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, III, Commissioner

RECEIVED
JAN 16 2020
SC Court of Appeals

Case No. 1423018

Giles Long...Claimant, Appellant/Respondent

v.

Metro Construction, Inc., Employer, and
American Zurich Ins. Co. and The
SC Uninsured Employer's 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

---

RECORD ON APPEAL VOLUME IV OF IV

Lee Dixon, Esquire
Hedrick Gardner Kincheloe & Garofalo, L.L.P.
1230 Main Street, Suite 325
Columbia, SC 29201
Counsel for Respondent American Zurich Insurance Company

Robert C. Cook, Esquire
The Robert Cook Law Firm, LLC
128 North Oak Street
Batesburg, SC 29006
Counsel for Respondent/Appellant Metro Construction, Inc.

Timothy B. Killen, Esquire
Holder Padgett Littlejohn & Prickett, LLC
349 West Coleman Boulevard, Suite 300
Mt. Pleasant, SC 29464
Counsel for Respondent/Appellant, SC Uninsured Employers Fund

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

INDEX

VOLUME I

(1) Orders

Decision and Order of the Appellate Panel filed April 30, 2019 1

Decision and Order of the Single Commissioner filed August 22, 2018 45

Judicial Conference Decision and Order of the Full Commission filed May 15, 2017 75

Order from the Single Commissioner denying Respondent SC Uninsured Employers' Fund's Motion to Add Giles Long as a Defendant filed April 19, 2017 76

Order from the Single Commissioner adding Respondent American Zurich Ins. Company as a Defendant filed April 14, 2016 78

(2) Pleadings

Claimant's Notice of Appeal filed May 29, 2019 79

Form 30 Request for Commission Review by Respondent American Zurich Ins. Company filed September 5, 2018 82

Form 30 Request for Commission Review by Respondent SC Uninsured Employers' Fund filed September 5, 2018 88

American Zurich Ins. Company's Form 51, filed October 20, 2017 89

SC Uninsured Employers' Fund's Form 51, filed October 13, 2017 90

Claimant's Form 50 requesting a hearing, filed September 29, 2017 92

Form 58 Respondent American Zurich Ins. Company's Pre-Hearing Brief and APA Submissions filed July 10, 2017 93

Form 58 Respondent SC Uninsured Employers' Fund's Pre-Hearing Brief and APA Submissions filed July 10, 2017 96

Form 58 Claimant's Pre-Hearing Brief and APA Submissions filed July 5, 2017 100

VOLUME II

Form 58 Claimant's Pre-Hearing Brief and APA Submissions filed July 5, 2017 (cont.)........501

Form 30 Respondent SC Uninsured Employers' Fund's Appeal filed April 27, 2017............849

Form 51 Denial of Claim by Respondent American Zurich Ins. Company filed April 7, 2017...851

Respondent SC Uninsured Employers' Fund's Motion to Add Claimant, Giles Long as a Third-Party Defendant filed March 24, 2017..852

Respondent SC Uninsured Fund's Motion to Add Respondent American Zurich as a Third-Party Defendant filed April 7, 2016...855

Form 51 Denial of Claim by Respondent SC Uninsured Employers' Fund filed December 30, 2015..862

Claimant's Form 50 Requesting a Hearing filed December 3, 2015.............................864

Claimant's Form 50 Notice of Claim filed September 29, 2015....................................865

Claimant's Form 50 Notice of Claim filed March 12, 2015..866

(3) Transcripts

Transcript of the Argument Before the Appellate Panel...867

Transcript of Hearing Before the Single Commissioner...901

Testimony of Timothy Lukes...946

Direct Examination by Ms. Haltiwanger...946

Cross-Examination by Mr. Callas...978

Cross-Examination by Mr. Killen...994

VOLUME III

Cross-Examination by Mr. Cook...1000

Redirect Examination by Ms. Haltiwanger..1034

Recross Examination by Mr. Callas...1044

Recross Examination by Mr. Killen....1049

Further Redirect by Ms. Haltiwanger....1052

Testimony of Giles Long....1073

Direct Examination by Mr. Callas....1073

Cross-Examination by Mr. Killen....1099

Cross-Examination by Ms. Haltiwanger....1118

Cross-Examination by Mr. Cook....1133

Recross-Examination by Mr. Killen....1146

Redirect Examination by Mr. Callas

(4) Exhibits

Insurance Application....1151

Workers' Compensation Policy....1159

Insurance Agent's Policy docs....1208

Premium payment check....1302

April 14, 2014 Policy Binder....1303

July 4, 2014 Cancel Notice....1306

July 5, 2014 Notice of Non-Cooperation with Preliminary Audit by Defendant America Zurich....1307

Proof of NCCI cancellation/NCCI Policy Data Collection screen....1309

September 19, 2014 Premium Audit Notice....1310

October 23, 2014 Notice of Non-Cooperation with Preliminary Audit....1315

November 3, 2014 Premium Adjustment Notice....1317

November 3, 2014 Message legend to Metro....1320

November 5, 2014 Earned Premium statement....1321

January 5, 2015 Premium Adjustment Notice....1323

January 7, 2015 Earned Premium Statement....1327

January 26, 2015 Earned Premium statement....1328

Quarterly 941 for 2014 dated 8/20/2014....1329

Memo showing premium payment of $128 dated 11/24/2014....1333

Notice of additional premium due from Defendant American Zurich dated 1/7/2015....1334

SC Secretary of State application for reinstatement....1335

SC Secretary of State Articles of Incorporation....1337

Title to Real Estate....1339

SC Secretary of State Business Entities Online....1340

Compliance Agreement....1342

2015 Individual Income Tax Return 1040....1343

2014 Individual Income Tax Return 1040....1345

2013 Income Tax Return 1040....1347

2014 Corporation Income Tax Return....1349

2013 Corporation Income Tax Return....1386

2015, 2014, 2013 W-2s....1419

Claimant Questionnaire....1422

UEF's Investigative Report....1423

(5) Other Materials and Documents

Claimant's Brief to the Appellate Panel....1465

VOLUME IV

Respondent American Zurich Ins. Company's Brief to the Appellate Panel....................1479

Respondent SC Uninsured Employers' Fund's Brief to the Appellate Panel......................1502

Claimant's Memorandum in Opposition to Adding Third-Party Defendant dated April 4, 2017..1508

Certificate of Counsel

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1423018

GILES GREGG LONG,

Claimant,

vs.

METRO CONTRUCTION, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY AND THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND,

Carriers,

Defendants.

APPELLANT'S BRIEF TO THE FULL COMMISSION

STATEMENT OF THE CASE

This case was heard before Commissioner Avery B. Wilkerson, Jr. ("Single Commissioner") on March 13, 2018, in Columbia, South Carolina. Giles Gregg Long ("Claimant") sustained injuries from a work-related accident on November 20, 2014. As defendants/employers, Claimant named Metro Construction, Inc. ("Metro"), American Zurich Insurance Company ("Zurich") and The South Carolina Uninsured Employers' Fund ("SCUEF").

