

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)

RECEIVED
DEC 13 2019
SC Court of Appeals

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 REPLY BRIEF OF APPELLANT METRO CONSTRUCTION, INC.

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Pursuant to Rule 208(b)(3), SCACR, the Appellant Metro Construction, Inc., replies to the initial brief of the Respondent American Zurich Insurance Company as follows:

ARGUMENT IN REPLY

1. The insurance company assumes language not contained in the policy.

The insurance company does not address the argument of Metro that the insurance policy it drafted contained no deadline with regard to audit request compliance. The insurance company simply assumes that it can unilaterally determine such deadlines even though the policy does not state that. In fact, the audit compliance provision quoted by the insurance company at page 3 of its brief only provides two actually stated criterion: (1) that the insured permit the insurance company to examine and audit records, and (2) that such audits can be conducted during “regular business hours during the policy period.” In other words, the policy itself only requires that the insured allow the insurance company to inspect its records during regular business hours. The insurance company admits at page 3 that its cancellation was based upon Metro’s “**failure to provide** requested records during this audit,” which is a significant admission as the policy does not require Metro to provide that information rather than only allow access to it. (Emphasis added). The Commission’s finding of fact No. 18 found a substantial breach by Metro on this basis, which is plain error as the policy does not even place this obligation on Metro. There is no evidence that the insurance company even requested an onsite audit or that Metro did not cooperate with the same. This argument raised in pages 7 and 8 of Metro’s initial brief are just ignored by the insurance company. Metro simply asks that the actual (and not assumed) language of the policy be applied in determining its obligations.

2. The insurance company ignores its obligation to assist the insured, rather than confuse the insured.

The insurance company does not even reference the Crews case cited and discussed by both Mr. Long and Metro which requires that meaningful assistance be provided to the insured. In a case like this one, where the actions taken by the insurance company were so confusing that its own witness could not testify that its cancellation complied with South Carolina law, the Crews requirement of meaningful assistance becomes all the more important. The insurance company sent both a cancellation notice dated July 4th and an audit letter dated July 5th which stated only that coverage may be cancelled. Leaving aside the strangeness of a notice dated July 4th (and the closure of the post office on Independence Day, which means that it could not have been mailed until the following day, which means the insured would likely have received them both on the same day), this one, two combination punch by the insurance company was inherently confusing to Metro. There are other examples of the confusion created by the insurance company laid out in the initial briefs of Metro and Mr. Long. The Commission implicitly recognized the confusion created by the insurance company in holding that Mr. Long (the owner) subjectively thought he had fully complied with the audit obligations at finding of fact No. 26. The insurance company does not argue that holding was error. The obligations of the insurance company are not negated by the timing of its cancellation. This is true whether the Court looks at the confusion the insurance company created or its failure of assistance. The position of Metro is straightforward as follows: the insurance company cannot send confusing and contradictory documents to the insured, ignore its obligation to provide meaningful assistance after doing so, and then seek to excuse the same by reliance upon assumed audit conditions that are not even part of the policy.

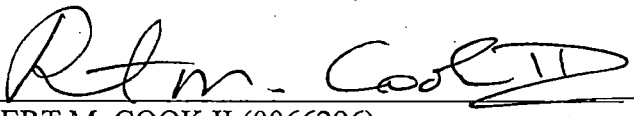
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R. [Signature]

CONCLUSION

For the reasons stated above, or as may be made at oral argument or as otherwise briefed, the Appellant Metro Construction, Inc., requests that this Court reverse the finding that American Zurich Insurance Company did not have coverage for this claim.

Respectfully submitted,

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December 12, 2019

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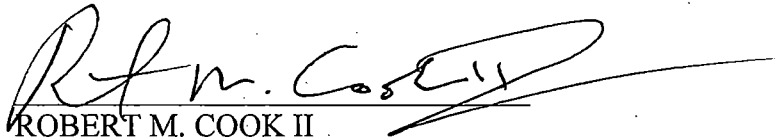
of which Metro Construction, Inc., Employer, and The SC Uninsured Employers' Fund,
Carrier, are Respondents/Appellants

And American Zurich Ins. Co. is the Respondent

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant Metro Construction, Inc. on the attorneys for the Respondents by depositing a copy of it in the United States Mail, first class postage prepaid, on December 12, 2019, addressed to Nicholas G. Callas, Esquire, 1901 Gadsden Street, Suite B, Columbia, SC 29201, the attorney for the Appellant, 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.

December 12, 2019



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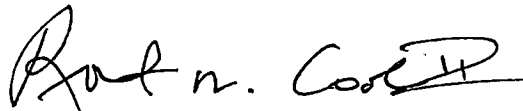
SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Reply Brief of Appellant Metro Construction, Inc., with proof of service attached. Please file the original and return the file-stamped extra copy to me. By means of a copy of this letter I am serving opposing counsel with this document. Please call if there are any questions.

Very Truly Yours,



ROBERT M. COOK II
The Robert Cook Law Firm, LLC

RMC:ppd

Enclosures: Initial Reply Brief of Appellant Metro Construction, Inc.
Proof of Service
Return Envelope

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



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