THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Commissioner
R. Michael Campbell, II, Commissioner
Gene McCaskill, Commissioner

SCWCC File No. 1521141

Appellate Case No.: 2018-000939

Calvin Felder, Claimant

v.

Central Masonry, Inc. & Arnold Construction Co., Employer, AmGuard Insurance Co./Old Republic Insurance Co. and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co., is the Appellant and Central Masonry, Inc. and South Carolina Uninsured Employers Fund are the Respondents.

FINAL BRIEF OF RESPONDENT, CENTRAL MASONRY, INC.

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STATEMENT OF ISSUES ON APPEAL

1. Should not AmGuard Insurance Company be required to furnish coverage and be responsible for the award made to the Employee/Claimant in this case? (Responding to all three issues raised by Respondent in its Brief)

STATEMENT OF THE CASE

Respondent is a Georgia corporation specializing in masonry work. In August, 2015, Respondent expanded its operations into South Carolina. Before beginning any work in South Carolina, Respondent contacted the agent, Lloyd Pro Group ("agent") and informed the agent of its plans and the need for a South Carolina Workers' Compensation coverage. Respondent also informed the agent it would need proof of insurance to provide to the general contractor of the South Carolina jobs (Collins & Arnold Construction Co.). Respondent was assured by the agent "Okay, I just requested South Carolina be added to the workers' compensation, and the waivers be processed. We should be all good at this point." (Record on Appeal Page 385). This representation was made after email discussions about expected payroll and job locations. Central Masonry, Inc. anticipated that one job would require its own workers and that in excess of $10,000.00 in payroll would be used in completing that job. Two other anticipated jobs were expected to use only independent contract workers from other companies. Those other companies possessed their own workers' comp insurance coverage. Central Masonry, Inc. would have its own supervisors at the South Carolina job sites.

The agent then issued for delivery to Collins & Arnold Construction Co. three (3) standard certificates of insurance on the standard ACORD form (Record on Appeal Pages 198 - 201, 208 - 209). There was a Certificate issued for each of the three (3) jobs Respondent was doing in South Carolina.

The agent had, supposedly, successfully placed the insurance with Appellant, AmGuard

Insurance Co.

Respondent had already previously been insured for workers' compensation coverage by Appellant Georgia and North Carolina. The procedure followed in obtaining certificates of coverage in those states was exactly that which was followed in this case. All parties admit there was workers' compensation in affect through Appellant, AmGuard Insurance Co., in Georgia and North Carolina during the relevant period of time. Nothing in the record suggests that a different procedure should have been followed.

Appellant invited Respondent to rely upon the agent to provide certificates of insurance such as those submitted to Collins & Arnold Construction Co. This invitation is found in Appellant's policy. On the first page of the AmGuard policy is found the following language:

> "**To request Certificates of Insurance:**
>
> If you are represented by an agency, they can provide you with the certificates you need. Otherwise, you can either fax us at **1-570-823-2059** or call our **Customer Service Department** at **1-800-673-2465**. Either way, be prepared to provide the company name, address, fax number and contact person of the entity requesting the certificate." (Record on Appeal Page 267).

Respondent complied with this procedure suggested by Appellant and received the certificates of insurance from the agent, Lloyd Pro Group. There was also a phone conversation between the agent and Appellant"s representative, "Carley", which occurred on or about September 5, 2015. Both a transcript and audio recording of that conversation should be part of the Record on Appeal. (Record on Appeal, Pages 184 - 189; 390; (CD, phone call recording). Both were presented to the workers' compensation Commission its for use in deciding this case.

In that same phone conversation, the AmGuard representative said "Now, I'm going to add South Carolina to the policy..." (Record on Appeal Page 185). The AmGuard representative was also advised that at least one of the South Carolina jobs would use Central Masonry, Inc.

employees and was expected to have payroll in excess of $10,000.00. (Record on Appeal Page 185). There were two other jobs which anticipated using only a subcontractor's employees and no direct employees of Respondent. One of those jobs did, in fact, use only a subcontractor's workmen. The other job, the "Kroger job" on which Claimant was injured, ended up requiring Central Masonry, Inc. employees because, in the fall of 2015, South Carolina unexpectedly experienced the "1,000-year flood", and construction progress fell behind. Mr. Felder was one of those direct employees of Respondent (Record on Appeal Pages 151 - 152).