By way of background, Claimant is the owner of Metro, a commercial construction and demolition company, and is also an employee of the company. Claimant purchased an assigned risk workers' compensation policy for Metro on April 4, 2014, under which policy he was an insured employee. The original policy period was for April 4, 2014, to April 4, 2015. Claimant was notified on July 5, 2014, that his policy would be cancelled effective August 8, 2014, for

failure to cooperate with the audit if he did not provide the information that had been requested of him. When the problem was not rectified, Metro's policy was cancelled effective August 8, 2014. Claimant continued to receive requests for payroll information as he still had an obligation under the contract to provide that information to permit Zurich to determine the correct premium amount for the time period when the policy was in effect based on Metro's actual payroll, not the estimate used when he purchased the policy. Claimant also received a request for additional premium as the initial audit for the April 4, 2014 to August 8, 2014 policy period was based on an estimate when no payroll records were received. Once payroll records were received from Claimant, another request for additional premium was mailed to "true up" Metro's account with Zurich for actual premium owed for the actual effective dates of the policy. Claimant asserted that because he continued to pay premiums and provide financial/payroll information, he believed he had workers' compensation coverage for himself at the time of his accident. Therefore, he argued he was entitled to past medical expenses, past temporary total disability benefits and future medical care for his November 20, 2014, accident.

Zurich denied the claim on the grounds that Metro's policy was cancelled prior to the date of the accident for failure to comply with the audit, conditional warranty in accordance with S.C. Code Ann. §38-75-730(a)(4). Specifically, Zurich argued Claimant's failure to provide audit information represented a substantial breach of the contract in violation of S.C. Code Ann. §38-75-730(a)(4) and maintained that its policy cancellation was properly executed because notice of cancellation was timely delivered to the insured and the agent of record in accordance with S.C. Code Ann. §38-75-730(b).

SCUEF argued that either Zurich was responsible for Claimant's damages, or Claimant was personally responsible for his own damages. SCUEF's argument was that Claimant, as the

owner of Metro, continued to operate his business after it was administratively dissolved by the SC Secretary of State's office. However, Metro was administratively reinstated by the Secretary of State's office in December 2016, and the SCUEF's motion to add Claimant individually as a defendant to this claim was denied prior to the hearing.

In an Order dated August 22, 2018 ("Order"), the Single Commissioner found that while Zurich mailed a notice of cancellation of the policy to Metro and its agent on July 4, 2014, with a stated reason of "failure to audit payroll or permit an audit" and effective date of cancellation of August 8, 2014, and that Zurich provided the proof of NCCI cancellation received on July 7, 2014, showing a cancellation reason of "failure to comply with the terms & conditions or audit failure" and a cancellation effective date of August 8, 2014, and a number of other documents regarding the cancellation, including several documents well after the date of cancellation, some of the wording was confusing and could cause Claimant to believe he still had coverage. The Single Commissioner found Claimant believed he had provided the requested payroll information required by Zurich, paid all required premiums on time and that he believed coverage was in effect at the time of his work-related accident. He further found Claimant believed the non-compliance letter from Zurich dated October 23, 2014, meant that coverage was in effect.

The Single Commissioner found the actions taken by Zurich, and the letters and correspondence sent by Zurich to Metro, were confusing as to what was required of Metro, when it was required and what would happen if the information was not provided as requested. He found Metro fully paid all premiums as required and reasonably and substantially complied with all requests for additional information. The Single Commissioner found Claimant did not commit a substantial breach of the contract pertaining to the audit requirement under the workers' compensation policy or under Section 38-75-730(a)(4) as Claimant paid his initial premium in full,

continued to provide payroll/financial information to Zurich and timely paid premium charges upon receipt. He found the policy provided by Zurich was not cancelled and that coverage was in effect on November 20, 2014, when Claimant was injured and that Zurich was responsible for providing all benefits to Claimant that he is entitled to under the S.C. Workers' Compensation Act.

The Single Commissioner concluded there was no violation of S.C. Code Ann. §38-75-730(a)(4) in this case and found Claimant did not commit a substantial breach of his contractual duties, conditions or warranties of the contract with Zurich. He determined Claimant was not at maximum medical improvement and that Zurich is to provide reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care pursuant to Section 42-15-60(A). He further determined that *Crews v. W.R. Crews, Inc.* 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010), holds that a carrier is to adopt a flexible approach when dealing with an insured who is unable to strictly comply with the policy terms but is making reasonable efforts to do so.

Zurich filed a Form 30, *Request for Commission Review*, on September 5, 2018, asserting twenty-seven (27) errors in the Single Commissioner's Findings of Fact and Conclusions of Law. Specifically, Zurich argues the Single Commissioner erred in: 1) relying on the subjective beliefs Claimant had concerning the terms of the policy instead of the plain language of the documents; 2) inferring Claimant was excused from timely responding to Zurich's requests for audit information because no deadline existed in the policy as this ignores statutes and must be read in conjunction with the policy; 3) relying on *Crews* regarding a flexible approach when dealing with an insured as there is no evidence Claimant attempted to comply with Zurich's requests for information prior to the cancellation; 4) finding the language in the October 23, 2014, letter was confusing enough for Claimant to believe his policy was still in effect when the cancellation had

occurred over 60 days' prior to Claimant's receipt of this letter; 5) conflating reinstating the policy with the processes for cancelling the policy; and 6) finding Claimant paid for coverage and was entitled to coverage from April 4, 2014, to April 4, 2015, when the premiums paid only covered through August 8, 2014.

STATEMENT OF THE FACTS

Timothy Lukes

On examination by counsel for Travelers and Zurich, Mr. Lukes testified that he is employed by Traveler's Indemnity Company and its property and casualty affiliates, where he is a Senior Underwriter for the Assigned Risk market. (Tr. p. 46). He has been employed there for twelve (12) years and his responsibilities include servicing a book of business, offering management and executive's opinions on complex cases, and appearing at hearings and/or depositions as needed. (Tr. p. 47). Mr. Lukes testified that he had traveled from the Orlando office and that his office along with an office in St. Louis, Missouri, operated the Assigned Risk Division of Travelers. (Id.). Mr. Lukes testified that the Orlando office services the State of South Carolina and thus he was sent from Orlando to attend the hearing. (Tr. pp. 47-48). Mr. Lukes testified about assigned risk policies and explained that each state provides an avenue for legal entities to acquire a Worker's Compensation policy in compliance with the law. (Tr. p. 48).

Mr. Lukes testified that a policy was issued to Metro in which he identified the specific policy that was issued to Metro and confirmed that the policy number was 6ZZUB2E1499-8-14. (Tr. pp. 49-50). Mr. Lukes then explained that Zurich contracts with Travelers to handle Zurich's worker compensation polices for South Carolina. (Tr. pp. 51-52). Mr. Lukes clarified that Travelers does not work underneath Zurich, but contracts with them to work on their South Carolina policies. (Id.). Mr. Lukes continued his testimony and explained that the policy coverage

period for Metro's policy was from April 4, 2014 to April 4, 2015. (Tr. p. 52). Mr. Lukes confirmed the address for Metro as 2526 Caney Branch Road, Leesville, South Carolina 29070-8928 and clarified that the policy in question was Metro's first and only year of issuance with Zurich and that the date of issue was May 8, 2014, as stated at the bottom of the policy. (Tr. p. 53).

