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SC Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Case No: 2016-001380

David Pate,

Employee, Claimant,
Respondent,

v.

TAC Logging, Inc,

Employer,
Respondent, and

Forestry Mutual Insurance
Company,

Carrier, Appellant,

South Carolina Uninsured
Employers' Fund,

Defendant,
Respondent

**FINAL BRIEF OF RESPONDENT
SOUTH CAROLINA WORKERS' COMPENSATION
UNINSURED EMPLOYERS' FUND**

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN FAILING TO FIND THAT A WORKERS' COMPENSATION POLICY CAN BE TERMINATED AFTER 10 DAYS' NOTICE OF CANCELLATION UNDER S.C. CODE OF LAWS SECTION 38-75-730 WHEN AN EMPLOYER FAILS TO PAY PREMIUMS ON A WORKERS' COMPENSATION POLICY.
- II. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN FINDING FORESTRY MUTUAL HAD AN ACTIVE POLICY OF WORKERS' COMPENSATION INSURANCE COVERING TAC ON MARCH 3, 2015, WHERE TAC FAILED TO PAY ITS PREMIUM FOR THE MONTH OF JANUARY 2015, WAS NOTIFIED OF THE SAME OF FEBRUARY 19, 2015, AND THE POLICY WAS CANCELLED BY FORESTRY EFFECTIVE MARCH 1, 2015, WHICH WAS 10 DAYS AFTER NOTICE OF THE PENDING CANCELLATION WAS PROVIDED.
- III. WHETHER THE COMMISSION ERRED, AS A MATTER OF LAW, IN FAILING TO CONCLUDE REGULATION 67-405 IS LIMITED TO DETERMINING AN EMPLOYERS COMPLIANCE WITH MAINTAINING WORKERS' COMPENSATION INSURANCE RATHER THAN THE AUTHORITY FOR DETERMINING THE EFFECTIVE DATE OF CANCELLATION OF A WORKERS' COMPENSATION POLICY.
- IV. WHETHER THE COMMISSIONER ERRED, AS A MATTER OF LAW, IN CONCLUDING FORESTRY MUTUAL FAILED TO NOTIFY TAC'S AGENT OF RECORD REGARDING THE PENDING WORKERS' COMPENSATION POLICY CANCELLATION.

STATEMENT OF THE CASE

This matter arises out of an accidental injury, which occurred on March 3, 2015 in Union County, North Carolina. On that date, David Pate, Respondent, was employed by TAC Logging, Inc., a logger with its principle place of business in Florence, South Carolina. TAC Logging, Inc. is also a Respondent in this Appeal. Mr. Pate, hereinafter called "Claimant" was involved in a truck accident and suffered numerous injuries. Shortly thereafter, the Claimant filed a Form 50, Hearing Request, listing Forestry Mutual Insurance Company, Appellant, as the Carrier for

TAC Logging on the date of the accident. (Record on Appeal, p. 35)

The Compliance Division of the South Carolina Workers' Compensation Commission was of the opinion that Forestry Mutual Insurance Company had in place a policy of Workers' Compensation Coverage for TAC Logging on the date of the Claimant's accident. (Record on Appeal, P. 81) Forestry Mutual Insurance Company has denied coverage in this case. Forestry Mutual Insurance Company filed a Notice of Cancellation within NCCI on February 19, 2015. On that Notice, Forestry Mutual listed March 1, 2015, ten (10) days after the date of notification as its effective date of cancellation. (Record on Appeal, p. 69) Because Forestry Mutual denied coverage, the South Carolina Uninsured Employers' Fund Respondent was made a party to this matter.

A Hearing was held before Commissioner Melody James on September 29, 2015. Appearances were made by the Claimant, the South Carolina Uninsured Employers' Fund, and Forestry Mutual Insurance Company. The Employer, TAC Logging, Inc. failed to appear. Commissioner James heard arguments of the parties, accepted documents and exhibits, and heard testimony from the Claimant. Following the Hearing, Commissioner James requested Forestry Mutual and the South Carolina Uninsured Employers' Fund to present memoranda on the question of coverage.

On January 29, 2016, Commissioner James issued a Decision and Order finding that Forestry Mutual Insurance Company had in place, a policy of Workers' Compensation Insurance covering Employees of TAC Logging on March 3, 2015, the date of the Claimant's accident. Commissioner James ordered Forestry Mutual to provide benefits. (Record on Appeal, p.2) No Appeals were taken regarding the compensability of the benefits due in this claim.

Following the issuance of Commissioner James' Order, Forestry Mutual Insurance

Company filed an Appeal with the South Carolina Workers' Compensation Commission. Arguments were heard by the Commission's Appellate Panel on April 8, 2016. Thereafter, on June 3, 2016, the Appellant Panel of the Commission issued its Decision and Order unanimously affirming the Decision of Commissioner James. (Record on Appeal, p. 18) Forestry Mutual timely appealed the Panel's decision to the South Carolina Court of Appeals.

