THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Circuit Court Judge

Case No. 2013-000575

Artemio Alvarez v. Quality HR Services, et.al.
W.C.C. File No.: X030301
William Brockman v. Quality HR Services, et.al.
W.C.C. File No.: X030600
Martha Burke v. Quality HR Services, et.al.
W.C.C. File No.: X030681
Lucille Dwight v. Quality HR Services, et.al.
W.C.C. File No.: 0326238
Robert Hunter v. Quality HR Services, et.al.
W.C.C. File No.: X040142
Tammy Miller v. Quality HR Services, et.al.
W.C.C. File No.: X040301
Patricia Wade-Portee v. Quality HR Services, et.al.
W.C.C. File No.: 0907616
Jessie Pringle v. Quality HR Services, et.al.
W.C.C. File No.: 0327062
Steven Cameron v. Quality HR Services, et.al.
W.C.C. File No.: 0316901
Ruth Harmon v. Spectrum HR, et.al
W.C.C. File No: 040613.....Respondents,

v.

South Carolina Property and Casualty
Insurance Guaranty Association.....Appellant.

APPELLANT'S FINAL BRIEF

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October 4, 2013

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STATEMENT OF THE CASE

The matters subject to this appeal are similarly situated cases in regard to workers' compensation insurance coverage. Two professional employer organizations (PEOs) known as Quality HR Services (hereinafter "Quality HR") and Spectrum HR allege that they and their client companies maintained valid workers' compensation insurance coverage with Realm National Insurance Company (hereinafter "Realm") at the time of the subject accidents associated with the various claims.[1] These matters and two other matters were consolidated by the Workers' Compensation Commission (hereinafter "Commission") for a joint hearing to determine coverage issues relative to Quality HR, Spectrum HR and the various client companies.[2] The joint coverage hearing was held on June 26 and 27, 2008 in Columbia, South Carolina before Commissioner Andrea C. Roche. Appellant South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "SCPCIGA") is a party to this proceeding as a result of the liquidation of Realm by Order of the State of the New York on June 15, 2005. (R. pp. 1325- 1331). At issue was whether Spectrum HR, Quality HR, and/or any of their respective client companies maintained workers' compensation insurance coverage with Realm at the time of the subject accidents associated with the various claims and whether the various claims

[1] In regard to the Steven Cameron matter, the client company Keith's Welding maintained a separate workers' compensation insurance policy with Capital City Insurance Company at the time of the subject accident relative to that claim.

[2] In regard to the Joseph Coonce v. Spectrum HR Services, et.al. matter (W.C.C. File No. 0408190), there was no appeal by any party to that case from the Single Commissioner's holding that neither Spectrum HR or its client company Fleet Source were insured at the time in question and a subsequent Order of Commissioner Andrea C. Roche in connection with the substantive Forms 50 and 51 issues confirmed dismissal of South Carolina Property and Casualty Insurance Guaranty Association as a party to that claim. Subsequent to the coverage hearing but prior to issuance of a Decision and Order, the Commission approved an Agreement and Final Release (i.e. Clincher) in the Arthur Mobley v. Quality HR Services, et.al. matter (W.C.C. File No. 0406356); thereby leaving the Commission without subject matter jurisdiction to determine the coverage issues in that claim. *See* Labouseur v. Harleysville Mutual Insurance Company, 302 S.C. 540, 397 SE2d 526 (1990).

constitute "covered claims" under the South Carolina Property and Casualty Insurance Guaranty Association Act, §38-31-10 et.seq. of the South Carolina Code (1976, as amended) (hereinafter "Guaranty Act").

Central to disposition of the issues involved in this appeal is an understanding of the relationship between various PEOs, specifically including Spectrum HR and Quality HR, and an entity known as American Insurance Managers, Inc., and its affiliates and representatives (hereinafter collectively referred to as "AIM") and AIM's relationship with Realm and Realm's parent companies (AlphaStar Insurance Group, Ltd., and Stirling Cooke North American Holdings, Inc. hereinafter referred to collectively and individually as "Realm's parent companies"). Realm was an insurance company domiciled in the State of New York. In accordance with New York's insurance law, the New York Superintendant of Insurance sought and obtained an Order of the State Supreme Court, New York County, dated June 15, 2005 declaring that Realm was insolvent and appointing the New York Superintendent of Insurance as liquidator of Realm with directions to take possession of Realm's assets and property and to liquidate Realm's affairs for the benefit of its policyholders, creditors and investors, and resolve liabilities and claims against Realm's estate. (R. pp. 1325-1331). The New York Superintendent's duties in that regard are carried out by the New York Liquidation Bureau.

AIM, a Georgia corporation, and its President and CEO, David Dennett-Smith, have a troubled history. Dennett-Smith is a British citizen and former member of a Lloyd's of London syndicate with outstanding dues of 300,000 pounds. (R. pp. 165-166, H.T., p. 27, line 4-p. 28, line 4; R. p. 203, H.T., p. 65, lines 3-5). Dennett-Smith came to

the United States in 1981 and located in Atlanta where he, along with various partners, formed and operated AIM. (R. p. 168, H.T., p. 30, lines 20-24). AIM is not an insurance carrier but has functioned in various capacities relative to the insurance industry. AIM previously owned and served as managing general agent for an insurance carrier known as Georgia General. (R. pp. 205-206, H.T., p. 67, line 10-p. 68, line 8). Georgia General was ordered liquidated by the State of Georgia in 1992 as a result of its insolvent status and at a time when AIM was serving as its managing general agent and owner. (R. p. 206, H.T., p. 68, lines 9-22). Following the Georgia General liquidation and through 1999, AIM's only business activities involved medical stock loss. (R. pp. 206-207, H.T., p. 68, line 23-p. 69, line 1). In 1999, a dispute arose between Dennett-Smith and his various partners at that time which resulted in Dennett-Smith being removed from his position with AIM. (R. p. 207, H.T., p. 69, lines 5-14). As a result of litigation initiated by Dennett-Smith, he returned to his position with AIM in approximately 2001. (R. p. 207, H.T., p. 69, lines 5-22; R. p. 209, H.T., p. 71, lines 11-15). When Dennett-Smith returned to his position with AIM in 2001; it had no employees, no money and no business. (R. p. 211, H.T., p. 73, lines 4-15). AIM has not maintained any errors and omissions coverage or other type of professional liability insurance coverage since 1998. (R. p. 210, H.T., p. 72, lines 12-18). AIM has not maintained an office since 2004. (R. p. 292, H.T., p. 154, lines 12-17). At the time of the coverage hearing, AIM's corporate status in South Carolina had been in forfeiture for years and had been recently revoked in Georgia. (R. p. 292, H.T., p. 154, lines 18-24).

During a period of time inclusive of 2001 through 2003, it was difficult for PEOs to obtain workers' compensation insurance coverage in the voluntary market. (R. p. 167,

H.T., p. 29, lines 11-23). The assigned risk pool resulted in higher workers' compensation insurance costs which was of critical significance to the competitiveness of a PEO. In view of these market conditions, AIM embarked on a plan to create a workers' compensation insurance program for PEOs that would be affordable for the PEOs and profitable for AIM. (R. p. 168, H.T., p. 30, lines 3-10). In addition to Dennett-Smith, other individuals with AIM involved in the program whose testimony is included in the record were Bruce Holley, Vice President of Underwriting, and Brian Imperiale, Financial Director/Controller and subsequently Chief Financial Officer. (R. p. 173, H.T., p. 35, lines 3-17; R. p. 197, H.T., p. 59, lines 18-25). Various issues relative to the formation of such a program, including re-insurance and the participation of a licensed insurer to serve as the issuing carrier, were explored. (R. pp. 214-220, H.T., p. 76, line 24-p. 82, line 12). In connection with its efforts to find an issuing carrier for the program, Realm was identified by AIM, through an intermediary, as a licensed insurance carrier that could be purchased. (R. p. 168, H.T., p. 30, lines 11-16).

