

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 1521141

CALVIN A. FELDER,
Dependents Claimants/Respondents,

vs.

CENTRAL MASONRY INC. & ARNOLD CONTRUCTION CO., Employer, AND
AMGUARD INSURANCE CO./OLD REPUBLIC INSURANCE CO., Carrier,
Defendants/Appellants,

Appellate Panel Review held in Columbia, South
Carolina, on September 18, 2017 per notices timely
and properly served upon all parties of interest.

RECEIVED

Appellate Panel Decision and Order Filed:

MAY 21 2018

April 17, 2018

SC Court of Appeals

APPEARANCES: Appearances: Paula Howker Amick, Esq. on behalf of the
Employee/Claimant.

Jonathan R. Hendrix, Esq. on behalf of the Employer Central Masonry,
Inc.

George D. Gallagher, Esq. on behalf of Amguard Insurance Company

J. Randall Hedlund, Esq. on behalf of Collins and Arnold Construction
Company and Old Republic Insurance Company

Lisa C. Glover, Esq. on behalf of the South Carolina Uninsured Employers
Fund.

This matter was before the Single Commissioner held in Columbia, South Carolina on November 28, 2016 and December 15, 2016. The Single Commissioner issued her Decision and Order on June 20, 2017, from which this appeal originates.

STIPULATIONS

At the call of the case, the attorneys representing the respective parties stipulated as follows:

1. The parties to this proceeding, with the exception of Amguard Insurance Company, agreed to be subject to and bound by the terms and the provisions of the *South Carolina Workers' Compensation Act*.
2. The parties, with the exception of Amguard Insurance Company, admitted to jurisdiction in this State.
3. Sufficiency of the notice of hearing was admitted.
4. Venue, for the purposes of this hearing, was proper in Richland County.
5. The subcontractor is Central Masonry and the general contractor is Collins and Arnold, which is insured by Old Republic.
6. Central Masonry provided a certificate of insurance to Collins and Arnold.

APA SUBMISSIONS/EXHIBITS

The following APA submissions were submitted on behalf of the parties:

Employee/Claimant:

Physician	Address	Dates of Report(s)	Pages
1. Michael Ugino, M.D.	Midlands Orthopedics 1910 Blanding Street Columbia, SC 29201	1/6/16 – 10/3/16	pp. 1-24 A (25)
2. Michael Ugino, M.D.	Providence Hospital 2435 Forest Drive Columbia, SC 29204	3/24/16	pp. 25-29 (5)
3. Kathryn Crumpler, OT	Midlands Orthopedics 1910 Blanding Street Columbia, SC 29204	4/19/16	pp. 30-31 (2)

4. Michael Ugi no, M.D.	Midlands Orthopedics 1910 Blanding Street Columbia, SC 29204	Form 148 - Dr. Ugi no	p. 31A (1)
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Exhibits

A. Richland County Business Service Center – Construction Contractors with Issued 2015 Richland County Business Licenses (to include the Employer)	1/27/16	pp. 32-41 (10)
B. Secretary of State Business Filings relating to the Employer (administratively dissolved 6/1/15) and its Agent for Service of Process.	4/15/16	pp. 42-44 (3)
C. Pay Stubs	1/7/16-1/27/16	p. 45 (1)

Employer Central Masonry, Inc.:

APA	NAME OF REPORT(S)/ PHYSICIANS OR OTHER EVIDENCE	PLACE	REPORT DATE(S)	PAGE NOS.
1.	Certificate of Liability – Policy #10-21873-152244-209369	Job Site – Kroger-GA-678 Clemson Road, Columbia, SC	Coverage 08-07-15 to 08-07-16	46-47
2.	Certificate of Liability – Policy #10-21873-152244-209369	Job Site – Outparcel at Wescott 9500 Dorchester Rd, North Charleston SC	Coverage 08-07-15 to 08-07-16	48-49
3.	Certificate of Liability – Policy #10-21873-152244-209369	Job Site-Twister #5318 Columbia, SC	Coverage 08-07-15 to 08-07-16	50-51
4.	Email from Sandra Sturkie		09-26-15	52 (5 pages)
	Transcript of September 2, 2015 phone conversation between representatives of Lloyd Pro Group and Amguard.		Submitted after first hearing	(7 pages)

Amguard Insurance Company:

EXH#	EXHIBIT	DATED	PAGE NOS.
1.	Certificate of Liability Insurance		1-2
2.	Workers Compensation and Employers Liability Policy Binder		3-45
3.	Electronic Correspondence		46-51
4.	Workers Compensation and Employers Liability Policy		52-77
5.	General Workers Compensation Policy		78-84
6.	Notice to Controvert		85-86
7.	Rosemarie Farrell Affidavit		87
8.	Legal Memorandum		88-96
9.	Guard Insurance Policy		97-122
10.	2015 Tax Returns		123-142
11.	Form 27 to Lloyd Pro Group	10/27/16	143-147
12.	Form 27 to Central Masonry	10/6/16	148-150
13.	Numerous emails regarding coverage		151-159
14.	Central Masonry Non-employee compensation	8/7/15-8/7/16	160-163

Collins and Arnold Construction Company and Old Republic Insurance Company:

Exhibit C	Email correspondence between Central Masonry and Collins and Arnold		1-11
Exhibit D	Email correspondence between Lloyd Pro Group and Central Masonry and Collins and Arnold		12-25

The South Carolina Uninsured Employers' Fund:

NAME OF PHYSICIAN	DATES OF REPORT	NO. OF PAGES
None		

CLAIMANT BIOGRAPHICAL

Age: Forty-Eight (DOB: August 7, 1968)

Gender: Male

Marital Status: Married

Work History: Laborer

Educational History: GED

STATEMENT OF THE CASE

The Claimant initially filed a Form 50 hearing request on January 20, 2016, naming Central Masonry, Inc. (hereinafter Central Masonry), a Georgia-based company, as the employer, and serving the South Carolina Uninsured Employer's Fund (hereinafter SCUEF). The SCUEF filed on February 8, 2016 a Form 51 denying all aspects of the claim. A hearing was set for May 4, 2016, at which time Mr. Max Gallardo, owner of Central Masonry attended with a certificate of insurance and information regarding the general contractor. The hearing was postponed so as to permit the Claimant to file a motion to add additional parties, namely Berkshire Hathaway Guard or Amguard Insurance Company (hereinafter Amguard), as well as the upstream employer Collins and Arnold Construction Co., LLC. (hereinafter Collins and Arnold) and its carrier Old Republic Insurance Company (hereinafter Old Republic) The motion was granted by Commissioner McCaskill on June 21, 2016.

