THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SC WORKERS COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Melody L. James, Commissioner
R. Michael Campbell, II, Commissioner

Case No. 1423018

Giles Long .....Claimant, Appellant/Respondent

v.

Metro Construction, Inc., Employer, and
American Zurich Ins. Co. and The
SC Uninsured Employers' Fund .....Carrier, Defendants

of which Metro Construction, Inc., Employer, and
The SC Uninsured Employers' Fund, Carrier are.....Respondents/Appellants

And American Zurich Ins. Co.....Respondent

RESPONDENT'S BRIEF OF CLAIMANT, APPELLANT/RESPONDENT

Nicholas G. Callas, S.C. Bar#15193
Law Office of Nicholas G. Callas, P.A.
1901 Gadsden Street, STE B
Columbia, South Carolina 29201
(803) 369-3968
Nick@callaslawfirm.com

Attorney for Claimant, Appellant/Respondent

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STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. *Hargrove v. Titan Textile Co., 360* S.C. 276, 288, 599 S.E.2d 604 (Ct. App. 2004); *(see also Lark v. Bilo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); *Gibson v. Spartanburg Sch. Dist. No.* 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Bursey v. South Carolina Dep't of Health & Envtl. Control,* 360 S.C.135, 141, 600 SE.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003).

ARGUMENT

(Respondent Fund)

I. WHETHER THE COMMISSION ERRED IN FAILING TO APPLY THE MAJORITY RULE REGARDING LIABILITY FOR ACTIONS TAKEN BY OFFICERS OF CORPORATIONS IN FORFEITURE?

The Appellate Panel of the S.C. Workers' Compensation Commission agreed with the Single Commissioner's findings that Respondent Fund would be responsible for the Claimant's damages if Respondent Zurich's contract with the Claimant was properly cancelled. Their decision was based on S.C. Code Ann. § 42-7-200(B) (2012) and premised on Mr. Long acting in his capacity as an employee of Metro Construction when he brought the claim. (Decision and Order of the Appellate Panel, Finding of Fact No. 25).

Prior to the Appellate Panel's decision, Respondent Fund filed a motion to add Claimant, Giles Long, as a third-party defendant since he suffered his accident while continuing to operate Metro Construction after it was administratively dissolved. (Resp't Fund's Motion, March 24, 2017). Respondent Fund contends that the Claimant's continued business activity following dissolution "potentially" exposed him to "personal liability" for any business liability of the corporation. (Resp't Br. p. 7, August 29, 2019).

The motion to add Mr. Long as a third-party defendant was denied by Commissioner Aisha Taylor. On appeal, the South Carolina Workers Compensation Judicial Conference issued an order denying further review of the Single Commissioner's decision on the grounds that the motion was interlocutory. Finally, the Appellate Panel also denied review of the Single Commissioner's decision on the same procedural grounds. (Decision and Order of the Appellate Panel, Finding of Fact No. 23).

Respondent Fund alleges that the Appellate Panel erred in failing to consider its request to

add Mr. Long as a third-party defendant on the grounds that the issue presented was not interlocutory and should be subject to further review. (Resp't Fund's Br. p. 8, August 28, 2019).

Mr. Long asserts that whether the issue is interlocutory or subject to further review is irrelevant to the facts of this case due to the statutory provisions of S.C. Code Ann. §§ 33-14-200 (2013) and 33-14-220 (2013) and the case law cited by Respondent Fund in support of its position.

A. S.C. Code Ann. §§ 33-14-210(d) (2013) and 33-14-220(c) (2013)

Both the Claimant and Respondent Fund rely on statutes S.C. Code Ann. §§ 33-14-210 (2013) and 33-14-220 (2013) in support of their respective positions. Section 33-14-210(d) states in part that a "corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs." Moreover, Respondent Fund agrees that Section 33-14-220(c) states that "[when] the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on business *as if the administrative dissolution had never occurred. (emphasis added)*" (Resp't Fund's Br. p. 5, August 28, 2019).

