THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Appellate Case No. 2016-002493

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SC Court of Appeals

Armando Fuentes, Employee, Claimant, Respondent,

v.

Mays Contracting Company, LLC, Employer, and

Builders Mutual Insurance Company, Carrier, Appellants,

And

Jose M. Ortiz DBA Ortiz Construction, Employer, and

Riverport Insurance Company, Carrier, Respondents.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 3

Statement of the Case 4

Facts 7

Standard of Review 10

Arguments 10

1. THE COMMISSION FAILED TO PROPERLY IDENTIFY THE RULE THAT WOULD PERMIT RIVERPORT TO INITIATE CANCELLATION OF ORTIZ'S POLICY PURSUANT TO *CREWS* AND THE ASSIGNED RISK PLAN RULES 13

   a. As a Matter of Law, the Commission's Application of *Crews* Was Improperly Narrow and Did Not Address Whether Riverport Had Proven the Existence of a Circumstance that Allowed it to Initiate Cancellation of Ortiz's Policy 13

   b. The Commission Improperly Relied on a Letter from NCCI to Riverport as Being Equivalent to a "Rule with Precise Language in the Record" as Required by *Crews*, as Such a Finding Was Both an Error of Law and Unsupported by Substantial Evidence 14

2. AS A MATTER OF LAW, THE COMMISSION FAILED TO IMPOSE THE REQUIREMENT THAT RIVERPORT PROVIDE ORTIZ WITH AN OPPORTUNITY TO CURE BEFORE INITIATING CANCELLATION OF THE POLICY AS REQUIRED BY *CREWS* AND THE ASSIGNED RISK PLAN RULES, AND IF IT HAD, THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT RIVERPORT EVER PROVIDED SUCH AN OPPORTUNITY 16

   a. The Commission Failed to Find that Riverport was Required to Give Ortiz an Opportunity to Cure Before Initiating Cancellation of the Policy 16

   b. Riverport Did Not Provide Ortiz with an Opportunity to Cure Before Initiating Cancellation of the Policy as Required Under *Crews* and the Assigned Risk Plan Rules 17

Conclusion 20

TABLE OF AUTHORITIES

CASES

Avant v. Willowglen Acad., 367 S.C. 315, 319, 626 S.E.2d 797 (2006). 11-2

Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85,93-4, 396 S.C. 695 (Ct. App. 2011) ... 11-2

Crews v. Crews, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010) 5-7, 11-17

Jeffrey v. Sunshine Recycling, 386 S.C. 174, 687 S.E.2d 332 (Ct. App. 2009)............................16

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) 10

Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005) 10

Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999) 10

STATUTES

S.C Code Ann. §42-1-410 (2016)..6

REGULATIONS

Regulation 67-405..18

OTHER AUTHORITIES

South Carolina Workers' Compensation Insurance Assigned Risk Plan (NCCI 2015) 17

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION, AS A MATTER OF LAW, ERRED IN FINDING THAT A LETTER FROM NCCI TO RIVERPORT INSURANCE COMPANY AMOUNTED TO A "RULE WITH PRECISE LANGUAGE IN THE RECORD" WITHIN THE MEANING DISCUSSED IN *CREWS*, THEREBY PROVIDING THE BASIS AND/OR AUTHORITY FOR RIVERPORT INSURANCE COMPANY TO CANCEL THE WORKERS' COMPENSATION INSURANCE POLICY INSURING JOSE M. ORTIZ MENDOZA D/B/A ORTIZ CONSTRUCTION.

II. WHETHER THE COMMISSION'S FINDING THAT A LETTER FROM NCCI TO RIVERPORT INSURANCE COMPANY AMOUNTED TO A "RULE WITH PRECISE LANGUAGE IN THE RECORD" WITHIN THE MEANING DISCUSSED IN *CREWS*, THEREBY PROVIDING THE BASIS AND/OR AUTHORITY FOR RIVERPORT INSURANCE COMPANY TO CANCEL THE WORKERS' COMPENSATION INSURANCE POLICY INSURING JOSE M. ORTIZ MENDOZA D/B/A ORTIZ CONSTRUCTION, WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

III. WHETHER THE COMMISSION, AS A MATTER OF LAW, ERRED 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 DISMISSISNG RIVERPORT INSURANCE COMPANY FROM THIS CLAIM.

