

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.
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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,

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SC COURT OF APPEALS

v.

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

APPELLANT'S FINAL REPLY BRIEF

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APPELLANT'S REPLY TO RESPONDENTS' ARGUMENTS

The Respondents' briefs contain numerous inaccuracies and factual assertions without citation to the evidentiary record. Many of these inaccuracies and factual assertions are not material to the issues raised by Appellant on appeal and this Court's disposition of the same but several warrant discussion and rebuttal as will be set forth below. Respondents fail to engage in any substantive fashion the Appellant's argument that those findings of the Workers' Compensation Commission (hereinafter "Commission") not finally determined by the Circuit Court to have been affected by error of law are supported by substantial evidence in the record and thus mandate a determination of no workers' compensation insurance coverage for Quality HR Services (hereinafter "Quality HR"), Spectrum HR or their respective client companies with Realm National Insurance Company (hereinafter "Realm") on the claims subject to this appeal. Respondents also fail to engage in any substantive fashion Appellant's argument that the Circuit Court erred as a matter of law in substituting its own findings of fact and reaching its own holding in connection with the issues pertinent to insurance coverage for those of the Commission that were not affected by error of law in light of the substantial evidence in the record. Respondents essentially advance the substantial compliance doctrine and public policy rationales set forth in the Circuit Court's Order.

Although not directly relevant to disposition of the issues raised by Appellant on appeal, Respondent South Carolina Uninsured Employers' Fund (hereinafter "SCUEF") mischaracterizes Appellant as a state agency funded by taxes contrary to the terms and provisions of §38-31-40, §38-31-60 and §38-31-140 of the South Carolina Code (1976, as amended). These statutory provisions establish Appellant as a non profit

unincorporated legal entity consisting of insurers defined as members under §38-31-20(8) of the South Carolina Code (1976, as amended) as a condition of their authority to transact business in South Carolina and provide for Appellant's funding mechanisms. Respondent SCUEF erroneously asserts that no one has disputed the facts of this case when in fact, numerous factual issues have been disputed to specifically include whether American Insurance Managers, Inc. and its affiliates and representatives (hereinafter collectively referred to as "AIM") and AIM's subproducers had authority to bind insurance coverage on behalf of Realm and whether certificates of insurance coverage issued by AIM purporting to bind workers' compensation insurance with Realm were valid. Respondent SCUEF also erroneously asserts that the Appellant's primary contention in connection with its position on the insurance coverage issue is that no policies of insurance were issued when in fact, Appellant's primary contention has been, and remains, that Realm did not provide workers' compensation insurance coverage to Quality HR; Spectrum HR, or their respective client companies on the claims subject to this appeal; therefore, without insurance coverage, these claims do not constitute "covered claims" under §38-31-60 and §38-31-20 of the South Carolina Code (1976, as amended).

Respondent SCUEF asserts that Appellant has argued that the Courts cannot look to the South Carolina Workers' Compensation Act in making determinations on the operation of the terms and provisions of the South Carolina Property and Casualty Insurance Guaranty Association Act (hereinafter "Guaranty Act"). Appellant acknowledges the applicability of the Workers' Compensation Act but further contends that provisions of the Guaranty Act and fundamental principles of contract law also apply

to the determination of insurance coverage in the case. Respondent SCUEF also asserts that Appellant is relying on the fraud of Realm and AIM to support its position concerning insurance coverage. Appellant does not rely on the fraud of any third party. This suggests that Appellant is relying on a fraud to prove or establish a negative (i.e. the non-existence of insurance coverage) and defies basic logic.

Of particular significance are the assertions in Respondents' briefs that Realm paid claims until its insolvency; that Realm accepted premiums; that it is undisputed this case would have never happened but for the bankruptcy/insolvency of Realm; that Realm bound coverage; that AIM paid claims per Realm's instructions; that Quality HR purchased a voluntary policy from Realm; that there is no dispute premiums were paid to Realm; that Realm would have most likely paid the claims if it had not become insolvent; and that Appellant is eligible to recoup any benefits paid by it in connection with the claims subject to this appeal from Realm's estate. As a threshold matter, Appellant would point out to this Court that these assertions contain no citations to the evidentiary record. Of more consequence at this stage of the appellate process is that no factual findings to this effect were made by the Commission which is the ultimate finder of fact. *See DeBruhl v. Kershaw County Sheriff's Department*, 303 S.C. 20, 24; 397 S.E.2d 782, 785 (Ct. App. 1990) *citing Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). In fact, those findings of the Commission not finally determined by the Circuit Court to have been affected by error of law directly contradict several of these assertions.