There were some comments by Carley during a phone conversation to the effect that she "wouldn't" [get coverage for South Carolina] "if it's not our actual payroll" [bracketed language supplied] (Record on Appeal Page 188). However, Carley never made it unequivocally clear that coverage would not be afforded after initially saying that South Carolina would be added to the policy. Carley was also made aware that at least one of the jobs was to have Central Masonry, Inc. payroll employees working in South Carolina. (Record on Appeal Pages 185 - 187).

Respondent was not aware of the existence of this telephone conversation and/or its contents until after all the hearings in this case had been completed. Respondent's witness, owner Max Gallardo, testified that Respondent customarily would not be allowed to start any work for Collins & Arnold or any other general contractor without proving it had "the proper coverage", especially workers' compensation coverage. (Record on Appeal Page 149). This is a customary practice in the construction industry. The necessary proof was the certificate of insurance on the ACORD form. (Record on Appeal Pages 198 - 201; 208 - 209).

Respondent relied upon the certificate issued by the agent and so did Collins & Arnold Construction Co.

ARGUMENT

"... [W]hen there is a pending employee claim for compensation, the exclusive jurisdiction for determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is the workers' compensation Commission." *Labouseur v. Harleyville Mut. Ins. Co.*, 302 S.C. 540, 397 S.E. 2d 526 (1990).

"The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 619, 611 S.E. 2d 297, 300 (Ct. App. 2005). "In an appeal from the [Appellate Panel], neither this court nor the circuit court may substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E. 2d 551, 552 (Ct. App. 2004). "Any review of the [Appellate Panel's] factual findings is governed by the substantial evidence standard." id. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole. **335 would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Liberty Mut. Ins.*, 363 S.C. at 620, 611 S.E. 2d at 300. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Id." *Jeffrey v. Sunshine Recycling*, 388 S.C. 174, 687 S.E. 2d 332 (2009).

"Furthermore, workers' compensation statutes and regulations should be liberally construed in favor of finding coverage and the Appellate Panel should be given great deference in determining coverage. *Earl v. HTH Assoc., Inc./Ace Usa Insurance Col, of N. Am.*, 368 S.C. 76, 81, 627 S.E. 2d 760, 762 (Ct. App. 2016)." *Jeffrey v. Sunshine Recycling* 386 S.C. 174, 687 S.E.

2d 332 (2000).

"An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Williams v. Government Employees Ins. Co.* (GEICO), 409 S.C. 586, 594, 762 S.E. 2d 705, 709 (2014) (citing *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E. 2d 484 (2008)). "Where the contract's language is clear and unambiguous, the court alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E. 2d 571, 574 (2009). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E. 2d 818, 819 (1977), *First National Bank of S.C. v. U.S.F. & G. Co.*, 373 F. Supp. 239 [D.C. S.C. 1974] *Blanton v. Nationwide Mutual Ins. Co.*, 247 S.C. 148, 146 S.E. 2d 156 (1966); 5 Corbin on Contracts, Section 1037.

The Courts must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer, *Stringer v. State Farm Mut. Auto Ins. Co.*, 386 S.C. 188, 687 S.E. 2d 58 (Ct. App. 2009) *American Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 663 S.E. 2d 492 (2008).

"A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *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).

Equity doctrines and principles apply to the determination of contract issues. *Ingram v.*

Kasey and Associates, 340 S.C. 98, 531 S.E. 2d 287 (2000). These include "(1) equity regards as done what ought to be done; (2) equity looks to intent, rather than to form;...[(3)]equity imputes an intention to fulfill an obligation; [(4)] equity will not suffer a wrong without a remedy...." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E. 2d 35 (2013).

"The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. *Fochtman v. Clanton's Auto Auction Sales*, 233 S.C. 581, 106 S.E. 2d 272 (1958) supra. See generally, West's General Digest, Principal & Agent, Key #9." *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E. 2d 424 (1982).

"A true agency relationship may be established by showing evidence of apparent or implied authority, even where the parties have entered an agreement to the contrary. *Burriss v. Texaco, Inc.*, 361 F.2d 169 (4th Cir. 1966); *Hubbard v. Rowe, et al.*, 192 S.C. 12, 5 S.E. 2d 187 (1939). *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E. 2d 424 (1982).