The subject of this appeal relates to issues of Workers' Compensation Insurance Coverage. The South Carolina Uninsured Employers' Fund contends that the Findings and Conclusions of Commissioner James, which were unanimously affirmed by the Appellant Panel of the Workers' Compensation Commission, are correct. Forestry Mutual Insurance Company had in place a policy of Workers' Compensation Commission Insurance on the date of the Claimant's accident, and is thus, responsible for paying benefits to the Claimant.

FACTS

Forestry Mutual Insurance Company issued a policy insuring TAC Logging, Inc. of Florence, South Carolina with policy effective dates of July 9, 2014 through July 9, 2015. (Record on Appeal p. 25) During the policy, Forestry Mutual filed Notices of Cancellation and Reinstatement with NCCI on a monthly basis between August of 2014 and January of 2015 due to non-payment of premium. (Record on Appeal, p. 79-80) On February 19, 2015, Forestry Mutual electronically filed a Notice of Cancellation with NCCI again cancelling TAC Logging's policy. Forestry Mutual included in that notice an effective cancellation date of March 1, 2015. (Record on Appeal, p. 69)

Thereafter, Written Notice of Cancellation was forwarded to TAC Logging, Inc. by Certified Mail. According to the Certified Return Receipt, that notification was delivered to TAC Logging, Inc. on February 24, 2015. (Record on Appeal, p. 101)

Upon the filing of this claim, a coverage and compliance investigation was completed by the Compliance Division of the South Carolina Workers' Compensation Commission. Following that investigation, Compliance was of the opinion that Forestry Mutual had in place a policy of Workers' Compensation Insurance on March 3, 2015, the date of the Claimant's accident. The Division opined that the proper date of cancellation was on or about March 20, 2015. (Record on Appeal, p. 97).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard for Judicial Review of Decisions of the Workers' Compensation Commission. An Appellant Court can reverse or modify a decision of the Workers' Compensation Commission 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. Nicholson v. South Carolina Department of Social Services, 405 S.C. 537, 748 S.E.2^d 256 (S.C. Appeals 2013).

The issues in this matter deal with the cancellation of a Workers' Compensation Insurance Policy. Workers' Compensation Statutes and Regulations are to be construed liberally in favor of coverage. The requirements for cancelling a Workers' Compensation Insurance Policy are exacting and strictly construed because of the essential role of insurance in the compensation process and the serious potential effects of non-insurance on both the Employer and the Employee. An Insurer's failure to strictly comply with the Regulations renders a termination in effective. Earl v. HTH Associates 368 S.C. 76, 81, 627 S.E. 2d 760, 762 (Court of Appeals, 2006).

ARGUMENTS

- I. TAC LOGGING, INC. HAD IN PLACE A POLICY OF WORKERS' COMPENSATION INSURANCE ON MARCH 3, 2015, THE DATE OF THE

CLAIMANTS ACCIDENT. THE WORKERS' COMPENSATION COMMISSION CORRECTLY CONCLUDED THAT PURSUANT TO S.C. CODE, OF LAWS SECTION 38-75-730 AND COMMISSION REGULATION 47-405, THE EFFECTIVE DATE OF CANCELLATION WOULD BE MARCH 20, 2015.

The Appellant, Forestry Mutual, admits that it issued a Policy of Insurance with effective dates of July 9, 2014 through July 9, 2015 covering TAC Logging, Inc. However, Forestry Mutual contends that it cancelled that policy of insurance due to non-payment of premium with the effective cancellation date of March 1, 2015, two days before the Claimant's accident. Forestry Mutual offered into evidence documents before and after the Hearing of September 29, 2015. Forestry Mutual offered no testimony.

On September 28, 2016, the day before the scheduled Hearing, Forestry Mutual filed an Amended Pre-Hearing Brief and Notice of Witnesses and Written Reports and offered into evidence additional documents regarding insurance coverage in this matter. Those documents included an affidavit of an Employee of NCCI as well as printed screen shots from the NCCI data base. (Record on Appeal pp. 74-80) Those screen shots were forwarded to Wayne Ducote, Jr., Director of Coverage and Compliance with the South Carolina Workers' Compensation Commission. After reviewing those documents, Mr. Ducote, in an e-mail, stated "the documents from NCCI that are provided in your attachment are the same documents that the Coverage Division of the Commission reviews when determining coverage. As you will notice, the Notice of Cancellation was received by NCCI on 2/19/15. Pursuant to Regulation 67-405 C(1) a termination of a Workers' Compensation Policy shall not be effective until thirty (30) days after receipt by the Commissions authorized agent (NCCI). Following that thirty (30) day rule, the cancellation would not be effective until on or about 3/20/15. However, the final decision would be determined by a Commissioner at the Hearing." (Record on Appeal, p. 97). Based upon the

evidence received at the Hearing and applicable law, the Single Commissioner and Full Commission agreed that Forestry Mutual's effective date of cancellation was 3/20/15. Thus, TAC Logging had in place a policy of Workers' Compensation Insurance on the date of the Claimant's accident.