The Claimant, in the interim, filed an Amended Form 50 hearing request on May 25, 2016. Amguard filed its Form 51 on June 22, 2016, denying all aspects of the claim. On June 29, 2016, the SCUEF again filed a Form 51 denying all aspects of the claim. On July 8, 2016 Collins and Arnold and Old Republic filed a Form 51 denying the Claimant suffered a compensable injury, and asserting all affirmative and specific defenses, and then filed an Amended Form 51 on July 20, 2016 asserting as further grounds or contentions S.C. Code Ann. §42-1-415 (Representation of coverage), §42-1-440 (Indemnity of principal contractor), and §42-1-460 (Contracts subject to title), and on July 29, 2016 also filed a Form 19/Denial. On September 26, 2016 Jonathan Hendrix filed notice of representation of Central Masonry.

The Claimant alleged a compensable injury occurring on or about December 30, 2015, for which he underwent a fusion surgery to his right wrist on March 24, 2016, performed by Michael R. Ugino, M.D., who subsequently released the Claimant at maximum medical

improvement with a twenty percent (20%) residual impairment to his right wrist. The Claimant maintained the dispute was essentially a coverage dispute, and that there was no genuine issue of material fact in dispute concerning whether the Claimant was entitled to benefits, and that, pursuant to S.C. Code Ann. § 42-9-430, the carriers involved should share equally in the payment of those benefits until it was determined which party is solely liable.

Central Masonry, Inc. maintained this loss should be covered by Amguard, if not pursuant to the language of the policy, then pursuant to the doctrine of agency where the agent authorized to arrange the workers' compensation policy for Central Masonry through Amguard then issued a certificate of insurance upon which Central Masonry relied, and which it in turn provided to the general contractor, Collins and Arnold, before commencing work on the Columbia site where the alleged injury occurred. Central Masonry maintained further that an independent conversation between a representative of Lloyd Pro Group, Inc. (hereinafter "Lloyd") and an Amguard representative bound Amguard for coverage in South Carolina.

Amguard's stated position was that the Claimant was an independent contractor, that South Carolina did not have jurisdiction over Central Masonry because it did not regularly employ four or more employees in the State, that, regardless, under the terms of the Amguard policy there was no coverage afforded for this South Carolina claim, there was no agency, and the agent who issued the certificate of insurance had no authority to do so where it was in direct conflict with the specific language of the contract. The Defendant Amguard also took the position that Lloyd was an agent of Central Masonry.

The position of Collins and Arnold and Old Republic was that they relied upon acceptable documentation of insurance from the lower tier contractor, Central Masonry, such that, pursuant to S.C. Code Ann. §42-1-415 and S.C. Code Reg. §67-415, liability should be shifted to the SCUEF in the event Central Masonry were to be not covered under the Amguard policy and therefore uninsured.

In turn, the SCUEF maintained the documentation of insurance did not meet the requirements of S.C. Code Reg. §67-415, but that in the event the certificate of insurance were to be held acceptable documentation, then the SCUEF would be entitled to indemnification against Central Masonry.

EVIDENCE OF THE CASE

The Claimant submitted medical records of Dr. Ugino, including a January 6, 2016 report referring to a Providence Northeast emergency room visit after his on-the-job injury on December 30, 2015, for which Dr. Ugino recommended surgery. (Claimant's APA #2 & #4) Dr. Ugino's January 6, 2016 report lists the treatment as work-related, pursuant to the Claimant's report of striking his right hand against a wall at work, and the resulting fracture of the scaphoid bone diagnosed by Dr. Ugino. (Claimant's APA #1) Dr. Ugino goes on to describe a chronic fracture nonunion with avascular necrosis, but which was asymptomatic until the December 30, 2015 injury on the job and "[t]herefore the treatment should be covered by his worker's compensation carrier." (Claimant's APA #3) The records also included records of the March 24, 2016 surgery (scapholunate reconstruction with scaphoidectomy and four-quadrant fusion) including the implantation of significant hardware in to the Claimant's wrist, with the surgery being performed at Providence Hospital. (Claimant's APA #25-26). Dr. Ugino's March 6, 2016 note indicates he was "released to his work activities" as of that date, although Dr. Ugino noted the Claimant was apparently going back to school. (Claimant's APA #20) The records culminated with Dr. Ugino's completed Form 14B dated October 3, 2016, which indicated the Claimant reached maximum medical improvement as of September 28, 2016, with a twenty percent (20%) residual impairment to his right wrist, with no restrictions or anticipated future treatment. (Claimant's APA #31A)

The Claimant furthermore submitted Richland County and Secretary of State records indicating Central Masonry, Inc. was licensed to do business in Richland County and was a Georgia for-profit corporation registered to do business in the State of South Carolina. (Claimant's APA #41 & #42) Finally, the Claimant submitted copies of two paystubs from Central Masonry, Inc., dated January 7, 2016 - one for \$115 marked as "Contract Labor Kroger 678-Columbia" and one for \$200 marked as "Work Compensation." (Claimant's APA #45)