IV. WHETHER THE COMMISSION'S 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 DISMISSISNG RIVERPORT INSURANCE COMPANY FROM THIS CLAIM, WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

This appeal from the South Carolina Workers' Compensation Commission arises from an admitted work accident involving a dispute about which carrier is responsible for providing benefits under the South Carolina Workers' Compensation Act (hereinafter "the Act"). Specifically, Mays Contracting Company, LLC, and Builders Mutual Insurance Company (hereinafter "Appellants") dispute responsibility for providing benefits under the Act to Armando Fuentes (hereinafter "Claimant"). Appellants assert that Jose M. Ortiz Mendoza DBA Ortiz Construction (hereinafter "Ortiz") and Riverport Insurance Company (hereinafter "Riverport") are the employer-carrier combination responsible for Claimant's benefits.

On or about June 30, 2015, Claimant sustained an injury by accident while working for Ortiz. At the time of the accident, Ortiz was performing services as a subcontractor for Appellants. On October 27, 2015, Claimant filed a form 50 Employee's Request for Hearing seeking benefits under the Act for the work injury of June 30, 2015, naming as parties Appellants as the general contractor, and Ortiz as the subcontractor. Under the section of the form 50 labeled "11. Further grounds or unusual aspects of the claim:" it reads "Subcontractor [Ortiz] had coverage through Berkeley [an affiliate of Riverport]; however, Berkeley canceled the policy on 4.30.15, approximately two months before the date of injury, such that, upon information and belief, subcontractor Ortiz was uninsured on the date of injury."

In response to Claimant's form 50, Riverport timely filed an answer denying coverage for this claim, asserting it had provided Ortiz with notice of cancellation of its workers' compensation policy on April 15, 2015, with an effective cancellation date of April 30, 2015. Appellants timely filed an answer asserting the defense of lack of an employer/employee relationship with Claimant.

Claimant admits that he was a direct employee of Ortiz on the date of accident, but in the event that Ortiz did not have workers' compensation insurance coverage on the date of accident, he asserts that the responsible employer/carrier combination for providing benefits under the Act would be Appellants under a theory of statutory employment.

Riverport admits to providing workers' compensation insurance coverage for Ortiz effective March 26, 2015. However, Riverport asserts that it properly canceled Ortiz's coverage effective April 30, 2015, based on Ortiz being identified as having undisputed premium dollars owed on a prior workers' compensation policy with a different carrier (Companion).

Appellants' argued that Riverport improperly canceled Ortiz's policy because the given reason for the cancellation is not supported by the rules that govern assigned risk policies, which is the type of policy written by Riverport for Ortiz. Under the case of *Crews v. Crews*, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010), Appellants assert that an assigned risk policy cannot be canceled because of activities that occurred on a prior policy, regardless of whether the prior policy was written by the current carrier or a prior carrier. In the alternative, even if such cancellation is permitted under the rules addressing assigned risk policies, Riverport failed to provide Ortiz with an opportunity to cure, as is required under the applicable rules. In sum, because Riverport improperly cancelled Ortiz's policy on April 30, 2015, Riverport is the responsible carrier for Claimant's work accident and related injuries sustained on June 30, 2015, while he was working as a direct employee of Ortiz.

On February 9, 2016, a hearing on this matter was held before the Honorable Aisha G. Taylor, Commissioner (hereinafter "the single Commissioner"). Appearances were made by Claimant and his counsel, Appellants and Riverport. Ortiz did not make an appearance.

At the hearing before the single Commissioner, records were submitted into evidence by

Claimant, Appellants, and Riverport, including transcripts from the depositions of Claimant, Mr. Thaddeus Everett Mays, and Mr. Jose Ortiz. Claimant provided live testimony.

On June 1, 2016, the single Commissioner issued a Decision and Order, finding and concluding Riverport had properly canceled the workers' compensation insurance policy insuring Ortiz with the effective date of cancellation being April 30, 2015, and Riverport is therefore dismissed from this claim. The single Commissioner further found that on July 30, 2015, Ortiz did not have any workers' compensation insurance coverage; therefore, under S.C. Code Ann. § 42-1-410, Appellants, the upstream general contractor and its carrier, are the liable employer/carrier combination responsible for Claimant's benefits for the work accident of June 30, 2015, while Claimant was working for Ortiz. Appellants timely appealed the single Commissioner's decision to the Full Commission.

