

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION  
COMMISSION

RECEIVED

Appellate Panel Decision

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FEB 10 2017

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

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INITIAL BRIEF OF RESPONDENT RIVERPORT INSURANCE COMPANY

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### STATEMENT OF THE ISSUES ON APPEAL

1. Did Respondent Riverport Insurance Company properly cancel Respondent Ortiz Construction's workers' compensation policy under the terms of the South Carolina Assigned Risk Plan after receiving orders from the National Council on Compensation Insurance (the Plan Administrator) to cancel the policy due to Ortiz Construction's undisputed failure to pay premiums on a prior workers' compensation policy?

2. Did Respondent Riverport Insurance Company properly comply with its obligations under the South Carolina Assigned Risk Plan to provide Ortiz Construction with an opportunity to cure by sending Ortiz Construction a letter that directed Ortiz Construction to call the National Council on Compensation Insurance to resolve the unpaid premium issue more than two weeks before the policy was to be cancelled?

### STATEMENT OF THE CASE

On October 27, 2015, Claimant Armando Fuentes ("Claimant") filed a Form 50 Employee's Request for Hearing regarding a work injury he sustained on June 30, 2015, while employed by Respondent Jose M. Ortiz Mendoza DBA Ortiz Construction ("Ortiz Construction"). Ortiz Construction served as a roofing sub-contractor for the general contractor, Appellant Mays Contracting Company, LLC. Up until April 30, 2015, Respondent Riverport Insurance Company ("Riverport") provided workers' compensation insurance coverage for Ortiz Construction. Appellant Builders Mutual Insurance Company provided workers' compensation insurance coverage for Mays Contracting. (Builders Mutual and Mays Contracting will be referred to collectively as "Appellants").

Riverport answered the Form 50 by denying coverage for Claimant's claim based on its April 15, 2015 notice of cancellation of Employer's workers' compensation policy, with an

effective cancellation date of April 30, 2015. General Contractor and Builders denied coverage as well.

On February 9, 2016, Commissioner Aisha G. Taylor held a hearing on this issue, and on June 1, 2016, Commissioner Taylor found and concluded that Riverport had properly cancelled the workers' compensation policy for Ortiz Construction, effective April 30, 2015. She dismissed Riverport from the claim. Commissioner Taylor further determined that General Contractor and its carrier, Builders, were the liable employer and carrier for Claimant's injuries. General Contractor and Builders appealed to the Full Commission.

On September 19, 2016, the Full Commission held a hearing and unanimously upheld, in a November 15, 2016 Decision and Order, all of Commissioner Taylor's findings of fact and conclusions of law as being "correct as stated and supported by substantial evidence in the record." Full Commission Order, pp. 8-9. Appellants timely appealed.

#### STATEMENT OF THE FACTS

On June 30, 2015, Claimant was working on a roof in Newberry, South Carolina, when he slipped and fell approximately twenty meters to the ground. Claimant testified that he was working for Ortiz Construction when he fell.

Riverport initially provided workers' compensation insurance coverage to Ortiz Construction with an effective policy period from 1-11-15 to 1-11-16. (Respondent's APA #3, p. 75). Riverport issued this policy under the South Carolina Assigned Risk Plan, which is administered by the National Council on Compensation Insurance ("NCCI").<sup>1</sup> On April 15, 2015, NCCI notified Riverport that Ortiz Construction had been identified as being ineligible for

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<sup>1</sup> NCCI is the official Plan Administrator for the South Carolina Assigned Risk Plan. *See National Council on Compensation Insurance Inc. vs. SCDOI*, ALJ Docket No. 00-ALJ-09-0687-CC (2001) ("NCCI is also the assigned risk plan administrator pursuant to the provisions of S.C. Code Ann. §38-73-540(C) (Supp. 2000).").

assigned risk coverage under the Workers' Compensation Plan, because Ortiz Construction had "an undisputed premium or other monetary obligation on a prior/current workers' compensation policy." (Respondent's APA #3, p. 96). This prior workers' compensation policy had been issued to Ortiz by Companion Property and Casualty Group ("Companion").

