THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

WCC NO. 1423018
(Appellate Case No. 2019-000897)

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. is the ..... Respondent.

INITIAL BRIEF OF RESPONDENT METRO CONSTRUCTION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE ON APPEAL

I. **DID THE COMMISSION ERR IN HOLDING THAT THE ADMINISTRATIVE DISSOLUTION AND SUBSEQUENT REINSTATEMENT OF METRO CONSTRUCTION, INC., DID NOT BAR THIS CLAIM?**

STATEMENT OF THE CASE/FACTS

Metro Construction, Inc., (Metro) is a general construction firm located in Batesburg-Leesville and is owned by the Giles Gregory (Gregg) Long. As is true of many small businesses, Mr. Long was paid as an employee of Metro while at the same time being the owner of Metro. Mr. Long is also the claimant in this matter, having been badly burned and injured in a dynamite explosion on November 20, 2014 (4/30/19 Full Commission Decision and Order at No. 7, 8 and 9), resulting in over $2 million in medical bills. Metro was incorporated in 1999, later went through a period of administrative forfeiture prior to reinstatement in 2016. Metro acquired workers' compensation coverage with American Zurich Insurance Company (insurance company) in 2014 and paid an initial estimated premium of $18,025.00. (Id. at Findings of Fact No. 10 and 11). At the time of that accident Metro was in the middle of responding to a premium audit request from the insurance company. The insurance company denied coverage, which resulted in litigation leading to the Single Commissioner finding coverage (8/22/18 Order of Commissioner Wilkerson) and later the Full Commission denying coverage and directing the Uninsured Employers' Fund (UEF) to pay this claim in the absence of coverage. (Decision and Order at pp. 42-43). The Full Commission, nevertheless, did specifically find that Mr. Long subjectively believed that he had fully complied with all premium audit information and made all payments required by the insurance company. (Id. at Finding of Fact No. 26). The claimant and Metro have both appealed the failure of the Full Commission to find coverage for this claim. Presumably, the UEF concurs with those appeals insofar as coverage is being sought elsewhere. The present appeal by the UEF

deals exclusively with the failure of the Commission to find this claim was somehow barred as a result of the period of administrative dissolution of Metro. (Order at Findings of Fact No. 24 and 25).

ARGUMENT

This is a workers' compensation appeal. This Court may only reverse a decision of the Commission if that decision was controlled by an error of law or otherwise not supported by substantial evidence. Barton v. Higgs, 381 S.C. 367, 647 S.E.2d 145 (2009). Significant deference is given to the factual findings of the Commission. Id. There is no contention by the Appellant that there is a factual dispute, the resolution of which would be dispositive one way or the other. Basically, the Appellant asserts that the Commission committed a reversible legal error in failing to bar this claim as a result of the corporate employer's prior administrative dissolution, while the claimant and Metro disagree (as did the Commission, which ruled against the UEF on this issue). Resolution of this dispute will necessarily focus on the statutory language of Title 38 (our corporate law) and Title 42 (our workers' compensation law). There is no case law even close to being on point and a fair and logical reading of the applicable statutes should result in a decision affirming the order of the Commission as to this issue.

I. There is no basis in either the case law or the statutory law for barring a claim based upon the corporate employer's since-resolved administrative forfeiture.

The position of the UEF seems to be that the corporate status of Metro was in administrative forfeiture at the time of this accident and that the failure of Mr. Long, as owner, to acquire coverage prior to his accident leads to the conclusion that he should not be permitted to receive benefits from the UEF. There is no doubt that Mr. Long was an employee of Metro and the Commission found him to be such. (Order at Finding of Fact No. 4). By way of example of this, he was paid

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by Metro on a W-2. (2013 and 2014 W-2s). The UEF does not point out any facts that would show otherwise. When he purchased insurance coverage Mr. Long specifically elected to be covered under that policy even though he could have chosen to be excluded. (Insurance Policy Election). The UEF refers to its position as "the majority rule" without really providing any compelling evidence that it is truly a majority rule in the sense of being widespread in actual fact, rather than just described as such. The reality is that there is no basis for application of such a harsh result in South Carolina without regard to the nomenclature or phraseology used. The UEF frankly notes both that this is a matter of first impression (p. 6) and that the South Carolina corporate reinstatement statute does not address personal liability (also p. 6). There simply is no reason for the UEF to seek refuge in cases from the Fourth Circuit or Vermont because the statutes in issue in the case at bar are clear and unambiguous.

