

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Judge Paul E. Short, Jr.  
Judge H. Bruce Williams  
Judge Aphrodite K. Konduros

**RECEIVED**

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Supreme Court Appellate Case No. 2017-001410  
Court of Appeals Appellate Case No. 2015-001546  
W.C.C. 0919909

JUL 24 2017

S.C. SUPREME COURT

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Rudy Barreira Almazan,.....Employee/Claimant.

v.

Henson & Associates, Inc., Employer, and  
Auto Owners Insurance Company, Carrier,.....Respondents,

and

S.C. Uninsured Employers' Fund.....Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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### **Questions Presented for Review**

- I. Are the Workers' Compensation Commission's findings that the Respondents have proven all elements for reimbursement under S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415 the law of the case and otherwise supported by substantial evidence?
- II. Did the Court of Appeals properly conclude that S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415 do not impose additional requirements beyond those specified?
- III. Did the Workers' Compensation Commission abuse its discretion in concluding the Respondents collected proper documentation of insurance on a "form acceptable to the Commission"?

### **Counter -Statement of the Case**

Almazan was injured while working for Contreras Panels on September 26, 2009. (A. p. 19). Unfortunately, Contreras Panels was uninsured at the time of the accident and statutory liability was placed upon the upstream contractor, Henson & Associates. (A. pp. 45–46). On November 12, 2013, Henson & Associates and Auto Owners Insurance ("Respondents") filed a Petition to Transfer Liability for Almazan's workers' compensation claim to the Uninsured Employers Fund ("UEF") and sought reimbursement of all benefits paid to or on behalf of Almazan pur-

suant to S.C. Code Ann. § 42-1-415. (A. pp. 69–100). The matter originally came before Commissioner Andrea Roche, who issued her Decision and Order on July 8, 2014, denying the Petition. (A. pp. 47–51).

The Respondents filed a Form 30 on July 18, 2014, seeking review and rehearing by the Workers’ Compensation Commission’s Appellate Panel. (A. p. 120). After a hearing on February 23, 2015, the Appellate Panel issued a final Decision and Order on July 17, 2015, determining that Henson & Associates fully complied with the requirements of S.C. Code Ann. § 42-1-415 and; therefore, are entitled to transfer liability to, and are entitled to reimbursement from, the UEF. (A. pp. 52–67). The Respondents respectfully contend that the Commission committed no abuse of discretion in determining that the documentation of insurance collected by the Respondents was “acceptable” in accordance with S.C. Code Ann. 42-1-415(B). The Respondents further contend that the Commission’s findings of fact, which were not appealed by the UEF, are supported by substantial evidence in the record and the Commission properly applied the law to these facts without legal error.

The Court of Appeals agreed with the position of the Respondents and issued its unpublished Opinion (2017-UP-124) on March 15, 2017, holding that the Respondents had met all requirements of S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415. The UEF now argues, by its Petition for Writ of Certiorari, that the Court of Appeals somehow misinterpreted the requirements of S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415.

The Respondents respectfully contend that the Court of Appeals committed no legal error and otherwise properly affirmed the final Decision and Order of the South Carolina Workers' Compensation Commission based on substantial evidence in the Record. In addition, the UEF has failed to identify any special or important reason why a Writ of Certiorari should be granted, as required by Rule 242(b), S.C.A.C.R.. As such, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

### **Arguments**

**I. Are the Workers' Compensation Commission's findings that the Respondents have proven all elements for reimbursement under S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415 the law of the case and otherwise supported by substantial evidence?**

S.C. Code Ann. § 42-1-415 provides that when a subcontractor “has represented himself...as having workers' compensation insurance” to a higher tier contractor, the higher tier contractor “must be relieved of any and all liability under this title.” (emphasis added). In order to transfer liability under § 42-1-415, the Respondents must prove the following:

- Documentation of insurance was collected at the time the subcontractor “was engaged to perform work;”

- Documentation of insurance was “turned over to the Commission” at the time a claim is filed by the employee;
- Documentation of insurance was on a “standard form **acceptable to the commission;**” (emphasis added).