Central Masonry submitted copies of three separate Certificates of Liability Insurance dated August 18, 2015, providing for commercial, automobile, umbrella and workers' compensation coverage, with the workers' compensation coverage insurer listed as Amguard. (Central Masonry APA #46-51) The first certificate refers to "Job: Kroger GA-678, Clemson, Road, Columbia SC." (Central Masonry APA #47). The second certificate refers to "Job: Outparcel #3 at Wescott, 9500 Dorchester Road, North Charleston, SC." (Central Masonry APA #49) The third certificate refers to "Project #30-15-012 - Twister #5318 - Columbia, SC." (Central Masonry APA #51) Central Masonry also provided a five-page email stream, including

an August 19, 2015 email from Patrick Barger, Commercial Lines Account Manager with Lloyd, to Sandra Sturkie¹ at Central Masonry stating, "Ok I just requested SC be added to the WC, and the waivers be processed. We should be all good at this point." (Central Masonry APA #52-1) Earlier in the same email stream, Ms. Sturkie indicates to Lloyd, "on ALL of our South Carolina jobs we will use Sub-contractor. There will be hardly any payroll. As I stated in the waiver of subrogation the job Outparcel # 3 in Charleston, SC will have a payroll amount of \$10,200.00 (it's a very small job). All other jobs will have a Subcontractor [sic] and we will have their COI for those jobs." (Central Masonry APA #52-4)

Amguard submitted the Workers' Compensation and Employers Liability Policy Binder dated August 12, 2015, from the National Council on Compensation Insurance, Inc., addressed to Central Masonry and listing the insurance company as Amguard and the agency as Lloyd. (Amguard APA #3) Amguard also submitted a five-page Workers' Compensation Application, listing Central Masonry as the applicant, and listing workers' compensation states as "GA, NC" and listing locations as two separate addresses – one in Duluth Georgia, and one in Wake Forest, North Carolina. (Amguard APA #8) Additionally, Amguard provided a copy of the policy itself, which indicated the covered states were Georgia and North Carolina, with reference to an other states endorsement. (Amguard APA #53) The submissions further include the "Other States Insurance Endorsement," which provides, "We will pay . . . benefits required of you by the workers' compensation law of any state not listed . . . if all of the following conditions are met: (a) the employee claiming benefits was either hired under a contract of employment made in [North Carolina or Georgia] or was, at the time of injury, principally employed in [either North Carolina or Georgia]; and (b) the employee . . . is not claiming benefits in a state where, at the time of injury, (i) [the insured has] other workers' compensation insurance coverage, or (ii) [the insured was], by virtue of the nature of its operations in that state, required by that state's law to have obtained separate workers compensation insurance coverage, or (iii) the insured is an authorized self-insurer or participant in a self-insured group plan; and (c) the duration of the work being performed by the employee claiming benefits in the state is temporary." (Amguard APA #58)

Amguard's submissions also include an affidavit of a coverage specialist with Amguard, stating the policy number on the certificate of insurance produced by Lloyd was not a valid

¹ Sandra Sturkie's last name is spelled "Sturkey" in the hearing transcript, but we defer to the spelling on her emails.

Amguard policy number, as well as an email stream from Lloyd providing a timeline of events. (Amguard APA #87, #151-52)

Submissions from Collins and Arnold and Old Republic included additional emails with additional copies of the various certificates of insurance. (Collins and Arnold Exhibits C and D)

The Claimant testified he was hired on the spot by Central Masonry when he went up to the Kroger job site on Clemson Road looking for work. He stated he was hired full-time at \$10 per hour. He stated he was told he was going to get a raise to \$11 per hour, but was injured before that went in to effect. The Claimant acknowledged working for a very short period of time before getting injured, and that the few weeks he worked were not full weeks. Nonetheless, he testified he was hired for full-time work and would have worked forty (40) hours per week excluding weather and holidays. He described his job duties as mixing mortar and otherwise setting up for the brick masons, and using equipment such as a forklift, sledge hammer and scaffold. He stated he followed instructions of Central Masonry and used Central Masonry's equipment, and was paid by the hour, not the job. He also stated his understanding that he would have been fired by Central Masonry if he had not done a good job. (Nov. Hrg. T. p.15-18, 31-33)

The Claimant described his injury as occurring on December 30, 2015 when he was using a sledge hammer to knock holes in a wall and then struck his hand against the wall when the hammer slipped out of his hands. He further described then coming down off of the roof on to a scaffold when he tripped and then had to catch himself, further injuring his wrist, at which point he decided to go home. When his pain worsened that evening, he stated he called his supervisor and told him he was going to the emergency room because his hand was hurting. He stated he was referred from the hospital to Dr. Ugino who recommended surgery. He went on to testify that he reported the injury but received a denial letter from the insurance company (Amguard) and therefore filed the subsequent March 24, 2016 surgery under his health insurance. He also stated he worked only one day after the injury. (Nov. Hrg. T. p.18-20)

The Claimant testified that as of the November 28, 2016 hearing he had not worked since the day after the injury, but stated he had signed up for classes to try to acquire new skills. He also demonstrated for the Commission the limited range of motion in his right wrist, pursuant to the fusion surgery, and described a loss of grip strength, as well as residual pain. (Nov. Hrg. T. p. 21-23)

Mr. Gallardo then testified on behalf of Central Masonry, as owner and operator. He testified Central Masonry's principal place of business is in Georgia. (Nov. Hrg. T. p. 53-54). He also confirmed Central Masonry does not have an office in South Carolina. (Nov. Hrg. T. p. 68) He explained Central Masonry, as a Georgia company, successfully bid on a contract for the Kroger project on Clemson Road with Collins and Arnold, and that he provided the requisite certificate of insurance from his insurance agency before starting any work. (Nov. Hrg. T. p.35-36) Mr. Gallardo went on to testify he was initially using only his regular employees, but that the job was behind schedule because of the floods in Columbia in October of 2015 and that he had to pick up some workers in Columbia, including the Claimant. (Nov. Hrg. T. p. 38-39) He stated the Claimant started work on December 9, 2015, which was a Wednesday, and worked twenty-three and a half hours over the three days remaining that week. He described the Claimant working additional hours until the date of the injury. Mr. Gallardo also confirmed the Claimant was hired for forty hours per week, and would have worked forty hours per week but for weather and holidays. (Nov. Hrg. T. p. 50-51) Mr. Gallardo testified the Claimant was for all intents and purposes an employee. (Nov. Hrg. T. p. 50) Mr. Gallardo also admitted to receiving a doctor's note stating the Claimant was unable to work, but could not recall if that was the week of the injury or the following week. (Nov. Hrg. T. p. 41-43)