Mr. Luke testified about the notice of cancellation and explained that the notice was sent to Metro based on a failure to audit their payroll or permit an audit to be conducted by the insurer. (Tr. p. 54). He further explained that an audit is required on a policy to confirm the payroll information that was estimated at the time of issuance. (Id.). He explained that the initial payroll or exposure must be estimated and states that an audit can occur at any point during the term as a means of truing up the estimated exposure and providing actual exposure amounts. (Id.). Mr. Lukes testified that the payroll audit was a preliminary audit. (Tr. p. 55).

Mr. Luke testified that the initial premium for Metro's policy was $15,928.00. (Tr. p. 57). Mr. Lukes then testified that the notice of cancellation was issued on July 4, 2014 and went out by mail either the evening of July 4, 2014 or early morning on July 5, 2014. (Id.). He stated that the effective date of the cancellation was August 8, 2014. (Tr. p. 58). Mr. Lukes explained that an insured is required to do an audit and if they fail to complete the audit, a cancellation will be issued. (Id.). Mr. Lukes confirmed that the notice of cancellation in question was the type that would be issued for failure to complete an audit. (Id.). Mr. Lukes testified that the agent of the policy would also receive notice of cancellation which is indicated on a cover letter that shows the Agent's address. (Tr. pp. 58-59).

Mr. Lukes testified generally about the NCCI system used by the insurer and stated that the status of a policy is displayed in the system. (Id.). He explained that Travelers sends cancellation information to the system. (Tr. pp. 60-61). He clarified that the system reported that

Metro's policy was cancelled as of August 8, 2014 for failure to comply with the terms and conditions pertaining to audits. (Tr. p. 61). He testified that the cancellation was due to audit failure only. (Id.).

Mr. Lukes then testified about the premium notices and stated that the notice was mailed to the insured on September 19, 2014 and displayed a policy period of April 4, 2014 to August 8, 2014. (Tr. pp. 61-62). Mr. Lukes explained that the notice notified Metro that it was time for a premium audit and that Metro would need to schedule an appointment. (Tr. p. 62). He further explained that an audit was required to cover the policy terms from April 4 2014 until August 8, 2014. (Id.). Mr. Lukes testified that if the audit was completed within 60 days of lapse, then the policy could be reinstated with a lapse period. (Tr. pp. 62-63).

Mr. Lukes testified that a subsequent notice sent on October 23, 2014 deemed Metro to be uncooperative for failure to respond to the September 19, 2014 notice. (Tr. p. 63). He then testified about a November 3, 2014 premium adjustment notice sent to Metro based on an estimated audit. (Tr. p. 64). He pointed out that the policy period for this notice was April 4, 2014 to April 4, 2015, but also indicated that the cancellation period was for April 4, 2014 to August 8, 2014. (Id.). He clarified that this notice stated estimated audit results due to the fact that Metro failed to comply with the audit requirement. (Id.). He explained that Travelers must close the audit within sixty (60) days of the cancellation and in Metro's case, Travelers closed it out with estimated information. (Id.). Mr. Lukes testified about how the estimates are formulated to create an even audit, which attempts to avoid a return premium or additional premium. (Tr. pp. 64-65). Mr. Lukes testified that the estimated audit figures are formulated in a system created by Travelers' IT department. (Tr. pp. 65-66).

Mr. Lukes testified that based on the estimated audit, Metro was billed $128.00. (Tr. pp. 67-68). The bill was issued on November 5, 2014 and payment was due on November 20, 2014. (Tr. p. 68). He stated that the amount due was for the policy period of April 4, 2014 to April 4, 2015. (Tr. p. 69). Mr. Lukes testified that the payment of the $128.00 would satisfy the monetary obligation, but not the interim audit requirement and thus the cancellation would remain effective as of August 8, 2014. (Tr. p. 70).

Mr. Lukes then testified that a second premium adjustment notice was mailed to Metro and included a revised cancellation generated based on actual figures provided by Metro pertaining to their payroll. (Tr. pp. 75-76). The revised notice maintained the same cancellation period from April 4, 2014 to August 8, 2014. (Tr. p. 76). Mr. Lukes explained that a new bill was issued on January 7, 2015 after the revised notice was issued which billed Metro $2,095.00 in additional premium based on actual payroll figures. (Tr. p. 77).

On cross-examination by Claimant's counsel, Mr. Lukes testified that he had never directly spoken to Claimant or his agent, nor was he the actual underwriter for Claimant's policy. (Tr. p. 79). Mr. Lukes testified that NCCI was the plan administrator which assigned the policy to Zurich, which in turn is sent over to Travelers for issuance and underwriting. (Tr. pp. 81-82). Mr. Lukes testified that he reviewed the July notice and based on his review, he had the belief that prior attempts had been made to Claimant from Travelers to comply with the audit requirement. (Tr. pp. 82-83). Mr. Lukes clarified that he did not have access to any documents except for documentation included in Claimant's file. (Tr. p. 83). Mr. Lukes testified that Claimant's policy would have been reinstated if he would have satisfied the audit requirement. (Tr. p. 85). He stated that Claimant paid both bills issued by the insurer, but had no proof of timely compliance with the audit requirement. (Tr. pp. 91-92). Mr. Lukes explained that the language in the notices, sent after

cancellation, does not imply that the policy was still in effect. (Tr. p. 90). He also stated that all records of contact with Claimant would be in the Travelers' Audit Department records. (Tr. p. 93).

On cross-examination by counsel for the SCUEF, Mr. Lukes explained that a form 941 is a report of the employer's quarterly federal tax return. (Tr. p. 96). He states that this form is usually required as a part of the audit. (Id.). Mr. Lukes testified that upon review of Claimant's 941 form, signed and dated by Claimant on August 20, 2014, he noted that the form appeared much later in his file, showing January 2015 as the time of receipt. (Tr. pp. 97-98). Mr. Lukes explained that Claimant was subject to two separate types of audits. (Tr. p. 99). He stated that the preliminary audit is a physical audit which requires that Claimant make an appointment to meet up and provide wage reports, payroll records, which would include the 941 or annual tax return. (Id.). After cancellation of the policy, the second type of audit was a cancellation audit, which is performed as a result of noncompliance. (Id.).