Consistent with § 42-1-415, the Commission promulgated S.C. Code Reg. 67-415 to specify that a Certificate of Insurance “shall serve as documentation of insurance” and that the Certificate “must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.” S.C. Code Reg. 67-415 (Supp. 2007).<sup>1</sup> Of course, the Regulation should not be interpreted to alter or add to the simple requirements of Section 42-1-415, because the Commission had no authority to do so. Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995); Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496, 499 (1943); *see also* Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (holding that “[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute.”). Therefore,

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<sup>1</sup> Note that S.C. Code Reg. 67-415 was amended after the accident in this case; therefore, the current version regulation is not applicable. The applicable regulation contains absolutely no requirement that the Certificate of Insurance specify coverage in South Carolina.

Regulation 67-415 does not and cannot do more than define what, in the discretion of the Commission, is a “standard form **acceptable to the Commission.**” (emphasis added).

The job at York High School on which Almazan was injured began in April 2009. (A. pp. 302–309; pp. 251–252). Prior beginning work at York High School, Contreras was required to provide a Certificate of Insurance to Henson and Associates. (A. p. 252, lines 3–17; A. p. 211, line 18–p. 212, line 1). Contreras provided Henson with a Certificate of Insurance dated April 23, 2009, which Certificate specifies the York High School project in the description of operations. (A. p. 77). The Certificate of Insurance dated April 23, 2009 was provided before the work began at York High School and was issued directly by Associates Benefits to Henson. (A. p. 251, line 24–p. 252, line 17; A. p.311, A. p.313). Prior to the expiration of the first Certificate of Insurance, a second certificate was obtained and dated May 8, 2009 and this second certificate also specifies the York High School project in the description of operations. (A. p. 253, lines 15–25; A. p. 78). The May 8, 2009 Certificate of Insurance lists the Insurance Company of Pennsylvania as the workers’ compensation carrier. (A. p. 254, lines 1–3; A. p. 78). None of these facts are in dispute.

Kenneth Henson, President of Henson & Associates, believed that Contreras Paneling had workers’ compensation coverage in South Carolina, as the Certificates of Insurance specify the York High School project in the description of operations. (A. p. 252, line 23 – p. 253, line 7; A. p. 254, lines 11–23; A. p. 311). The York High School project where Almazan

was injured is, of course, in York, South Carolina. (A. p. 253, lines 2–7).

Because the Henson collected a Certificate of Insurance at the time the subcontractor, Contreras, was engaged to perform work, because the Certificate was signed and dated, and because the Certificate was turned over to the Commission prior to the adjudication of Almazan’s claim, the Commission determined that the Respondents collected documentation of insurance “on a standard form acceptable to the Commission” and further found and concluded that the Respondents have met all of the statutory requirements of S.C. Code Ann. § 42-1-415 and are entitled to transfer liability to, and reimbursement from, the UEF. (A. pp. 63–67). Here, the Commission’s findings of fact on the statutory elements are the law of the case, as the UEF has raised no argument on appeal regarding their propriety to the Court of Appeals or in its Petition for Writ of Certiorari. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding that a finding becomes the law of the case when neither party has appealed that finding).; *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (holding that “[a]n unappealed ruling is the law of the case and requires affirmance.”); *see also Fields v. Monroe Ltd. P’ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned.”); and *First Sav. Bank v. McLean*, 314 S.C. 361, 363 444 S.E.2d 513, 515 (1994) (stating an issue is abandoned where the appellant fails to provide argument or supporting authority).