A hearing was held before the Commission's appellate panel on September 19, 2016, during which arguments were put forth by Appellants and Riverport. Thereafter, on November 15, 2016, the Commission issued its Decision and Order sustaining the findings of fact and conclusions of law of the single Commissioner. Appellants timely appealed from the Commission's decision to the South Carolina Court of Appeals.

Based on the evidence in this case, the rules governing assigned risk policies for workers' compensation insurance, and the South Carolina Court of Appeal's decision in *Crews v. Crews*, *supra*, the Commission's findings of fact and conclusions of law regarding the proper carrier constitute errors of law and/or are not supported by substantial evidence and should be reversed on the issue of which employer/carrier is responsible. Accordingly, the Commission's decision should be modified to hold Riverport responsible for Claimant's benefits under the Act.

FACTS

Ortiz, Claimant's direct employer at the time of accident, does not read or speak English. (Appellants' APAs p. 101). From January 11, 2014 through January 11, 2015, Ortiz had an assigned risk workers' compensation insurance policy with Companion Property and Casualty Group (hereinafter Companion). On November 10, 2014, Companion notified Ortiz the policy ending on January 11, 2015, would not be renewed because Companion would no longer be a servicing carrier for the assigned risk pool in South Carolina. (Appellants' APAs p. 86). After the Companion policy period, a final audit was conducted for the purpose of determining whether any premiums were owed on Companion's policy. On February 24, 2015, Companion issued a notice to Ortiz informing that the final audit resulted in a premium increase of $6,531.00. (Appellants' APAs p. 88). At some point thereafter, Ortiz paid the premium increase. (Appellants' APAs p. 102).

Concurrent to the above timeline, Ortiz purchased a policy for workers' compensation insurance classified under an "assigned risk section" written by Riverport, with a policy period date of January 11, 2015 through January 11, 2016. (Riverport's APAs pp. 13 & 68). The quoted premium amount was $1,250.00, and it was paid in full by Ortiz via credit card on December 29, 2014. (Riverport's APAs pp. 24 & 34).

On February 19, 2015, Riverport sent Ortiz a letter entitled "Notice of Cancellation of Workers' Compensation Policy" notifying the policy was cancelled effective March 26, 2015, for noncompliance with underwriting requirements, specifically failure to complete and return an underwriting evaluation letter. In that letter, Ortiz was provided an opportunity to cure the deficiency by sending the requested information prior to March 26, 2015, to avoid cancellation.

(Appellants' APAs p. 91).

On March 19, 2015, Ortiz cured the deficiency by returning the completed underwriting evaluation letter with a contracting supplement to Riverport. (Appellants' APAs pp. 92-3). In response, consistent with the opportunity to cure, Riverport issued a letter to Ortiz advising that the policy would be reinstated as of March 26, 2015. (Appellants' APAs p. 94).

On April 15, 2015, Riverport received a letter from NCCI informing that Ortiz was no longer eligible for assigned risk coverage because Ortiz was identified as having an undisputed premium or other monetary obligation on a prior/current workers' compensation policy. NCCI further instructed that if the policy was an assigned risk policy, Riverport was to proceed with initiating cancellation in accordance with the cancellation provisions of the assigned carrier performance standards found on NCCI's website and "applicable Plan rules and/or statutory or regulatory requirements regarding the policy." (Riverport's APAs p. 96).

That same day, on April 15, 2015, Riverport sent a letter to Ortiz entitled "Notice of Cancellation of Workers' Compensation Policy," advising that the policy would be canceled effective April 30, 2015, stating "Reason for cancellation: Non-Compliance with Underwriting Requirements," below which also reads: "Employer identified as having an undisputed premium or other monetary obligation on a *prior* workers' compensation policy (emphasis added)." (Riverport's APAs p. 1). The parties agree that the prior policy obligation referenced is the additional premium assessed by Companion.

It was not until May 21, 2015, after the effective date of cancellation, that one of Riverport's representatives contacted Ortiz via voicemail message. An appointment letter was sent on June 1, 2015, and additional phone calls were made to Ortiz. The Riverport representative documented that on June 15, 2015, he called Ortiz to confirm an appointment, and the insured

canceled stating "they are unable to complete audit as scheduled and will have a translator call auditor back. No response." There is no evidence in the record that any of Riverport's communications with Ortiz were spoken or written in Spanish. Ortiz denies that he told anyone he would hire or have an interpreter. (Appellants' APAs p. 102, & Riverport's APAs p. 98).

