

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill; Melody L. James; R. Michael Campbell, II
Workers' Compensation Commissioners

WCC File 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

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December 2, 2018

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STATEMENT OF ISSUES ON APPEAL

DID THE COMMISSION ERR IN FINDING THAT ZURICH PROPERLY CANCELLED METRO'S POLICY PRIOR TO THE DATE OF ACCIDENT?

STATEMENT OF THE CASE

This appeal from a decision and order of the South Carolina Workers Compensation Commission ("Commission") arises out of a work-related accident that occurred on November 20, 2014. At the time of the accident, the claimant, Giles "Gregg" Long ("Claimant") was the owner of Metro Construction Company ("Metro"), as well as an employee.¹ Prior to this accident, Metro had a workers compensation insurance policy issued through American Zurich Insurance Company ("Zurich"). That policy was cancelled by Zurich effective August 8, 2014 due to Metro's failure to comply with a post-issuance audit. As a result, Metro was uninsured at the time of the accident. Following the accident, Claimant sought coverage under the policy but Zurich denied the claim based on the prior cancellation. The South Carolina Uninsured Employers' Fund ("UEF") was made a party based on the denial of coverage.

A hearing was held before Commissioner Avery B. Wilkerson, Jr. ("Single Commissioner") on March 13, 2018 for the purpose of, *inter alia*, determining whether Zurich's policy provided coverage for this accident. The Single Commissioner found that Zurich did not properly cancel its policy, that Metro did not commit a substantial breach of its contract, and that Claimant believed that he had coverage in place on the date of his injury. As such, the Single Commissioner held that Zurich was the responsible carrier for this claim. On appeal to the Appellate Panel of the Commission reversed the Single Commissioner's decision with respect to the issue of Zurich's liability. The Appellate Panel found that Zurich had properly cancelled coverage prior to Claimant's

¹ As a result of this dual role, the terms "Claimant" and "Metro" will in most cases refer to the individual, Mr. Long, and may be interchangeable throughout this brief.

accident and, as such, was not responsible for the claim. The Appellate Panel found that Metro and the UEF were responsible to Claimant for any workers compensation benefits and dismissed Zurich from the claim. Claimant, Metro, and the UEF all filed Notices of Appeal as to the order of the Appellate Panel.

STANDARD OF REVIEW

“In workers’ compensation cases, the Full Commission is the ultimate fact finder. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. It is not the task of this Court to weigh the evidence as found by the Full Commission. *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)(internal citations omitted). A decision of an administrative agency must be affirmed unless that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5)(Supp. 2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E. 2d 304 (1981). “Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact.” *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007).

The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 495 S.E.2d 447 (1998). When factual findings are supported by substantial evidence, analogous to a jury’s finding of fact on disputed issues, the agency’s conclusions should be affirmed. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E. 2d 613 (1986). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. *Tiller v. Nat’l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

STATEMENT OF FACTS

Effective April 4, 2014, Zurich issued a Workers Compensation and Employers Liability Policy (the “Policy”) to Metro. (APA 799) In addition to providing workers compensation coverage, the Policy imposes certain obligation and duties upon the insured. Specifically, the Policy specifies the following requirement:

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium.

(APA 758). The testimony in the record explains that an audit is conducted after a policy is issued in order to “true up” the policy premium to actual payroll and exposure rather than what was provided in the initial application for the policy. (Tr. p. 54) In order to assist insureds, the policy included “Premium Audit Tips” providing answers to common questions about audits and advising that cooperation with an audit is “very important.” (APA 773-774). Based on the failure to provide requested records during this audit, Zurich issued a cancellation notice on July 4, 2015. (APA 802) That notice, under the heading “CANCEL NOTICE – FAILURE TO AUDIT PAYROLL OR PERMIT AN AUDIT,” notified Metro that “your policy designated herein is cancelled in accordance with its terms as of the effective date of cancellation indicated herein...” (*Id.*) The effective date of the cancellation was August 8, 2015; more than thirty (30) days after the date the notice of cancellation was issued. On July 5, 2014, Zurich further issued a “Notice of Non-Cooperation with Preliminary Audit” to Metro and its agent advising that “several attempts