On cross-examination by counsel for Metro, Mr. Lukes testified that the policy contract states that Claimant would be subject to an audit. (Tr. pp. 106-107). He explained that no deadline for compliance is stated in the policy contract, but that Claimant is subject to the policy provisions as well as the additional documentation that is sent during the policy cycle. (Tr. p. 108). He addressed that his role, as underwriter, would not allow him to give any opinion about whether the cancellation was issued in compliance with South Carolina law. (Tr. pp. 109-111). Mr. Lukes confirmed his knowledge of a June 2014 worker's compensation claim by an employee of Metro named William Rogers and testified that the premium audit was not initiated as a result of this employee's claim. (Tr. p. 112). Mr. Lukes reiterated that the decision to cancel the policy was due to noncompliance with the preliminary audit requirement only. (Tr. pp. 112-113). Mr. Lukes testified that the July 4, 2014 cancellation was a form letter that communicated the insured's intent

to cancel Metro's policy. (Tr. pp. 114-119). He stated that language in the notice that advised Metro to disregard the notice, if Metro had already complied with the audit was a two-step disclaimer that only applied if the letter was sent after Metro had complied with the prior notices. (Tr. pp. 122-124). Mr. Lukes clarified that language in the three notices sent to Metro after cancellation, which stated that the policy "may" be cancelled, is due to the possibility of reinstatement anticipated by the insurer. (Tr. pp. 126-128). He clarified that the automated system will use the word "may" because it lacks knowledge to see if there is subsequent coverage in place (Tr. pp. 128-130).

On redirect by counsel for Zurich, Mr. Lukes reiterated that he represents the Underwriting department only. (Tr. p. 137). He stated that the preliminary audit notice was for the policy period of April 4, 2014 to April 4, 2015, but the final audit or cancellation audit was for the policy period of April 4, 2014 to August 8, 2014. (Tr. pp. 139-143). On re-cross by Claimant's counsel, Mr. Lukes testified that Claimant was subject to the language of the policy and that the insurer reserved three (3) years to go back and perform an audit. (Tr. p. 146). Mr. Lukes testified that the first and second quarter payroll information was due from Metro for the audit based on the initial July notice. (Tr. pp. 148-149). On re-cross by counsel for the SCUEF, Mr. Lukes testified that the Audit Department could provide information on whether an invitation to complete an audit or make an audit appointment. (Tr. pp. 150-151). On further re-direct by counsel for Zurich, Mr. Lukes testified only as to Metro receiving notice of non-compliance with the audit prior to NCCI receiving notice. (Tr. pp. 152-153).

Claimant Gregg Long

During the second day of the hearing, Claimant testified on his own behalf. (Tr. p. 173). On direct examination by Claimant's counsel, Claimant testified that he is 59 years old with an

11th grade education. (Id.). He confirmed that his address is 2550 Horne Road, Leesville, South Carolina and he is sole owner and employee at Metro Construction. (Id.).

Claimant testified that he had a work-related accident before that resulted in a worker's compensation insurance claim and that he was injured, based on this present claim, in November 2014. (Tr. p. 174). Claimant testified that his business is mainly construction, infrastructure, sewer, water, storm drains, and roll buildings. (Id.). Claimant stated that he was injured while disposing of chemicals. (Tr. pp. 174-175). He testified that the chemicals were to be disposed by burning and an explosion was caused as a result. (Tr. p. 175). He testified that burning complied with the guidelines for disposing of these chemicals and he has performed this task over 20 times. (Id.). He testified that the disposal method is governed by the South Carolina Fire Marshall. (Id.).

Claimant stated that as a result of the explosion his skull, left thigh, left calf, lungs, eyes, skin, left eardrum, and stomach were severely injured due to burns and lodged debris. (Tr. pp. 175-176). He testified that he has lost his hearing in his left ear and can hear about 20 percent in his right ear. (Id.). Claimant testified that he is not done being treated and has over two-million dollars in medical bills. (Tr. p. 176). He testified that some of his bills have been covered by his health insurance provider and the others are outstanding. (Tr. p. 179). He explained that his healthcare provider went bankrupt and denied any further claims after initial coverage. (Tr. pp. 179-180). Claimant testified that he was airlifted to Palmetto Richland Hospital and then transported to the August Burn Center in Augusta, Georgia. (Tr. p. 181).

Claimant stated that it was his understanding that Zurich denied his worker's compensation claim because his policy was cancelled. (Tr. p. 182). Claimant testified that he received the notice of noncooperation dated July 5, 2014. (Tr. pp. 182-183). Claimant denied receiving any documents or phone calls from Zurich prior to July 5, 2014. (Tr. p. 183). He testified that he paid about

$18,000.00 as an upfront payment of his initial premium and received about $2,000.00 in a refund from Zurich. (Tr. pp. 184-185). He stated that Zurich was provided with financial information prior to payment of the premium. (Id.). Claimant testified that upon receipt of the July 5th notice, that he instructed his bookkeeper to gather information for submission to Zurich. (Tr. p. 186). Claimant testified that he also received the August 2014 notice with the August 8, 2014 date of cancellation. (Id.). Claimant stated that he thought that if he complied, that his policy could be reinstated. (Id.). Claimant testified that he submitted the required payroll information on August 20, 2014 and believed that this was sufficient to reinstate his policy. (Tr. pp. 186-187).

Claimant testified that he had been in business since 1999, 18 years, and had never been issued an assigned risk policy under his worker's compensation insurance. (Tr. p. 187). He had never had an audit in the middle of the policy cycle and usually paid the premium upfront and had an audit at the yearend of the policy term. (Tr. p. 188). Claimant testified that by October 2014, when he received another notice about the audit, he thought that he had already complied with the audit requirement and thus disregarded the notice. (Tr. pp. 189-190). Claimant testified that he paid the $128.00 bill and the $2,095.00 bill assessed by Zurich in full. (Tr. pp. 190-191). Claimant testified that he had no idea that an audit would be initiated within 90 days of issuance and felt that the timing of the audit was unreasonable because his company was not prepared for the audit. (Tr. p. 192). He noted that this also was the reason for his delay in returning the audit information. (Id.). Claimant demanded payment of all medical bills, present and future, attorney's fees, and a pain and suffering award. (Tr. p. 193). He testified that he got out the hospital on January 7th or 8th and continued to receive partial paychecks from Metro. (Tr. p. 196).

On cross-examination by counsel for the SCUEF, Claimant testified that he earned $10,820.00 in 2014 and $43,000.00 in 2013. (Tr. pp. 200-202). He stated that he worked up until

November 2014, the date he was injured. (Tr. p. 202). Claimant testified that he is the President of Metro and sole officer, starting the company with a personal loan. (Tr. p. 203). Claimant testified that he does not have shareholders meetings, keep minutes, but he keeps a separate account from his personal funds. (Tr. p. 204). He testified that he only reported $43,000.00 in 2013 because he was in an accident with a drunk driver while in a company truck. (Tr. p. 205). He explained that he was out of work and when he returned only earned a partial salary. (Id.). Claimant filed a worker's compensation claim on this accident in October 2013 and was out until the end of the year. (Tr. p. 206). He stated that he received temporary total benefits and was paid by the Commission weekly checks for October, November, and December 2013. (Tr. pp. 206-207). Claimant testified that Metro's address is 2526 Caney Branch Road in Leesville, South Carolina and that Metro pays him rent of $1,000.00 a month which is currently being paid out. (Tr. pp. 207-208). Claimant testified that he has made about $12,000.00 a year from income from the corporation. (Tr. p. 208). He testified that Metro also uses his personal farm equipment at no cost. (Tr. p. 210). Claimant testified that Metro was in forfeiture after the accident. (Tr. pp. 210-212). Claimant also testified that he entered into a compliance agreement with the Commission and paid a fine in lieu of a hearing with the Commission. (Tr. pp. 212-215).