The Respondents further contend that the Workers’ Compensation

Commission's findings of fact on the essential elements of Section 42-1-415 are supported by substantial evidence. Under the Administrative Procedures Act, it is well-settled that the Workers' Compensation Commission is the ultimate fact finder in a workers' compensation claim. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the commission. DeBruhl v. Kershaw Co. Sheriff's Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990). An appellate court must affirm the findings made by the commission if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The substantial evidence test "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." Instead, a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

Because the Commission's findings of fact are supported by substantial evidence in the record and are otherwise the law of the case, the Respondents respectfully contend that the Court of Appeals committed no legal error in affirming the Workers' Compensation Commission's final Decision and Order dated July 17, 2015 in accordance with the Administrative Procedures Act.

**II. The Court of Appeals properly concluded that S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415 do not impose additional requirements beyond those specified.**

The Respondents' right to transfer liability to the UEF is a statutory one and governed by S.C. Code Ann. § 42-1-415. The statute imposes no affirmative duty upon an employer to investigate a fully-completed Certificate of Insurance. Nevertheless, the UEF argues that Henson had an obligation to investigate whether the Certificate of Insurance was for a policy that provided coverage in South Carolina. The Workers' Compensation Commission properly concluded that the UEF's investigation argument was without merit under the specific facts of the case and the Court of Appeals committed no legal error in affirming the Commission's conclusion in this regard.

The plain language of S.C. Code Ann. § 42-1-415 does not require employers to investigate a fully-completed Certificate of Insurance. In the case at bar, each and every section of the Certificate of Insurance was completed: *the name of the producer, the name of the insured, the name of the insurance company, the date, the policy number, the policy dates, the policy limits, the description of operations, the name of the certificate holder, and an authorized representative's signature.* (A. pp. 77-78). The fact that the Certificate of Insurance was fully completed clearly distinguishes the present case from that of Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145 (2009), which is cited by the UEF.

In Barton, the Certificate of Insurance had no signature whatsoever

and the Court held that the upstream contractor could not reasonably rely on an unsigned Certificate of Insurance. Essentially, the Court concluded that it was arbitrary for the Commission to determine that an unsigned Certificate of Insurance was “acceptable” when such a determination conflicted with the Commission’s own regulation that requires a signature. However, Barton does not support the UEF’s contention that Henson was *required* to investigate a fully completed Certificate of Insurance. In fact, such an interpretation would have been beyond the scope of the Court’s authority when neither Section 42-1-415, nor Regulation 67-415 requires any investigation into a complete and reasonable Certificate of Insurance, the specific provisions of a workers compensation policy, or whether the policy provided coverage in South Carolina. *See City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) (stating that “[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.”).

If the Legislature had intended to require a Certificate Holder to do more than “collect documentation,” the Legislature would have explicitly included such a requirement in the statute. However, the only requirements imposed on employers are codified at S.C. Code Ann. § 42-1-415(B):

“To qualify for reimbursement under this section, the higher tier subcontractor or project owner must collect documentation of in-

insurance as provided in subsection (A)<sup>2</sup> on a standard form **acceptable to the commission**. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.” (emphasis added).

Therefore, because the Legislature mandated no such investigation requirement, it is not even within the authority of the Courts or the Commission – by regulation or otherwise – to impose additional requirements or to amend this clear and unambiguous statute. *See Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (holding that “[t]he Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation.”) (internal citations omitted); *see also City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) (stating that “[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.”); *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that

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<sup>2</sup> Subsection A does not impose any additional requirements regarding the proper documentation of insurance and the “standard form acceptable to the commission” is the Acord Form Certificate of Insurance.

are not in the legislature's language).

The UEF appears to further rely on Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E. 2d 1, (2009) in support of their argument that Henson was required to do more to satisfy the requirements of Section 42-1-415 to the satisfaction of the Commission in order to transfer liability. However, the UEF's reliance on Hopper is also misplaced. In Hopper, the Supreme Court explained:

“We find **substantial evidence** in the record to support the Commission's finding that Kajima failed to comply with the requirements of § 42-1-415(A). The Description of Operations box on the Certificate of Insurance was **left blank** and unlike the previous Certificate of Insurance that Kajima accepted, this Certificate contained **no information** regarding the coverage that the policy provided, the deductible amount, or the project to which the policy applied. In failing to fill out the entire Accord Form, Hunt essentially submitted an **incomplete document** purporting to show that it had a workers' compensation policy, which Kajima accepted. In our view, accepting **an incomplete Accord Form does not constitute proper documentation.**” *Id.* at p 3. (emphasis added).