Mr. Gallardo further testified he relied on the certificate of insurance and believed he had insurance for the project in South Carolina. He explained he paid his workers by 1099's for accounting purposes, but as far as having "people directly working" and "we telling what to do," Central Masonry probably had - at some points - six, seven, eight people on the job. (Nov. Hrg. T. 47; 49-50; 55-56; 59-60) Mr. Gallardo also admitted to having other projects in South Carolina prior to the Kroger job. (Nov. Hrg. T. p. 56) Mr. Gallardo confirmed Central Masonry supervisors had control over the Claimant's work, telling him what to do on the job and when to do it, and that they paid him by the hour. He also confirmed the Claimant was hired for full-time work, and that he would have worked forty hours per week if the weather permitted, and would have been offered work on future jobs with Central Masonry. (Nov. Hrg. T. p. 48, 50-51) Mr. Gallardo also conceded he considered the Claimant to be an employee who had been injured on the job and was due workers' compensation benefits. (Nov. Hrg. T. p. 53)

As to the issue of insurance, Mr. Gallardo stated that once he got the Kroger job from Collins and Arnold he contacted his agent in Georgia, Lloyd, and requested a certificate of insurance, which he considered to be proof he was covered. He acknowledged he never read the

actual insurance policy itself, but instead relied on the language of the certificate of insurance as confirmation he was covered for the job, and relied on Lloyd to ensure he was covered. (Nov. Hrg. T. p. 61-62, 65)

Ms. Sandra Sturkie, an employee of Central Masonry, testified it was her job to secure certificates of insurance and that she always requested those from the agent, Lloyd, and received assurance from the agent they were covered for the Kroger job in South Carolina. (Dec. Hrg. T. p. 6, 10) She explained further it was common for payroll to vary or not be exact, but there was an audit procedure by which premiums would be adjusted after the fact to reflect the actual payroll on any given job. (Dec. Hrg. T. p. 11-12) She also explained they did not anticipate a direct payroll in South Carolina when they initially requested a certificate of coverage from the agent's office, and stated further it was not her understanding that the policy only covered Georgia and North Carolina. (Dec. Hrg. T. p. 12-13, 17) Ms. Sturkie reiterated her reliance on the agent and her understanding, "the certificate of insurance is what tells me that we were covered in South Carolina." (Dec. Hrg. T. p. 22)

After the second hearing, a motion to submit the recording of a September 2, 2015 telephone call between Lloyd and Amguard was made by Central Masonry. All parties consented to the admission of the recording, and a transcript of the recording was produced along with the recording itself.

SINGLE COMMISSIONER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties to the proceeding, including Central Masonry, are subject to and bound by the terms and provisions of the *South Carolina Workers' Compensation Act* (hereinafter *the Act*). This finding is based upon the stipulations and admissions of the parties, the testimony of Mr. Gallardo, and the APA submissions.
2. The Claimant met his burden of proving he was an employee of Central Masonry at the time of his injury, and not an independent contractor. Not only did Mr. Gallardo testify the Claimant was for all intents and purposes an employee (Tr. 50), the testimony of the Claimant and Mr. Gallardo establishes that Central Masonry had the right or exercise of control over the Claimant by directing the method and manner of the work he performed, by providing the equipment used by the Claimant on the job site, by paying the Claimant by the hour, as opposed to by the assignment or job, and by confirming it had the right to fire the Claimant. *See Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, ___, 753 S.E.2d 416, 419 (S.C., 2013) (citations omitted) ("Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. . . . [pursuant to] four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.")
3. Central Masonry, according to the testimony of Mr. Gallardo and of the Claimant, summarized above, had four or more regularly employed employees at the Kroger job site on Clemson Road as of December 30, 2015.
4. The Claimant injured his right wrist while working at the Kroger job site on December 30, 2015. The Claimant described striking his right hand and wrist on a wall as the sledge hammer he was using slipped out of his hand, and described shortly thereafter catching himself with his right hand while descending a scaffold. The medical records of Dr. Ugino, a licensed medical provider, indicate the Claimant's injury was work related. Based on the description of the injury and on the medical records it is apparent the Claimant suffered a compensable scaphoid fracture in his right wrist, during the course and scope of his employment with Central Masonry at the Kroger job site on December 30, 2015, within the meaning of S.C. Code Ann. § 42-1-160.

5. The Claimant, as documented in the medical records included in the APAs, received treatment from Providence Northeast, Midlands Orthopaedics and Providence Hospital for his work-related injury and is entitled to benefits to include payment of expenses associated with medical, surgical, hospital and other treatment at those facilities, of the scaphoid fracture in his right wrist, within the meaning of S.C. Code Ann. § 42-15-60.
6. The Claimant has an average weekly wage of four hundred (\$400.00) dollars a week, with a corresponding compensation rate of two hundred sixty-six and 68/100ths (\$266.68) dollars. There is not an established history of the Claimant's wages, as he worked such a short period of time before his injury. The few weeks that he worked were not full weeks. Nonetheless, the greater weight of the evidence in the record, including the pay records, and the testimony of the Claimant and of Mr. Gallardo detailed above, provides the Claimant was earning ten (\$10.00) dollars an hour and was to work forty hours per week, such that four hundred (\$400.00) dollars a week most nearly approximates the amount which the Claimant would be earning were it not for the injury, within the meaning of S.C. Code Ann. § 42-1-40. (Both the Claimant and the Employer testified that he was hired for full-time work and would have worked forty (40) hours, excluding weather and holiday. (Testimony of Mr. Gallardo at Tr. 50-51) There is no evidence of the number of holidays or weather days in the record to quantify or determine any effect to the Claimant's wages.)
7. The Claimant is entitled to payment of temporary total payments for the period of December 30, 2015 through May 6, 2016, at which point he was released to work activities by Dr. Ugino. (Claimant's APA #20) This period translates to eighteen and two-sevenths (18 2/7ths) weeks, or four thousand eight hundred seventy-six and 43/100ths dollars (\$4,876.43). There is a stipulated credit of six hundred dollars (\$600.00), however, pursuant to payments made by Central Masonry to the Claimant, such that the back due benefits owed are thereby reduced to four thousand two hundred seventy-six and 43/100ths dollars (\$4,276.43).