No one has alleged or proven that Central Masonry, Inc. did, 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." *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). Respondent's business is that of 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 in which it performed masonry work. Central Masonry does not claim to be expert in the law or the insurance business. The contract

of insurance it had with Appellant, Amguard Insurance Company, for South Carolina and other states clearly and unambiguously invites Respondent, first, to rely on the agent to obtain proof of insurance. This, it did.

Appellant created a situation where Respondent was encouraged to rely upon the Certificates of coverage issued by the agent and to have others to rely upon them as well. Appellant had to know this reliance would include Respondent not seeking the required coverage elsewhere. Knowing this, Appellant did not inform the agent or Respondent that it was not affording coverage until after the Claimant was injured. The Lloyd Pro Group was clothed by Appellant with the ostensible authority to issue Certificates of insurance to respondent and general contractors under circumstances such that Appellant had to know these certificates would be relied upon. Appellant should not be allowed to deny coverage when detrimental reliance on those certificates has been so clearly demonstrated.

The September 5, 2015 phone call between "Carley" and Patrick (Record on Appeal Page 185) 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..." (Record on Appeal Page 185).

Although the record is clear that there was going to be some payroll for the South Carolina jobs, and that this fact was known both to the agent and Amguard Insurance Company, Appellant erroneously seeks to rely upon an e-mail from a Ms. Dunn dated January 15, 2016 (Record on Appeal Page 367) that wrongly (and untruthfully) stated the agent was advised there would be no payroll on any of the jobs. The phone conversation in the record, which occurred on or about September 5, 2015, between the agent, Patrick and the Amguard representative, Carley, bears stark witness to the error and/or falseness of Ms. Dunn's statement. (Record on Appeal

Page 185).

Without doubt, worker's compensation coverage should have been added to Central Masonry's policy. If more payroll was payed than was initially anticipated and estimated, then, in accordance with the "customs, practices, usages and terminology as generally understood in the particular trade or business...", *Hawkins v. Greenwood Dev. Corp.*, 328 S.C.585 at 592, 493 S.E. 2d 875 at 878 (Ct. App. 1997), *Canal Insurance Co. v. National House Movers*, LLC, 414 S.C. 255, 777 S.E. 2d 418 (2015) that fact would have been caught in an audit and premium adjustments would have been made. (Record on Appeal Pages 158; Pages 93 - 96).

Our Supreme Court has recognized that, despite other evidence to the contrary, the scope of risk under an insurance policy may be extended by estoppel if the insurer has misled the insured into believing the particular risk is within the coverage. *Crescent Company of Spartanburg, Inc. v. Insurance Company of North America*, 266 S.C. 598, 225 S.E. 2d 656 (1976); *Spencer v. Republic National Life Insurance Company*, 243 S.C. 317, 133 S.E. 2d 826 (1963); *Pitts v. New York Life Insurance Company*, 247 S.C. 545, 148 S.E. 2d 369 (1966); *Standard Fire Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 392 S.E. 2d 460 (1990). "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).

Appellant has made a great deal about the issue of whose agent Lloyd Pro Group was. Respondent submits that the contractual policy of insurance designated the agent as Appellant's

agent concerning the issuance of Certificates of Insurance. Respondent would also point out that, if Lloyd was Respondent's agent, then AmGuard's representative, "Carley," misrepresented the fact that South Carolina would be added to Respondent's policy just as effectively as if that misrepresentation were made directly to Respondent.

Here there can be no question but that Central Masonry was, at all times relevant, ignorant of the fact that, at the time of Mr. Felder's injury, Appellant would deny that it would provide the promised coverage. Respondent was misled by the actions of Amguard into believing it was covered by Workers' Compensation insurance in South Carolina. Appellant's representative confirmed to the agent that South Carolina would be added to Respondent's policy and also in the policy expressly authorizing the agent to issue Certificates of insurance certifying that workers' compensation coverage was in effect.

If, in fact, there was no coverage, neither the agent nor Amguard took any steps to advise Appellant of that fact after the September, 2015 phone call between the agent and the Amguard representative before Mr. Felder's injury. Both the agent and Amguard represented, by the standard Certificate of Insurance provided by the agent, in accordance with the Amguard policy language that Central Masonry had South Carolina worker's compensation coverage. If it is assumed that Amguard never provided the requested and legally required coverage, only it was aware of that fact and only it is to blame for not providing the requested coverage and charging a premium for the required coverage. Nowhere in the record is there any suggestions that Appellant or its representative, Carley, were asked for any opinion about whether workers' compensation was a good idea under the circumstances. Appellant was only asked to provide such coverage. Their opinions do not matter in the slightest as to what should be done in this case. It is also quite clear that Central Masonry relied upon the representation and conduct of the

[1]agent and Amguard indicating that it did have such coverage to its prejudice and detriment.