In order to effectuate the purchase of Realm, AIM further developed and marketed to PEOs, a program whereby AIM and the PEOs would form a company known as Glastonbury which would purchase and own Realm. (R. p. 182, H.T., p. 44, lines 6-16). To participate in this program, the PEOs were required to make substantial capital contributions and premium payments, all of which were paid by the PEOs to AIM. (R. pp. 181-182, H.T., p. 43, line 12-p. 44, line 2). The capital contribution and participation in the formation of Glastonbury to purchase and own Realm were requirements for a PEO to obtain workers' compensation insurance in the program being developed by AIM. (R. pp. 181-182, H.T., p. 43, line 12- p. 44, line 2). The program was never presented to the

South Carolina Department of Insurance for approval. (R. p. 230, H.T., p. 92, lines 12-24). The marketing of this program to the PEOs and the collection of capital contribution funds and premiums was initiated by AIM prior to any formal stock purchase agreement with Realm and/or its parent companies or any closing in connection with such a stock purchase agreement. (R. pp. 230-233, H.T., p. 92, line 25-p. 95, line 17).

On October 2, 2002, AIM entered into a non-binding letter of intent with Realm's parent companies to negotiate the purchase of all the outstanding stock of Realm subject to the approval of regulatory authorities having jurisdiction over Realm. (R. pp. 2014-2017). In connection therewith, AIM agreed to make an interim loan of up to three and one-half (3.5) million dollars to Realm's parent companies pending regulatory approval and final agreement and documentation of the Realm acquisition. (R. pp. 182-183, H.T., p. 44, line 20-p. 45, line 7; R. p. 227, H.T., p. 89, lines 6-12; R. p. 232, H.T., p. 94, lines 11-19). The contemplated purchase price for Realm's stock was set at twelve (12) million dollars and if the agreement was finalized, the loan would be treated as part of AIM's payment for the Realm stock. (R. p. 223, H.T., p. 85, lines 3-8).

Prior to the negotiation of any further terms associated with the proposed transaction and prior to any regulatory approval for the transaction, AIM along with various subproducers, began issuing unauthorized Certificates of Insurance in late 2002. (R. pp. 2018-2022; R. p. 190, H.T., p. 52, lines 14-17; R. p. 233, H.T., p. 95, lines 13-17). Realm denied that AIM was ever authorized to issue insurance certificates using Realm's name. (R. p. 238, H.T., p. 100, lines 6-14). There was no executed agency agreement between Realm and AIM. (R. p. 235, H.T., p. 97, lines 7-12). Moreover, various documents related to the transaction, including the letter of intent and an eventual stock

purchase agreement entered in March 2003, contained various prohibitions on AIM's ability to write insurance and provided that no insurance could be written by AIM until such time as regulatory approval was obtained and which never occurred. (R. pp. 2014-2017; R. pp. 1332-1400). Neither AIM, any individual affiliated with AIM or any of AIM's subproducers, including U.S. Insurance Group, were ever appointed by Realm as an authorized agent to write and bind coverage in the State of South Carolina. (R. p. 172, H.T., p. 34, lines 12-19; R. p. 175, H.T., p. 37, lines 15-17).

Following the issuance of numerous unauthorized Certificates of Insurance issued in Realm's name by AIM and various subproducers including U.S. Insurance Group, Realm provided written notice to various State regulators (including the Director of the South Carolina Department of Insurance and Garry Smith, Director of the South Carolina Workers' Compensation Commission's Coverage and Compliance Department) and PEOs (including Quality HR and Spectrum HR) that the certificates were invalid and that Realm was not providing coverage to the PEOs or their client companies. (R. pp. 2018-2022; R. pp. 986-999; R. pp. 2025-2026; R. p. 177, H.T., p. 39, lines 3-12; R. p. 237, H.T., p. 99, lines 21-25; R. pp. 238-239, H.T., p. 100, line 15-p. 101, line 1). AIM notified the PEOs of the dispute in writing and advised the PEOs to either escrow premiums to pay claims, file a declaratory judgment action and/or obtain replacement coverage. (R. p. 239, H.T., p. 101, lines 2-14; R. p. 240, H.T., p. 102, lines 5-12). Realm's parent companies and Realm filed suit against AIM in the United States District Court, Southern District of New York seeking a declaratory judgment that AIM was not authorized to bind insurance on behalf of Realm and claiming damages and other relief. (R. p. 178, H.T., p. 40, lines 6-16; R. pp. 1459-1589). The Court directed the parties to

engage in settlement negotiations and as a result, the parties entered into a stock purchase agreement for the sale of Realm to AIM on March 21, 2003. (R. pp. 1332-1400; R. p. 257, H.T., p. 119, lines 6-9). AIM's underwriting authority was specifically addressed in the stock purchase agreement providing that such was contingent upon regulatory approval and a first closing.[3] (R. pp. 1332-1400).

AIM subsequently brought suit in the Delaware Chancery Court to foreclose on the stock given as security on the interim loan to Realm's parent companies. (R. p. 180, H.T., p. 42, lines 8-17; R. p. 258, H.T., p. 120, lines 19-25). Thereafter, Realm and Realm's parent companies voluntarily dismissed the pending District Court action and on December 15, 2003, Realm's parent companies filed for Bankruptcy Court protection in the United States Bankruptcy Court for the Southern District of New York. (R. pp. 180-181, H.T. p. 42, line 12-p. 43, line 6; R. p. 259, H.T., p. 121, lines 1-4). Despite the automatic stay associated with the Bankruptcy Court filing, AIM commenced another action in the United States District Court, Southern District of New York on January 12, 2004 making allegations of fraud against the individual officers and directors of Realm and Realm's parent companies and seeking a declaratory judgment of validity of the coverage AIM had issued purportedly on behalf of Realm. (R. pp. 263-269, H.T. p. 125, line 20-p. 131, line 17; R. pp. 1459-1588). On May 3, 2004, the Bankruptcy Court stayed AIM's action filed in District Court and consolidated into the Bankruptcy Court's adversary proceedings AIM's action filed in Federal District Court along with various

[3] As set forth above, no such first closing ever occurred except to the extent that in connection with subsequent Bankruptcy Court proceedings, AIM's claims against Realm's parent companies were resolved in August 2006 when the bankruptcy trustee assigned to AIM, Realm's parent companies' stock in Realm as satisfaction of AIM's claims against Realm's parent companies and said assignment was approved by Order of the Bankruptcy Court in August 2006. It is noted that to the extent such an assignment is considered a closing, such occurred after the liquidation of Realm in June 2005 and well after the period of time during which Quality HR, Spectrum HR and their respective client companies purport to have had workers' compensation coverage in effect in South Carolina through Realm.

lawsuits filed against Realm and AIM by persons to whom coverage had purportedly been sold by AIM. (R. pp. 263-269, H.T. p. 125, line 20- p. 131, line 17; R. pp. 1014-1016). In the meantime, various states determined that AIM did not have authority to bind insurance coverage on behalf of Realm. (R. pp. 249-253, H.T., p. 111, line 16-p. 115, line 16). Similar findings were made by the Missouri Attorney General and Texas Department of Insurance. (R. pp. 1401-1433).