Thereafter, on June 24, 2015, Ortiz received an audit close out notice informing the final premium for the policy could not be determined because of failure to return payroll report forms or to allow the completion of a physical audit. In this letter, Ortiz was advised that failure to afford access to operations for auditing purposes may result in cancellation of the policy and may also result in ineligibility for future workers' compensation coverage. Ortiz was further advised completion of the final audit may result in entitlement to a refund of premium or a bill for additional premium. The policy period is listed as January 11, 2015, through April 30, 2015. By the time of this letter, the policy was already cancelled, and there is no language addressing potential re-instatement following compliance. (Appellants' APAs p. 96). Notably, the terms of the policy between Ortiz and Riverport states under Part Five – Premium, subsection E: "If the policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise: 1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium." (Riverport's APAs p. 73). Riverport did not return any premium to Ortiz.

On June 30, 2015, Claimant sustained injuries by accident arising out of and in the course of his employment with Ortiz. As of January 20, 2016, Riverport had not refunded any of Ortiz's premium paid for the foreshortened policy period. (Appellants' APAs p. 97).

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). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 834 (1999).

ARGUMENTS

The pivotal facts in this case are as follows: Appellants are the upstream employer and carrier, Ortiz was a subcontractor for Appellants, Claimant was the direct employee of Ortiz, and the workers' compensation policy written by Riverport covering Ortiz - the one that Riverport argues was properly cancelled prior to the date of accident - was written under the Assigned Risk Plan.

The Supreme Court of South Carolina recognized the purpose of the Assigned Risk Plan and its pool of insurers, which came about in 2000, is to provide a source of workers' compensation insurance coverage to "applicants who are in good faith entitled to, but who are unable to procure, [workers' compensation] insurance through ordinary methods." *Rodriguez v. Romero*, 363 S.C. 80, 84-5, 610 S.E.2d 488, 490 (2005). This scheme, which privatized the assigned risk market in South Carolina, replaced a former system that spread the risk over all carriers, whereas the current system places the burden on only a few carriers who have *requested* to handle assigned risk to bear the loss (emphasis added). *Id.* at Fn. 4. In a more recent case, this Court has observed:

> "The General Assembly has delegated certain authority over assigned-risk insurance to the Director of the Department of Insurance. South Carolina Code section 38-73-540(A)(1) states that 'any mechanism designed to implement' the assigned-risk agreement executed by the state's insurers "must be submitted in writing to the director or his designee for approval prior to use, together with such additional information as the director or his designee may reasonably require." The Code does not require that the implementation mechanism be promulgated as a regulation. Rather, the mechanism attains the force of law when it is approved by the Director of the Department of Insurance."

Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85,93, 719 S.E.2d 695, 699 (Ct. App. 2011) (quoting *Avant v. Willowglen Acad.*, 367 S.C. 315, 319, 626 S.E.2d 797 (2006)).

In its decision finding that Riverport properly cancelled Ortiz's policy, the Commission failed to properly apply the South Carolina Court of Appeals' decision in *Crews v. Crews*, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010), and the Assigned Risk Plan rules.

In *Crews v. Crews*, the primary issue addressed was whether, under the Assigned Risk Plan, a carrier could properly cancel a subsequent workers' compensation insurance policy (hereinafter "Policy 2" for ease of discussion) because of an employer's failure to comply with an audit request on a prior policy written by the same carrier (hereinafter "Policy 1"), where the policy period for Policy 1 had already expired. 390 S.C. at 22, 699 S.E.2d at 193.

In *Crews*, the carrier issued Policy 1 to the employer using estimated payroll information to calculate the premium, with the understanding that the exact payroll exposure, and hence the precise premium, would not be known *until the end of the policy term after the completion of an audit* (emphasis added). *Id.* at 18, 191. Towards the end of the coverage period for Policy 1, the carrier sent the employer an audit request to determine whether the employer owed additional premium payments on Policy 1 or was entitled to a refund of estimated premiums already paid. *Id.* By the expiration of the coverage for Policy 1, the employer had not responded to the audit request. *Id.* at 19, 191. Three days after Policy 1 expired, the employer paid the quoted premium

for Policy 2, which became effective the same day. *Id.*

Approximately two months into the Policy 2 coverage period, the carrier sent the employer two letters dated the same day. *Id.* The first letter informed the employer of an estimated audit for Policy 1, indicating neither party owed money to the other, but such determination was subject to revision once the employer responded to the audit request for policy one. *Id.* The second letter informed the employer that Policy 2 had been cancelled effective approximately one month later, citing noncompliance with Plan rules and failure to comply with auditing or loss prevention service department requests as the reasons for cancellation. *Id.* A representative of the carrier provided testimony clarifying that the failure to comply with auditing referenced in the letter canceling Policy 2 actually related to activity on Policy 1. Approximately three months after Policy 2 was cancelled, the employer suffered serious injuries due to a workplace accident. *Id.* at 20, 192.