8. Based on the medical records, the testimony of the Claimant, and the undersigned's observation of the Claimant's right wrist and his range of motion in that wrist, it is apparent the Claimant has a residual specific disability equivalent to twenty-eight (28%) percent to his right arm, and as a result he is entitled to sixty-one and 6/10ths (61.6) weeks specific disability within the meaning of S.C. Code Ann. § 42-9-30(13), which translates to sixteen thousand four hundred twenty-seven and 49/100ths dollars (\$16,427.49).
9. There is no future medical treatment warranted, according to the 14B of Dr. Ugino, with the exception of any future repair, maintenance or replacement of the retained hardware in his wrist; pursuant to the March 24, 2016 surgery. (Claimant's APA #24a, 26) Moreover, hardware is to be maintained and replaced pursuant to *the Act* in accordance with S.C. Code Ann. § 42-15-60.
10. Central Masonry is responsible for the payment of these benefits.
11. It must then be determined whether Central Masonry has insurance through Amguard such that Amguard must provide payment on behalf of Central Masonry.
12. Lloyd is Central Masonry's insurance agent through which Central Masonry secured its workers' compensation insurance coverage.
13. Central Masonry's agent, Lloyd, obtained for Central Masonry a workers compensation and employers liability policy through a Georgia Assigned Risk Policy, the binder for which was issued on August 12, 2015. (Amguard APA #3). The policy was for the states of Georgia and North Carolina with an "Other States Endorsement" which will be discussed below.
14. Central Masonry began accepting jobs in South Carolina, including accepting a job for the Kroger job site on Clemson Road in Columbia, South Carolina.
15. At the request of Central Masonry, Lloyd issued a certificate of liability insurance which showed workers' compensation coverage on August 18, 2015 for the South Carolina job site of Kroger at Clemson Road in Columbia, South Carolina. (Central Masonry APA #46). The parties stipulate that this certificate was tendered to Collins and Arnold, the general contractor.

16. Mr. Gallardo and Ms. Sturkie both testified on behalf of Central Masonry that the company relied on Lloyd's representations that Central Masonry had workers' compensation insurance coverage in South Carolina. Central Masonry's argument extends further that, even if there was not coverage under the strict language of the policy, the conversation between Lloyd and Amguard establishes coverage and/or binds Amguard under principles of agency. (As summarized above, Amguard's position is that Lloyd was an agent of Central Masonry not Amguard.)
17. Central Masonry could not reasonably rely on the issuance of the certificate of insurance in this matter. The certificate of insurance was issued on August 18, 2015 by an August 17, 2015 email at 5:08p.m. Central Masonry requests the specific certificates to be emailed directly to the general contractor and indicates that all certificates should include job addresses. (Collins and Arnold Exhibit D). However, Central Masonry is notified by Lloyd on August 19, 2015 at 8:51a.m. by email that the underwriter denied the waiver of subrogation on all South Carolina jobs. (Central Masonry APA #52-5).
18. Lloyd issued the certificate of insurance without knowledge of a binder or endorsement by Amguard on August 18, 2015. The record is also devoid of any evidence of knowledge on the part of Lloyd at that time that Amguard could write insurance for South Carolina. (It is noted in a later email that they learned that Amguard did not write insurance for Kentucky.) (Amguard APA #48)
19. Later, on August 19, 2015, the email chain between Lloyd and Central Masonry indicated the Lloyd representative was going to get South Carolina added for the payroll and wanted to know the address of the job; the response was a location in North Charleston. Later that day, the Lloyd representative stated that he "just requested SC be added to the WC, and that the waivers be processed. We should be all good at this point." (Central APA #52-5) These emails indicate a "request" and that it "should be all good," but does not indicate the coverage has been completed. Central Masonry could not reasonably rely on this conversation with Lloyd as proof they had coverage in South Carolina.
20. Jordan Dunn of Lloyd indicates in a May 5, 2016 email there was a phone call between Amguard and the agent on September 2, 2015, and that "SC was not added to this policy and will not be added," along with a discussion that no employees would be doing the work. (Amguard APA #47-48).

21. The telephone conversation of September 2, 2015, the transcript and recording of which was admitted after the November hearing, indicates South Carolina would be added, but then the conversation turns to whether there would actually be employees. The Lloyd representative ("Pat") indicates that Central Masonry will just be hiring subs with certificates. (Call Transcript p. 4). Later, the Lloyd representative states that Central Masonry did not even assume it had to add South Carolina, to which the Amguard representative ("Carley") responds, "probably in this case, I wouldn't if it's not our actual payroll." (Call Transcript p. 5). "Carley" again indicates at the end of the call that "they all have their own insurance." (Call Transcript p. 5-6). There is no agreement at the end of the call about the addition of South Carolina. The failure to have an understanding between Lloyd and Amguard as to whether South Carolina was to be added or not is further evidenced by the email of May 5, 2016 reciting the understanding of the phone call by Lloyd that "SC was not added to this policy and will not be added." (Amguard APA #47-48)
22. Lloyd never received a binder or endorsement adding South Carolina. As stated by Jordan Dunn of Lloyd, in her May 5, 2016 email summarizing a January 15, 2016 conversation with Amguard, and as is apparent from the record as a whole, there were no endorsements, increased premiums billed, or South Carolina waivers billed and mailed out on the policy for the state of South Carolina. Also, it was noted that a preliminary audit was completed in the beginning of October [2015] that did not have any South Carolina exposure/payroll added on it. (Amguard APA #152, #156).
23. The accident occurred on December 30, 2015.
24. Presumably upon being questioned about the coverage after the accident, Ms. Dunn of Lloyd emailed Central Masonry on January 15, 2016, indicating, "in order to add coverage, we need payroll and address for the job." Her email goes on to state, "We were advised on August 19, 2015, all of your jobs in South Carolina were performed by sub-contractors and there would be no payroll - thus SC was not added to the policy." Ms. Dunn then states Lloyd was advised by Amguard that an audit completed in October showed no payroll for South Carolina. Ms. Dunn then requested payroll for South Carolina so that they could add the state. (Amguard APA #155).
25. The preponderance of the evidence does not provide that Amguard contracted with Lloyd

to insure Central Masonry for South Carolina during the correspondence and phone call with Lloyd.