Following the Order of Liquidation relative to Realm entered by the State of New York in June 2005, the Superintendent of Insurance of the State of New York, in his capacity as liquidator of Realm, filed a Motion to Dismiss from the Bankruptcy Court proceedings, various claims including those alleged by Realm against AIM and AIM against Realm. (R. pp. 1206-1213, 1035-1075). On May 4, 2006, Judge Stuart M. Bernstein of the United States Bankruptcy Court issued an Order for dismissal relative to various claims, including those alleged by Realm against AIM and AIM against Realm, from the Bankruptcy Court proceedings. (R. pp. 1032-1034; R. pp. 314-315, H.T. p. 176, line 18-p. 177, line 5). This Order effectively divorced the various claims between Realm and AIM from those associated with claims as between AIM and Realm's parent companies, which remained under the jurisdiction of the Bankruptcy Court. As set forth in footnote No. 3 above, the Bankruptcy Court subsequently approved the assignment of Realm's parent companies' stock in Realm to AIM in August 2006 as satisfaction of AIM's claims against Realm's parent companies. (R. pp. 1014-1016).

Also in conjunction with the Bankruptcy Court proceedings, AIM sought to have reference to its claims against the various individual directors and officers of Realm and Realm's parent companies removed from the Bankruptcy Court proceedings. The

Bankruptcy Court granted AIM's requested relief in that regard and AIM reconstituted its prior complaint in Federal District Court alleging, *inter alia*, essentially the same causes of action set forth in the District Court action it filed in January 2004. (R. pp. 1459-1588). The reconstituted complaint also named the New York Superintendent of Insurance and New York Liquidation Bureau as Defendants and sought a declaration that the coverage AIM purportedly bound with Realm on behalf of the various PEOs was effective. (R. pp. 1459-1588). That action was subsequently dismissed by consent pursuant to a Stipulation and Order filed on June 16, 2008 that was executed by the attorneys for the various parties, including attorney Stanley A. Coburn on behalf of AIM, and approved by U.S. District Judge Richard J. Holwell. (R. pp. 2010-2013). In summary, the various litigation in the United States Bankruptcy Court and District Court for the Southern District of New York did not yield any determination concerning the coverage issue.

Following the coverage hearing and submission of Post-Hearing Briefs by various parties, the Single Commissioner issued her Decision and Order dated April 22, 2009 wherein she made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Because the issues before me are whether Quality and Spectrum and their respective clients had coverage with Realm and who would be responsible for paying on these claims if any benefits are due, I do not reach any other issues in the claims including, but not limited to, compensability, benefits due, and employer/employee relationship. All other issues remaining in the consolidated claims other than the issue before me are preserved.

2. AIM and Alphastar intended to enter into an agreement whereby Alphastar would sell Realm to AIM. There was an intention by both parties that AIM would be a duly authorized agent of Realm during the pendency of the sale. The Letter of Intent provided, however, that Realm would have to enter into a general agency agreement with AIM. Although a general

agency agreement was prepared by Realm, I find Realm did not execute the agreement.

3. Based on the evidence, including the fact that Realm did not execute the agency agreement, I find AIM did not have real authority to issue certificates of insurance in the time preceding the Stock Purchase Agreement. I also find the evidence does not support a finding of apparent authority. Furthermore, I find the evidence does not support a finding that Realm was binding the coverage itself in the time preceding the Stock Purchase Agreement. I find Dennett-Smith's testimony at the hearing on this issue conflicted with positions earlier asserted by AIM in contemporaneous documents.

4. Based on the letters from Mark Sioma, I find Realm disavowed any coverage and considered the certificates of insurance *void ab initio*.

5. Based on the letters from Mark Sioma to Quality, I find Quality was aware of the coverage issue as early as December, 2002. This is not disputed by Quality.

6. I find that after the Realm lawsuit was filed, Realm, Aim, and Alphastar continued to negotiate in an attempt to consummate the sale. As a result, the parties entered into the Stock Purchase Agreement.

7. The Stock Purchase Agreement provided it did "not permit the binding of coverage or issuance of Certificates of Insurance until the First Closing." Therefore, I find the Stock Purchase Agreement did not permit any party, including Realm, to bind coverage or issue Certificates of Insurance for the PEO program until the First Closing. The First Closing as contemplated by the Stock Purchase Agreement never occurred; therefore, pursuant to the Stock Purchase Agreement, no coverage was bound.

8. After the signing of the Stock Purchase Agreement, the e-mails between Realm and AIM reveal both parties were actively involved in underwriting. I find the parties continued to behave as if the sale would occur until AIM filed the Delaware suit and Alphastar filed for bankruptcy. I find the parties behaved as if the PEO program would go forward, and the coverage would be bound back to October 1, 2002 at the time of the First Closing. I do not make any finding as to the actual intent of AIM, Alphastar, or Realm regarding the pending sale. I find Realm actively engaged in underwriting with AIM. Contrary to what was suggested at the hearing, I find Realm was involved in assigning policy numbers. In an e-mail, Roni Zinnert wrote "[i]t appears we have assigned two policy numbers to this one client. See EBB158011 and EBB15863." Also in those e-mails, however, any reference to a client being bound is in

quotes. I do not find these underwriting actions constituted the binding of coverage.

9. Based on the evidence in the record, I find claims from the PEOs were being adjusted and paid. I find that Crawford was adjusting claims for a period of time. The claims were being paid by AIM while the deal was still pending. I find Realm was aware of all this, and based on the e-mails, approved.

10. Pam Evette and David Evette testified at the hearing. I find Pam Evette, in particular, was a credible witness. Based on the testimony of Pam and David Evette, I find that Quality believed it had coverage with Realm. I find Pam Evette was growing uneasy regarding the ongoing dispute between AIM and Realm. I find Pam and David Evette traveled to AIM's offices in Atlanta to address their concerns. Mark Sioma, as President of Realm, represented to Pam David Evette on July 22, 2003 that Quality and its clients had coverage with Realm. I find that Quality relied on these representations of Mark Sioma and did not seek other coverage as a result.

11. I find the South Carolina Department of Consumer Affairs sent a letter dated November 7, 2003 to Quality. In that letter, the Department stated Realm informed them that the certificates were not valid and that Realm denied coverage.

12. I find that Realm, based on the representations of Mark Sioma, is estopped from denying coverage from July 22, 2003, the date of the representations by Sioma until November 7, 2003, the date Quality should have known Sioma's representations were not true. I find Quality was uninsured for any pertinent dates outside July 22, 2003 through November 7, 2003.

13. I find Realm did not bind any coverage of Spectrum or any of its clients. I find neither AIM nor US Insurance Group was authorized to bind coverage for Spectrum or any of its clients. Therefore, I find Spectrum was uninsured during the pertinent time period.

CONCLUSIONS OF LAW

1. Because the issues before me are whether Quality and Spectrum and their respective clients had coverage with Realm and who would be responsible for paying on these claims if any benefits are due, I do not reach any other issues in the claims including, but not limited to, compensability, benefits due, and employer/employee relationship. All other issues remaining in the consolidated claims other than the issue before me are preserved.

2. When there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is in the Workers' Compensation Commission. Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 397 S.E.2d 526 S.C. (1990).