On cross-examination by counsel for Zurich, Claimant testified that his bookkeeper at the time of the accident was named Salina. (Tr. p. 218). He explained that she handled records including records of communication. (Tr. p. 219). He testified that she would have spoken to the insurance agent regarding cancellation due to noncompliance. (Tr. pp. 220-221). He testified that he received, but failed to read, the premium audit tips included in this policy. (Tr. pp. 225-226). Claimant testified that he received an August 21, 2014, letter from his agent that his policy was expired and would need to be rewritten and confirmed that he submitted the 941 form on August

20, 2014. (Tr. pp. 227-229). Claimant stated that his email address used for billing purposes was 'Metrocon@comporium.net' and that emails from Bonita Rabon, on behalf of the insurance agent, would go to that email address. (Tr. pp. 230-231). He stated that his bookkeeper, Salina, would report to him about their correspondence including cancellation and audit-related correspondence from Ms. Rabon. (Tr. p. 232).

On cross-examination by counsel for Metro, Claimant testified that Metro's employee William Roger had a worker's compensation claim that was paid. (Tr. pp. 234-235). Claimant also testified as to his family history of injury. (Tr. pp. 236-238). Claimant testified that Metro engages in inherently dangerous activity that involves a lot of risk and that he created a corporation to shield Claimant personally from liability along with tax benefits. (Tr. pp. 238-240). He testified that he has always received a W-2 as an employee and complied with Federal and State requirements as well as submits to Fire Marshall Inspections and obtains permits issued to Metro only. (Tr. pp. 242-244). Claimant testified that his activities on November 20, 2014 were done under a permit issued to Metro and he was paid as an employee on that same day. (Tr. p. 245). On cross-examination by counsel for the South Carolina Workers' Compensation Uninsured Employer's Fund, Claimant testified that he went into forfeiture on March 3, 2014 and was reinstated December 14, 2016. (Tr. p. 246). On redirect by Claimant's counsel, Claimant testified that he thought the reinstatement would operate retroactively as if he was never in forfeiture. (Tr. p. 248).

QUESTIONS PRESENTED

Did the Single Commissioner err in finding that the policy provided by Zurich to Metro was not cancelled and that coverage was in effect on November 20, 2014, the errors being that the Single Commissioner:

a. relied on Claimant's beliefs concerning the terms of the policy;
b. ignored statutes and failed to read them in conjunction with the policy;

c. relied on documents Claimant received after the date of cancellation that did not invalidate the policy cancellation from over 60 days' prior;
d. conflated reinstating the policy with the processes for cancelling the policy; and
e. found Claimant paid for and was entitled to coverage from April 4, 2014 to April 4, 2015, when such is against the greater weight of the evidence?

ARGUMENT

THE SINGLE COMMISSIONER ERRED IN FINDING METRO'S POLICY WITH ZURICH WAS NOT CANCELLED EFFECTIVE AUGUST 8, 2014, AND THAT COVERAGE WAS IN EFFECT ON NOVEMBER 20, 2014, SUCH THAT ZURICH IS RESPONSIBLE FOR PAYMENT OF ALL BENEFITS TO CLAIMANT AS ZURICH COMPLIED WITH SOUTH CAROLINA LAW AND PROPERLY CANCELLED METRO'S POLICY.

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).

The provisions of the Assigned Risk Plan prevail over the workers' compensation regulations because the Plan has been approved by the Department of Insurance. *Avant v. Willowglen Academy*, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006). The regulations fill in the gaps that exist in the Plan. *Id.* Nonetheless, the rules of contract interpretation remain the same.

Here, the terms of the policy are clear and unambiguous. 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.

> 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). Furthermore, the policy itself offers two pages, entitled Premium Audit Tips, providing instructions and answers to commonly asked questions by customers. (APA 773-774). Thus, Claimant was aware of his obligations and that Zurich could demand the information be provided. "Every one is presumed to know the effect of a contract that he signs." *Batesburg Cotton Oil, Co. v. Southern Ry. Co.*, 103 S.C. 494, 88 S.E. 360 (1916). The Single Commissioner's Findings of Fact 31 ignores the law when it relies upon the "beliefs" that Claimant had concerning the terms of the insurance policy.

Zurich mailed to Claimant correspondence on July 4, 2014 which indicated previous attempts to complete the audit had been ignored, and that Claimant had to respond to the audit request within 30 days or the policy would be cancelled. (APA 802-804). The timeline for the response is not specified in the policy or the regulations governing the policy; however, it is implicitly included in S.C. Code Ann. §38-75-730 as the statute permits the insurer to cancel the policy with 30 days' notice of a breach in the contract provisions. The Single Commissioner erred in Finding of Fact 33 when he inferred Claimant was excused from timely responding because no deadline existed in the policy. This Finding ignores the statutes that must be read in conjunction with the policy.

Additionally, Zurich complied with the statutes and regulations for cancelling a workers' compensation policy. 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 indicated above, the plain language of the insurance policy spelled out the obligations of the insured to comply with audit requests. Furthermore, the Assigned Risk Supplement states that when the assigned carrier determines that an insured is in non-compliance with the policy provisions by failing "to comply with reasonable health, safety, audit, and/or loss prevention requirements," the assigned carrier must institute cancellation of the policy "after providing an opportunity to cure." (Assigned Risk Supplement 12 B.1.). Here, Zurich gave the insured an opportunity to cure by sending the notice of cancellation letter 35 days prior to the intended date of cancellation. Even taking Claimant's testimony as true regarding his submission of a 941 at the end of August 2014, Claimant did not attempt to cure the defect until 57 days after the notice of intent to cancel was mailed, and 12 days after the policy had actually cancelled. Zurich, contends, however, that it did not receive any documentation requested until January of

2015, well after the cancellation date. Nonetheless, Claimant did not attempt to cure the defect prior to the given cancellation date.

Additionally, the Assigned Risk Supplement states that the "policy must be cancelled in accordance with the cancellation provisions of NCCI's ***Basic Manual*** Rule 3-A-3, ***Assigned Carrier Performance Standards***, and state law." (Assigned Risk Supplement 12 B.1.). Again, here, the cancellation procedures satisfied all three.

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, Zurich met all these provisions. (APA 802-805).

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 mailing the notice, the policy had not been in effect for 120 days. Under either provision of the statute, Zurich properly cancelled the policy.

NCCI's ***Basic Manual*** Rule 3-A-3 deals with the assessment of premium after cancellation, and not the method of cancellation. Furthermore, the Basic Manual reflects the same language as the Assigned Risk Supplement in regard to following a violation the assigned risk carrier "will initiate cancellation." (NCCI Basic Manual 4A.4a(3)). Zurich complied with these procedures, and in fact, under the Plan, was required to implement the cancellation.

Zurich also complied with the *Assigned Carrier Performance Standards.* The ACPS requires the assigned carrier to ensure the insured complies with the audit; otherwise, the assigned carrier must institute cancellation. ACPS Performance Standard 6 defines audits. The carrier must complete the preliminary audit within ninety (90) days of the policy date, or the receipt of the assignment. Here, Zurich attempted to meet this deadline. Once again, the ACPS requires the assigned risk carrier must cancel if the insured is in non-compliance with the Plan. (Assigned Risk Performance Standards Standard 3 D.2).