Obviously, Hopper is a substantial evidence case, which requires great deference to the Commission's findings of fact. Lark v. Bi-Lo, Inc.,

276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (“a judgment upon which reasonable men might differ will not be set aside”). Therefore, the issue before the Hopper Court was not a legal question, but was merely a question of whether there was substantial evidence to support the Commission’s finding of fact that the documentation of insurance was insufficient (*i.e.*, whether it was an abuse of discretion for the Commission to determine that the documentation was not “acceptable”).

More importantly, the Hopper Court’s suggestion that “an incomplete Acord Form does not constitute proper documentation” — does not support the UEF’s argument *sub judice*. Here, Henson relied upon a fully completed Certificate of Insurance. Every section of the Certificate of Insurance was completed and fully documented that Contreras had workers’ compensation insurance for the York High School project where Almazan was injured. (A. pp. 77—78). No section of the Certificate was left blank or looked suspect. Instead, the fully-completed Certificates of Insurance in the instant case were found to be “reasonable on their face.”

Therefore, the Workers’ Compensation Commission properly concluded that S.C. Code Ann. § 42-1-415 does not require Henson to further investigate a fully-completed Certificate of Insurance specifying coverage for the York High School project where Almazan was injured, based upon its unappealed finding that there “was nothing odd or unusual” about the Certificates of Insurance, which “on their face gave Henson and Associates no reason to doubt the veracity of the information contained therein.”

Based upon these facts, the law only required Henson to collect the documentation on the required forms as set forth in Section 42-1-415(A) and Regulation 67-415(A). Therefore, the Court of Appeals committed no legal error in concluding that all statutory and regulatory requirements for a transfer of liability were met and the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

**III. The Workers' Compensation Commission did not abuse its discretion in concluding the Respondents collected proper documentation of insurance on a "form acceptable to the Commission."**

The Workers' Compensation Commission granted the Respondents' Petition to Transfer Liability to the UEF based on the finding that Henson collected proper and adequate documentation of insurance from Contre-ras. The applicable statute, S.C. Code Ann. § 42-1-415, requires only that the documentation be "on a standard form **acceptable to the Commission.**" (emphasis added). Here, in the discretion of the Workers' Compensation Commission, the documentation of insurance collected by Henson was clearly "acceptable to the commission." This discretionary judgment, which the Legislature reserved to the Commission, was neither arbitrary, nor capricious, and is otherwise supported by substantial evidence in the record and the applicable law. See Palmetto Alliance, Inc., v. S.C. Public Service Comm'n, 282 S.C. 430 436, 319 S.E.2d 695, 698 (1984) (holding

that appellate review of a discretionary judgment of an administrative agency “is confined to determining if that discretion has been abused.”) (internal citations omitted); *see also* 73A C.J.S. Public Administrative Law and Procedure § 223a (1983) (for the proposition that an exercise of discretion by an administrative agency will not be disturbed unless there was an abuse of discretion evidenced by a showing that the agency action was arbitrary or unlawful).

However, the UEF essentially argues that the Commission’s judgment on the acceptability of the documentation of insurance should be ignored and that the Appellate Courts should substitute its judgment on this issue. According to the UEF, because the Certificate of Insurance did not further elaborate as to whether that the “York High” project listed in the description of operations was the very same “York High” project Henson and Contreras were working on in York, South Carolina, the Court of Appeals should have concluded that the Certificate is not “acceptable to the Commission” as a matter of law. This argument is simply without merit.