3. Based on the evidence, including the fact that Realm did not execute the agency agreement, I find AIM did not have real authority to issue certificates of insurance in the time preceding the Stock Purchase Agreement.

4. "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." Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). I find the evidence does not support a finding of apparent authority. I find Realm did not lead anyone to believe that AIM was its agent in the time preceding the Stock Purchase Agreement.

5. I find the evidence does not support a finding that Realm was binding the coverage itself in the time preceding the Stock Purchase Agreement.

6. The Stock Purchase Agreement provided it did "not permit the binding of coverage or issuance of Certificates of Insurance until the First Closing." Therefore, I find the Stock Purchase Agreement did not permit any party, including Realm, to bind coverage or issue Certificates of Insurance for the PEO program until the First Closing. The First Closing as contemplated by the Stock Purchase Agreement never occurred; therefore, pursuant to the Stock Purchase Agreement, no coverage was bound.

7. After the Stock Purchase Agreement, the e-mails between Realm and AIM reveal both parties were actively involved in underwriting. I find the parties continued to behave as if the sale would occur up until AIM filed the Delaware suit and Alphastar filed for bankruptcy. I find the parties behaved as if the PEO program would go forward, and the coverage would be bound back to October 1, 2002 at the time of the First Closing. I find Realm actively engaged in underwriting with AIM. Contrary to what was suggested at the hearing, I find Realm was involved in assigning policy numbers. In an e-mail, Roni Zinnert wrote "[i]t appears we have assigned two policy numbers to this one client. See EBB158011 and EBB15863." Also in those e-mails, however, any reference to a client being bound is in quotes. I do not find these underwriting actions constituted the binding of coverage.

8. 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 misled; (3) reliance upon such representations or conduct; and (4) prejudicial change of position as the result of such reliance. Pitts v. New York Life Ins. Co., 247 S.C. 545, 552, 148 S.E.2d 369, 371 (1966). I find that Realm, based on the representations of Mark Sioma, is estopped from denying coverage from July 22, 2003, the date of the representations by Sioma until November 7, 2003, the date Quality should have known Sioma's representations were not true.

9. I find Quality and its clients were not insured by Realm for any pertinent dates outside July 22, 2003 through November 7, 2003.

10. I find Realm did not bind any coverage of Spectrum or any of its clients. I find neither AIM nor US Insurance Group was authorized to bind coverage for Spectrum or any of its clients. Therefore, I find Spectrum and its clients were not insured by Realm during the pertinent time period.

11. I find claims for the period time Realm was estopped from denying coverage are "covered claims" as contemplated in §38-1-20 (sic) and the provisions of the Guaranty Act. I do not reach the issue of whether any of the claims are time barred pursuant to §38-1-60(2) (sic), as I find this issue more appropriately handled on a case by case basis.

(R. pp. 7- 45).

Based on these findings and conclusions, the Single Commissioner held that Realm was estopped from denying coverage for the Quality HR claims with dates of accident from July 22, 2003 through November 7, 2003; that Quality HR and its clients were not insured for the claims with dates of accident outside July 22, 2003 through November 7, 2003; that Spectrum HR and its clients were not insured by Realm on any of the Spectrum HR claims; that Quality HR claims with dates of accident from July 22, 2003 until November 7, 2003 are "covered claims" as contemplated in §38-1-20 (sic) and the provisions of the Guaranty Act (i.e. the Brockman, Burke, Cameron, Hunter, and Pringle matters). (R. pp. 7-45).

Following service of the Single Commissioner's Decision and Order on April 22, 2009, SCPCIGA, South Carolina Uninsured Employers' Fund (hereinafter "SCUEF") and ABC Investments, Inc. (Spectrum HR's client company in connection with the Harmon matter) filed requests for Commission review. Briefs were filed on behalf of SCPCIGA, SCUEF, ABC Investments, Inc. and Quality HR and oral argument was held before a Full Commission Appellate Panel on October 26, 2009. The Appellate Panel issued its Decision and Order dated January 5, 2010 wherein it affirmed the Order of the Single Commissioner in its entirety. (R. pp. 46- 60). From that Order; SCPCIGA, SCUEF and ABC Investments, Inc. appealed to the Court of Common Pleas for Greenville County pursuant to §42-17-60 and §1-23-380 of the South Carolina Code (1976, as amended).[4]

The parties were heard before The Honorable Charles B. Simmons, Jr., Special Circuit Court Judge, on August 18, 2010. The Circuit Court issued an Order dated September 9, 2010 and filed September 13, 2010 remanding the matter to the Commission to specifically answer three questions. Those remand questions were as follows:

1. Because no party directly raised the issue of estoppel, did the determination that Realm National Insurance Company is estopped from denying coverage from July 22, 2003 through November 7, 2003 violate the due process rights of the Guaranty Association?

2. Conclusion of Law #11 concludes the claims from July 22, 2003 to November 7, 2003 were "covered claims" as contemplated by §38-30-20 and the provisions of the Guaranty Act. On remand, the Commission shall make detailed findings of fact and conclusions of

[4] The appeal from the Commission's Final Decision and Order was made to the Circuit Court as a result of the subject accident dates associated with all of the underlying claims being prior to July 1, 2007; therefore, the statutory amendment to §42-17-60 effective July 1, 2007 and providing for direct appeal to the Court of Appeals was not applicable. *See* Pee Dee Regional Transp. V. South Carolina Second Injury Fund, 377 S.C. 60, 650 S.E.2d 464 (2007).

law and explain with certainty and in detail, why the claims are "covered" pursuant to the Guaranty Act, accepting or rejecting the Association's arguments in its brief.

3. In conjunction with Number 2 above, it doesn't appear that the Commission has ever addressed the issue raised by the UEF concerning whether issuing of Certificates of Insurance with policy numbers attached makes the claims "covered" under the Workers' Compensation doctrine of substantial compliance expounded in the brief of the UEF.

(R. pp. 61- 69).

The Appellate Panel issued its Supplemental Order dated August 30, 2012 which addressed the questions on remand.[5]

Concerning the issue of whether SCPCIGA's due process rights were denied by the Commission in disposing of the coverage issues pertinent to five of the Quality HR claims based on equitable estoppel, the Appellate Panel found that this issue was raised prior to the consolidated coverage hearing before the Single Commissioner by SCPCIGA in its Pre-Hearing Brief and in its Position Statement submitted to the Single Commissioner. In response to the Circuit Court's directive for the Commission to make detailed Findings of Fact and Conclusions of Law and explain with certainty and in detail why these five Quality HR claims are "covered" under the Guaranty Act, the Appellate Panel relied on a California Appeals Court opinion to hold that the behavior of Realm's President constitutes an "insurance policy" "issued by an insurer" and that the legislature has made a list of excluded claims but did not exclude claims created by estoppel. In connection with the "substantial compliance" issue raised by SCUEF, the Appellate Panel referenced the applicable South Carolina Court decisions addressing the doctrine of substantial compliance and concluded that such pertains to otherwise exempt employees

[5] This Appellate Panel consisted of Commissioner Derrick Williams and Commissioner Avery Wilkerson. The original Appellate Panel which issued the Commission's Decision and Order dated January 5, 2010 also included Commissioner David Huffstetler who was no longer a member of the Commission.

and/or employers under §42-1-360 of the South Carolina Code (1976, as amended) (and/or its prior versions under South Carolina's predecessor codes) and waiver of those exemptions under §42-1-380 of the South Carolina Code (1976, as amended) (and/or its prior versions under South Carolina's predecessor codes). The Appellate Panel concluded that the doctrine has no bearing on, or applicability to, a determination on whether an employer maintained valid workers' compensation insurance at a particular time in question and, therefore, no bearing on the Commission's prior holdings concerning coverage for Quality HR, Spectrum HR and their respective client companies, or the findings and conclusions in support thereof. (R. pp. 70- 77). Following service of the Appellate Panel's Supplemental Order, the matter was reset for oral argument before Judge Simmons on October 24, 2012.

