THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

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

Giles Long, Claimant, ... Appellant/Respondent

v.

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

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

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

FINAL BRIEF OF APPELLANT METRO CONSTRUCTION, INC.

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II. **DID THE COMMISSION ERR IN FINDING THAT CERTAIN TERMS OF THE INSURANCE POLICY WERE CLEAR AND UNAMBIGUOUS?**

III. **DID THE COMMISSION ERR FAILING TO FIND THAT AMERICAN ZURICH INSURANCE COMPANY HAD COVERAGE FOR THIS CLAIM?**

STATEMENT OF THE CASE/FACTS

The Appellant Metro Construction, Inc., (Metro) is a general construction firm located in Batesburg-Leesville and is owned by the Appellant/Claimant Giles Gregory (Gregg) Long. Mr. Long, in addition to owning the business, was treated as an employee for purposes of workers' compensation coverage. (R.p. 30) (Commission Order, Finding of Fact No. 4). Metro initially paid a lump sum of $18,025.00 for the estimated annual premium for coverage with the Respondent American Zurich Insurance Company (insurance company) with a policy term from 4/4/14 to 4/4/15. (R.p. 32) (Id. at No. 10 and No. 11). The insurance company paid a refund of over $2,000.00 back to Metro based upon its revised premium calculation. (R.p. 32) (Id. at No. 11). On 11/20/14 Mr. Long and his son (who also has a claim) were disposing of aged industrial dynamite when a tremendous explosion occurred, severely injuring Mr. Long who was badly burned over much of his body, among other injuries. (R.pp. 30-31) (Id. at No. 5 and No. 7). Mr. Long spent 6 months as a patient at the Joseph Still Burn Center at Doctors Hospital in Augusta and the bills for his injuries are massive. (R.pp. 137-848; R.pp. 38-39) (Claimant's APA Submissions, Exhibits 2 and 3; Finding of Fact No. 30). For example, the evidence submitted by Mr. Long showed charges of $2,131,320.88 for only six weeks of treatment. Nevertheless, and

presumably at least partially in consideration of the nature of this claim, the insurance company denied coverage. Not surprisingly, this denial resulted in litigation, leading to the single commissioner's order finding this claim both compensable and covered by the policy of the insurance company. The appellate panel of the Commission reversed that finding of coverage and this appeal followed.

The order of the Commission directs the Uninsured Employers' Fund (Fund) to provide benefits to Mr. Long, who is the sole owner of Metro. That is, at best, an imperfect remedy for Mr. Long and is a real impediment to Metro (and Mr. Long as its owner). The Fund has also appealed that order directing it to pay this claim and, accordingly, there is no time delay prejudice to Mr. Long as a result of the appeal of Metro. Further, and as a perhaps more financially direct impact, the Fund will have a statutory lien against Metro for reimbursement of all benefits paid to Mr. Long. South Carolina Code Section 42-7-200. Mr. Long, as the sole owner of Metro, can reasonably be expected to be impacted, whether directly or not, as a result of that statutory lien against Metro unless coverage is found under the insurance policy. The order of Commission puts Mr. Long (as owner of Metro) in the odd position of perhaps having to participate in the reimbursement to the Fund for benefits paid to himself.

ARGUMENT

This is a workers' compensation insurance coverage appeal. This Court may reverse the decision of the Commission if that decision was controlled by an error of law or otherwise not supported by substantial evidence. Crews, infra. Resolution of such coverage disputes must be weighted towards a finding of coverage for the injured worker in that, among other things, the provisions of the policy are to be construed as a direct promise to pay by the carrier to the injured worker. South Carolina Code Section 42-5-80. Our workers' compensation law presupposes an

explicit bias towards compensability and coverage. Bentley v. Spartanburg Co., 398 S.C. 418, 730 S.E.2d 296 (2012) ("liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for which it was designed."). The Commission was wrong to find that there was no coverage and this was a reversible error of law.

I. Metro did not breach the policy.

It is undisputed that Metro paid the original annual premium of $18,025.00 in full, after which a refund of $2,097.00 was returned by the insurance company to Metro based upon the insurance company's own premium revision. (R.p. 32) (Finding of Fact No. 11). Mr. Long's injury on 11/20/14 occurred within the stated policy coverage period. The insurance company has not argued that his injuries were not the result of a compensable injury by accident under Section 42-1-160 and there is no evidence that his injuries are not compensable. Metro complied with the request of the insurance company for additional financial information for premium audit purposes, but the policy itself did not contain any deadline for submission of such information to the insurance company. (R.p. 1007, line 8-R.p. 1008, line 8; R.p. 1045, lines 3-9; R.p. 1045, line 19-R.p. 1046, line 23) (Transcript at p. 107, line 8 – p. 108, line 1; p. 145, lines 3-9; p. 145 line 19 – p. 146, line 23). The actions of the insurance company in connection with the premium audit were confusing and inconsistent to the extent the insurance company's own witness was unable to testify that its actions complied with South Carolina law. (R.p. 1011, lines 8-11) (Id. at p. 111, lines 8-11). All of this shows, as a general proposition, that the Commission was simply wrong to find there was no coverage for Mr. Long's claim.