26. The question then turns to whether Lloyd has the ability to bind Amguard.
27. The record, which includes copies of the binder and policy, establishes that the policy was obtained through the Assigned Risk Pool in Georgia, providing coverage for Georgia and North Carolina.
28. Central Masonry presented a certificate of insurance issued by Lloyd, which allegedly provided workers compensation coverage in South Carolina through an Amguard policy. The certificate of insurance was issued, however, without the knowledge of Amguard and does not provide a valid Amguard policy number. (It appears that Lloyd may have used the binder number to place on the certificate of insurance.) The certificate of insurance does not change the terms and conditions of the policy, and the policy is subject to all terms, conditions, limitations and exclusions regardless of the certificate of insurance. Moreover, the certificate of insurance contains a disclaimer which affirms it does not extend rights to the holder, extend coverage, or change terms of the policy. There were no endorsements, increased billing premiums or waivers on the policy for the state of South Carolina. In addition, the evidence does not establish Central Masonry ever submitted or disclosed its South Carolina payroll to Amguard.
29. The certificate of insurance, again, was produced by Lloyd without the knowledge or consent of Amguard.
30. The record establishes Lloyd was the agent of Central Masonry, acting as a broker for Central Masonry.
31. As a general rule, a broker acting for the insured has no authority to bind the insurer. *Holmes v. McKay*, 334 S.C. 433, 440, 513 S.E.2d 851, ___ (S.C. App. 1999); *Allstate Ins. Co. v. Smoak*, 182 S.E.2d 749, 754 (S.C. 1971). A broker is ordinarily employed by the individual seeking to purchase insurance, and should be distinguished from a typical insurance agent who is employed by an insurance company to solicit and write insurance for the company. *Allstate v. Smoak* at 754. Where one has no agency license with the insurer, and is requested by the insured to place the business, he is a broker. *Id.* at 754 (citing *Tri-City Transportation Co. v. Bituminous Casualty Corp.*, 311 Ill. App. 610, 37 N.E.2d 441 (1941)).

32. Lloyd had no authority to bind Amguard. Lloyd was the insurance broker hired by Central Masonry to procure and provide insurance from a selected carrier. Central Masonry had a policy with Amguard, procured by Lloyd, covering Central Masonry in the states of North Carolina and Georgia. The certificate of insurance at issue here was produced by Lloyd without the knowledge or consent of Amguard. Although, the agent may have provided the certificate of insurance to the employer for the job, this does not establish coverage on behalf of Amguard, nor does it change the terms and conditions of the policy. Moreover, in this case, the agent is even further removed from Amguard because the policy at issue was an assigned risk policy. Lloyd applied for a policy with the National Council on Compensation Insurance, Inc. (hereinafter NCCI), as administrator of the Georgia assigned risk pool, on behalf of Central Masonry. (Amguard APA #3) NCCI then assigned Amguard to be the carrier and issued a policy for Central Masonry. The NCCI Notice to Central Masonry furthermore specifically provides a certificate of insurance may be issued only for operations in North Carolina and Georgia, and that the terms of the policy are unchanged and that the certificate holder may not be extended any greater rights than those extended to the insured. (Amguard APA #4-5)
33. Lloyd was necessarily not acting at the "instance or request" of Amguard when issuing the certificate of insurance, in direct conflict to the terms of coverage placed through the assigned risk plan, and did not have authority, actual or apparent, to contractually bind Amguard.
34. While a broker may be an agent of the insurer, the evidence in this matter does not provide that there was any agency relationship, actual or apparent, between Lloyd and Amguard.
35. The policy itself is also examined. The plain terms of the policy do not provide for coverage in South Carolina in this matter. The policy states it "applies to Workers' Compensation Law of the following states: Georgia, North Carolina." (Amguard APA #53) Nowhere in the policy do its terms provide for coverage in South Carolina. The policy does contain, however, an "Other States Insurance Endorsement," in which the Carrier agrees to pay benefits required by the workers' compensation laws of any other state if the following conditions were met: (a) the employee claiming benefits was either

hired under a contract of employment made in North Carolina or Georgia or was, at the time of injury, principally employed in either North Carolina or Georgia; (b) the employee is not claiming benefits in a state where, at the time of injury, (i) the insured has other workers' compensation insurance coverage, or (ii) the insured was, by virtue of the nature of its operations in that state, required by that state's law to have obtained separate workers compensation insurance coverage, or (iii) the insured is an authorized self-insurer or participant in a self-insured group plan; and (c) the duration of the work being performed by the employee claiming benefits in the state is temporary. (Amguard APA #58) None of the conditions were met in this instance. The Claimant was not hired in North Carolina or Georgia. The Claimant was hired by Central Masonry in South Carolina and was principally employed in South Carolina as it is his state of residence, and the only state in which he worked for the company. Moreover, Central Masonry, as determined above, was subject to *the Act* and was required to have workers' compensation coverage for its employees in South Carolina. Finally, as also determined above, the Claimant was hired to be a regular full-time employee of Central Masonry. As a result, the conditions the "Other States Endorsement" have not been met in this claim and coverage would not extend through that endorsement.