In Conclusion of Law No. 8, the Single Commissioner relied upon *Crews v. W.R. Crews, Inc.*, 390 S.C. 15, 699 S.E.2d 189 (2010), in determining that Zurich should have adopted a flexible approach in dealing with Plaintiff. However, *Crews* can be distinguished from the present matter. In *Crews*, the insurer issued a letter to the insured requesting audit information. The record showed that the insured attempted to comply prior to the cancellation of the policy. Furthermore, some of the information was not available. The insured returned the completed audit form "several days before the scheduled cancellation." *Id.* at 25, 699 S.E.2d at 195.

Here, there is no evidence in the Record that Claimant attempted to comply with the request for information prior to the cancellation. There was no substantial compliance prior to the cancellation, and arguably no compliance at all until January of 2015. Here, the policy itself contained a preliminary list of answers to commonly asked questions concerning an audit. Claimant was aware his policy could be cancelled if he failed to comply with an audit. Claimant was fully aware of the time period under the law. As stated in *Crews*, the assigned carrier must "work with and assist the . . . employer . . . on problems relating to coverage and service under the plan." *Id.* at 25, 699 S.E.2d at 194. Here, the insurer did so by advising Claimant that failure to comply with the audit would result in cancellation. Zurich could not have worked on problems

when Claimant never reached out to Zurich to identify what problems he was having. The policy cancelled on August 8, 2014. There is nothing in the Assigned Risk Plan that mandates an insurer has to work with the insured to correct deficits in the audit and reinstate a cancelled policy.

The Single Commissioner also based his decision on events which occurred after the cancellation. In Findings of Fact 17 and 18, the Single Commission drew attention to an October 23, 2014 letter which sought information to complete the final audit and included language that failure to comply may result in cancellation. The letter identified the policy period of April 4, 2014 through April 4, 2015. (APA 811-812). The Single Commissioner found this letter was confusing enough to induce Claimant to believe his policy was still in effect. However, this finding does not invalidate the cancellation that occurred over 60 days previous.

Further, the finding ignores the two other correspondences sent to Claimant, one before and one after the October 23, 2014 correspondence. On September 19, 2014, Zurich sent Claimant a Premium Audit Notice, clearly stating the audit covered the policy period of April 4, 2014 through August 8, 2014. (APA 806-810). Claimant took no action. Following the October 23, 2014 correspondence, Claimant again took no action. On November 3, 2014, a third correspondence was sent to Claimant, again identifying the policy period from April 4, 2014 through August 8, 2014. (APA 813-816). A fourth correspondence was sent on November 5, 2014 which also stated that the policy period terminated on August 8, 2014. (APA 817-818).

The Single Commissioner conflated reinstating the policy with the processes for cancelling the policy. The Single Commissioner essentially concluded that the policy was not properly cancelled because Zurich did not assist Claimant with correcting the deficits in the audit following cancellation. However, again, Claimant is at fault and ignored requests by Zurich. Again, taking Claimant's testimony as true, even if Claimant returned information at the end of August, after the

policy cancelled, Claimant was on notice that something was amiss when Zurich sent the September 19, 2014 correspondence, which clearly stated the policy was terminated August 8, 2014. The letter requested a response by October 4, 2014, but Claimant did not respond. Even if, as the Single Commissioner found, Claimant felt he maintained coverage, he once again failed to comply with an audit request. The Single Commissioner's findings that Zurich failed to assist Claimant are erroneous, as the Record shows attempts by Zurich to ascertain information from Claimant, but Claimant did not respond. Claimant was the non-cooperative entity in this matter, not Zurich.

The Single Commissioner also erred in his understanding of the monies Claimant paid for his policy, as recited in Findings of Fact 19, 20, and 21. The Single Commissioner assumed Plaintiff paid for a policy which extended from April 4, 2014 until April 4, 2015. The Single Commissioner specifically found in Finding of Fact 32 that Claimant paid for coverage and was entitled to coverage from April 4, 2014 through April 4, 2015. The documents in the Record show otherwise.

Claimant paid the initial down payment for the policy in the amount of $15,928.00. (APA 827). This amount was an estimate to be revised upon receipt of the audit information, which Zurich did not receive.

On November 3, 2014, Zurich mailed a Premium Adjustment Notice for Cancellation Audit period of April 4, 2014 to August 8, 2014 for an estimated total earned premium for the cancellation period of $16,056. (APA 813-816, 827-828). This resulted in an Earned Premium Statement being mailed on November 5, 2014 for $128.00, representing the difference in what Claimant initially paid and what was due following the cancellation audit in which Claimant provided no information. (APA 817-818, 828).

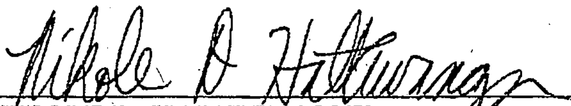
On January 5, 2015, Zurich sent a second Premium Adjustment Notice for the cancelled policy period of April 4, 2014 to August 8, 2014, indicating a total earned premium of $18,151 because of a revised payroll. (APA 819-822, 828). Likewise, a second Earned Premium statement was mailed on January 7, 2015 for additional premium due for the period of April 4, 2014 to August 8, 2014 in the amount of $2,095.00, representing again the difference in the total amount paid and the total amount owed. (APA 823-824, 828). Claimant never paid any amount for any coverage beyond August 8, 2014. The Single Commissioner's finding is erroneous and is contrary to the documented evidence.

The Single Commissioner may have felt Zurich should have done more, and the Single Commissioner may have felt the post cancellation letters were confusing. Nonetheless, the law states Zurich fully complied with the statutes and regulations in cancelling the policy. To allow Claimant to escape his responsibilities, which he lawfully contracted for, violates South Carolina contract law and undermines insurance law. The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *B.L.G. Enters,* 334 S.C. at 535, 514 S.E.2d at 330.

CONCLUSION

Based on the foregoing, the Single Commissioner erred in determining Metro's policy with Zurich was not cancelled and that coverage was in effect on November 20, 2014. Simply put, Zurich fully complied with the statutes and regulations in cancellations 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.

Respectfully submitted, this, the 15th day of November, 2018.



NIKOLE D. HALTIWANGER
Hedrick Gardner Kincheloe & Garofalo, LLP
P.O. Box 11267
Columbia, SC 29211
(803) 727-1200
Attorney for Defendant
American Zurich Insurance Company

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1423018

Gregg Long, Employee, Claimant/Respondent, vs. Metro Construction, Inc., Defendant/Respondent, American Zurich Ins. Co., Defendant/Appellant, and South Carolina Workers' Compensation Uninsured Employers' Fund, Defendant/Appellant.	)	**SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND'S BRIEF TO THE FULL COMMISSION**

STATEMENT OF THE CASE

This matter arises from the Claimant's Form 50, Request for Hearing, dated September 20, 2017. In the Form 50, Claimant alleges multiple injuries suffered on November 20, 2016, while employed by Metro Construction. In its Form 51 of October 13, 2017, Defendant/Appellant South Carolina Workers' Compensation Uninsured Employers' Fund ("Fund") asserted that the claim "is either covered by the American Zurich policy or not compensable, as Claimant was the sole proprietor (or president of a corporation in forfeiture) and failed to secure coverage for himself." Defendant/Appellant American Zurich Ins. Co. ("Carrier") denied both coverage and compensability in its Form 51 of October 20, 2017. The Employer did not file a Form 51.