Appellant has the gall to try to claim that Respondent, Central Masonry, Inc. is, somehow guilty of "unclean hands" by cherry picking facts from the timeline of events in this case to try to claim the agent knew there was no coverage despite the phone call between the AmGuard representative, "Carley", and the agent. As stated by Appellant on Page 19 of its brief, "...Central [Respondent] was clearly ignorant..." of any representations of the Agent (or AmGuard, for that matter). (Bracketed language supplied) Appellant, in its brief, even refers to "[T]he vagueness of this conversation..." The entity which bore the duty to speak clearly was Appellant. This, Appellant admits, it did not do. Yet, somehow, Appellant argues Respondent is guilty of unclean hands. Respondent, Central Masonry, Inc., never knew of the existence of the phone call until after the hearings in this case were concluded.[1]

Respondent provided, in good faith, the Certificate of Insurance to prove that it had the required coverage to the general contractor, Collins and Arnold Construction Company. The Commissioner found that it was reasonable for Collins and Arnold Construction Company to rely upon that representation that Respondent had the required coverage to its detriment and prejudice. This Court should find that Respondent also reasonably relied upon the same certificate of insurance to its detriment and prejudice. Respondent acted in conformance with its usual practices and customs in acquiring and proving Workers' Compensation coverage for the state of South Carolina. Appellant's representative, Carley, assured the agent that South Carolina would be added to Respondent's workers' compensation policy.

The South Carolina Workers' Compensation Commission Appellate Panel found facts

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[1]Ironically, Appellant never revealed the existence of this taped phone conversation until after the hearings even thought it possessed a copy of it before the hearings occurred.

which support the determination that Appellant must be responsible for Claimant's award. Those factual findings are supported by substantial evidence. Respondent, Central Masonry, Inc. disagrees with Appellant's statement on Page 8 of its brief that; "Pursuant to these authorities, this Court owes no deference to the Commission's factual finding regarding insurance coverage..."

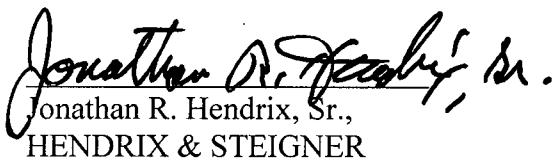
Appellant should certainly be found to be estopped to deny workers' compensation coverage to Respondent for Mr. Felder's injury. Equitable and legal principles and doctrines must prevent Amguard from denying the very coverage it assured the agent and, by way of the agent, Respondent, was in place and effective at the time Mr. Felder was injured. Appellant seeks to avoid this responsibility on the basis of a tortured and hyper-technical twisting of the facts and legal principles. This Court should not permit that tactic to succeed.

CONCLUSION

Respondent, Central Masonry acted reasonably and in accordance with the customary business practices it has always used in dealing with its agent and Amguard when it obtained coverage and proof of insurance to assure itself and others that it had all the required South Carolina workers' compensation insurance. It followed the same procedures (as did the agent) as was always done in obtaining proof and verification of workers' compensation coverage. The agent certainly had apparent authority to issue the Certificate based upon the policy language and the past dealings between Central Masonry, Inc., the agent and Appellant. It should be concluded that, either the policy clearly and unambiguously authorized the agent to provide proof of insurance which could be relied upon and bind the insurer or, if the policy is ambiguous in that regard, it must be construed in favor of Respondent with the same result.

The certificate of insurance was a promise by the agent and Appellant that coverage was

there, if needed. Amguard has gone to great lengths to try and avoid honoring this promise. This must not be allowed to occur. Conduct which is rewarded will be repeated. It is submitted by Respondent that what happened here is not conduct which should be encouraged or allowed to be repeated. Appellant should be required by this Court to provide coverage for Mr. Felder's accident and to pay, in full, that award by affirming the Award of the Workers' Compensation Appellate Panel.



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 21, 2018.

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