have been made to obtain payroll, classification and tax information from you in order to prepare the preliminary audit.” (APA 803-04) The Policy was reported “Cancelled” to NCCI effective August 8, 2014 for failure to comply with terms and conditions or audit failure. (APA 805) Subsequent to the effective date of cancellation, Zurich continued its attempts to obtain audit information. (APA 806-812)

On November 20, 2014, Claimant was involved in a work accident where he sustained injuries in a dynamite blast explosion. (See generally, APA 1 – 655)

ARGUMENT

THE COMMISSION DID NOT ERR IN FINDING THAT ZURICH PROPERLY CANCELLED METRO’S POLICY PRIOR TO THE DATE OF ACCIDENT.

It is undisputed that Zurich notified Metro of the cancellation of its policy on July 4, 2014. (Zurich Exh. D, APA 802) That notice, under the heading “CANCEL NOTICE – FAILURE TO AUDIT PAYROLL OR PERMIT AN AUDIT”, advised Metro that “your policy designated herein is cancelled in accordance with its terms as of the effective date of cancellation indicated herein...” (APA 802). The appellants, particularly Claimant and Metro, argue on appeal that the cancellation was itself improper and that subsequent communications from Zurich created an understanding on the part of Metro that the policy had not been cancelled. For the reasons set forth below, both of these arguments are without merit and the findings and decision of the Appellate Panel should be affirmed.

I. The Policy cancellation was proper.

South Carolina law provides that “[i]nsurance policies are subject to the general rules of contract construction.” *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). “When a contract is unambiguous, clear, and explicit, it must be construed

according to the terms the parties have used.” *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* Moreover, an insurer’s obligation under a policy must be defined by the terms of the policy itself and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (1990). When the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage. *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (2001). Furthermore, once a determination is made that the contract is unambiguous, the court must enforce it according to its terms “regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) (citation omitted).

Here, the Commission found that the terms of the policy are clear and unambiguous. (Decision, Finding of Fact No. 15) The Commission found that the policy states that the insured has an obligation to maintain records to compute the premium and the insurer has the right to perform an audit. As evidenced by the record, correspondence to Metro indicated that “several attempt have been made to obtain payroll, classification and tax information from you . . .” (See APA 803-804) The Commission found that no such records were produced by Metro prior to the effective date of cancellation. (Finding of Fact No. 17) As such, the Commission found that Metro’s failure to provide the requested information constituted a substantial breach of the terms of the Policy and that the Policy was properly cancelled as of August 8, 2014. (Finding of Fact No. 18)

Claimant contends that the Commission erred in finding that Metro substantially breached its contract with Zurich. In support of this position, Claimant relies on actions taken by Claimant after receipt of the cancellation notice and after the effective date of the cancellation. In particular, Claimant points to testimony of Claimant that he hired a bookkeeper and provided a

Form 941 containing payroll and financial information to Zurich twelve days after the policy cancellation. See Claimant's APA, Exh. E. Whether or not this information was provided to Zurich after the cancellation of the policy, such evidence does not and cannot form the basis for a finding that the policy wasn't properly cancelled. As stated by the Commission in its order, "None of the correspondence or actions of the parties subsequent to the cancellation date could reasonably be construed as a reinstatement of the policy or revocation of the cancellation." (Finding of Fact No. 23).