Forestry Mutual contends that the Commission concluded that the language contained in Regulation 67-405 C(1) controlled the cancellation of a Workers' Compensation Insurance Policy as opposed to South Carolina Code Section 38-75-730 relating to insurance coverage in general. The Commission made no such finding or reached any such conclusion. Instead, the Commission determined that the Statute (38-75-730) and Regulation 67-405 C(1) are not inconsistent or irreconcilable with each other. The Statute provides that the mailing or delivery of the notification be "**not less**" than ten (10) days prior to the effective date of cancellation. The Commission's Regulation has expanded the effective date of cancellation to require a thirty (30) day effective date after the filing with the Commission's Agent. Had the Regulation sought to regulate an effective date less than ten (10) days, it would have been inconsistent and irreconcilable. However, thirty (30) days, as provided in Regulation 67-405 C(1) is **not less** than ten (10) days as provided for in the Statute and thus consistent with the Statute.

This issue was raised back in 2010 following the proposed promulgation of Regulation 67-405 C(1). A Proposed Change to the Regulation was made at that time. A Public hearing was held and an Opportunity for Public Comment was allowed. Following the above, the Commission concluded that there was no conflict between the language of Code Section 38-75-730 and Regulation 67-405 C(1). Thus, no change was made to the Regulation and the promulgation process for the proposed regulation change was terminated.

It is clear from the above that Regulation 67-405 C(1) governs the cancellation of a

Workers' Compensation Insurance Policy consistent with the provisions of §38-75-730. Pursuant to that Regulation, Forestry Mutual's effective date of cancellation would be thirty (30) days after February 19, 2015 or March 20, 2015. Thus, Forestry Mutual had in place a policy of insurance on the date of the Claimant's accident.

II. THE WORKERS' COMPENSATION COMMISSION WAS CORRECT IN DETERMINING THAT COMMISSION REGULATION 67-405 GOVERNS THE EFFECTIVE DATE OF THE CANCELLATION OF A WORKERS' COMPENSATION INSURANCE POLICY AND THAT THE REGULATION IS NOT LIMITED TO DETERMINING AN EMPLOYERS' COMPLIANCE WITH MAINTAINING WORKERS' COMPENSATION INSURANCE.

As all are aware, the South Carolina Workers' Compensation Act was substantially modified effective July 1, 2007. Following that time, the Workers' Compensation Commission amended and added regulations to Chapter 67 to reflect the changes in Title 42. The changes and amendments to those regulations as well as comments regarding those changes can be found in the South Carolina State Register, Volume 34, Issue 2, published February 26, 2010.

According to Forestry Mutual, up until 2010, Regulation 67-406 addressed the cancellation, renewal, and non-renewal of Workers' Compensation Policies. It appears that Former Regulation 67-406 was promulgated after July 1, 1989, when NCCI became the Commission's authorized agent for filing a Report of Coverage and Notice of Termination for Workers' Compensation Insurance Policies. According to Forestry Mutual, that regulation was repealed in 2010 but not replaced. Thus, Appellant's contend Chapter 67 no longer provides for termination, cancellation or non-renewal of Workers' Compensation Policies. However, the provision of Former Regulation 67-406 are now found under new Regulation 67-405 C(1).

Former Regulation 67-405 dealt with Employers and Insurance Carriers proof of compliance. If you reviewed the former regulation in its entirety, it contained no provision regarding the effective date of termination or cancellation of an insurance policy. However, in

2010, that regulation was amended. Regulation 67-405 C(1) was added. That regulation required an insurance carrier to file a notice of termination with the Commission's authorized agent. It further states that such termination shall not be effective until thirty (30) days after receipt by the Commission's authorized agent. The language is almost identical to the termination/cancellation language found in former Regulation 67-406. According to the comments found in the State Register dealing with Regulation 67-405 C(1), the regulation is amended to delete references to Regulation to 67-406 and Regulation 67-407, to add reference to 67-416, and to **clarify termination date**. References to NCCI were deleted. According to the comments, those deletions were made to "reflect the possibility NCCI might not continue to be the Commission's agent."

The Legislature did not repeal Regulation 67-406 without replacing it. The Regulation was simply recodified under Regulation 67-405(C)(1). The purpose of the new regulation was to **clarify** the thirty (30) day termination date. Based upon that clarified termination date, Forestry Mutual had insurance coverage on March 3, 2015 when the Claimant's accident occurred.