NCCI's mandate to Riverport was the result of an audit conducted by Companion, Ortiz Construction's prior assigned risk carrier, which found that Ortiz Construction owed Companion \$6,531.00 in unpaid workers' compensation premiums. Companion issued notice of the audit findings to Ortiz Construction on February 24, 2015. (Appellant's APA, p. 88). On April 15, 2015, NCCI therefore instructed Riverport to initiate cancellation of the Riverport assigned risk policy. (Respondent's APA #3, p. 96).

Pursuant to notice and instructions from NCCI, Riverport on April 15, 2015, issued and sent to Ortiz Construction a "NOTICE OF CANCELLATION OF WORKERS' COMPENSATION POLICY" with the effective cancellation date of April 30, 2015. (Respondent's APA #1, p. 1). Riverport took this action due to Ortiz Construction being identified as having an undisputed premium or other monetary obligation on a prior worker' compensation policy (i.e., the Companion policy). (*Id.*). In this notice, Riverport directed Ortiz Construction to "[p]lease contact NCCI . . . to resolve this matter" regarding the unpaid premium. *Id.* (emphasis added). No such payment was ever made.<sup>2</sup>

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<sup>2</sup> Although Mr. Ortiz testified at his deposition that he had paid the additional premium, he did not know how much he had paid or when he had paid, nor did he or any other party ever produce any documentation to confirm payment, other than Ortiz's self-serving testimony. Ortiz did not show up for the hearing before Commissioner Tayler.

## STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "The appellate court's review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law." *Hendricks v. Pickens County*, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999); see *Roper Hosp. v. Clemons*, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997) ("On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law."). The commission's decision must be affirmed unless it is clearly erroneous in view of the substantial evidence on the whole record. See *Nettles v. Spartanburg School Dist. #7*, 341 S.C. 580, 586, 535 S.E.2d 146, 149 (Ct. App. 2000).

## ARGUMENTS

This case turns on whether Riverport properly cancelled Ortiz's workers' compensation policy. This policy was issued under the umbrella of the Assigned Risk Plan for South Carolina Workers' Compensation for 2015 ("ARP"). The propriety of Riverport's cancellation depends on (1) whether Riverport had sufficient grounds to cancel the policy, and (2) whether Ortiz had an opportunity to cure the defects in his prior policy. Each of these elements is contained and explicated in the ARP itself.

### **I. IN CANCELLING ORTIZ CONSTRUCTION'S POLICY, RIVERPORT PROPERLY FOLLOWED THE DIRECTIONS OF THE PLAN ADMINISTRATOR, WHICH IS THE PARTY WITH AUTHORITY TO ADMINISTER THE ASSIGNED RISK PLAN.**

#### **A. The National Council on Compensation Insurance is the Assigned Risk Plan Administrator and has authority to order carriers to cancel policies with employers.**

NCCI, as Plan Administrator of the ARP, is tasked with “administering the affairs of the Plan as provided by the regulatory authority of the state [the Department of Insurance].” ARP, Supp. 2(C). NCCI has several duties in this role, including administering, managing, and enforcing the plan; determining applicant eligibility; establishing written performance standards for assigned carriers; and monitoring and enforcing assigned carrier performance. *Id.* NCCI’s specific duties, obligations, and authority are governed by the ARP itself, which, as Appellants have noted, carries “the force of law” insofar as it has been approved by the Director of the South Carolina Department of Insurance. *Avant v. Willowglen Acad.*, 367 S.C. 315, 318–19, 626 S.E.2d 797, 799 (2006).

Once a carrier issues a policy under the ARP, the carrier cannot cancel that policy on a whim. In fact, “[t]he Assigned Risk Plan specifies five circumstances allowing the carrier to cancel an 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 to the assigned carrier the full nature and scope of the assigned carrier’s exposure.” *Crews vs. W.R. Crews, Inc.*, 390 S.C. 15, 23, 699 S.E.2d 189, 194 (Ct. App. 2010) (emphasis added); *see also* ARP, Supp. 12(B).