Before the Circuit Court, SCPCIGA contended that the Commission erred as a matter of law in connection with its findings, conclusions and holding that Realm was estopped from denying coverage for Quality HR and it client companies on claims with dates of accident from July 22, 2003 until November 7, 2003. SCPCIGA also contended that the Commission erred as a matter of law relative to its conclusion and holding that the Quality HR claims with dates of accident from July 22, 2003 through November 7, 2003 are "covered claims" under the Guaranty Act. SCPCIGA further contended that it was denied due process of law as a result of the Commission's decision to dispose of the coverage issues in five of the Quality HR claims based on an estoppel theory of coverage and that the Commission's holding in connection with that issue as set forth in its Supplemental Order was clearly erroneous. SCUEF argued that pursuant to the doctrine of substantial compliance, coverage by Realm should be afforded on all of the claims

subject to the appeal. SCUEF asserted that the issuance of certificates of insurance with policy numbers attached to Quality HR and Spectrum HR reflecting workers' compensation insurance coverage with Realm, and the belief by Quality HR and Spectrum HR that they had secured workers' compensation insurance, effectuated coverage with Realm on the claims subject to the appeal pursuant to the doctrine of substantial compliance. SCUEF also asserted that as a result of the coverage created for Quality HR and Spectrum HR by Realm pursuant to the doctrine of substantial compliance, the claims subject to the appeal should be considered "covered claims" under the Guaranty Act and that SCPCIGA cannot rely upon the fraud of a third party to contest such claims being considered "covered claims" under the Guaranty Act. Moreover, SCUEF asserted that the statutory intent of the Guaranty Act is more applicable to the facts of these matters than the statutory provisions of the Workers' Compensation Act creating SCUEF. ABC Investments, Inc. joined in the position of SCUEF. Quality HR as a participating Respondent also joined in the position of SCUEF.

The Circuit Court issued its initial Order filed February 14, 2013, following which Keith's Welding and Capital City Insurance Company (Quality HR's client company and its carrier in connection with the Cameron matter) filed a Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Thereafter, the Circuit Court issued its Amended Order filed March 11, 2013. The Circuit Court held there was no legal basis for the Commission to have "carved out" or "pro-rated" the claims subject to the appeal as between SCPCIGA and SCUEF and having done so by relying on the doctrine of estoppel constituted an error of law. (R. pp. 102-125). Accordingly, the Circuit Court reversed the Commission's findings, rulings and holding that Realm is

estopped from denying coverage for Quality HR and its client companies on claims with dates of accident from July 22, 2003 until November 7, 2003. In view of that determination, the Circuit Court held that it was unnecessary to address additional assertions of error raised by SCPCIGA in connection with that issue and rendered moot SCPCIGA's contentions that it was denied due process of law and that the Commission erred as a matter of law in holding that the Quality HR claims on which Realm was held to be estopped from denying coverage constituted "covered claims" under the Guaranty Act. (R. pp. 102- 125).

As to the issues raised by SCUEF, the Circuit Court held that the Commission erred as a matter of law in its Supplemental Order dated August 30, 2012 to the extent it concluded and held that the doctrine of substantial compliance has no bearing on, or applicability to, a determination on whether an employer maintained valid workers' compensation insurance at a particular time in question and, therefore, no bearing on the Commission's prior findings, conclusions and holdings concerning coverage for Quality HR, Spectrum HR and their respective client companies. The Circuit Court reversed the Commission's holding in connection with the substantial compliance issue and applied its analysis of the doctrine of substantial compliance to the facts in the matters on appeal. The Circuit Court also made its own findings of fact and concluded that coverage by Realm for Spectrum HR and Quality HR was effectuated. The Circuit Court further held that while the facts of the claims on appeal do not fit squarely within either the statutory provisions establishing SCUEF or SCPCIGA; it was clear that between SCUEF and SCPCIGA, SCPCIGA should provide coverage when looking at the larger purpose of statutory intent. Having concluded that coverage was effectuated for Quality HR and

Spectrum HR pursuant to the doctrine of substantial compliance, the Circuit Court further concluded that such rendered the claims subject to the appeal to be "covered claims" under the Guaranty Act as a matter of law and that AIM, Realm and SCPCIGA are legally precluded from otherwise contesting the same. (R. pp. 102-125). From the Circuit Court's Amended Order filed March 11, 2013, SCPCIGA timely filed and served its Notice of Appeal to this Court.

STANDARD OF REVIEW

The standard of review in an appeal from a final decision of an administrative agency is governed by S.C. Code Ann. §1-23-380(B) (1986, as amended) (commonly known as the Administrative Procedures Act). *See* Pringle v. Builders Transport, Inc., 298 S.C. 494, 381 S.E.2d 731 (1989); *See also* Lark v. Bi Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The Appellate Court can reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *See* Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct.App. 2000); *See also* S.C. Code Ann. §1-23-380(G) (1986, as amended). In considering an appeal from a Decision and Order of the Commission, the Court's role is of an appellate capacity and is limited to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law. *See* Rogers v. Kunja Knitting Mills Co., 312 S.C. 377, 440 S.E.2d 401, re-hearing denied (Ct. App. 1994). In an appeal from the Commission, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is

affected by an error of law. *See* Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct.App. 2000), citing S.C. Code Ann. § 1-23-380(a)(6) (1976, as amended). A decision of the Commission must be affirmed if factual findings are supported by substantial evidence. *See* Stokes v. First National Bank, 306 S.C. 46, 410 S.E.2d 248 (1991). Substantial evidence is that evidence which would require refusal to direct a verdict if the matter were before a jury and is something less than the weight of the evidence. *See* Hoxit v. Michelin Tire Corporation, 304 S.C. 461, 405 S.E.2d 407 (1991). The possibility of drawing two inconsistent conclusions from the evidence does not prevent administrative findings from being supported by substantial evidence. *Id.* If the factual findings of the Commission are supported by substantial evidence, the Commissions' conclusions must be affirmed. *See* Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989).

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN REVERSING THE WORKERS' COMPENSATION COMMISSION'S HOLDING THAT THE DOCTRINE OF SUBSTANTIAL COMPLIANCE HAS NO BEARING ON, OR APPLICABILITY TO, A DETERMINATION ON WHETHER AN EMPLOYER MAINTAINED VALID WORKERS' COMPENSATION INSURANCE AND IN APPLYING SUCH TO ITS ANALYSIS AND HOLDING ON THE ISSUE OF COVERAGE.

The doctrine of substantial compliance under the Workers' Compensation Act stems from the opinion of the South Carolina Supreme Court in the case Yeomans v. Anheuser-Busch, Inc., 198 S.C. 65, 15 S.E.2d 833 (1941). In addition to Yeomans, the substantial compliance doctrine has been addressed in several subsequent cases including Sweeney v. Cape Fear Wood Corporation, 237 S.C. 471, 118 S.E.2d 70 (1961); Carter v.