Despite these arguments by Claimant, the substantial evidence in the records supports the findings of the Commission. S.C. Code Ann. § 38-75-730(a)(4) allows that a workers' compensation insurance policy may be cancelled for "substantial breaches of contractual duties, conditions, or warranties." As determined by the Commission, the plain language of the insurance policy spelled out the obligations of the insured to comply with audit requests. Here, Zurich gave Metro a notice of cancellation on July 4, 2014, a full 35 days prior to the effective date of cancellation. According to Claimant's testimony, he submitted a Form 941 with certain financial information at the end of August 2014. The testimony of Mr. Lukes indicates that this Form 941 was not actually received by Zurich until sometime in January 2015. (Tr. p. 98) Even assuming Claimant's testimony is true, Claimant did not provide this information until at least 47 days after the cancellation notice was issued, and 12 days after the policy had actually cancelled. There is simply no evidence in the record that Metro made any attempt to cure its breach prior to the cancellation date and nothing in the records supports an argument that the policy was not cancelled or had been reinstated.

S.C. Code Ann. § 38-75-730(b) states that cancellation, in general, is not effective unless written notice of cancellation has been mailed to the insured and agent of record "not less than thirty days prior to the proposed effective date of cancellation" at the addresses shown in the

policy, and states the precise reason for cancellation. Here, it is undisputed that Zurich met all of these provisions. (APA 802-805; Tr. p. 59). However, Zurich did not even need to comply with these provisions as S.C. Code Ann. § 38-75-730(c) states that these provisions do not apply where the policy is not a renewal policy and has been in effect for less than one hundred twenty days. In this circumstance, the policy may be cancelled for any reason so long as written notice is furnished to the insured within thirty days. As of the date of the cancellation notice, the policy had not been in effect for 120 days. Under either provision of the statute, Zurich properly cancelled the policy. This was the finding of the Appellate panel and is supported by the substantial evidence in the record.

Based on the foregoing, the substantial evidence in the record supports the findings of the Commission and, as such, must be affirmed on review.

II. The cancellation notice was clear and unequivocal.

The Commission found that Zurich properly cancelled the Policy based on Metro's failure to comply with a premium audit and that Zurich satisfied the statutory requirements for cancellation. In an effort to side-step these factual determinations of the Commission, Claimant argues that certain language in the post-cancellation period was confusing and that this confusion should operate to reinstate a policy that had been properly cancelled. The Commission properly rejected this argument by finding that there was no ambiguity in the correspondence and that, if there were, such post-cancellation actions could not reinstate the Policy. (Finding of Fact No. 23)

As an initial matter, it is important to note that the cases cited by Claimant involve the interpretation and construction of language in a contract. In this case, Claimant argues that documents outside of the contract, and issued after the contract was cancelled, can create an

ambiguity that would negate the prior cancellation. Zurich can find, and Claimant has not cited, any authority for this argument.

The cornerstone of Claimant's argument is the fact that several premium audit notices issued to Metro following the cancellation contain references to the original policy period of 4/4/14 – 4/4/15 and contain the same admonition that "failure to allow access for audit of the policy may result in cancellation of your Workers Compensation and Employers Liability Insurance Policy." The first such notice was issued on October 23, 2014; 77 days after the effective date of the cancellation. As testified to by Mr. Lukes, this notice was a form letter regarding an insured's obligation to cooperate with a premium audit and references the initial policy term. (Tr. 127-128). The "may result in cancellation" language is part of the form letter intended to cover situations where there may have been a reinstatement of a policy and advise the insured of their continued duties under any applicable policy. Nothing in this form language can reasonably be construed as advising Metro that its policy has been reinstated following the clear cancellation notice from months prior. The same is true for the Earned Premium Notices. (APA 817, 823). Each of these notices advise the insured of a premium adjuster as a result of "recent audit activity". Nothing in these letters advises the insured that its previously cancelled policy has been reinstated.