In determining whether a good faith entitlement to coverage exists (circumstance #1), the ARP states that an “employer is not in good faith entitled to insurance” if “[t]he employer has any **outstanding workers compensation insurance premium obligation** . . . on a current workers compensation insurance policy or on **any previous or other workers compensation**

policy that is not subject to a bona fide premium dispute . . . .” ARP, Supp. 3(B). Once this determination is made, “[t]he employer will remain ineligible for coverage through the WCIP until such time the employer has satisfied the outstanding workers compensation insurance premium obligation . . . and is deemed by the Plan Administrator to be in good faith entitled to insurance.” *Id.*

NCCI does not knowingly assign employers to carriers under the ARP if NCCI knows that the employer has unpaid premiums on prior workers’ compensation policies. ARP, Supp. 3(G). Employers with unpaid prior premiums, if allowed to simply jump to another policy when they default on their current policy, would create chaos in the assigned risk pool. The potential for chaos explains why the ARP gives assigned carriers “the right to cancel a policy currently in force” under the ARP if the employer “does not meet all undisputed workers compensation insurance premium obligations under the current policy or previous assigned risk . . . policy.” *Id.* Carriers must simply comply with statutory cancellation requirements. *Id.* If the carrier does determine that the employer is non-compliant with any of the five grounds mentioned above, the “carrier will initiate cancellation (after providing an opportunity for cure),” and an employer bears the onus to “reestablish eligibility or . . . demonstrate entitlement to coverage . . . .” ARP, Supp. 12(B)(1) (emphasis added).

**B. Riverport followed the direction of NCCI and complied with the requirements of the ARP in properly cancelling Ortiz’s policy.**

Riverport maintains that it properly cancelled Ortiz Construction’s workers’ compensation policy on the grounds that Ortiz was not, in good faith, entitled to coverage under the ARP. Ortiz had failed to pay an undisputed premium amount to its prior insurance carrier, Companion, and NCCI, as Plan Administrator, had properly directed Riverport to cancel the current policy with Ortiz. Riverport immediately complied with the Plan Administrator’s

directive. As noted in the ARP's definition of what constitutes a lack of good faith eligibility, a failure to pay premiums on current or former policies strips an employer of good faith eligibility in the assigned risk pool policies, and Ortiz's failure falls directly into this definition. ARP, Supp. 3(B). The parties do not dispute that Ortiz owed premiums to Companion and that Ortiz had not paid that premium at the time Riverport received notice from NCCI to cancel, nor do they dispute that Ortiz did not pay it at the time that Riverport notified him of the pending cancellation. He was undisputedly not entitled to workers' compensation insurance at the time Riverport cancelled the policy under the direction of NCCI.

The entirety of Appellants' first argument is that the Commission "failed to properly identify the rule that would allow Riverport to cancel Ortiz's policy," thereby—the argument goes—rendering its decision invalid. (Appellants' Initial Brief, p. 16). However, the Commission *did* identify the specific basis for why Riverport's termination of the policy was effective, albeit without using the magic words that Appellants argue is necessary. Specifically, the Commission held that the record contained evidence "with the precise language explaining the basis on which cancellation was made," citing two documents: (1) the Notice from NCCI to Riverport Insurance Company dated April 15, 2015 and (2) the Notice of Cancellation of Workers' Compensation Policy dated and sent to Jose M. Ortiz Mendoza DBA Ortiz Construction on April 15, 2015. (Full Commission Order, ¶ 11). These documents confirm that Ortiz Construction had not paid its premium on a prior policy (i.e., the Companion Policy). Further, Ortiz Construction had been notified by Companion as far back as February 24, 2015, about his unpaid premiums, and Ortiz Construction took no action to cure this defect and comply with his contractual obligations. When Ortiz Construction received notice on April 15, 2015, of the impending cancellation of his Riverport policy on April 30, 2015, it again took no action to pay the unpaid premium to

Companion. Indeed, the record contains no reliable evidence that Ortiz Construction *ever* paid its unpaid premium to Companion.