Associated Petroleum Carriers, 235 S.C. 80, 110 S.E.2d 8 (1959) and Herring v. Lawrence Warehouse Co., 222 S.C. 226, 72 S.E.2d 453 (1952); Marsh v. Leo's, Inc., 249 S.C. 45, 152 S.E.2d 350 (1967) and Deanhardt v. Neil C. Deanhardt Masonry Contractors, 298 S.C. 244, 379 S.E.2d 726 (Ct.App. 1989); Nolan v. National Sales Co., Inc., 292 S.C. 1, 354 S.E.2d 575 (Ct.App. 1987) as affirmed in Nolan v. National Sales Co., Inc., 294 S.C. 371, 364 S.E.2d 572 (1988). A careful review of these cases reveals that the doctrine of substantial compliance pertains to otherwise exempt employees and/or employers under §42-1-360 of the South Carolina Code (1976, as amended) (and/or its predecessor statute under prior versions of the South Carolina Code) and waiver of those exemptions under §42-1-380 of the S.C. Code (1976, as amended) (and/or its predecessor statute under prior versions of the South Carolina Code). Therefore, the doctrine of substantial compliance is applied to questions that involve a determination of whether an employee or employer is covered by the terms and provisions of the Workers' Compensation Act which is a separate and distinct issue from whether an employer maintained valid workers' compensation insurance coverage at a particular time in question. The Circuit Court's Amended Order unquestionably reflects that it applied the doctrine of substantial compliance to its analysis and determination of the insurance coverage issues involved in the claims that are subject to this appeal. (R. pp. 102-125). In that regard, the Circuit Court specifically cited Yeomans, Carter, Dependents of Sweeney and Nolan notwithstanding the fact that none of those cases involved a determination of whether an employer maintained valid workers' compensation insurance at a particular time in question. (R. pp. 102-125). SCPCIGA respectfully asserts that the Circuit Court confused the issue of whether an employee or

employer is covered under the terms and provisions of the Workers' Compensation Act with the issue of insurance coverage for an employer at a particular time in question; erred as a matter of law in reversing the Commission's determination that the doctrine of substantial compliance has no bearing on, or applicability to, a determination of whether an employer maintained valid workers' compensation insurance at a particular time in question; and erred as a matter of law in relying on the doctrine of substantial compliance in its analysis and holding on the insurance coverage issues involved in this appeal. SCPCIGA further asserts that in analyzing whether there is an insurance contract, basic principles of contract law govern (i.e. offer and acceptance accompanied by valuable consideration). Carolina Amusement Co, Inc. v. Connecticut National Life Insurance Company, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (1993) *citing* Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App. 1984) and Hodge v. National Fidelity Ins. Co., 221 S.C. 33, 41, 68 S.E.2d 636, 638-39 (1952). There must be a meeting of the minds to make binding contracts of insurance. *See* Hydrick v. Rhode Island Insurance Co., 131 S.C. 8, 127 S.E. 367 (1924). "To be binding as a contract of insurance, a preliminary contract must be one for present insurance, and not merely an agreement to insure at some future time, as an acceptance of an application, or the issuance and delivery of a policy. There must be both an agreement and a consideration for present insurance of a temporary nature." Hyder v. Metropolitan Life Ins. Co., 183 S.C. 98, 190 S.E. 239, 247 (1937), *quoting* 32 C.J. 1099.

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN SUBSTITUTING ITS OWN FINDINGS OF FACT AND REACHING ITS OWN HOLDING IN CONNECTION WITH ISSUES PERTINENT TO INSURANCE COVERAGE FOR THOSE OF THE WORKERS' COMPENSATION COMMISSION THAT WERE NOT AFFECTED BY ERROR OF LAW IN LIGHT OF THE SUBSTANTIAL EVIDENCE IN THE RECORD AND APPLICABLE LAW.

As set forth above, the Commission found/held that Quality HR and its clients were not insured for the claims with dates of accident outside July 22, 2003 through November 7, 2003 and that Spectrum HR and its clients were not insured by Realm on any of the Spectrum HR claims. (R. pp. 46-60). In support of these findings/holdings on the ultimate issue before it, the Commission further found: that the Letter of Intent provided that Realm would have to enter into a general agency agreement with AIM and that Realm did not execute the agreement; that AIM did not have real authority to issue Certificates of Insurance in the time preceding the Stock Purchase Agreement and the evidence did not support a finding of apparent authority; that the evidence does not support a finding that Realm was binding the coverage itself in the time preceding the Stock Purchase Agreement and David Dennett-Smith's hearing testimony on this issue conflicted with positions asserted earlier by AIM; that based on letters from Mark Sioma, Realm disavowed any coverage and considered the Certificates of Insurance *void ab initio* and Quality HR was aware of the coverage issue as early as December 2002; that the Stock Purchase Agreement did not permit any party, including Realm, to bind coverage or issue Certificates of Insurance until the first closing; that the first closing as contemplated by the Stock Purchase Agreement never occurred and, therefore, pursuant to the Stock Purchase Agreement, no coverage was bound; that underwriting activities pursuant to the Stock Purchase Agreement did not constitute the binding of coverage; that

coverage would be bound back to October 1, 2002 at the time of the first closing; that claims were being paid by AIM while the deal was pending; and that neither AIM or U.S. Insurance Group was authorized to bind coverage for Spectrum or its clients and Realm did not bind coverage for Spectrum HR or its clients. (R. pp. 46-60). SCPCIGA respectfully asserts that these findings by the Commission are supported by substantial evidence in the record, made in accordance with fundamental contract law and dispositive of the coverage issues involved in this appeal.[6]

The substantial evidence in the record supporting the foregoing findings of the Commission is straightforward and overwhelming. The deposition testimony of Bruce Holley and Brian Imperiale of AIM, and Jacqueline Bazemore, representative of the New York Liquidation Bureau, confirms that there was no executed agency agreement between Realm and AIM. (R. p. 728, Holley August 3, 2006 Deposition Transcript, p. 342, line 25-p. 343, line 24; R. pp. 806-807, Imperiale Deposition Transcript, p. 267, line 14-p. 272, line 2; R. p. 855, Bazemore Deposition Transcript re: Cameron matter, p. 12, lines 11-20). Similarly, David Dennett-Smith's testimony reflects that he could not produce an executed agency agreement between Realm and AIM. (R. pp. 234-237, H.T. p. 96, line 2-p. 99, line 19). The terms and provisions of the Letter of Intent and Stock

[6] Also as set forth above, the Circuit Court agreed with SCPCIGA's contention that the Commission erred as a matter of law with respect to its findings, conclusions and holding that Realm is estopped from denying coverage for Quality HR and its client companies on claims with dates of accident from July 22, 2003 until November 7, 2003 and reversed the Commission's findings, rulings and holdings in this regard. The Circuit Court's determination in this regard has not been preserved for further appellate review and as such, becomes final and the law of the case. *See* Hudson v. Lancaster Convalescent Ctr., 393 S.C. 1, 7, 709 S.E.2d 65, 68 (Ct.App. 2011); Smith v. NCCI, Inc., 369 S.C. 236, 247-48, 631 S.E.2d 268, 274 (Ct.App. 2006) and Rodney v. Michelin Tire Corp., 320 S.C. 515, 517, 466 S.E.2d 357, 358 (1996). Therefore, SCPCIGA contends that the Commission's remaining findings that are supported by substantial evidence in the record are dispositive of the coverage issues relative to these claims as a matter of fundamental contract law. Alternatively, SCPCIGA would contend that the matter should be remanded to the Commission for a determination as to coverage on these claims consistent with the Circuit Court's unappealed finding/holding on the estoppel issue and this Court's determination on whether substantial evidence in the record supports the Commission's remaining findings.