Metro complied with the request of the insurance company for additional information despite the fact that the correspondence it received from the insurance company was, at best, confusing, and, at worst, misleading. Notification of the purported coverage cancellation was

dated 7/4/14 (R.p. 1306) (APA at p. 802), but the following day the insurance company sent Metro a letter (R.p. 1307) (APA at p. 803) stating: "Failure to allow access for audit of the policy term **may** result in cancellation of your Workers Compensation and Employers Liability Insurance Company." (emphasis added). That inconsistency in the actions taken on 7/4 and 7/5 was inherently confusing. Adding to the confusion several months later, in a letter dated 10/23/14 (R.p. 1315) (APA submissions at p. 11), the insurance company stated the same thing once again: "Failure to allow access for audit of the policy term **may** result in cancellation of your Workers Compensation and Employers Liability Insurance Company." (emphasis added). That letter was sent just 28 days prior to Mr. Long's injury. None of the audit compliance letters sent to Metro contained any stated deadline by which its insured must act. The language of those letters was patently inconsistent with any contention that the insured would have reasonably known coverage had already been cancelled.

The policy itself does not provide any deadline at all within which an insured must comply with an audit request. (R.p. 1175) (APA at p. 758, Part Five-Premium, Section G. Audit). That policy does contain a provision that any cancellation of coverage must comply with the state law of the insured: "Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with the law." (R.p. 1176) (Id. at p. 759, Part Six-Conditions, Section D.4. Cancellation). The sole witness of the insurance company at the hearing admitted that he could not say that the cancellation of coverage for Metro complied with South Carolina law. (R.p. 1011, lines 8-11)(Transcript at p. 111, lines 8-11). The single commissioner considered that to be a significant (and damning admission), but the Commission erred in not following suit.

South Carolina law directs that there can be no cancellation of coverage in this type of circumstance unless there has been a substantial breach of its contractual obligations by the insured. The relevant statute states: "(a) No insurance policy or renewal thereof may be canceled by the insurer prior to the expiration of the term stated in the policy, except for one the following reasons: .... (4) substantial breaches of contractual duties, conditions, or warranties.". South Carolina Section 38-75-730(a)(4). Section 38-75-10 explicitly provides that the statutory cancellation provisions apply to "casualty insurance," which is defined by Section 38-1-20(11) to include workers compensation insurance. Since workers compensation is a creature of statute the requirements of coverage cancellation must be strictly construed with an affirmative bias in favor of finding coverage. Earl v. HTH Associates, 368 S.C. 76, 627 S.E.2d 760, 762 (Ct. App. 2006) ("First, workers' compensation statutes and regulations are to be construed liberally in favor of coverage. Second, because workers' compensation is a creature of statute, 'we are bound to strictly construe the terms of the statute ...'") (internal citations omitted). There simply was no substantial breach by Metro and the cancellation by the insurance company was invalid. Surely, this preference towards finding coverage applies all the more strongly in a case like this one which does not involve cancellation based upon non-payment, but rather a purported cancellation for alleged non-compliance with an audit. Significantly, Metro has paid all premiums billed by the insurance company and, in fact, over-paid the original premium.

In Crews v. W.R. Crews, 390 S.C. 15, 699 S.E.2d 189, 194 (Ct. App. 2010), which found an improper cancellation of workers' compensation coverage based upon a premium audit, the court noted that its decision must be based upon whether the insured substantially complied with the audit request in light of the carrier's obligation to provide assistance to the insured with regard to compliance. In the case at bar the Commission found that the owner of Metro (Mr. Long)

subjectively believed he had fully complied with the requested audit information and paid all premiums. (R.pp. 37-38) (Order at Finding of Fact No. 26). The order of the Commission does not really provide any analysis or discussion of how the evidence could both show a subjective belief of full compliance, but not at the same time show actual substantial compliance. There was no testimony or other evidence indicating that the insurance company provided in any meaningful assistance to Metro as required by Crews.

In addition, there is no compelling analysis in the order, and essentially no analysis of any kind, considering the legal impact of the patent inconsistency and confusion raised by the language in the documents sent to Metro. Whatever its failure of analysis, the Commission did specifically find:

(1) Metro paid the entire original premium. (R.p. 32) (Id. at No. 11).
(2) Metro then received a refund from the insurance carrier. (R.p. 32) (Id.).
(3) The 7/5/14 letter to the insured only stated coverage "may" be cancelled. (R.p. 34) (Id. at No. 16).
(4) Following the 7/5/14 letter the insured did contact its agent regarding compliance with the audit. (R.p. 35) (Id. at No. 19).
(5) On 11/5/14 (15 days before the injury) the insurance company advised Metro that only $128 in additional premium was owed and that this was paid by Metro. (R.pp. 35-36) (Id. at No. 21).
(6) In January of 2015 the insurance company requested an additional premium of $2,095, which was paid by Metro. (R.p. 36) (Id. at No. 22).