While the ARP does provide only five grounds for cancelling a workers' comp policy, Appellants take this one requirement, mix it together with the fact-specific and distinguishable *Crews v. W.R. Crews* case (390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010)), and thereby attempt to twist the ARP's grounds into requiring far more of NCCI and the Commission than is justified. Appellants argue that not only must one of the five grounds exist in order for Riverport to properly cancel the policy, but that NCCI's letter to Riverport should have included the specific ground or rule that NCCI was basing its directive to cancel on. (App. Brief, p. 15). Appellants further argue that the Commission was required by *Crews* to designate one of the specific grounds for termination of the policy before the Commission's decision becomes valid. (*Id.*). Neither requirement is supported by law or policy, nor do Appellants cite to the locations of such commandments.

The record establishes that Riverport notified Ortiz Construction on April 15, 2015, that its policy was being cancelled effective April 30, 2015, due to the Ortiz Construction being "identified as having an undisputed premium or other monetary obligation on a prior workers compensation policy." (Respondent's APA #1, p. 1). This language directly tracks the ARP's language that defines good faith entitlement to a workers' comp policy, and thereby places this cancellation squarely within the first basis for cancelling the policy. Upon this determination by NCCI, Riverport was required by the ARP to "initiate cancellation" of the policy, "even if the noncompliance was for a previous policy issued by a different carrier." ARP, Supp. 12(B)(1). While the NCCI letter was the impetus for Riverport to initiate cancellation of the policy (since Riverport did not and would not have knowledge of Ortiz Construction's failure to pay the

premium of an entirely different carrier), Riverport had a duty and requirement under the ARP to initiate the cancellation of the policy as soon as it received notice from NCCI, the Plan Administrator. And ultimately the Commission found that NCCI's letter to Riverport and Riverport's subsequent letter to Ortiz Construction contained this "precise language explaining the basis on which cancellation was made." (Full Commission Decision, ¶ 11).

This basis, given the Full Commission's immediate citation to the NCCI and Riverport letters, is clearly the "non-payment of premium" grounds contained in the letters themselves, especially considering the fact that Riverport argued this very point in its Brief at the Full Commission appeal hearing. There, Riverport listed the five grounds from the ARP and argued that Ortiz Construction's non-payment of the premium was the specific justification for terminating coverage. (Riverport Brief, Full Commission Hearing, page 3-4). Based on Riverport's arguments, along with the NCCI and Riverport letters before it as evidentiary support, the Full Commission found that Riverport properly cancelled the policy. Just because the Full Commission did not label Paragraph 11 of its decision with the exact language that Appellants demand does not render Riverport's cancellation, as mandated by NCCI and as demanded by the ARP itself, an improper act. Nor does it somehow invalidate the Full Commission's holdings. NCCI and Riverport's basis for cancelling the policy was clear, and the Full Commission was clear what basis it used to reach its conclusion.

As alluded to briefly above, the *Crews v. W.R. Crews* case is ultimately irrelevant to this case. *Crews* dealt with markedly different facts and it ultimately provides no additional rules or requirements to any party involved in this lawsuit that are not already present in the ARP. In *Crews*, the issue was whether the carrier had properly cancelled its insured's current policy due to the insured's failure to comply with reasonable audit requirements on a previous policy with

that same carrier, which is the second of five circumstances where a carrier can cancel a policy (recall that the instant case deals with cancellation on the first ground, lack of good faith eligibility). 390 S.C. 15, 21-22, 699 S.E.2d 189, 192-93. The *Crews* court found that the carrier's cancellation of the current policy was improper, because the ARP did not provide any specific language permitting the carrier to cancel the current plan due to the insured's non-compliance on a previous policy issued by the same carrier. *Id.* at 23, 699 S.E.2d at 193.