Approving of the Circuit Court's decision, which found that the carrier could not cancel Policy 2 because of alleged failures to comply with the requirements of Policy 1, the Court of Appeals quoted the following from the lower court decision: "There is no provision of the [Assigned Risk] Plan requiring or allowing cancellation of a current policy due to an alleged failure to comply with the requirements of a previous policy…" *Id.* at 23, 193.

According to the court in *Crews*, the Assigned Risk Plan specifies five circumstances that allow a carrier to cancel a workers' compensation insurance policy : (1) the employer is not in good faith entitled to workers' compensation coverage, (2) the employer has failed to comply with reasonable health, safety, or audit and loss prevention requirements, (3) the employer has violated one or more of the terms under which the insurance was issued, (4) the employer refuses to allow the assigned carrier reasonable access to its facilities or its files and records for audit or inspection, and (5) the employer refuses to disclose the assigned carrier the full nature and scope of the assigned carriers

exposure. *Id.*

Additionally, even if one of the five conditions exist, *Crews* instructs that the Assigned Risk Plan rules "specify the carrier must first provide an opportunity to cure" before cancelling a policy under the plan. *See id.* at 25, 194.

In sum, *Crews* makes it clear the analysis for determining whether an Assigned Risk Plan policy was properly cancelled is a two-step inquiry: (1) which of the five circumstances exist that would allow the carrier to initiate cancellation, and (2) assuming one of the circumstances is identified, whether the carrier provided an opportunity to cure the deficiency before initiating cancellation.

The Commission failed to properly apply the Assigned Risk Plan rules in accordance with the decision in *Crews* in that if failed to identify the basis upon which Riverport was authorized to cancel the policy in question. Additionally, even if the Commission did identify the basis for the cancellation as recognized in *Crews* and the Assigned Risk Plan rules, the Commission still misapplied the law in that it should have found Riverport failed to provide Ortiz with an opportunity to cure as is required. Accordingly, Ortiz's policy with Riverport remained active on the date of accident, and, therefore, the Commission's decision with respect to assigning responsibility for this claim to Appellant should be reversed.

1. THE COMMISSION FAILED TO PROPERLY IDENTIFY THE RULE THAT WOULD PERMIT RIVERPORT TO INITIATE CANCELLATION OF ORTIZ'S POLICY PURSUANT TO *CREWS* AND THE ASSIGNED RISK PLAN RULES.

In its decision, the Commission should have applied *Crews* and the Assigned Risk Plan rules and made findings of facts and conclusions of law identifying the rule that would have allowed Riverport to initial cancellation of Ortiz's policy. The Commission did not identify such a basis, and its decision should therefore be reversed.

a. As a Matter of Law, the Commission's Application of *Crews* Was Improperly Narrow and Did Not Address Whether Riverport Had Proven the Existence of a Circumstance that Allowed it to Initiate Cancellation of Ortiz's Policy.

The Commission's decision is confusing in that it is difficult to tell whether or not it applied *Crews*. In Finding of Fact number 10, it seems as though the Commission declines to follow *Crews* by distinguishing it from the present facts: "We find *Crews v. 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...could not cancel either policy without giving [the claimant in that case] a reasonable opportunity to cure. In the present case before the Commission, [Riverport] did not have the ability to give Ortiz an opportunity to cure any failure to cooperate with an audit report of a prior insurance carrier."

This application is incorrect in that it assumes, in order for *Crews* to apply, the basis for cancellation in the present case must be the same basis that was argued in *Crews* in order to apply the framework. In other words, this finding suggests that the only circumstance that triggers a carrier's obligation to provide an opportunity to cure is when there is an unmet obligation on a prior policy written by the same carrier. This narrow application by the Commission fails to address whether any of the other four bases apply to the facts of this case. Instead, the Commission should have first required Riverport to prove, by a preponderance of the evidence, which of the five circumstances identified in *Crews* allowed Riverport to initiate cancellation of Ortiz's policy. It was an error of law for the Commission to do otherwise.

b. The Commission Improperly Relied on a Letter from NCCI to Riverport as Being Equivalent to a "Rule with Precise Language in the Record" as Required by *Crews*, as Such a Finding Was Both an Error of Law and Unsupported by Substantial Evidence.