36. Absent ambiguous policy language, which is not the case here, the language of the policy itself, not the certificate of insurance, is examined to determine the obligations of the insurer. *See Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 591, 225 S.E.2d 344, 348 (1976). Because no ambiguity in the policy language exists, the certificate of insurance has no bearing on the effect of the policy and cannot be used to create coverage in South Carolina.
37. In this case, the plain language of the policy states coverage applies in Georgia, North Carolina, and other states if certain conditions are first satisfied. Although the certificate of insurance appears to provide coverage through an Amguard policy in South Carolina, this has no bearing on the language of the policy itself. The policy is subject to all terms, conditions, limitations and exclusions regardless of the certificate of insurance. There were no endorsements, increased billing premiums or waivers on the policy for the state of South Carolina. The certificate of insurance also specifically provides that only an endorsement can make a certificate holder an additional insured. (Amguard APA #1). In

- this case there was never any request for such an endorsement. Furthermore, the policy number listed on the certificate of insurance is not an Amguard policy number.
38. Amguard is not a responsible party and should be dismissed from the action.
 39. It was stipulated at the beginning of the hearing that Collins and Arnold was the general contractor of the project, and that it contracted with Central Masonry to provide services at the Kroger site on Clemson Road, in Columbia, South Carolina.
 40. As it is the upstream employer, Collins and Arnold is responsible for the payments to the Claimant pursuant to S.C. Code Ann. §42-1-410.
 41. *The Act* provides further, however, that if a subcontractor represents himself "to a higher tier subcontractor, contractor, or project owner has having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work," upon submission of documentation to the Commission, "the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under [the Act] except as specifically provided in [Section 42-1-415]." S.C. Code Ann. §42-1-415(A). An acceptable form of documentation is an ACORD Form 25-S, Certificate of Insurance. S.C. Code Regs. §67-415(A)(2).
 42. It was stipulated and clear from the testimony and the record as a whole that a certificate of insurance was tendered on behalf of Central Masonry to Collins and Arnold.
 43. The certificate of insurance is in the record in various places, including Collins and Arnold's Exhibit D and Central Masonry's APA #46. It is on an ACORD Form 25-S.
 44. S.C. Code Ann. §42-1-415(B) provides that to qualify for reimbursement, the contractor must collect documentation on a standard form acceptable to the Commission. S.C. Code Reg. §67-415 provides certain documents which are acceptable for purposes of S.C. Code Ann. §42-1-415.
 45. Central Masonry's principal place of business is Georgia, and it does not have an office in South Carolina, as testified to by Mr. Gallardo. It is therefore an out-of-state employer for purposes of S.C. Code Reg. §67-415(2).
 46. Regulation 67-415(2) provides that for an out-of-state employer the ACORD 25-S is acceptable, provided the authorized representative of the insurance carrier for the insured affirms in an accompanying statement: "South Carolina is a named state in section 3A or 3C of the declaration page of the insured's policy."

47. Although the SCUEF maintains the request fails pursuant to S.C. Code Reg. §67-415, this regulation provides documents which are acceptable, but does not indicate that it is an exclusive list of documents the Commission may find acceptable. The Form in the case at bar does not contain the language cited in S.C. Code Reg. §67-415(2). However, the second page contains the "Job" and it is for "Clemson Road" in "Columbia, S.C." The recipient, Collins and Arnold, should be able to rely on issuance of a certificate of insurance which indicates there is workers' compensation insurance for Central Masonry and lists the job location as South Carolina. The logical conclusion from a review of the certificate of insurance is that Central Masonry had workers' compensation coverage for South Carolina.
48. Central Masonry presented a certificate of insurance to Collins and Arnold documenting the company's insurance coverage at the time it was engaged to perform the work for the project in Richland County. The certificate of insurance was issued by an authorized representative of the carrier and included a date and signature. Further, the certificate included a description of the job location for which the assurance of coverage was being provided – Kroger GA-678, Clemson Road, Columbia SC. (Collins and Arnold Ex. D p. 5-6) The logical conclusion from a review of the certificate of insurance is that Central Masonry had workers' compensation coverage for South Carolina. Accordingly, the requirements of S.C. Code Ann. §42-1-415 were met.
49. Collins and Arnold and its carrier, Old Republic, should be dismissed from the action.
50. The responsibility for the payment of the award is therefore with the Employer, Central Masonry, and the SCUEF.
51. On the date of this accident, Central Masonry was subject to *the Act*, but was operating without insurance and as an unqualified self-insured employer. If Central Masonry does not pay or provide the benefits provided herein when the benefits become due pursuant to the provisions of this Order, the SCUEF shall provide the benefits to the Claimant. The SCUEF shall retain all rights of recovery against Central Masonry as provided under S.C. Code Ann. §42-7-200.
52. The Claimant has petitioned for a division of responsibility of the award should the parties continue to disagree as to which party is responsible for this claim. There were genuine issues of fact as to at least one or more of the requirements of S.C. Code Ann.

§42-9-430, including the issue of average weekly wage. As such, the undersigned could not grant the motion. Should the underlying requirements of section 42-9-430 not be appealed, however - that is to say any appeal does not include an appeal of the findings regarding the Claimant's employment, average weekly wage, the occurrence of an injury, the extent of the injury, or the fact that the injury arose out of and in the course of the employment - it would then be appropriate to require the Defendants to equally share in the responsibility of payment of the benefits, pursuant to section 42-9-430, should issues of coverage be appealed. Accordingly, the Claimant may renew the motion should there be an appeal of the coverage issue(s).

53. The SCUEF shall assume responsibility for this claim within thirty days of this determination of responsibility, in accordance with S.C. Code Ann. §42-1-415(A).

APPEAL TO THE FULL COMMISSION

Within the statutory period, Defendants and Claimant both filed an Application for Review (Form 30) in this case, appealing the Single Commissioner's Ruling. On appeal, Defendants appeal the entirety of the Single Commissioner's Findings. Specifically, Defendant appeal whether Amguard insurance Company must furnish coverage and be responsible for paying the award made to Claimant.

APPELLATE PANEL FINDINGS OF FACT

The Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the decision, weigh the evidence presented at the initial hearing and if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those findings. After careful review of the instant case, the Commission has determined that the Single Commissioner's Findings of Fact and Conclusions of Law are to be Reversed.

