverport Insurance Company, Defendant/Respondent. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered to individual members of the Appellate Panel of the Commission, along with the Briefs filed, and has since been under study and consideration.

By appeal, Defendants/Appellants, Mays Contracting Company, LLC, and Builders Mutual Insurance Company submit the following grounds for appeal:

1. Did the single Commissioner err in finding that *Crews v. Crews*, 390 S.C. 15, 669 S.E.2d 189 (Ct. App. 2010), was distinguishable from this claim, and therefore not controlling precedent, because *Crews* dealt with a subsequent policy written by the same carrier, which served as the basis for holding the carrier could not cancel either policy without giving *Crews* a reasonable opportunity to cure, and further finding that in the present case Defendant Riverport Insurance Company did not have the ability to give Jose M. Ortiz Mendoza d/b/a Ortiz Construction an opportunity to cure any failure to cooperate with an audit report of prior insurance Carrier? See FF #10. This is also an error of law.

2. Did the single Commissioner err in finding *Crews* as distinguishable from this claim based on the Court's reliance on the lack of "rules with precise language in the record," further finding there was evidence in the record with the precise language explaining the basis on which cancellation was made? See FF #11. This is also error of law.
3. Did the single Commissioner err in finding that Riverport Insurance Company properly canceled the workers' compensation insurance policy insuring Jose M. Ortiz Mendoza d/b/a Ortiz Construction with the effective date of cancellation being April 30, 2015, thereby dismissing Riverport Insurance Company from this claim? See FF #12. This is also an error of law.
4. Did the single Commissioner err in finding that on the date of accident, June 30, 2015, Jose M. Ortiz Mendoza d/b/a Ortiz Construction did not have any workers' compensation insurance coverage? See FF #13. This is also an error of law.
5. Did the single Commissioner err in finding that based upon the analysis set forth in the findings of fact and the preponderance of the evidence in the record, that Builders Mutual Insurance Company, workers' compensation carrier for Mays Contracting Company, LLC, is the workers' compensation carrier liable Armando Fuentes as a result of a compensable job injury sustained on June 30, 2015, while working for Jose M. Ortiz Mendoza d/b/a Ortiz Construction? See FF #14. This is also an error of law.
6. Did the single Commissioner err in finding Builders Mutual Insurance Company as the liable workers compensation insurance carrier and thereby responsible for paying all casually related medical treatment to claimant's right foot, right leg and ribs? See FF #15. This is also an error of law.
7. Did the single Commissioner err in finding Builders Mutual Insurance Company is the liable workers' compensation insurance carrier and thereby responsible for paying claimant temporary total disability benefits at the rate of \$333.33 per week from the date of accident of June 30, 2015, through present and continuing? See FF #16. This is also an error of law.
8. Did the single Commissioner err, in concluding as a matter of law, that under Section 42-1-410, Builders Mutual Insurance Company, as the workers' compensation insurance carrier, for the contractor, Mays Contracting Company, LLC, is the liable workers' compensation insurance carrier for the workers' compensation benefits due Armando Fuentes as a result of the injury by accident arising out of and in the course of his employment with

Jose M. Ortiz Mendoza d/b/a Ortiz Construction on June 30, 2015?
Conclusion of Law #4.

Pursuant to §42-17-50, S.C. Code Ann., we, the Appellate Panel, have reviewed Decision and Order, weighed the evidence as presented, and considered all grounds for appeal set forth in Defendants'/Appellants' Form 30. This Appellate Panel may make its own Findings of Fact and reach its own Conclusions of Law.

Defendants/Appellants rely upon the case of Crews v. Crews, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010), arguing that the facts before the Commission are similar to the facts in the Crews case. However, in Crews, the Court of Appeals simply held that the insurance carrier could not cancel an existing insurance policy due to the failure of the same insured to comply with reasonable audit requirements of a prior policy. In the case before the Commission, Defendant/Respondent Riverport Insurance Company received notice from the National Council Compensation Insurance (NCCI) that Defendant Jose M. Ortiz Mendoza had been identified as being ineligible for assigned risk coverage under the workers' compensation plan for the reason that Jose M. Ortiz Mendoza had undisputed premium or other monetary obligation on a prior/current workers' compensation policy. Defendant/Respondent Riverport Insurance Company was instructed to initiate cancelation of the assigned risk policy which Riverport Insurance Company properly did.

After careful review of this case before the Commission including Briefs by the respective parties as well as oral argument, the Appellate Panel of the SC Workers' Compensation Commission has determined by unanimous vote that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated and

supported by the substantial evidence in the record. The Findings of Fact and Conclusions of Law by the Hearing Commissioner are adopted verbatim by this Appellate Panel. Therefore, based upon the foregoing, the Order of the Hearing Commissioner is affirmed.

ORDER

IT IS THEREFORE ORDERED that the Order by the Hearing Commissioner filed in the above captioned claim on June 1, 2016 is unanimously affirmed by the Appellate Panel and the same shall constitute the Decision and Order of this Appellate Panel as follows:

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, as Amended, with Jose M. Ortiz Mendoza DBA Ortiz Construction as Employer.

2. On June 30, 2015, Mays Contracting Company, LLC, subcontracted with Jose M. Ortiz Mendoza DBA Ortiz Construction to perform roofing work on a house in Newberry, South Carolina (Deposition Testimony of Thaddeus Everett Mays, APA p. 66-79).

3. On June 30, 2015, Armando Fuentes was employed by Jose M. Ortiz Mendoza DBA Ortiz Construction at an average weekly wage of \$500.00, resulting in a compensation rate of \$333.33.

4. On June 30, 2015, Armando Fuentes sustained an injury by accident to his right foot, right leg, and ribs arising out of and in the course of his employment with Jose M. Ortiz Mendoza DBA Ortiz Construction.