The Commission recognized that it needed to identify a rule the would allow Riverport to

cancel Ortiz's policy, but it missed the mark in that regard.

The Commission, while on one hand distinguishing *Crews* as inapplicable on the issue of whether Riverport was required to provide Ortiz with an opportunity to cure, the Commission found as follows under Finding of Fact no. 11: "We further find *Crews* as distinguishable from the present case before the Commission based on the Court's reliance in *Crews* on the lack of 'rules with 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] dated April 15, 2015 (APA #3, p. 96) and Notice of Cancellation of Workers' Compensation Policy dated and sent to [Ortiz] on April 15, 2015 (APA #1, p. 1) (emphasis added)."

In *Crews*, with respect to whether the carrier could cancel a current policy due to noncompliance with an audit request for a prior policy, the court observed "we found no rules with this precise language in the record." 390 S.C. at 23, 699 S.E.2d at 193. The court went on to state what rules *were* identified among the record, and it listed the five circumstances under which a carrier can cancel a workers' compensation insurance policy pursuant to the Assigned Risk Plan, as listed in full above. *Id.*

Among the evidence we have in the current case is a letter from NCCI to Riverport identifying Ortiz as an employer having an undisputed premium or other monetary obligation on a prior/current workers' compensation policy, and Riverport is instructed to initiate cancellation in accordance with the cancellation provisions of the Assigned Carrier Performance Standards, and applicable Plan rules and/or statutory or regulatory requirements regarding the policy. None of the five circumstances from *Crews* are listed, nor does the letter purport to cite a specific rule requiring initiation of policy cancellation under the given circumstances. Although the

Commission identified the NCCI letter as the purported reason or basis for the cancellation, *Crews* requires that a rule be identified within the Assigned Risk Plan requiring the cancellation in order for such cancellation to be valid. No such rule can be found among the evidence of this case; therefore, it was an error of law for the Commission to find otherwise, and the finding was furthermore not supported by substantial evidence in the record.

In sum, because the Commission narrowly applied *Crews* and failed to properly identify the rule that would allow Riverport to cancel Ortiz's policy, the Commission's decision should be modified to appoint Riverport as the responsible carrier.

2. AS A MATTER OF LAW, THE COMMISSION FAILED TO IMPOSE THE REQUIREMENT THAT RIVERPORT PROVIDE ORTIZ WITH AN OPPORTUNITY TO CURE BEFORE INITIATING CANCELLATION OF THE POLICY AS REQUIRED BY *CREWS* AND THE ASSIGNED RISK PLAN RULES, AND IF IT HAD, THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT RIVERPORT EVER PROVIDED SUCH AN OPPORTUNITY.

Assuming, *argeuendo*, the Commission properly identified a rule allowing Riverport to initiate cancellation of the Ortiz policy, it did not place upon Riverport the prerequisite of providing Ortiz with an opportunity to cure before initiating cancellation of the policy as is required by *Crews* and the Assigned Risk Plan rules. And even if the Commission had recognized and applied such a requirement upon Riverport, the record reveals no such opportunity was ever given to Ortiz. Failure to follow Assigned Risk Plan rules supports a determination that the policy was not properly cancelled and therefore active on June 30, 2015, the date of claimant's accident. *See, e.g., Jeffrey v. Sunshine Recycling*, 386 S.C. 174, 687 S.E.2d 332 (Ct. App. 2009) (finding the Commission's decision to hold the carrier responsible despite a lapse in coverage where the carrier's reinstatement notice did not include clear and unambiguous language indicating there had been a lapse in coverage as required by the Assigned Risk Plan Operating Rules and Procedures).

Accordingly, the Commissions finding and decision that Riverport properly cancelled Ortiz's policy should be reversed.

a. The Commission Failed to Find that Riverport was Required to Give Ortiz an Opportunity to Cure Before Initiating Cancellation of the Policy.

The court in *Crews* pointed out the following: "the Assigned Risk Plan allows a carrier to initiate cancellation procedures if it determines one of the five conditions enumerated above exists; however, Plan rules specify the carrier must first provide an opportunity to cure. Furthermore, the Plan requires a servicing carrier '[t]o work with and assist the... employer... on problems relating to coverage and service under the Plan.'" *Id.* at 25, 194. This reasoning is extrapolated directly from the Assigned Risk Plan rules.

