

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

Armando Fuentes,

Employee, Claimant,
Respondent,

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SC Court of Appeals

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 REPLY BRIEF OF APPELLANT

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REPLY

This brief is submitted in reply to Riverport's assertions that (1) the Commission was not required to make a specific finding regarding the grounds upon which the Ortiz policy was canceled, (2) it followed the direction of NCCI and complied with the requirements of the Assigned Risk Plan in canceling the Ortiz policy, and (3) that Riverport complied with its obligation to provide Ortiz with an opportunity for cure.

As an initial matter, Riverport contends there is no law or policy that required the Commission to make a finding as to which one of the five (5) grounds applied to the cancellation of the Ortiz policy. To the contrary, the Supreme Court of South Carolina has pointed out that "not only must findings of fact be made upon the essential factual issues, but that they be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings." *Hill v. Jones*, 255 S.C. 219, 223-4, 178 S.E.2d 142,144 (1970). As it has been established that the Assigned Risk Plan rules have the force of law with respect to assigned risk policies in South Carolina, the Commission was required to identify which portion of that law it was applying. In this case, the Commission did not sufficiently identify the portion of the applicable law that it purported to apply.

Riverport represents that it did everything as instructed by NCCI and the Assigned Risk Plan rules, and therefore properly cancelled the Ortiz policy, but the evidence does not support this contention. The Assigned Risk Plan, under the heading "(3) Cancellation of the Policy," instructs that when one of the five bases for cancellation exist, the policy "should be canceled in accordance with the cancellation provisions of NCCI's Basic Manual Rule 3-A-3, the Assigned Carrier

Performance Standards, and state law.” Riverport has failed to demonstrate, explain or even address how it followed the rule or performance standards cited, but more importantly, it failed to follow state law.

Riverport cites S.C. Code of Laws § 38-75-730(c) for the proposition that cancellation of a policy for non-payment of premium may be accomplished with ten days’ notice, arguing that it gave Ortiz five (5) more days than was required by giving him fifteen (15) days’ notice of the cancellation. First off, nowhere in the statute cited does it provide an insurer with the authority to cancel a policy with 10 days’ notice for an insured’s failure to pay premiums on *another carrier’s* policy. That authority simply does not exist in the statute. Riverport wants to expand the scope of the statute beyond the limits of its plain language. Furthermore, Riverport is not even citing the correct authority for the time restraints placed on workers’ compensation carriers with respect to effective date of cancellation.

Pursuant to regulations of the South Carolina Workers’ Compensation Commission directly addressing cancellation of policies, termination of a workers’ compensation policy shall not become effective until thirty (30) days after receipt of the termination notice by the Commission’s authorized agent (which is NCCI). *See* R. 67-405(C)(1). Accordingly, assuming Riverport notified NCCI of the pending cancellation the same date it notified Ortiz, it terminated Ortiz’s policy fifteen days earlier than allowed by the applicable state law.

And finally, for the first time in the life of this claim, in its brief Riverport affirmatively concedes that it was required to give Ortiz an opportunity for cure, arguing that it did give Ortiz such an opportunity. In support of this contention, Riverport attempts to dilute the importance of the comparator letter it sent Ortiz on February 19, 2015, which was also a notice of pending cancellation relating to an underwriting evaluation letter that Ortiz needed to complete and return

to Riverport, and Ortiz complied. In that letter, Riverport gave Ortiz explicit instructions on how to avoid cancellation. (Appellants' APAs p. 91). The letter Riverport sent Ortiz on April 15, 2015, did not contain any cancellation avoidance instructions. Riverport insists that there is some qualitative difference between the two scenarios that prompted the letters, such that it was not required to give Ortiz substantially the same instructions and opportunity in both instances with respect to avoiding cancellation. This reasoning does not find any support among the Assigned Risk Plan rules.

In contrast to Riverport's reasoning, the Assigned Risk Plan rules treat all of the bases for cancellation the same, and the same requirements must be met regardless of the circumstance under which cancellation is initiated. An opportunity for cure must first be provided before initiating cancellation "even if the noncompliance was for a previous policy issued by a different carrier." Assigned Risk Plan Rule 4(A)(4)(a)(3).

Furthermore, Riverport portrays itself as having no leverage to coerce compliance with respect to Ortiz's obligations to a prior carrier, which, of course, is grossly minimizing its position. The stick Riverport could have wielded to coerce compliance was the threat of cancellation, which is the same stick it wielded when it instructed Ortiz to complete and return the underwriting evaluation letter. The difference is that when Riverport learned of the outstanding obligation to Companion, it treated this situation differently without justification among the rules. Riverport did not provide Ortiz with instructions on how to avoid cancellation, which means it did not provide him with an opportunity for cure.

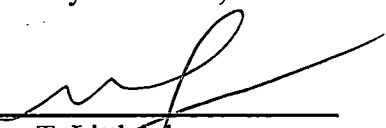
To summarize Riverport's obligations under the Assigned Risk Plan rules and applicable state law, it had to give Ortiz thirty (30) days, complete with an opportunity for cure, before cancelling the Assigned Risk Plan policy at issue. Riverport did not meet these obligations; therefore, the Ortiz policy was not properly cancelled. Accordingly, responsibility for the workers' compensation benefits due Ortiz's direct employee should be assigned to Riverport.

CONCLUSION

For the reasons stated in Appellants' brief and this reply, this Court should reverse the decision of the South Carolina Workers' Compensation Commission.

February 17, 2017

Respectfully submitted,



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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

Case No. 2016-002493

Armando Fuentes, Employee, Claimant, Respondent,

v.

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

And

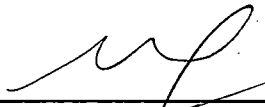
Jose M. Ortiz Mendoza DBA Ortiz Construction, Employer, and Riverport Insurance
Company, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant on Armando Fuentes by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2017, addressed to his attorneys of record, Joseph 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 February 17, 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 February 17, 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 February 17, 2017, addressed to The Honorable Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211.

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SC Court of Appeals

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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 Reply Brief of Appellant; and
- (2) Proof of Service of the Initial Reply Brief of Appellant.

Sincerely,



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