Purchase Agreement are unequivocal with regard to authority to bind coverage and substantiate the Commission's findings in connection therewith. (R. pp. 1332-1400; R. pp. 2014-2017). According to the testimony of Holley, Imperiale and Dennett-Smith; AIM did not have any authority to bind workers' compensation coverage on behalf of Realm. (R. p. 654, Holley July 6, 2006 Deposition Transcript, p. 55, lines 11-13; R. p. 690, Holley July 6, 2006 Deposition Transcript p. 196, lines 11-21; R. p. 806, Imperiale Deposition Transcript, p. 267, line 21-p. 268, line 24; R. pp. 883-884, Bazemore Deposition Transcript re: Cameron, p. 40, line 4-p. 41, line 12; R. p. 892, Bazemore Deposition Transcript re: Cameron p. 49, lines 7-17). The testimony of Garry Smith, Director of the Workers' Compensation Commission's Coverage and Compliance Department, indicates that based on his investigation; neither AIM, any individual affiliated with AIM or any of AIM's subproducer's including U.S. Insurance Group, were authorized to write and bind workers' compensation insurance coverage on behalf of Realm in South Carolina. (R. p. 562, H.T., p. 413, lines 10-15; R. p. 564, H.T., p. 415, lines 13-25). Dennett-Smith's testimony that Realm was actually binding coverage is directly contradicted by the testimony of Smith, who indicated that AIM, through its attorney Kip Becker, had previously advised him that AIM had apparent authority to bind coverage on behalf of Realm. (R. pp. 556-558, H.T. p. 407, line 2-p. 409, line 3).

Written correspondence from Mark Sioma to David Evette with Quality HR (along with certified mail documentation confirming receipt and David Evette's hearing testimony acknowledging receipt) establishes Realm's position in connection with coverage for Quality HR and its clients and confirms Quality HR's knowledge of the coverage dispute in December 2002. (R. pp. 2025-2026; ;R. p. 411, H.T. p. 262, lines 12-

23). The testimony of Dennett-Smith and Holley confirms that claims were paid by AIM until funds were exhausted. (R. p. 183, H.T., p. 45, lines 8-18; R. p. 717, Holley August 3, 2006 Deposition Transcript, p. 297, lines 1-24). The record is devoid of any evidence, or contention, that there was ever a first closing as contemplated by the Stock Purchase Agreement. AIM's legal complaints filed against Realm's parent companies and Dennett-Smith's testimony acknowledge that the first closing as contemplated by the Stock Purchase Agreement never occurred.[7] (R. pp. 1459-1588; R. pp. 233-235, H.T. p. 95, line 13-p. 97, line 12). The testimony of Holley also establishes that coverage would have been bound back to October 1, 2002 in the event the first closing had occurred in accordance with the Stock Purchase Agreement.[8] (R. p. 734, Holley August 3, 2006 Deposition Transcript, p. 367, lines 2-13).

The testimony of Garry Smith, the testimony of Jacqueline Bazemore and written correspondence of Bazemore and Jeffrey A. Naimoli, another representative of the New York Liquidation Bureau, set forth their opinions on coverage issues in connection with each of the claims subject to this appeal based on their respective investigations. (R. pp. 549-552, H.T. p. 400, line 10-p. 403, line 5; R. pp. 883-884, Bazemore Deposition Transcript re: Cameron, p. 40, line 4-p. 41, line 12; R. p. 892, Bazemore Deposition Transcript re: Cameron, p. 49, lines 7-17; R. pp. 974-985, 1000). Each were of the opinion that Realm did not provide workers' compensation insurance coverage to Quality

[7] To the extent AIM's claims against Realm's parent companies were resolved in August 2006 when the Bankruptcy Trustee assigned Realm's parent companies' stock in Realm to AIM as satisfaction of AIM's claims and said assignment was approved by order of the Bankruptcy Court; such occurred after the liquidation of Realm in June 2005 and well after the period during which Quality HR, Spectrum HR and their respective client companies purport to have had coverage with Realm and after the dates of the subject accidents associated with the claims subject to this appeal.

[8] Even to the extent this ever occurred; SCPCIGA would contend that the claims subject to this appeal would not be considered "covered claims" under the Guaranty Act pursuant to §38-31-30(6) of the South Carolina Code (1976, as amended).

HR, Spectrum HR or their client companies on any of the claims subject to this appeal. The testimony of Smith and Bazemore further reflects that there was no report of coverage for Quality HR or Spectrum HR by Realm in accordance with Commission Regulations 67-405 and 406. (R. p. 565, H.T., p. 416, lines 1-21; R. pp. 924- 925, Bazemore Deposition Transcript re: Harmon, p. 8, line 22- p. 9, line 8; R. p. 856, Bazemore Deposition Transcript re: Cameron, p. 13, lines 5-12).

In addition to the foregoing findings of the Commission being supported by substantial evidence, the Commission correctly applied principles of contract law in making its findings/holdings on the issue of whether Quality HR and its clients were insured on the claims with dates of accident outside July 22, 2003 through November 7, 2003 and whether Spectrum HR and its clients were insured on any of the Spectrum HR claims. In that regard, the Commission analyzed the fundamental question of whether AIM, or any of its sub-producers including U.S. Insurance Group, were authorized to make an offer and acceptance of workers' compensation insurance on behalf of Realm to Quality HR, Spectrum HR and/or their respective client companies. Based on substantial evidence in the record, the Commission concluded that there was no such authority. Moreover, the Commission properly applied the express and unequivocal terms of the Stock Purchase Agreement in making the foregoing findings. Therefore, SCPCIGA asserts that the Commission's findings/holdings in this regard were made in accordance with applicable law.

In addition to its holding that the Commission erred as a matter of law in failing to apply the doctrine of substantial compliance and reversal of the Commission's holding in that regard; the Circuit Court made various findings of its own to support its ultimate

finding/holding on the coverage issue, some of which are contrary to those of the Commission that are supported by substantial evidence. The Circuit Court expressly found that Quality HR and Spectrum HR operated under the reasonable assumption that they had proper insurance from Realm and that Realm covered and paid claims until it became insolvent. (R. pp. 102-125). To the contrary, the Commission found that Quality HR was aware of the coverage issue as early as December 2002 and that AIM paid claims while the deal was pending. (R. pp. 46-60). As to Spectrum HR, SCPCIGA respectfully suggests that there is no evidence in the record to support the Circuit Court's finding in this regard. Spectrum HR made no appearance at the consolidated coverage hearing and did not present a case. SCPCIGA respectfully asserts that in making these findings in support of its own finding/holding on the ultimate issue of coverage; the Circuit Court misapplied the appropriate standard of review and, therefore, erred as a matter of law.