It is well established that statutes in South Carolina should be strictly construed. "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction." *Enos v. Doe*, 380 S.C. 298, 669 S.E.2d 619, 623 (2008). "Under the plain meaning rule, it is not Court's place when construing a statute to change the meaning of a clear and unambiguous statute." *Id.*

Claimant asserts that Sections 33-14-210 and 33-14-220 do *not* impose any *personal liability* on corporate officers or directors and that the *plain meaning* of these statutes prove the legislature did not intend to create this liability. Therefore, under Sections 33-14-210 and 33-14-220, Mr. Long cannot be held personally liable for his actions once Metro Construction was

properly reinstated.

B. Administrative Dismissal & Meaning of "Relate Back"

Respondent Fund *concedes* that there is no statutory or case law opinion in South Carolina imposing personal liability on officers acting on behalf of a dissolved corporation. (Resp't Fund's Br. p. 6, August 28, 2019). In fact, reinstatement of the dissolved entity results in treating the corporation as if it had never been dissolved.

With no statutory authority available in South Carolina to impose personal liability, Respondent Fund urges the Court to *alter the plain meaning* of S.C. Code Ann. § 33-14-220 (2013) by *adopting opinions from other jurisdictions* where the liability of corporate officers was imposed after the corporation was administratively dissolved. In support of its argument, Respondent Fund cites the *alleged* "majority rule" followed by Virginia in *Moore v. Occupational Safety & Health Review Comm'*, 591 F.2d 991, 994 – 95 (4th Cir. 1979).

However, a review of the statutory provisions ruled upon in the *Moore* case are not similar to the statutes applicable in the current case before the Court.

S.C. Code Ann. § 33-14-220, *Reinstatement following Administrative Dissolution:*

> (a) A corporation dissolved under Section 33-14-210 may apply to the Secretary of State for reinstatement at any time after the effective date of dissolution.
>
> (c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business **as if the administrative dissolution had never occurred**.

VA Code Ann. § 13.1-92 (1950), *Reinstatement:*

> A corporation that has been dissolved may apply to the Commission for reinstatement within five years thereafter . . . Upon the entry by the Commission of reinstatement, the corporate existence shall be deemed to have continued

> from the date of dissolution except that reinstatement shall have no effect on any question of *personal liability* of the directors, officers or agents in respect of the period between dissolution and reinstatement.

The differences between the Virginia and South Carolina statutes are numerous and significant. First, the reinstatement statute in *Moore,* VA Code Ann. § 13.1-92 (1950), specifically *allows* for the imposition of *personal liability* of corporate officers acting after the company had been administratively dissolved. Moreover, the notes to this section adds "directors, etc., not relieved of liability by reinstatement." *Id.* Based on the language of this statute the Court in *Moore* added:

> By operation of law thereby stripping the corporation's legal mandate to exist," it has been accurately said that, upon dissolution by operation of law under the statute, "there is no corporation at all, and any action performed by the directors or officers not looking to the dissolution of the corporation should be deemed Individual *(sic)* actions with concomitant individual liability therefor."

Id.

The imposition of personal liability on corporate officers was included in the Virginia statute but not mandated in the South Carolina statute applicable in this case. Clearly, the Virginia legislature intended to potentially hold corporate directors and officers personally liable for their actions after dissolution because they included specific language in their statute.

Second, relying on the holding in *Moore* is inappropriate because the statute addressed, VA Code Ann. § 13.1-92, was repealed in 1985 and replaced with VA Code Ann. § 13.1-754 (2018). Section 13.1-754(C) states:

> If the corporation complies with the provisions of this section, the Commission shall enter an order of reinstatement of corporate existence. Upon entry of the order, the corporate existence shall be deemed to have continued from the date of termination as if the termination had never occurred, and any liability incurred by the

> corporation or a director, officer, or other agent after the termination and before the reinstatement is determined as if the termination of the corporation's existence had never occurred.

Hence, under the current Virginia statute, personal liability is not imposed on the corporate directors or officers who operate the business after dissolution. Instead, their activities are treated as actions of a business that had never been dissolved.