Appellants ostensibly use *Crews* because of some superficial similarities with the present case, although a close examination of the facts in *Crews* reveals significant factual dissimilarities. *Crews* concerned two policies issued by the same carrier, the latter of which was cancelled due to issues with the former policy (canceled improperly, as the court eventually held). Appellants believe that *Crews* somehow creates additional duties on Riverport or on the Commission, stating repeatedly that the Commission "needed to identify a rule that would allow Riverport to cancel Ortiz's policy . . ." (App. Brief, p. 14-15). Appellants draw this "requirement" for a "rule with precise language" from *Crews*, but this language was in an entirely different context from the case before the Court.

In *Crews*, Liberty Mutual (the carrier) was arguing that it was required by the NCCI manual's rules to cancel the insured's current policy because the insured had violated the audit requirements from the insured's *prior* policy with Liberty Mutual. But the court could not find any "rules with this precise language in the record." *Crews*, at 23, 699 S.E.2d at 193. In other words, the *Crews* court could find no rules that dealt with one carrier, one insured, one new policy, one old policy, and one issue with audit compliance on the old policy.

The current case is demonstrably different. Riverport was not cancelling Ortiz Construction's current policy because Ortiz Construction had failed to comply with audit

requirements on a prior contract with Riverport, as in the *Crews* case. Rather, Riverport was cancelling its *only* policy with Ortiz Construction because (1) Ortiz Construction had failed to pay its premiums on a prior policy with a different carrier, as determined by NCCI; (2) the ARP's rules of eligibility state that Ortiz Construction's failure to pay his premium on a prior policy means he is conclusively "not in good faith entitled to workers compensation insurance"; (3) "not in good faith entitled to workers comp insurance" is a grounds for termination of the policy; and (4) NCCI, for that reason, had directed Riverport to cancel the policy, which Riverport did. Unlike in *Crews*, we have a rule with precise language in the record as to the basis for Riverport's cancellation of Ortiz's policy, and that rule is found in the ARP Supplement 3(B)(3). So even if *Crews* was applicable and factually similar to our situation, which Riverport disputes, Riverport still meets this alleged requirement. Appellants spend a great deal of time arguing that *Crews* places additional burdens on Riverport, but the simple fact is that the ARP provides the only real requirements that Riverport must comply with, and Riverport did in fact comply with these requirements.

## **II. RIVERPORT COMPLIED WITH ITS OBLIGATIONS TO PROVIDE ORTIZ CONSTRUCTION WITH AN OPPORTUNITY TO CURE.**

Riverport does not dispute that the ARP calls for an opportunity to cure defects in policies. What Riverport does dispute is Appellants' allegation that Riverport failed to provide Ortiz Construction with an opportunity for cure. In support of their allegation, Appellants attempt to conflate an earlier event between Riverport and Ortiz Construction with the very different facts of the present case. Specifically, Appellants describe Riverport's efforts in February 2015 to get Ortiz Construction to comply with certain underwriting requirements on Ortiz Construction's policy with Riverport. (Appellants' Brief, p. 18). On February 19, 2015, Riverport sent a notice to Ortiz Construction regarding the pending cancellation of Ortiz

Construction's policy for failure to complete and return an underwriting evaluation letter. (Appellants' APA, p. 91). Riverport stated that Ortiz Construction could cure the defect by providing the requisite form and documents prior to a certain date. *Id.* Ortiz Construction complied. *Id.* Appellants argue that the procedure and steps Riverport went through in this instance should have been exactly replicated when Riverport informed Ortiz Construction of the pending cancellation on April 15, 2015. Of course, these two instances are entirely different.

In the underwriting incident, Riverport was working directly with Ortiz Construction to get it to comply with certain requirements regarding Ortiz Construction's policy with Riverport. Riverport had the ready ability to gain compliance with the policy, because it was *Riverport's* policy and Riverport knew exactly which documents were needed to gain compliance. In the April 15 incident, NCCI had stepped in and ordered Riverport to cancel the policy because of issues with Ortiz Construction's prior policy with a completely different carrier. Riverport had no ability to gain Ortiz Construction's compliance, because Ortiz Construction's unpaid premiums were owed to a different carrier that was completely unknown to Riverport and for an amount that was likewise unknown to Riverport. In effect, Riverport had no ability to coerce Ortiz Construction into compliance with another policy. Again, like in Appellants' arguments regarding the *Crews* case, Appellants attempt to create new and—in this case—very specific duties for Riverport to follow. Appellants go so far as to prepare a script for Riverport to follow in cases such as these. *See* Appellants' Brief, p. 19. The ARP does not require the script that Appellants propose; it simply requires an opportunity to cure.