South Carolina Code Section 42-7-200 is the statute specifically dealing with claims against the Uninsured Employer's Fund. There is absolutely no provision within that statute, explicitly or by implication, that would provide a basis for what the UEF is asking this Court to do. The UEF has broad powers of reimbursement from uninsured employers to recover back benefits paid to the injured workers of such employers, to include lien and levy powers against the assets of an uninsured employer equivalent to those of the state Department of Revenue. (Section 42-7-200 (C) and (D)). The legislature did not, however, see fit to include language specifically addressing the disposition of uninsured claims in the present context other than to treat such claims in the same fashion as insured claims, at least insofar as the determination of compensability is concerned. The Commission, which is tasked with applying these statutes to the myriad fact patterns of work accidents, is itself a creature of statute and, therefore, limited to acting only within the sphere of powers specifically granted by the legislature. James v. Anne's, Inc., 386 S.C. 326,

688 S.E.2d 562 (2010). The inherent limited nature of the Commission's authority provides the answer to the argument of the UEF that equity should prevent the Claimant's receipt of benefits. (See UEF brief at p. 10 ("... equity demands that Claimant should be estopped from seeking benefits through the Fund."). When the legislature speaks clearly through its statute, however, claims of equity cannot stand in the face of the statutory language. Wigfall v. Tidlands Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The Commission simply has no authority to deny this claim for the reason asserted by the UEF.

The argument of the UEF is two-fold and they are treated throughout its brief as being interchangeable, but those two arguments are theoretically distinct. First, the UEF contends that this accident occurred during the period of time that Metro's corporation status was administratively dissolved by the Secretary of State and, so it is argued, Mr. Long should not be entitled to receive benefits from the UEF because he could have taken steps to get coverage prior to his accident. (UEF brief at pp. 5-9). This argument is fatally flawed, though, as the Full Commission found as a fact that Mr. Long subjectively believed that he had done all that he could to keep coverage in place through American Zurich and actually believed coverage was in place at the time of his accident. (Order at Finding of Fact No. 26). The UEF asserts that the administrative dissolution of Metro made the actions taken by Mr. Long imputable to him alone and not on behalf of the corporation. This premise fails outright because South Carolina Code Section 33-14-220(c) specifically provides that when a corporate reinstatement occurs (as happened with Metro on December 14, 2016): "When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and corporation resumes carrying on its business as if the administrative dissolution had never occurred." There are no reported decisions interpreting Section 33-14-220 and only one unpublished decision from 2006

regarding the enforceability of an arbitration provision in the context of dissolution/reinstatement. In truth, the language of Section 33-14-220(c) is abundantly clear, without the need for interpretation, and its relationship back language vitiates the position of the UEF.

Likewise, the contention of the UEF that Mr. Long did not elect coverage as an alleged sole proprietor (p. 8) is both factually and legally incorrect. Factually, Mr. Long did elect to be covered under workers compensation when initially establishing coverage with the insurance company. (Insurance coverage election). Legally, there is no procedure for such an election in the context of an uninsured claim, but both South Carolina Regulations 67-403 and 404 mandate that the initial coverage election of Mr. Long remained in effect unless and until a notice of withdrawal from the Act is filed with the Commission.