Under the section entitled "Cancellation of the Policy," the Assigned Risk Plan lays out the critical rule as follows: "If, after the issuance of a policy, the assigned carrier determines that an employer is in noncompliance with any of the following provisions on a current *or previous* workers' compensation policy by [the five circumstances listed in *Crews*], the current assigned carrier will initiate cancellation (after providing an opportunity for cure) *even if such noncompliance was for a previous policy issued by a different carrier*...[t]he policy should be cancelled in accordance with the cancellation provisions of NCCI's Basic Manual, the Assigned Carrier Performance Standards, and state law (emphasis added)." In sum, contrary to the Commission's decision, the Assigned Risk Plan and *Crews* make it clear that regardless of which of the five circumstances provide the justification for initiating cancellation, the carrier must first provide an opportunity to cure, even if the deficiency relates to a prior policy with a different carrier.

b. Riverport Did Not Provide Ortiz with an Opportunity to Cure Before Initiating Cancellation of the Policy as Required Under the Assigned Risk Plan Rules.

The record reveals that Riverport knew how to provide, and in fact had provided, Ortiz with an opportunity to cure a deficiency on a prior occasion. On February 19, 2015, Riverport sent Ortiz a letter notifying of a pending policy cancellation effective March 26, 2015, for noncompliance with underwriting requirements, specifically, failure to complete and return an underwriting evaluation letter. In that letter, Ortiz was advised he could cure his deficiency as follows: "Please compete and return the attached Underwriting Evaluation letter along with the proper documentation. *To avoid cancellation, please send the requested information prior to the cancel[lation] date of 3/26/2015* (emphasis added)." (Appellants' APAs p. 91).

On March 19, 2015, Ortiz cured the deficiency by completing and returned the underwriting evaluation letter with a contracting supplement to Riverport. (Appellants' APAs pp. 92-3). In response, Riverport issued a letter to Ortiz advising that the policy would be reinstated as of March 26, 2015. (Appellants' APAs p. 94).

However, the April 15, 2015 cancellation notice is crucially different from the February 19, 2015 cancellation notice because it fails to provide Ortiz with an opportunity to cure the deficiency in that it only says "Please contact NCCI at 800-622-4123 to resolve this matter." The April 15, 2015 cancellation notice does not contain any language to the effect of "please do the following *to avoid cancellation*." Just like it had done in the February 19, 2015 cancellation notice, Riverport should have informed Ortiz what action he could take to avoid cancellation on April 30, 2015, but that was not done in the April 15, 2015 cancellation notice.

As further evidence of Riverport's unreasonableness with respect to how it handled cancellation of Ortiz's policy, it did not even follow state law regarding the timing of cancelation. R. 67-405 instructs that if "the insurer cancels the policy, the employer's insurer shall immediately

notify the Commission's authorized agent that it no longer insures the employer," and "...such termination shall not be effective until *thirty days* after receipt by the Commission's authorized agent (emphasis added)." R. 67-405(C)(1). In this case, Ortiz was told his policy would be cancelled only *fifteen days* after notice of cancellation.

In sum, at minimum, in order for Ortiz to be provided with an opportunity to cure as required by the Assigned Risk Plan rules, which includes being consistent with state law, the cancellation notice should have said, "NCCI has identified that you have a monetary obligation on a prior policy. You need to satisfy this obligation within thirty days (30) or your policy will be cancelled. You should contact NCCI for details at [insert phone number]," or words to that effect.

Finally, Riverport essential takes the position that its only duty was to cancel the policy because it was told to do so by NCCI: "Riverport did exactly what Riverport should have done. Riverport did not have an obligation to chase Mr. Ortiz around and say, have you paid your premium yet because we insure you?...We were told to cancel; that's what Riverport did." (Full Comm. Hr. Tr. p. 20:11-16). This position oversimplifies Riverport's obligations and ignores the fact that the Assigned Risk Plan rules require more than just cancellation of the policy. Riverport was instructed by NCCI to proceed with initiating cancellation in accordance with the cancellation provisions of the assigned carrier performance standards found on NCCI's website and "applicable Plan rules and/or statutory or regulatory requirements regarding the policy." (Riverport's APAs p. 96).