Fund filed a Motion to Add Party Defendant on March 24, 2017. The motion was based

on the fact that, at the time of the alleged accident, Employer Corporation was administratively dissolved. The Motion was denied by Commissioner Taylor on April 19, 2017. Fund appealed the April 19, 2017, Motion Order by timely filing a Form 30 on April 27, 2017. The appeal was dismissed as interlocutory by Judicial Conference Decision and Order dated May 15, 2017.

The Single Commissioner issued his Order on August 22, 2018. The Single Commissioner found, *inter alia*, that the Employer had coverage on the date of accident through Carrier. However, the Single Commissioner also found that the Claimant was an employee of Employer on the date of accident, that Claimant's injuries were suffered in the course and scope of employment with Employer, and that the majority rule regarding corporations in forfeiture should not be applied in South Carolina. The Single Commissioner also made unnecessary findings that, if the policy with Carrier did lapse (though he found that it didn't), the Claimant's failure to secure coverage for himself did not act as an election to withdraw from the Act and, in such a hypothetical case, Fund would be responsible for payment of benefits.

Both Fund and Carrier timely appealed.

ISSUE PRESENTED

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

FACTS

Claimant alleges that, on November 20, 2014, he suffered multiple injuries in an explosion. Claimant alleges that, at the time of the incident, he was an employee of Employer. Employer was incorporated on September 14, 1999. APA p. 742. Claimant is the sole shareholder and officer (president) of Employer. Hr. Tr. p. 203, ll. 10 – 20.

Claimant capitalized Employer with a loan from himself to Employer, and that loan has

never been repaid. Hr. Tr. p. 203, l. 21 – p. 204, l. 5. There is no board of directors. Hr. Tr. p. 204, ll. 8 – 9. There are no shareholder meetings. Hr. Tr. p. 204, ll. 10 – 11. Employer does not keep any minutes. Hr. Tr. p. 204, ll. 12 – 13. Claimant personally owns the property where Employer conducts business. Hr. Tr. p. 207, l. 20 – p. 208, l. 2; APA p. 915. Employer uses equipment personally owned by Claimant in its business (including a farm tractor and farm implements) and does not pay a fair rental price to Claimant. Hr. Tr. p. 210, ll. 4 – 15. Claimant's attorney mailed a check of $1,000.00, which was the penalty assessed by this Commission against Employer for its failure to maintain workers' compensation coverage. APA p. 917. Claimant signed the Compliance Agreement with this Commission on behalf of Employer. APA p. 918.

Employer was not in good standing with the South Carolina Secretary of State at the time of the incident. Hr. Tr. p. 212, ll. 7 – 15; APA p. 916. The records show that Employer went into forfeiture on March 3, 2014. APA p. 916. The date of the incident is November 20, 2014. Form 50. Employer's corporate status was reinstated on December 14, 2016. APA p. 916.

ARGUMENT

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

Employer was administratively dissolved on March 3, 2014. APA 916. The date of the incident is November 20, 2014. Form 50. Employer's corporate status was reinstated on December 14, 2016. APA p. 916. The primary question in the Fund's appeal is whether, by conducting business purportedly on behalf of a corporation in forfeiture, does the Claimant/President of Corporation in Forfeiture/Sole Shareholder of Corporation in Forfeiture assume liability for the actions he takes? If so, was Claimant self-employed at the time of the accident? Fund asserts that Claimant was self-employed at the time of the accident.

According to S.C. Code Ann. § 33-14-210(d), "[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 . . . ." However, an administratively dissolved corporation may be reinstated under S.C. Code Ann. § 33-14-220. According to S.C. Code Ann. § 33-14-220(c), "[w]hen 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."

The issue is a matter of interpretation of statute. Whether personal liability is imposed on the officers in such situations has been litigated in other courts, but Fund can find no reported opinion from South Carolina courts. As such, this is a matter of first impression. In the Fourth Circuit case of *Moore v. Occupational Safety and Health Review Commission*, 591 F.2d 991, the issue is discussed extensively. The Fourth Circuit wrote that,

> A majority appears to have construed their statutes of dissolution as imposing personal responsibility on the directors for any liabilities, whether in contract or in tort, incurred in the continued operations of the dissolved corporation's business after forfeiture of its charter. This construction accords with what was the rule at common law.

The Supreme Court of Vermont has also addressed this issue. In *Daniels v. Elks Club of Hartford*, the Court wrote, "Where the reinstatement statute does not explicitly address personal liability, the majority rule appears to be that those who act for the corporation after its termination, but before reinstatement, are personally liable for actions occurring during that period." 2012 VT 55, 58 A.3d 925, 945 (2012).

It is undisputed that the South Carolina reinstatement statute does not address personal liability. The South Carolina reinstatement statute is silent on personal liability. If the majority rule were applied here, Claimant/Employer would be personally liable for the actions taken during

the dissolution. Here, because corporations are creatures of statute and cannot carry on business during forfeiture, the actions that were taken by Claimant during the incident were taken on his personal behalf. In this case, he became a sole proprietor that did not elect coverage (if Employer is ultimately determined to be without coverage), and, as such, he is not be entitled to benefits, per S.C. Code Ann. § 42-1-130 ("Any sole proprietor or partner, upon this election [of obtaining coverage through a carrier], is entitled to benefits . . . .").

If Fund is required to pay benefits in this case, it will implement collections actions against Employer. Under these facts, Employer's corporate veil will be thin. According to the South Carolina Court of Appeals in *Hunting v. Elders*, the eight (8) factors considered when determining whether the corporate veil can be pierced are: "(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a facade for the operations of the dominant stockholder." 359 S.C. 217, 225, 597 S.E.2d 803, 807 (Ct. App. 2004). This eight (8) factor analysis "looks to observance of the corporate formalities by the dominant shareholders." *Sturkie v. Sifly*, at 280 S.C. 453, 455 – 56, 313 S.E.2d 316, 317 – 18. Here, no corporate formalities were observed and there was only one (1) shareholder and a single officer: Claimant.

Because of the reasons set forth herein and that may be heard at oral arguments, Fund hereby Appeals Findings of Fact Four (4), Five (5), Seven (7), Twenty-Three (23), Twenty-Four (24), and Thirty-Eight (38) of the Single Commissioner's Order. Further, if the ultimate determination is that Carrier did not provide coverage to Employer on the date of incident, because Claimant was self-employed at the time of the incident, he is not entitled to benefits, and the Order

of the Single Commissioner should be reversed.