As a component of its application of the doctrine of substantial compliance, the Circuit Court focused its analysis on the Certificates of Insurance. In that regard, the Certificates of Insurance included in the record reflecting coverage for Quality HR and its clients by Realm were issued by AIM. (R. p. 2022; H.T. p. 52, lines 4-19). The Certificates of Insurance included in the record reflecting coverage for Spectrum HR and its clients were issued by U.S. Insurance Group. (R. pp. 2018-2021). The Circuit Court not only misapplied the doctrine of substantial compliance but failed to examine whether the Commission's findings concerning authority to issue the Certificates of Insurance as a method of binding insurance coverage were supported by substantial evidence in the record; and therefore, misapplied the appropriate standard or review. Also in connection with its analysis of the Certificates of Insurance, the Circuit Court erroneously relied on

§42-1-415 of the South Carolina code (1976, as amended) for the proposition that the Certificates of Insurance included in the record can be considered valid evidence of workers' compensation coverage in this case. As a threshold matter, §42-1-415 pertains to an upstream statutory employer's ability, under certain circumstances, to transfer liability for workers' compensation benefits to SCUEF rather than a determination of valid insurance coverage for an employer. Therefore, §42-1-415 is not applicable in this instance and SCPCIGA respectfully asserts that the Circuit Court erred as a matter of law in relying on such. Moreover, corresponding Commission Regulation 67-415(A) specifically requires that a Certificate of Insurance in that regard must be signed by an authorized representative of the insurance carrier when utilized for purposes under §42-1-415 (emphasis added). In view of the Commission's findings concerning authorization to bind insurance and issue Certificates of Insurance that are supported by substantial evidence in the record, the Circuit Court's analysis in this regard is characterized by error of law.

SCPCIGA also asserts that the Circuit Court erred as a matter of law with respect to its interpretation of statutory intent. The Circuit Court concluded that the facts of the claims on appeal do not fit squarely within either the statutory provisions establishing SCUEF or SCPCIGA. The Circuit Court further concluded that when looking at the larger statutory intent, SCPCIGA should provide coverage. (R. pp. 102-125). There was no detailed analysis by the Circuit Court in this regard. SCPCIGA respectfully contends that there is no ambiguity. The claims fit squarely under the statutory provisions establishing SCUEF if there is a determination of no coverage for Quality HR, Spectrum HR or their respective client companies. The claims fit squarely under the Guaranty Act

if there is a determination in favor of coverage and the claims meet the criteria for "covered claims" in accordance therewith.

In summary, substantial evidence in the record supports the Commission's findings/holdings that Quality HR and its clients were not insured for the claims with dates of accident outside July 22, 2003 through November 7, 2003 and that Spectrum HR and its clients were not insured by Realm on any of the Spectrum HR claims, along with the findings made in support thereof, and the Commission made no error of law in making these findings. The Circuit Court failed to apply the appropriate standard of review to these findings of the Commission; erroneously made and relied on its own findings and made several errors of law in its analysis and finding/holding on the issue of coverage. SCPCIGA requests that this Court reverse the Circuit Court's determination of coverage on the Quality HR claims with dates of accident outside July 22, 2003 through November 7, 2003 and the Spectrum HR claims and reinstate the findings/holdings of the Commission in that regard. As to the Quality HR claims with dates of accident from July 22, 2003 through November 7, 2003; this Court should determine that there was no coverage as a matter of fundamental contract law in view of the Circuit Court's Amended Order finally determining that the Commission erred as a matter of law in holding that Realm is estopped from denying coverage on these claims and reversing the Commission's findings/holding in that regard, and in view of the Commission's remaining findings being supported by substantial evidence in the record. Alternatively, SCPCIGA would request that this Court remand the matter to the Commission to make further findings concerning coverage on the Quality HR claims with dates of accident from July 22, 2003 through November 7, 2003 consistent with the Circuit Court's final

reversal of the Commission's findings/holding that Realm is estopped from denying coverage and the Commission's remaining findings that are supported by substantial evidence in the record.

III. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE CLAIMS SUBJECT TO THIS APPEAL CONSTITUTE COVERED CLAIMS UNDER THE SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION ACT AS A MATTER OF LAW AND THAT APPELLANT IS LEGALLY PRECLUDED FROM OTHERWISE CONTESTING THE SAME IN LIGHT OF THE SUBSTANTIAL EVIDENCE IN THE RECORD AND APPLICABLE LAW.

Under §38-31-60(b) of the South Carolina Code (1976, as amended), SCPCIGA is considered the insurer to the extent of its obligation on covered claims (emphasis added). §38-31-20(8) defines a "covered claim" under the Guaranty Act and requires that a covered claim be an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy issued by an insurer, if the insurer is an insolvent insurer (emphasis added). Therefore, it is fundamental under the Guaranty Act that to establish a covered claim, there must first exist coverage and a policy of insurance. In view of the substantial evidence in the record and applicable law supporting the Commission's findings/holdings that Quality HR and its clients were not insured for the claims with dates of accident outside July 22, 2003 through November 7, 2003 and that Spectrum HR and its clients were not insured by Realm on any of the Spectrum HR claims, along with the detailed findings in support thereof, and the Circuit Court's misapplication of the appropriate standard of review and errors of law as set forth above; the Circuit Court further erred in concluding that these claims are "covered claims" under the Guaranty Act as a matter of

law and that SCPCIGA is legally precluded from otherwise contesting the same. SCPCIGA does not rely on the purported fraud of a third party in its contention that the claims subject to this appeal are not "covered claims" under the Guaranty Act. Rather, SCPCIGA contends that coverage and issuance of a policy of insurance are fundamental pre-requisites to establishing a "covered claim" under the Guaranty Act. Similarly with regard to the Quality HR claims with dates of accident from July 22, 2003 to November 7, 2003; the Commission's findings that are supported by substantial evidence and the Circuit Court's Amended Order finally reversing the Commission's findings/holding that Realm is estopped from denying coverage are dispositive of the coverage issue on these claims as matter of fundamental contract law. As such, the Circuit Court erred as matter of law in concluding that these claims are "covered claims" under the Guaranty Act and that SCPCIGA is legally precluded from contesting the same.

CONCLUSION

Appellant SCPCIGA respectfully requests that this Court reverse the Circuit Court's findings/holdings that the doctrine of substantial compliance applicable to the facts in this matter establish coverage by Realm for Quality HR, Spectrum HR and their respective client companies in connection with the claims that are subject to this appeal and that such claims are "covered claims" under the terms and provisions of the Guaranty Act as a matter of law; reinstate the Commission's findings and holdings, along with the detailed findings made in support thereof, that Quality HR and its clients were not insured for the claims with dates of accident outside July 22, 2003 through November 7, 2003 and that Spectrum HR and its clients were not insured by Realm on any of the

Spectrum HR claims; and rule as a matter of fundamental contract law that Quality HR and its clients were not insured by Realm for the Quality HR claims with dates of accident from July 22, 2003 through November 7, 2003 based on those findings/holdings of the Commission that are supported by substantial evidence in the record and not finally determined to have been characterized by error of law and reversed by the Circuit Court. Alternatively with regard to the Quality HR claims with dates of accident from July 22, 2003 through November 7, 2003; Appellant SCPCIGA would request that this Court remand the matter to the Commission to determine whether Quality HR and its clients maintained workers' compensation insurance coverage with Realm and whether such constitute "covered claims" under the Guaranty Act consistent with the Commission's findings that are supported by substantial evidence in the record and the Circuit Court's final reversal of the Commission's findings/holding that Realm is estopped from denying coverage on these claims.

RESPECTFULLY SUBMITTED,

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October 4, 2013

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Circuit Court Judge

Case No. 2013-000575

Artemio Alvarez v. Quality HR Services, et.al.
W.C.C. File No.: X030301
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 2011(b) of the South Carolina Appellate Court Rules.

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October 4, 2013
Charleston, South Carolina