5. Riverport Insurance Company initially provided workers' compensation insurance coverage to Jose M. Ortiz Mendoza DBA Ortiz Construction with an effective policy period from 1-11-15 to 1-11-16 (APA #3, p. 75).

6. On April 15, 2015, Riverport Insurance Company received notice from National Council Compensation Insurance (NCCI) that Jose M. Ortiz Mendoza had been identified as being ineligible for assigned risk coverage under the workers' compensation plan for the reason that Jose M. Ortiz Mendoza had an undisputed premium or other monetary obligation on a prior/current workers' compensation policy (APA #3, p. 96).

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9. Defendants, Mays Contracting, LLC, and its Carrier, Builders Mutual Insurance Co. rely on the case of Crews vs. Crews, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010) to support their contention that Riverport Insurance Company failed to properly cancel the policy of insurance it provided to Jose M. Ortiz Mendoza DBA Ortiz

Construction, and therefore Riverport Insurance Company remained on the risk as the Workers' Compensation Insurance Carrier for Jose M. Ortiz Mendoza DBA Ortiz Construction at the time of Armando Fuentes' accident on June 30, 2015.

10. We find Crews vs. Crews, supra, is distinguishable from the case before the Commission. Crews dealt with a subsequent policy written by the same carrier, which served as the basis for holding the carrier (Liberty Mutual) could not cancel either policy without giving Crews a reasonable opportunity to cure. In the present case before the Commission, Riverport Insurance did not have the ability to give Jose M. Ortiz Mendoza DBA Ortiz Construction an opportunity to cure any failure to cooperate with an audit report of a prior insurance carrier.

11. We further find Crews is distinguishable from the present case before the Commission based on the Court's reliance in Crews on the lack of "rules with this precise language in the record." In the present case before the Commission, there is evidence in the record with the precise language explaining the basis on which cancellation was made.

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12. Riverport Insurance Company properly cancelled the workers' compensation insurance policy insuring Jose M. Ortiz Mendoza DBA Ortiz Construction with the effective date of cancellation being April 30, 2015 and is therefore dismissed from this claim (APA

#1, p. 1).

13. On June 30, 2015, Armando Fuentes was working for Jose M. Ortiz Mendoza DBA Ortiz Construction and on that date Jose M. Ortiz Mendoza DBA Ortiz Construction did not have any workers' compensation insurance coverage.

14. Based upon the analysis as set forth in the Findings of Fact above together with the preponderance of the evidence in the record, we find Builders Mutual Insurance Company, workers' compensation carrier for Mays Contracting Company, LLC, is the workers' compensation carrier liable for the workers' compensation benefits due Armando Fuentes as a result of compensable job injury he sustained June 30, 2015 while working for Jose M. Ortiz Mendoza DBA Ortiz Construction.

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16. Builders Mutual Insurance Company as the liable workers' compensation insurance carrier shall pay to Claimant temporary total disability benefits at the rate of \$333.33 per week from the date of accident of June 30, 2015 through the present and continuing.

CONCLUSIONS OF LAW

Accordingly, as provided in Section 42-17-40, S.C. Code Ann., it is the determination of this Commission:

1. Under Section 42-17-160, Claimant sustained an injury by accident to his right foot, right leg, and ribs arising out of and in the course of his employment with Jose M. Ortiz Mendoza DBA Ortiz Construction.

2. Under Section 42-15-60, Claimant is entitled to receive medical treatment causally related to his injuries to his right foot, right leg, and ribs.

3. Under Section 42-9-260, Claimant shall receive temporary total compensation payments of \$333.33 per week from the date of accident of June 30, 2015 through the present and continuing.

4. Under Section 42-1-410, Builders Mutual Insurance Company, as the workers' compensation insurance carrier for the contractor, Mays Contracting Company, LLC, is the liable workers' compensation insurance carrier for the workers' compensation benefits due Armando Fuentes as a result of the injury by accident arising out of and in the course of his employment with Jose M. Ortiz Mendoza DBA Ortiz Construction on June 30, 2015.

ORDER

IT IS ORDERED that Builders Mutual Insurance Company shall pay to Armando Fuentes temporary total compensation benefits at the rate of \$333.33 per week from June 30, 2015 through the present and continuing.

IT IS FURTHER ORDERED that Builders Mutual Insurance Company shall be responsible for all causally related medical treatment to Armando Fuentes' right foot, right

leg, and ribs arising out of his compensable job injury on June 30, 2015.

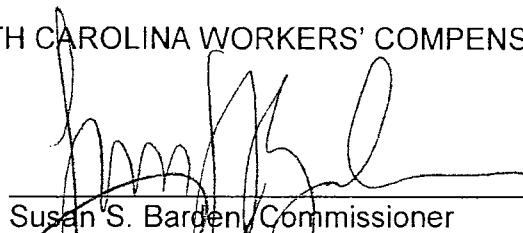
IT IS FURTHER ORDERED that any determination as to permanency is premature as Armando Fuentes has not reached maximum medical improvement.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

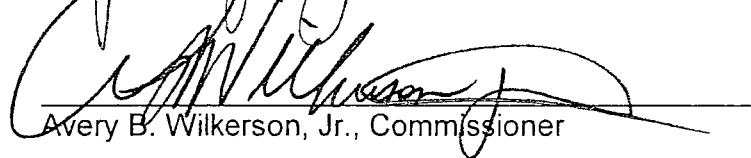
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL AFFIRMATION



Susan S. Barden, Commissioner

CONCUR



Avery B. Wilkerson, Jr., Commissioner



Melody L. James, Commissioner

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 November 15, 2016