Despite the lack of guidance, Ortiz eventually paid Companion the additional premium assessed. However thereafter, just like the carrier in *Crews*, the June 24, 2015 letter to Ortiz makes it clear that any efforts to contact him after the policy was cancelled were for premium adjustment purposes, and not for reinstatement purposes, as the policy period on the letter is January 11, 2015 to April 30, 2015, and the body of the letter begins with the words "[t]he final premium for your

workers' compensation policy could not be determined..." (Appellants' APAs p. 96). In other words, there is no evidence in the record Ortiz could have done anything to prevent cancellation once the notice letter was issued on April 15, 2015.

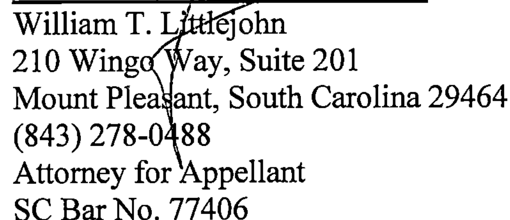
Such actions on the part of Riverport were not reasonable given the circumstances, and fell short of its obligation to Ortiz under the Assigned Risk Plan. Riverport did have the ability and duty to provide Ortiz with an opportunity to cure, but none was ever given. The Commission failed to hold Riverport accountable for providing Ortiz with an opportunity to cure before cancelling the policy. And even if it had, there is no evidence in the record to support a finding that Riverport had provided such an opportunity. Accordingly, the Commission's decision finding Riverport properly cancelled Ortiz's policy should be revered.

CONCLUSION

For the reasons stated, this Court should reverse and modify the decision of the South Carolina Workers' Compensation Commission with respect to holding Appellants responsible for Claimant's benefits under the Act, and instead hold Riverport responsible for said benefits.

Respectfully submitted,

January 9, 2017



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

RECEIVED
JAN 11 2017
SC Court of Appeals

Case No. 2016-002493

Armando Fuentes, Employee, Claimant, Respondent,

v.

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

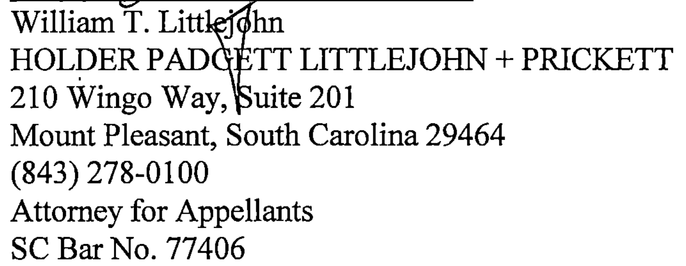
And

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

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 Armando Fuentes by depositing a copy of it in the United States Mail, postage prepaid, on January 9, 2017, addressed to his attorneys of record, Jospeh DuBois, Zachary Steven Naert, Michael Patrick Bennett, Naert & DuBois, Post Office Box 7228, Hilton Head Island, South Carolina 29938, to Riverport Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on January 9, 2017, addressed to the attorney of record, Michael Farry, Horton Law Firm, 307 Pettigru Street, Greenville, South Carolina 29601, José M. Ortiz Mendoza d/b/a Ortiz Construction by depositing a copy of it in the United States Mail, via certified mail, postage prepaid, on January 9, 2017, addressed to 2026 Montgomery Street, Newberry, SC 29108, and to the South Carolina Court of Appeals by depositing a copy of it in the United States Mail, postage prepaid, on January 9, 2017, addressed to The Honorable Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211.

January 9, 2017



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January 9, 2017

RECEIVED
JAN 11 2017
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

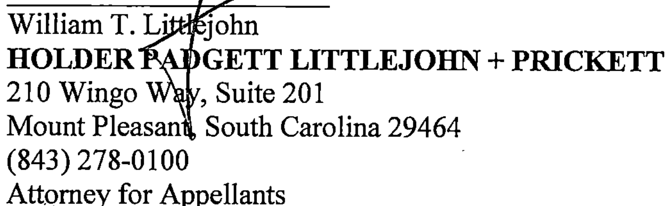
Re: Armando Fuentes, Employee, Claimant, Respondent, v. Mays Contracting Company, LLC, Employer, and Builders Mutual Insurance Company, Carrier, Appellants, and Jose M. Ortiz Mendoza DBA Ortiz Construction, Employer, and Riverport Insurance Company, Carrier, Respondents.
Appellate Case No. 2016-002493

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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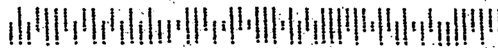

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