Respondent Fund also relies on a decision from the state of Vermont, *Daniels v. Elks Club of Hartford*, 10-181, 928, (Vt. August 3, 2012) (ROSS, Vt. Case Law). In its brief, Respondent Fund cites a portion of the *Daniels* case indicating that the "majority rule" appears to impose personal liability on those acting on behalf of a dissolved corporation. (Resp't Fund's Br. p. 6, August 28, 2019). However, Court in *Daniels* specifically held that its decision would *not* apply in all cases. The Court stated: "In most jurisdictions, the reinstatement of a corporation following dissolution by administrative action of the state relates back to the effective date of dissolution, and directors or officers are *not* personally liable for actions undertaken during the period of dissolution or suspension." *(emphasis added) Id.* The Court also found that:

> after reviewing the precedents from other jurisdictions, we conclude that it is unwise to adopt one hard-and-fast personal liability rule for reinstated corporations. We think that whether reinstatement operates to shield personal liability must depend on the reasonable expectations of the parties at the time the liability arises. These expectations will be shaped by the context in which the liability arises, especially the nature of the obligation, the parties' knowledge, and the timing of the corporate termination and the liability.

Id.

Therefore, both the *Moore* and *Daniels* cases cited by Respondent Fund provide no clear-cut "majority rule" from other jurisdictions. The statutory provision addressed in *Moore* is distinguishable from the applicable the South Carolina statute while the Court in *Daniels* did not intend to create a broad-based rule imposing liability on corporate officers.

II. ARGUMENTS PRESENTED BY RESPONDENT/APPELLANT METRO CONSTRUCTION, INC.

The Claimant agrees with the arguments provided by Respondent/Appellant Metro Construction in its Appellant's brief and hereby adopts by reference all arguments brought against Respondent Zurich and Respondent Fund regarding liability for the Claimant's damages.

CONCLUSION

It is undisputed that that Metro Construction was administratively dissolved at the time of the Claimant's accident. However, it is also undisputed that the corporation was properly reinstated in December 2016 by the South Carolina Secretary of State's office. (Exh. H to Clmt's. APA sub's.). Given these facts, under § 33-14-220, the dissolution of Metro Construction must be treated as if it never occurred. More importantly based on the *plain meaning* of this statute, the imposition of personal liability on officers/directors acting subsequent to corporate dissolution was not intended by the South Carolina legislature and cannot be imposed on the Claimant for his actions after dissolution and before reinstatement.

Secondly, the alleged "majority rule" relied on by Respondent Fund is based on a repealed statute from another jurisdiction that contained specific language imposing personal liability for the action of corporate officers after the entity was dissolved. Hence both the facts and analysis provided in the *Moore* and *Daniels* cases in inapplicable to the case presently before the Court.

Therefore, Respondent Fund's argument to add the Claimant as a party-defendant is without merit and its motion should be denied.

Mr. Long asserts that if Respondent Zurich is not liable for Claimant's damages under Title 42 of the South Carolina Code of Laws, then Respondent Fund should pay all benefits under the

Act.

Respectfully submitted,

September 25, 2019

Nicholas G. Callas, Esq.
LAW OFFICE OF NICHOLAS G. CALLAS, PA
1901 Gadsden Street
Suite B
Columbia, SC 29201
(803)369-3968 (phone)
(803)862-1002 (facsimile)
nick@callaslawfirm.com

ATTORNEY FOR CLAIMANT APPELLANT/RESPONDENT

Certificate of Service

I certify that I have served the Respondent's Brief of Claimant, Appellant/Respondent upon all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2019, to the Counsel of Record, as listed below:

Lee Dixon, Esquire
Hedrick Gardner Kincheloe & Garofalo, L.L.P.
1230 Main Street, Suite 325
Columbia, SC 29201

Timothy B. Killen, Esquire
Holder Padgett Littlejohn & Prickett, LLC
349 West Coleman Boulevard, Suite 300
Mt. Pleasant, SC 29464

Robert C. Cook, Esquire
The Robert Cook Law Firm, LLC
128 North Oak Street, Batesburg, SC 29006

And I certify that I have served the Respondent's Brief of Claimant, Appellant/Respondent upon the South Carolina Workers' Compensation Commission by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2019, as listed below:

Amy Bracy, Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

Merridy Taylor
Merridy Taylor