Claimant also argues that the submission of the Form 941 information is relevant to his "belief" that his policy had been reinstated. First, as discussed above, there is a conflict in the testimony as to when this financial information was provided. Claimant testified that it was provided approximately two weeks after the effective date of the cancellation and Zurich's records appear to show that the information was received in January 2015. Second, even assuming that Claimant's version is accurate, there is no contemporaneous evidence in the record from Zurich confirming receipt of the information or acknowledging a reinstatement of the

policy. The record, however, does contain several records specifically referencing the cancellation of the policy. On September 19, 2014, Zurich issued a letter regarding a premium audit. (APA 806) The header on that letter references the policy period of August 8, 2014. A “Premium Adjustment Notice” was issued on November 3, 2014 (three weeks prior to Claimant’s accident). (APA 813). That notice specifically references “CANCELLATION AUDIT 04/04/14 – 08/08/14.” A similar notice was issued on January 5, 2015. (APA 819). The September 19, 2014 letter specifically requested a written response with additional information within 15 days. There is no evidence that Claimant responded to this letter or made any other inquiry as to the status of his policy. Claimant’s subjective “belief” as to the continuation of his policy simply does not counter the evidence of a properly noticed and effective policy cancellation. This was the finding of the Commission and this finding is supported by the substantial evidence in the record.

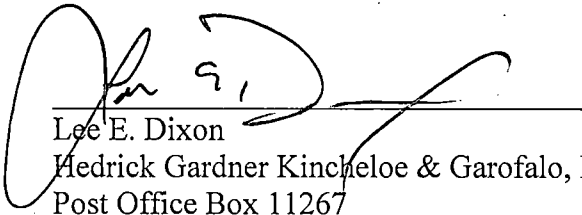
III. Zurich takes no position with regard to the issues raised on appeal by SCUEF.

On appeal, the SCUEF raises issues regarding the impact of Metro’s corporate dissolution as to SCUEF’s liability for Claimant’s accident. Zurich takes no position regarding this issues and the alleged assignment of error to the Appellate Panel.

CONCLUSION.

Based on the foregoing, the Commissioner correctly determined that Metro’s policy with Zurich was properly cancelled and that coverage was not in effect on November 20, 2014. Simply put, Zurich fully complied with the statutes and regulations in canceling the policy and Claimant, as the owner of Metro, should not be permitted to escape responsibilities for which he lawfully contracted when he made a conscious decision to ignore deadlines. Further, Zurich

should not be forced to provide insurance to Metro and Claimant beyond August 8, 2014, as Claimant did not pay any premiums for coverage beyond that date.



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December 2, 2019

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Of which Metro Construction, Inc., Employer, and The SC Uninsured Employers' Fund, Carrier
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and American Zurich Ins. Co. is the Respondent.

PROOF OF SERVICE

This is to certify that a copy of the foregoing **Respondent's Initial Brief** and
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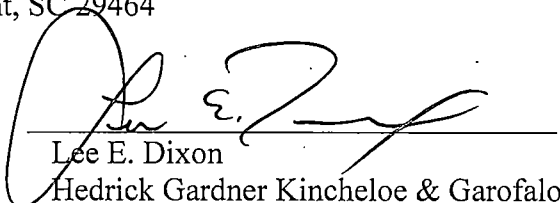
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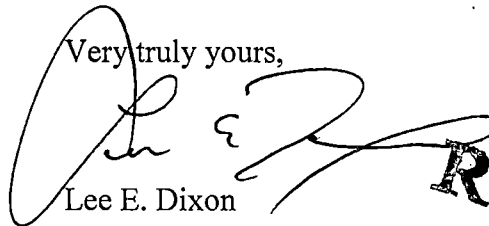
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WCC File No.: 1423018
Appellate Case No.: 2019-000897
Claim No.: E5V6745
Our File: 00082L.00536

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy each of the Initial Brief of Respondent American Zurich, Designation of Matter, and Proof of Service. Please file the originals and return the file-stamped copies to me. By copy of this letter, with attachments, I am hereby serving all counsel of record with these documents.

Very truly yours,



Lee E. Dixon

LED/led

Cc: Nicholas G. Callas
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S.C. Workers Compensation Commission

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