Specifically as it relates to the assertions that Realm accepted/received premiums and paid or directed AIM to pay claims (which Respondents apparently reference to

advance a theory of coverage based on estoppel despite this issue not being preserved for appellate review and having finally been determined by the Circuit Court); the Commission, as the ultimate fact finder, made no such findings. Moreover, the uncontradicted evidentiary record indicates that Realm did not accept any premium payments and to the extent payments were made on any of the claims, such were made by AIM. (R. pp. 659-660, Holley July 6, 2006 Deposition Transcript, p. 72, line 20-p. 74, line 4; R. p. 664, Holley July 6, 2006 Deposition Transcript, p. 95, line 23-p. 96, line 8; R. p. 668, Holley July 6, 2006 Deposition Transcript, p. 108, lines 22-25; R. p. 669, Holley July 6, 2006 Deposition Transcript, p. 110, lines 7-10; R. p. 670, Holley July 6, 2006 Deposition Transcript, p. 113, line 2-p. 114, line 2; R. p. 707, Holley July 6, 2006 Deposition Transcript, p. 260, lines 11-25; R. pp. 716-717, Holley August 3, 2006 Deposition Transcript, p. 296, line 23- p. 297, line 11; R. p. 723, Holley August 3, 2006 Deposition Transcript, p. 322, lines 1-20; R. p. 724, Holley August 3, 2006 Deposition Transcript, p. 327, line 8-p. 328, line 5; R. p. 744, Imperiale Deposition Transcript, p. 17, line 15-p. 19, line 1; R. pp. 760-761, Imperiale Deposition Transcript, p. 84, line 20-p. 85, line 3; R. p. 761, Imperiale Deposition Transcript, p. 86, line 8-p. 87, line 7; R. pp. 770-771, Imperiale Deposition Transcript, p. 124, line 20-p. 125, line 10; R. p. 775, Imperiale Deposition Transcript, p. 144, lines 11-25; R. p. 776, Imperiale Deposition Transcript, p. 148, lines 5-10; R. pp. 779-780, Imperiale Deposition Transcript, p. 160, line 24-p. 162, line 15; R. p. 782, Imperiale Deposition Transcript, p. 171, lines 8-13; R. pp. 787-789, Imperiale Deposition Transcript, p. 190, line 24-p. 198, line 23; R. pp. 792-793, Imperiale Deposition Transcript, p. 212, line 1-p. 213, line 7; R. p. 800, Imperiale Deposition Transcript, p. 242, lines 11-22; R. pp. 181-182, H.T., p. 43, line 19-p. 44, line

2; R. p. 183, H.T., p. 45, lines 8-24; R. pp. 230-231, H.T., p. 92, line 25-p. 93, line 22; R. p. 239, H.T., p. 101, lines 10-22; R. pp. 308-309, H.T., p. 170, line 5-p. 171, line 14; R. pp. 320-323, H.T., p. 182, line 12-p. 185, line 14; R. p. 464, H.T., p. 315, lines 13-18; R. p. 476, H.T., p. 327, lines 9-19; R. p. 485, H.T., p. 336, lines 6-16; R. p. 493, H.T., p. 344, lines 15-23; R. p. 506, H.T., p. 357, lines 18-24; R. p. 529, H.T., p. 380, lines 12-21; R. p. 530, H.T., p. 381, lines 20-25; R. pp. 924-926, Bazemore Deposition Transcript re: Harmon, p. 7, lines 2-17, p. 7, line 25-p. 9, line 21; R. p. 928, Bazemore Deposition Transcript re: Harmon p. 11, lines 17-23; R. p. 935, Bazemore Deposition Transcript re: Harmon, p. 18, lines 7-11; R. pp. 854-856, Bazemore Deposition Transcript re: Cameron, p. 11, line 25-p. 13, line 19; R. pp. 883-884, Bazemore Deposition Transcript re: Cameron, p. 40, line 21-p. 41, line 12; R. p. 885, Bazemore Deposition Transcript re: Cameron, p. 42, lines 9-16; R. p. 886, Bazemore Deposition Transcript re: Cameron, p. 43, lines 8-18; R. p. 891, Bazemore Deposition Transcript re: Cameron, p. 48, lines 4-12; R. pp. 828-829, Bazemore Deposition Transcript re: Pringle, p. 13, line 24-p. 14, line 11; R. pp. 974, 976-985 and 1000). Therefore, reliance on Russell v. Driver's Leasing Services, Inc., 282 S.C. 358, 318 S.E.2d 579 (Ct. App. 1984) and Middleton v. Cantley Construction, 278 S.C. 154, 293 S.E.2d 311 (1982) is misplaced.

As to the assertion that Appellant is entitled to recoupment from Realm's estate to the extent it pays any of the claims subject to this appeal, there is no evidentiary basis to support this assertion and the uncontradicted evidentiary record indicates otherwise. (R. p. 926, Bazemore Deposition Transcript re: Harmon, p. 9, lines 9-21; R. pp. 930-932, Bazemore Deposition Transcript re: Harmon, p. 13, line 11-p. 15, line 8; R. pp. 856-857, Bazemore Deposition Transcript re: Cameron, p. 13, line 20-p. 14, line 13; R. pp. 900-

901, Bazemore Deposition Transcript re: Cameron, p. 57, line 19-p. 58, line 5; R. pp. 974, 976-985 and 1000). Concerning the assertions that this case would have never occurred and that Realm would have paid the claims if it had not become insolvent; no such findings were made by the Commission nor is there any support for such cited to the evidentiary record. These assertions are purely speculative.