CONCLUSION

For the forgoing reasons and the reasons that may be set forth at oral arguments of this matter, Findings of Fact Four (4), Five (5), Seven (7), Twenty-Three (23), Twenty-Four (24), and Thirty-Eight (38) of the Single Commissioner's Decision and Order issued on August 22, 2018, should be reversed. The remaining Findings of Fact should be affirmed, as will be more fully argued in the forthcoming Respondents' Brief from Fund.

Respectfully submitted,

HOLDER PADGETT LITTLEJOHN + PRICKETT

Timothy B. Killen
Attorneys for Appellant Fund

Date: November 15, 2018

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO: 1423018

Giles Gregory Long, Claimant, v. Metro Construction, Inc. Employer, and American Zurich Ins. Co., Carrier, and South Carolina Workers' Compensation Uninsured Employers' Fund, Defendants.	**MEMORANDUM IN OPPOSITION TO ADDING PARTY DEFENDANT**

TO: South Carolina Workers' Compensation Commission; Timothy B. Killen, Esquire, Attorney for South Carolina Workers' Compensation Uninsured Employer's Fund; Dewana F. Looper, Esquire, Attorney for American Zurich.

PROCEDURAL HISTORY

On March 27, 2017, the Claimant, Giles Gregory Long, received a motion requesting that he be added as a Party Defendant in the above-referenced case from the Defendant, SC Worker's Compensation Uninsured Employers' Fund (hereinafter referred to as "Defendant Fund"). Specifically, Defendant Fund argues that the administrative dissolution of Mr. Long's company,

Metro Construction, by a state agency "potentially" exposes the Claimant to "personal liability" for any business liability of the corporation. Defendant Fund bases its position on S.C. Code Section 33-14-200, Grounds for an Administrative Dissolution and the case of Moore v. Occupational Safety and Health Review Commission, 591 F.2d 991, 994 – 95 (4th Cir. 1979) In response to Defendant's motion, the Claimant asserts that S.C. Code Section 33-14-220, Reinstatement following Administrative Dissolution provides the remedy to the Claimant's potential liability issue raised by Defendant Fund. Specifically, Section 33-14-220 provides that the proper reinstatement of a corporation relates back to the effective date of the administrative dissolution as if the administration dissolution had never occurred. Claimant provides this memorandum in opposition to Defendant Fund's motion.

FACTS

The Claimant, Giles Gregory Long, filed a claim for workers' compensation benefits with Metro Construction, Inc, alleging a date of accident of November 20, 2014 wherein he sustained severe injuries to his pulmonary, respiratory and digestive systems, back, ears, eyes, lungs, stomach, bilateral upper and lower extremities, hands, skin loss and scarring. Although Mr. Long is the owner of Metro Construction, he has always identified and maintained himself as an employee of the corporation on all health and workers' compensation insurance policies.

While the Claimant agrees that Metro Construction was administratively dissolved at the time of the accident, it is undisputed that the corporation was properly reinstated in December 2016 by the South Carolina Secretary of State's office in accordance with S.C. Code Annotated Section 33-14-220. Based on this reinstatement, Mr. Long contends that the statute specifically provides that the dissolution should be treated as if it never occurred.

LAW

The controlling statutes governing the dissolution and reinstatement of a corporation in South Carolina are SC Code Annotated Sections 33-14-200 and 33-14-220 (Law Coop, 1976) as amended. The pertinent portions of this statute state the following:

Section 33-14-200, Grounds for an Administrative Dissolution

> a) The Secretary of State shall commence a proceeding under Section 33-14-210(a) to dissolve a corporation administratively if: (1) the corporation does not pay when they are due any franchise taxes, taxes payable under Chapter 7 of Title 12, or penalties imposed by law; (2) the corporation does not deliver its annual report to the Department of Revenue when it is due; (3) the corporation is without a registered agent or registered office in this State; (4) the corporation does not notify the Secretary of State that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or (5) the corporation's period of duration stated in its articles of incorporation expires. (b) The Secretary of State shall dissolve a corporation pursuant to Section 33-14-210(c) if he is notified by the Department of Revenue that the corporation has failed to file a required tax return within sixty days of the notice required by Section 12-6-5520.

Section 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**.

Moreover, 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." "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."

Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 659 S.E.2d 171 (2008)

ARGUMENT

Defendant Fund's argument to add the Claimant as a party Defendant is without merit and its motion should be denied. While Mr. Long agrees that Metro Construction was administratively dissolved at the time of the alleged accident, this fact is not controlling in the current matter before the Commission due to the existence of S.C. Code Section 33-14-220 (Law Co-op., 1976). Simply put, Mr. Long took the necessary and appropriate steps to have Metro Construction reinstated by the Secretary of State's Office and was granted reinstatement. The reinstatement treats the corporate dissolution as if it never had occurred. Defendant Fund does not deny that Metro Construction was reinstated.

Paragraph (c) of Section 33-14-220 provides that "when the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution . . . as if the administrative dissolution had never occurred." Hence, the reinstatement treats the dissolution as if it had never occurred thereby nullifying Defendant Fund's argument.

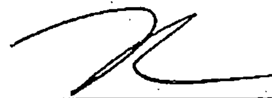
Defendant Fund improperly relies on the analysis provided in Moore v. Occupational Safety and Health Review Commission 591 F2d 991 (4th Cir. 1979) by stating that "during the forfeiture," the corporation has been stripped of its legal mandate to exist." (Defendant Fund's brief, p. 2). However, the facts addressed in Moore are materially different from the Claimant's case currently before the Commission. While the corporation was in forfeiture at the time of the proceedings against it in Moore, at this time, Metro Construction is not in forfeiture. Because of its reinstatement under Section 33-14-220, Metro Construction is entitled to all rights to as a business entity and its previous dissolution is treated as if it never had occurred. Again, based on

the plain meaning of Section 33-14-210, Metro Construction's reinstatement relates back to the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

CONCLUSION

The Claimant asserts that the Defendant Fund's motion to add Claimant Long as a Party Defendant is without merit and that it should be denied. Further, Claimant requests that the hearing previously requested by form 50 be scheduled to determine the issues of compensability, payment of past temporary total benefits, payment of past, current and future medical expenses, and the determination of the appropriate Defendant responsible for payment of these benefits.

Respectfully submitted,



Nicholas G. Callas
ATTORNEY FOR CLAIMANT

April 4, 2017

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, III, Commissioner

RECEIVED
JAN 16 2020
SC Court of Appeals

Case No. 1423018

Giles Long...Claimant, Appellant/Respondent

v.

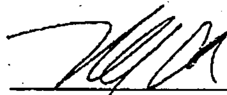
Metro Construction, Inc., Employer, and
American Zurich Ins. Co. and The
SC Uninsured Employer's Fund..................................Carrier, Defendants

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

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

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that this Record of Appeal contains all material proposed to be included by any of the parties and not any other material.



Nicholas G. Callas, SC Bar # 15193
Law Office of Nicholas G. Callas, PA
1901 Gadsden Street, Suite B
Columbia, SC 29201
(803) 369-3968
nick@callaslawfirm.com

January 16, 2020

Attorney for Claimant, Appellant/Respondent