As addressed above, the language of Title 42 does not help the UEF, either. This connects to the second main argument of the UEF, which is the asserted incongruity of the UEF providing benefits to Mr. Long which he would then in turn be required to pay back to the UEF pursuant to the provisions of Section 42-7-200 (C) and (D). (See initial brief of UEF at pages 9-11). There is no statutory language in Title 42 generally, or Section 42-7-200 specifically, that preconditions the determination of compensability based upon the presence or absence of a corporate structure. Even the statutes explicitly dealing with claims involving uninsured employers make no such distinctions. Mr. Long, as an employer, will receive benefits paid by the UEF individually and directly. Of course, he and Metro both hope that their appeals are successful and coverage is ultimately found to rest with the insurance company. The statutory lien of the UEF, if those appeals are not successful, will rest against the employer of Mr. Long, which is Metro. Both legally and factually, Mr. Long and Metro are distinct legal entities. This distinction is amplified by the refusal of the Commission to grant the motion of the UEF to add Mr. Long individually to

this claim as an employer. While that situation may be found strange by some, it is far less strange than denying Mr. Long any benefits at all because Metro went through a period of technical, administrative dissolution that was resolved long before to the UEF was ordered to pay this claim. Similarly, the UEF assertion regarding the alleged "thinness" of the corporate veil (p. 9) is both inapposite to the matter at hand and premature in that it relates to the theoretical post-judgment collection activities of the UEF ***after*** a judgment is entered (emphasis added).

There are mechanisms within Title 42 to "punish" an employer that is required to have workers' compensation insurance but does not. Section 42-5-40 provides that an employer that does not secure the required coverage "shall" be fined up to $100 per day for each day of non-compliance. Section 42-5-45 makes willful non-compliance a crime punishable by fine and/or up to six months in jail. Some states, New York, for example, have gone so far as to make the officers of an improperly uninsured corporation personally liability for a workers' compensation claim brought against the corporation. See NY WKC LAW Section 26-A. The unwillingness of our legislature to go further in punishment of uninsured employers is telling. The UEF would have this Court create another penalty beyond that provided by statute, which would be an outright bar of any claim being prosecuted on behalf of the injured worker when that worker also happens to an owner of an uninsured corporate employer. No such bar exists and it is not the place of the Commission or this Court to create one. Peay v. U.S. Silica Company, 313 S.C. 91, 437 S.E.2d 64 (1993) (workers' compensation statutes should be liberally construed in favor of coverage and any exceptions to coverage narrowly interpreted). In light of all of this, the decision of the Full Commission as to the issue raised by the UEF should be affirmed and no bar put between Mr. Long and his claim just because he was the owner of a uninsured corporation, particularly when the Commission itself explicitly found that Mr. Long subjectively believed that he had fully

complied with all audit requests and that coverage was in place on the date he was injured. (Order at Finding of Fact No. 26). For these reasons, the Commission should be affirmed on this issue.

CONCLUSION

For the reasons stated above, or as may be made at oral argument, the Respondent Metro Construction, Inc., requests that this Court affirm that part of the Commission's order regarding the Uninsured Employer's Fund.

Respectfully submitted,

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September 26, 2019

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

And American Zurich Ins. Co. is the ..... Respondent

PROOF OF SERVICE

I certify that I have served the Respondent's Designation of Matter of Metro Construction, Inc. and the Respondent's Brief of Metro Construction, Inc. on the attorneys for the parties by depositing a copy of it in the United States Mail, first class postage prepaid, on August 28, 2019, addressed to Nicholas G. Callas, Esquire, 1901 Gadsden Street, Suite B, Columbia, SC 29201, the attorney for Giles Long, Timothy B. Killen, Esquire, 349 West Coleman Blvd., Suite 300, Mt. Pleasant, SC 29464, the attorney for the South Carolina Uninsured Employers' Fund and Lee E. Dixon, Esquire, P.O. Box 11267, Columbia, SC 29201, the attorney for American Zurich Insurance Co.

September 26, 2019

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September 26, 2019

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Giles Long v. Metro Construction, Inc., et al.
Appellate Case No.: 2019-000897

Dear Ms. Abbott:

Enclosed please find the original and one copy each of the Respondent's Initial Brief and Designation of Matter of Metro Construction, Inc., with proof of service attached. Please file the originals of both documents and return the file-stamped extra copies to me. By means of a copy of this letter I am serving opposing counsel with both documents. Please call if there are any questions.