At the time in question, there existed no statute or regulation requiring that a Certificate of Insurance state that the policy provided coverage in South Carolina. While S.C. Code Reg. 67-415 was amended on February 26, 2010 (the year after Almazan’s work accident) to require South Carolina be named in a Certificate for an out of state employer, this regulation simply does not apply in the case at bar. In fact, this amendment is clear indicia that no such statement was required prior to that amendment

on February 26, 2010, otherwise, no amendment would have been necessary.

Furthermore, the Commission found, based on substantial evidence that Henson reasonably relied on the Certificates of Insurance they collected from Contreras as showing coverage for the York High project in South Carolina.<sup>3</sup> (A. pp. 310—313). Despite the UEF’s allegations to the contrary, the record contains the testimony of Wendy Henson, the company’s office manager, who clearly stated that when she receives a Certificate of Insurance, she reads it, records that it was received, records the dates of coverage, and places the Certificate in a project file under the contractor’s name. (A. p. 62, A. p. 93). Ms. Henson further testified that, looking at the face of the Certificate of Insurance she collected from Contreras, there was not anything that gave her pause to believe that it was not a valid Certificate of Insurance. (A. p. 62, A. p. 92 (p. 13, lines 4-8)). Instead, Ms. Henson relied upon the Certificates of Insurance provided by Contreras in making the decision to allow Contreras do work on the York High project

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<sup>3</sup> After Almazan was injured, it was revealed that the Certificates of Insurance Contreras provided to Henson were fraudulent. Basically, the insurance agency in Texas issued Certificates showing coverage for the York High School project when in fact there was never any policy. While the UEF speculates that if Henson contacted the producer in Texas, it may have learned that the policy did not provide coverage in South Carolina, this is not only pure speculation, but it defies common sense to suggest that an agency that would go to the lengths of producing such a detailed Certificate would undermine its own fraudulent scheme by admitting that the scope of the scheme did not extend to South Carolina.

in South Carolina. (A. p. 62, p. 92 (p. 13, lines 9–12)). This testimony is corroborated by the testimony of Kenneth Henson, as well as his sworn affidavit. (A. p. 249, lines 9–13; A. p. 250, lines 12–16; A. p. 250 line 25 – p. 255, line 12; A. pp. 310–311

While the UEF has likened this to a case where a Certificate is issued to Mickey Mouse by Santa Claus, there was nothing odd or unusual about the Certificate of Insurance *sub judice* and, the Certificate, on its face, gave Henson no reason to doubt the veracity of the information contained therein or doubt that the “York High” project listed on the Certificate was the York High project they were working on in South Carolina. Therefore, Henson’s reliance on the Certificate of Insurance as documenting valid workers’ compensation coverage for their subcontractor in South Carolina was specifically found to be reasonable by the Workers’ Compensation Commission based upon substantial evidence in the record. *See Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994) (holding that circuit court judges are not at liberty to decide a case as if there had been no decision by the Workers’ Compensation Commission); *DeBruhl v. Kershaw Co. Sheriff’s Dept.*, 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990) (holding that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel and it is not the task of the court to weigh the evidence as found by the commission).

Because the Commission’s did not abuse its statutory discretion in determining that the documentation of insurance collected by Henson was

“acceptable” and because this determination is otherwise supported by substantial evidence and the applicable law, the Respondents respectfully contend that the Court of Appeals properly affirmed the Decision and Order of the Workers’ Compensation Commission.

**Conclusion**

Based upon the arguments herein above, the Respondents, Henson & Associates and Auto Owners Insurance, respectfully request that the Petition for Writ of Certiorari be denied in accordance with Rule 242(b), S.C.A.C.R..

Respectfully submitted,

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and

S.C. Uninsured Employers' Fund.....Petitioner.

\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

The undersigned hereby certifies that the above-named Employee, Rudy Barreira Almazan, and the South Carolina Uninsured Employers Fund were served with the attached Return to Petition for Writ of Certiorari, this 21<sup>st</sup> day of July 2017, by depositing the same in the United States Mail, first class postage prepaid, addressed to the counsel of record, as follows:

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July 21, 2017

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