Based upon the evidence submitted by the respective parties pursuant to the Administrative Procedures Act and the Commission's file relative to this claim. WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. Based on the greater weight of the evidence, we find that Central Masonry, Inc. did not, or even tried to do anything wrong. It followed the usual customs, practices, usages and terminology as generally understood in the particular trade or business of being a masonry contractor trying its best to obtain and prove that it had all required workers' compensation insurance coverage for South Carolina and all other states it performed masonry work in.
2. Based on the greater weight of the evidence, we find that the contract of insurance Central Masonry had with Amguard Insurance Company for South Carolina and other states clearly and unambiguously invites it to rely on the agent to obtain proof of insurance.
3. Based on the greater weight of the evidence, we find that the September 5, 2015 phone call between "Carley" and Patrick (Page 2 of the phone call transcript) acknowledged that at least some direct payroll employees of Central Masonry, Inc., would be used in the South Carolina jobs. Carley assured the agent, Patrick, "Now, I'm going to add South Carolina to the policy..." (Page 2, Transcript of phone conversation).
4. Based on the greater weight of the evidence, we find that Central Masonry was, at all times relevant, ignorant of the fact that, at the time of Mr. Felder's injury, Amguard would deny that it would provide the promised coverage.
5. Based on the greater weight of the evidence, we find that Appellant was misled into believing it was covered by Workers' Compensation Insurance in South Carolina before Claimant was injured by the actions of Amguard in confirming to the agent that South Carolina would be added to Appellant's policy.

6. Based on the greater weight of the evidence, we find that both the agent and Amguard represented, by the standard Certificate of Insurance provided by the agent and in accordance with the Amguard policy language which invited an insured, such as Central Masonry, to obtain and rely upon such Certificates of Insurance provided by the agent, that Central Masonry had South Carolina worker's compensation coverage.
7. Based on the greater weight of the evidence, we find that Central Masonry relied upon the representation and conduct of the agent and Amguard indicating that it did have such coverage to its prejudice and detriment.
8. Based on the greater weight of the evidence, we find that Appellant provided, in good faith, the Certificate of Insurance to prove that it had such coverage to the general contractor, Collins and Arnold Construction Company and that Appellant also reasonably relied upon the same certificate of insurance to its detriment and prejudice.
9. Based on the greater weight of the evidence, we find that Appellant acted in conformance with its usual business practice and custom in dealing with the agent and Amguard as it relates to acquiring and proving Workers' Compensation coverage.
10. Based on the greater weight of the evidence, we find that Amguard's agent and servant, Carley, assured the agent that South Carolina was to be added to Appellant's workers' Compensation policy.

FULL PANEL'S CONCLUSIONS OF LAW

1. "The essential elements of equitable estoppel are: (1) ignorance of the party invoking it of the truth as to the facts in question; (2) representations or conduct of the party estopped which mislead; (3) reliance upon such representations of conduct; and (4) prejudicial change of position as the result of such reliance." Pitts v. New York Life Insurance

Company, 247 S.C. 552, 148 S.E. 2d, page 371; Crescent Co. Of Spartanburg, Inc. V. Insurance Co. Of North America, 266 S.C. 598, 225 S.E.2d 656 (1976). Equitable and legal principles and doctrines prevent Amguard from denying the very coverage it assured the agent and, by way of the agent, Appellant, that all necessary coverage was in place and effective before Mr. Felder was injured.

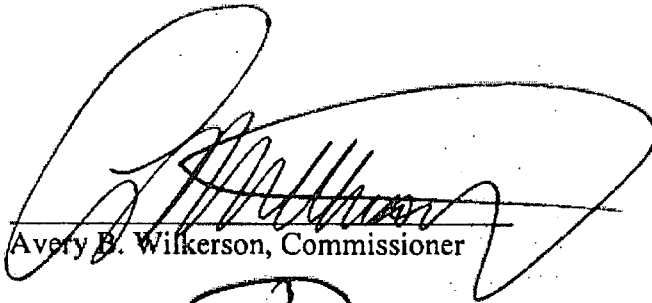
2. The usual "customs, practices, usages and terminology as generally understood in the particular trade or business" (of being a masonry contractor trying its best to obtain and prove that it had all required workers' compensation insurance coverage for South Carolina and all other states it performed masonry work in: (Hawkins v. Greenwood Dev. Corp, 328 S.C. 585 at 592, 493 S.E. 2d 875 at 878 (Ct. App. 1997; Canal Ins Co v. National House Movers, LLC. 414 S.C. 255, 777 S.E. 2d 418 (2015))). Central Masonry acted reasonably and in accordance with the customary business practices it has always used in dealing with its agent and Amguard for assuring itself and others that it had all required workers' compensation coverage. It followed the same procedures (as did the agent) as was always done in obtaining proof and verification of workers' compensation coverage.

ORDER

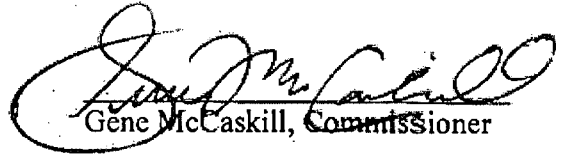
IT IS THEREFORE ORDERED by the Appellate Panel of the Full Commission that the Decision and Order of the Single Commissioner is Reversed as set forth above and

IT IS HEREBY ORDERED THAT Amguard Insurance Co. is required by the to provide coverage for Mr. Felder's accident and to pay, in full, that award.

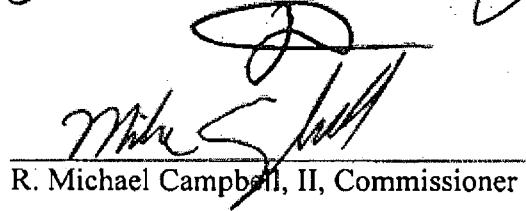
AND IT IS SO ORDERED.



Avery B. Wilkerson, Commissioner



Gene McCaskill, Commissioner



R. Michael Campbell, II, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on April 17, 2018