Riverport provided an opportunity for Ortiz Construction to cure in the only manner possible under these circumstances. Riverport did not know how much the unpaid premiums were that Ortiz Construction owed, nor did Riverport know which carrier the premiums were

owed to. So Riverport simply informed Ortiz Construction that its policy was being cancelled due to “having an undisputed premium or other monetary obligation on a prior workers compensation policy,” and that Ortiz Construction should “contact NCCI at 800-622-4123 to resolve this matter.” (Respondent’s APA #1, p. 1). Because Riverport had no ability to cure this defect, Riverport informed the only party who *could* cure this defect: Ortiz Construction itself. Ortiz Construction, however, failed to take any action in furtherance of curing this defect.

This Court should also not forget that Companion, Ortiz Construction’s former carrier, had informed Ortiz Construction of its unpaid premiums as far back as February 24, 2015, and Ortiz Construction had taken no action at that time. When Ortiz Construction received notice from Riverport on April 15, 2015, it again took no action before April 30, 2015. In fact, Ortiz Construction took no action at all at any time to cure this defect. Riverport provided an opportunity for Ortiz Construction to cure the defect, and Riverport did so by directing Ortiz Construction to contact NCCI to resolve the matter, which Ortiz Construction refused to do. Riverport cannot force Ortiz Construction to abide by its obligations when Ortiz Construction was determined not to comply.<sup>3</sup>

Finally, Appellant argues that Riverport failed to give Ortiz Construction sufficient time to cure the defect. However, as the *Crews* court noted, under S.C. Code § 38-75-730(c), an insurer may cancel a policy “for any reason by furnishing to the insured at least thirty days’ written notice of cancellation, except where the reason for cancellation is nonpayment of

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<sup>3</sup> While not dispositive on the issue of proper notice and right to cure, it is worth noting that Riverport made multiple attempts in May and June 2015 to contact Ortiz Construction and Mr. Ortiz for purposes of audit review, but Mr. Ortiz did not return messages or respond to letters from Riverport, and on the one occasion that a meeting *was* successfully scheduled, Mr. Ortiz cancelled at the last moment. Respondent APA #3, p. 98. These instances indicate that Mr. Ortiz and Ortiz Construction had a pattern of uncooperative behavior that no amount of notice or opportunity to cure could fix.

premium, in which case not less than ten days' written notice must be furnished." 390 S.C. 15, 26, 699 S.E.2d at 195. In this case, Riverport cancelled Ortiz Construction's policy due to non-payment of a premium, which under § 38-75-730 only required ten days' written notice. Riverport provided fifteen.

#### CONCLUSION

This Court should affirm the Full Commission's finding that Riverport properly cancelled the Ortiz policy and that Appellants are responsible for any benefits owed under a workers' compensation claim for the two reasons argued above: (1) Riverport properly canceled Ortiz Construction's workers' compensation policy under the ARP after receiving orders from NCCI to cancel the policy based on Ortiz Construction's undisputed failure to pay premiums on a prior workers' compensation policy; and (2) Riverport properly complied with its obligations under the ARP to provide Ortiz Construction with an opportunity to cure by sending Ortiz Construction a letter that directed Ortiz Construction to call NCCI to resolve the unpaid premium issue more than two weeks before the policy was to be cancelled, which Ortiz Construction failed to do.

*[signature and date on following page]*

Respectfully submitted,

**Horton Law Firm, P.A.**

A handwritten signature in black ink, appearing to read "Michael A. Farry". The signature is written in a cursive style with a horizontal line underneath it.

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