Very Truly Yours,

Robert M. Cook II

ROBERT M. COOK II
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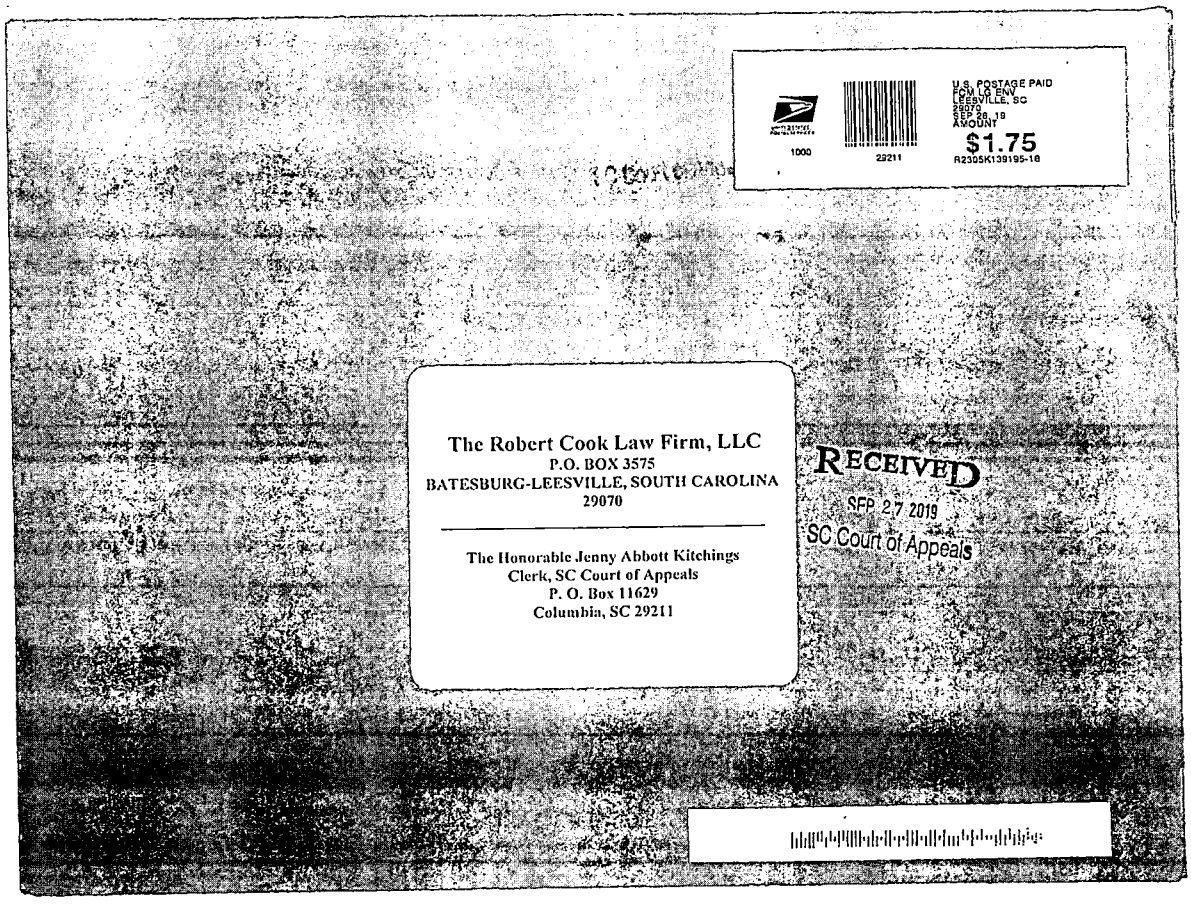
RMC:ppd

Enclosures: Respondent's Initial Brief of Metro Construction, Inc.
Respondent's Designation of Matter of Metro Construction, Inc.
Proof of Service

cc: Nicholas Callas, Esquire
Lee E. Dixon, Esquire
Timothy B. Killen, Esquire



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