These facts reveal that Metro made real and substantial efforts to comply with the audit request. On 10/23/14 Metro received a letter from the insurance company stating that coverage **"may"** be cancelled, but on 11/5/14 Metro was sent a notice that only $128 in additional premium was owed, which was then paid by Metro.

Pointedly, based upon these facts, no more than 15 days before Mr. Long's injury Metro logically anticipated that the audit information it had previously provided to the insurance company had been reviewed and resulted in only a small additional premium of $128. This

additional premium should be considered in light of the $2097 premium over-payment previously refunded to Metro. The testimony of the owner of Metro, the testimony of the sole witness of the insurance company, and the documents admitted into evidence all show that Metro at least substantially complied with the audit request and that the insurance company was satisfied with the compliance of Metro to the extent it sent a small bill for an additional premium two weeks before Mr. Long's injury.

II. The audit provisions of the policy were not clear.

The Commission incorrectly found that the policy was clear and unambiguous. (R.p. 34) (Id. at No. 15). The Commission focused on both the "records" and "audit" provisions of the policy. (Id.). The first provision only states that "you will provide us with copies of those records when we ask for them." There is no policy language as to by when the insured must comply and no language about the process by which audit information was to be requested and/or provided. The audit provision states in pertinent part: "You will let us examine and audit all your records that relate to this policy." There is no policy language that addresses any deadline for compliance or specific procedure for compliance. In fact, there is no actual policy requirement specifically mandating that such information be sent to the insurance company by the insured, only specific obligations to keep such records and provide access to such documents upon request. There is no allegation and no evidence that Metro was ever denied or failed to cooperate with any request by the insurance company for an on-site audit of its records.

Permitting an on-site audit is a strict and literal interpretation of Metro's obligation under the policy. This reading is consistent with the 11/3/14 follow up message to Metro from the insurance company which stated: "The Audit Provision of your policy contract, requires that you allow us, when requested, to examine and audit records of information needed to compute

premium. (R.p. 1320) (APA at p. 816). Likewise, the premium audit tips relied upon by the Commission in Finding of Fact No. 15 refers to "scheduling an appointment with our auditor" and does not contain any deadline for compliance. (R.pp. 1190-1191) (Id. at 773-774). The absence of a deadline by which the insured must comply or have its policy cancelled, as well the absence of any specific required procedure to satisfy the audit, makes that policy language unclear and ambiguous. As the drafter of the policy it was the legal duty of the insurance company to present Metro with a clear and unambiguous policy. Its failure to do so requires this court on appeal to construe all doubts and ambiguities as to those provisions against the insurance company. Canal Ins. Co. v. National House Movers, LLC, 414 S.C. 255, 777 S.E.2d 418 (Ct. App. 2015). The Commission patently erred in finding those provisions to be clear and unambiguous in the absence of any specific deadline for compliance and the absence of any specific method/procedure for audit compliance. This argument is advanced without prejudice to this Appellant's contention that it not only substantially, but fully, complied with the audit request of the insurance company.

III. The cancellation of coverage was invalid.

The general rules of contract interpretation provide that the insurance policy in question be construed against its drafter. Canal, supra. When the policy in question provides workers' compensation there is also a long-standing statutory and case law preference for finding coverage. Section 42-5-80 and Bentley, supra. In other words, the underlying legal analysis required when considering this type of claim supports a finding of coverage. Metro paid the original premium and received a refund. That payment and refund supports a finding of coverage. One day after purportedly sending a notice of cancellation the insurance company sent correspondence to Metro that stated cancellation was only a possibility, not an accomplished fact. The insurance company sent similar correspondence to Metro again on October 23, 2014. The substance of those two

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letters supports a finding of coverage. By November 5, 2014, the insurance company advised Metro that only an additional $128 was owed, which was paid. At that point, which was at most only 15 days before Mr. Long's injury, Metro properly concluded that its response to the audit was satisfactory to the insurance company. That small additional premium and its payment supports a finding of coverage. Metro contacted its agent about the audit and subjectively concluded that it had done everything the insurance company requested of it. These actions taken in response to the audit and the reasonable conclusion that the audit had been complied with supports a finding of coverage. The policy did not contain any stated deadline for audit compliance nor did it detail any specific manner of audit compliance. This ambiguity and lack of clarity within the policy supports a finding of coverage. Metro never opposed any request for an on-site audit by the insurance company. The failure of the insurance company to avail itself of an on-site audit supports a finding of coverage. In sum, based upon all of the above, the Commission committed legal error in failing to find there was coverage.

Metro is aware that Mr. Long and the Fund have also appealed this denial of coverage. Metro joins in the arguments of those appellants insofar as those arguments relate to the issue of the Commission's error in failing to rule that the insurance company should have coverage for this claim.

CONCLUSION

For the reasons stated above, or as may be made by way of reply brief or at oral argument, the Appellant Metro Construction, Inc., requests that this Court reverse the order of the Commission and find that American Zurich Insurance Company has coverage for the November 20, 2014, injuries of Mr. Long.

Respectfully submitted,

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February 4, 2020

CERTIFICATE OF COUNSEL

The undersign certifies that the Final Brief of the Appellant Metro Construction, Inc. complies with Rule 211(b), SCACR.

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