As set forth above, Respondents make no substantive argument against Appellant's contention that those findings of the Commission not finally determined by the Circuit Court to have been affected by error of law are supported by substantial evidence in the record and dispositive of the insurance coverage issues. Respondents essentially ignore the findings of the Commission and the appropriate appellate standard of review of a final decision of the Commission except to the extent Respondent SCUEF asserts that a determination on insurance coverage is purely an issue of law. Appellant disputes this notion and references the findings made by the Commission not finally determined by the Circuit Court to have been affected by error of law. Appellant asserts that these factual findings by the Commission address the critical questions of authority to bind insurance coverage; whether the certificates of insurance were valid and whether any coverage was bound and that these facts are essential to making a determination on insurance coverage when applying fundamental principles of contract law.

Respondents also continue to rely on the doctrine of substantial compliance. Despite the direct assertion in the Appellant's brief that there is no case law in South Carolina whereby the doctrine of substantial compliance has been applied to a determination concerning the existence of a contract of insurance and thus insurance coverage for an employer under the Workers' Compensation Act, Respondents fail to

counter this assertion and are unable to cite any case. In this regard, Respondents ignore the clear distinction between insurance coverage and a contract of insurance versus the question of coverage under the Workers' Compensation Act (i.e. subject matter jurisdiction). Appellant reiterates its assertion that these are distinct concepts and that the doctrine of substantial compliance has no application under South Carolina law to a determination concerning the existence of a contract of insurance and insurance coverage for an employer under the Workers' Compensation Act.

Respondent Quality HR asserts that its efforts to obtain workers' compensation insurance constitute substantial compliance with the Workers' Compensation Act and, therefore, coverage should be afforded to Quality HR and its client companies with Realm. However, Quality HR fails to cite any case law or statutory provision suggesting that an effort to obtain workers' compensation insurance constitutes the existence of a valid and binding contract of insurance. Appellant asserts that there is no legal authority whatsoever to support the notion that an employer's effort to obtain workers' compensation insurance can effectuate insurance coverage without the existence of a valid and binding contract of insurance. Respondents' other arguments in connection with the doctrine of substantial compliance focus on the certificates of insurance. Appellant does not dispute that certificates of insurance can constitute proof of a contract of insurance; however, such certificates must be valid and authorized. The findings of the Commission not finally determined by the Circuit Court to have been affected by error of law render any argument relying on the unauthorized and invalid certificates issued by AIM or its subproducers without merit at this stage in the appellate process.

As to the public policy arguments advanced by Respondents, Appellant re-asserts the arguments and points set forth in its Appellant Brief. If there is ultimately determined to have been coverage for Quality HR, Spectrum HR and/or their respective clients with Realm; the terms and provisions of the Guaranty Act would apply. However, if it is ultimately determined that no such coverage existed for Quality HR, Spectrum HR or their respective client companies; §42-7-200 of the South Carolina Code (1976, as amended) would apply. §42-7-200 clearly and unequivocally addresses situations where an employer under the Workers' Compensation Act is determined to be uninsured. The Guaranty Act clearly addresses situations where an employer maintained valid workers' compensation insurance coverage and the insurance carrier becomes insolvent. Appellant expressly rejects the assertion by Respondent SCUEF that no one can seriously contend that the facts fit within the enabling legislation of Respondent SCUEF. The argument that Respondent SCUEF is not equipped to deal with payment of these claims has no merit given the terms and provisions of §42-7-200 and case law which allows SCUEF to shift liability to upstream statutory employers. *See Miller v. Lawrence Robinson Trucking*, 333 S.C. 576, 510 S.E.2d 431, re-hearing denied, certiorari denied (Ct. App. 1998). It also is without merit to suggest that a determination of no insurance coverage in these matters would place responsibility for the entire Realm insolvency on SCUEF as only those claims involving Quality HR, Spectrum HR or their respective client companies would involve SCUEF. Appellant asserts that these public policy arguments present a false choice.

CONCLUSION

In summary, Appellant continues to assert that those findings of the Workers' Compensation Commission not finally determined by the Circuit Court to have been affected by error of law are supported by substantial evidence in the record and that the application of fundamental principles of contract law to these facts should determine the insurance coverage issues involved in the matters subject to this appeal. Appellant further asserts that the Circuit Court misapplied the appropriate standard of review and erroneously substituted its own findings and holding on the insurance coverage issue for those of the Commission that were not affected by error of law. Appellant further asserts that the substantial compliance doctrine has no bearing on, or applicability to, a determination of insurance coverage for an employer under the Workers' Compensation Act and that from a public policy standpoint, both potential outcomes are adequately provided for under South Carolina law. Appellant further asserts that the only genuine question for determination by this Court is whether to proceed with ruling as a matter of law that there was no insurance coverage by Realm on the Quality HR claims with dates of accident between July 22, 2003 and November 7, 2003 or whether a determination in that regard should be made by the Workers' Compensation Commission on remand.

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

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