Forestry Mutual also contends that new Regulation 67-405 is for compliance purposes only as evidenced by the title of the Regulation. The text contains no such limitation. Although the title and headings are part of the statute, they may not be construed to limit the plain meaning of the text. Brotherhood of Railroad Trainmen V. Baltimore & O.R. Co., 331 U.S 519, 67 S. Ct. 1387, 9 L.ED. 1646 (1947). For interpretive purposes, the title of a statute and heading of a section or of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt but they cannot undo or limit the text what the text makes plain. Garner V. Houck 435 S.E. 2d 847 (1993). The text of Regulation 67-405 is not limited to compliance and contains no ambiguity. Thus, the Regulation in conjunction with the Code

Section quoted above, govern the cancellation of Workers' Compensation Insurance Policies in South Carolina.

III. THE WORKERS' COMPENSATION COMMISSION WAS CORRECT IN CONCLUDING THAT FORESTRY MUTUAL FAILED TO NOTIFY TAC LOGGING'S AGENT OF RECORD REGARDING THE CANCELLATION OF TAC'S INSURANCE POLICY.

Forestry Mutual Insurance Company offered no witnesses but only documentary evidence at the Hearing held on September 29, 2015. According to those documents, Forestry Mutual filed a Notice of Cancellation of the Policy in question with NCCI on February 19, 2015. An Affidavit was introduced into evidence by Forestry Mutual showing that NCCI received the Notice of Cancellation electronically. A certified mail return receipt was later entered into evidence showing that the notice was delivered to the Insured, TAC Logging, Inc. on February 24, 2015

Code Section 38-75-730(b) requires that Written Notice of Cancellation be delivered or mailed to the Insured and the Agent of Record not less than ten (10) days prior to the proposed effective date of cancellation. The Notice of Cancellation shows Swamp Fox Agency, Inc. to be the producer of the policy. Forestry Mutual has offered no evidence to show that the Agency was properly notified of the cancellation pursuant to the statute. Even assuming that Notice of Termination was properly filed with NCCI, the other requirements of the Statute must be met for cancellation to be effective.

As stated above, the Statute in question states that "[c]ancellation [for nonpayment of premium] is not effective unless written notice of cancellation has been delivered or mailed to the Insured and ... not less than ten (10) days prior to the proposed effective date of cancellation." As stated above Forestry Mutual offered no testimony at the Hearing. Instead, Forestry Mutual offered into evidence following the Hearing, without objection, copies of

Certified Mail Return Receipt signed by Mary Carter on February 24, 2015.

The certified mail return receipt shows a “date of delivery” of February 24, 2015. Pursuant to Code Section 38-75-730(a), Forestry Mutual delivered the Notice of Cancellation to its insured on February 24, 2015. Based upon the clear language of Section 38-75-730(a), Forestry Mutual’s effective date of cancellation would be ten (10) days later or March 6, 2015, three (3) days after the Claimant’s accident. Thus, even if one assumes that Section 38-75-730(a) solely controls the cancellation of a Workers’ Compensation Insurance Policy, insurance was still in place on the date of the Claimant’s accident.

CONCLUSION

The Court of Appeals has held the requirements for canceling a Workers’ Compensation Insurance Policy are exacting and strictly construed because of the essential role of insurance in the compensation process...and Insurers failure to strictly comply with the Statutes and Regulations renders a termination ineffective. Pursuant to Section 38-75-730(a) of the South Carolina Code of Laws and Regulation 67-405 C(1), the cancellation of the Insurance Policy in question would not be effective until after the Claimant’s accident, if at all. Thus, Forestry Mutual had in place a Policy of Insurance on the date in question.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF COUNSEL IN FINAL BRIEF

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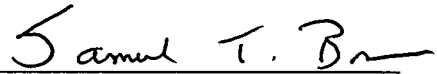
South Carolina Uninsured
Employers' Fund

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant South Carolina Workers' Compensation Uninsured Employers' Fund complies with Rule 211 (b), SCACR.

December 2, 2016



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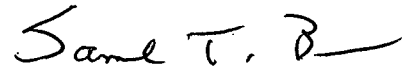
South Carolina Uninsured
Employers' Fund

Defendant,
Respondent

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent included by depositing three (3) copies of it in the United States Mail, Postage prepaid, on December 2, 2016, addressed to his Attorney of record Christopher Isgett, Post Office Box 1505, Columbia, South Carolina 29202, to TAC Logging, Inc., 1807 Osprey Drive, Florence, South Carolina, 29501, to Attorney Will Littlejohn, 210 Wingo Way, Suite 201, Mount Pleasant, South Carolina, 29464, and the original and fifteen (15) copies to The Honorable Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211.

December 2, 2016



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