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, II, Commissioner

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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 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..................................Respondent

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FINAL BRIEF OF CLAIMANT, APPELLANT/RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE APPELLATE PANEL ERR IN FINDING THAT THE CLAIMANT SUBSTANTIALLY BREACHED HIS CONTRACT WITH THE AMERICAN ZURICH INSURANCE COMPANY AND THAT RESPONDENT ZURICH PROPERLY CANCELLED THE POLICY?

2. DID THE APPELLATE PANEL ERR IN CONCLUDING THAT THE TERMS OF THE AMERICAN ZURICH INSURANCE POLICY, THE NOTICE OF NONCOOPERATION AND NOTICE OF CANCELLATION WERE CLEAR AND UNEQUIVOCAL?

3. DID THE APPELLATE PANEL ERR IN FINDING THAT RESPONDENT FUND WAS RESPONSIBLE FOR PROVIDING BENEFITS TO THE CLAIMANT UNDER TITLE 42 OF THE SOUTH CAROLINA CODE OF LAWS?

STATEMENT OF THE CASE

This case involves a denied claim for worker's compensation benefits. The Claimant, Appellant/Respondent, Giles "Gregg" Long (hereinafter "Claimant" or "Mr. Long") is an employee and owner of Metro Construction Company (hereinafter "Respondent Metro"). (R.p. 1073). On November 20, 2014, Mr. Long was injured in an on-the-job accident and made a claim under his worker's compensation policy which was denied by the carrier, the American Zurich Insurance Company (hereinafter "Respondent Zurich"). (R.p. 1080, lns. 9-11). Mr. Long asserts that the policy was in effect on the date of his injury and that he is entitled to worker's compensation benefits under Title 42 of the South Carolina Code of Laws. Respondent Zurich alleges that its contract with Metro Construction Company was properly cancelled on August 8, 2014 pursuant to S.C. Code § 38-75-730(a)(4) (2012) and that the Claimant is not entitled to benefits. The facts of the case are set out below.

Mr. Long purchased an assigned risk workers' compensation policy from the American Zurich Insurance Company providing coverage from April 4, 2014 – April 4, 2015. (R.pp. 1159 – 1207). Under the policy, he was considered an insured employee. (R.p. 1217). Since this was an assigned risk policy, Mr. Long paid the entire annual premium of $15,928.00 up front. (R.p. 1302).

On July 4, 2014, Respondent Zurich sent a letter notifying the Claimant that his policy *would be cancelled* on August 8, 2014 for "failure to audit or permit and audit." (R.p. 1306). On July 5, 2014, Respondent Zurich sent a notice of non-cooperation with preliminary audit stating that several attempts to obtain payroll/audit information had been made and that his policy *could be cancelled* if he did not comply. (R.p. 1307). Hence, the letter stating his policy *could be cancelled* was sent one day after the letter notifying the Claimant that his policy *had been cancelled.*

During the hearing before the Single Commissioner, Mr. Long testified that he never received any communication from Respondent Zurich prior to these letters. (R.p. 1083, lns. 14-17). Upon receiving this notice, Mr. Long attempted to immediately comply with the carrier's demand and retained the services of a bookkeeper to assist in the collection of this information. (R.p. 1086, lns. 2 - 4, R.p. 1122, lns. 12-15).

On August 20, 2014—twelve days after policy cancellation—Mr. Long allegedly provided 941 payroll and financial information to the carrier. (R.p. 1329, R.p. 1087, lns. 5-17).

On November 5, 2014, Respondent Zurich sent an Earned Premium Notice to the Claimant for charges based on the policy. Mr. Long paid the additional $128.00 premium. (R.p. 1333).

On November 20, 2014, Mr. Long was involved in a work-related accident resulting in burns to over 25 percent of his body and damage to his hearing, skin, pulmonary system, respiratory system, eyes, back, stomach, both upper and lower extremities and scarring. (R.pp. 139, 146, and 163). Due to this accident, Mr. Long has accumulated over two million dollars in medical expenses from various healthcare providers. (R.pp. 757-848). Most of these bills remain unpaid. (R.p. 1080, lns. 3-6).

A second Earned Premium statement was sent to Mr. Long on January 7, 2015 requesting an additional $2,095.00. (R.p. 1327). This premium was timely paid. (R.p. 1090, ln. 23 – R.p. 1091, ln. 3).

Since Respondent Zurich denied any coverage for the accident, Mr. Long filed a claim for worker's compensation benefits against the SC Uninsured Employers' Fund on March 12, 2015. (R.p. 864). Respondent Fund also denied coverage for accident for Mr. Long's claim. (R.p. 862).

On April 6, 2016, Respondent Fund and the Claimant filed a motion to add the American Zurich Insurance Company as a party-defendant. (R.p. 855). On April 14, 2016, Commissioner

Susan Barden granted the motion to add the American Zurich Insurance Company as a party-defendant. (R.p. 78).

Respondent Fund maintains that either Respondent Zurich is responsible for Mr. Long's damages or, in the alternative, that the Claimant individually is responsible for his medical bills and damages. (R.pp. 63-64). Respondent Fund's argument is based on the proposition that he—as the owner of Metro Construction—continued to operate his business after it was administratively dissolved by the SC Secretary of State's office and is not entitled to protections afforded employers under the Uninsured Employers' Fund. (R.p. 64). In support of this argument, Respondent Fund filed a motion with the SC Workers Compensation Commission to add Mr. Long as a party-defendant in his personal capacity. (R.p. 852). Mr. Long filed a responsive brief stating that he could not be held individually liable since he was an *employee* of Metro Construction when the injury occurred and Metro Construction was administratively reinstated by the Secretary of State's office in December 2016. (R.p. 1508). Mr. Long relies on S.C. Code § 33-14-220 (2013), which states that the restoration of a company retroactively corrects any prior error as if the dissolution had never occurred.

On April 19, 2017, Commissioner Aisha Taylor denied the Respondent's motion to add Mr. Long individually as a party-defendant. (R.p. 76). Subsequently, Respondent Fund filed an appeal to the Full Commission which was denied on the basis that Commissioner Taylor's ruling was considered interlocutory and not subject to further review. (R.pp. 75 and 849).

On August 22, 2018, Commissioner Avery B. Wilkerson, Jr. issued a Decision and Order stating that Mr. Long had sustained a compensable injury by accident to his pulmonary, respiratory, hearing and digestive systems as well as injuries to his back, ears, eyes, lungs, stomach, bilateral arms, legs and skin arising out of and in the course and scope of his employment with Metro Construction.

(R.pp. 57-58). A determination of permanency was deemed premature. (R.p. 58).

Commissioner Wilkerson also found that Mr. Long had <u>not</u> committed a substantial breach of the policy and that the workers' compensation policy with Respondent Zurich was in effect on the date of the accident. (R.pp. 67-68). Hence, Respondent Zurich was responsible for payment of all benefits arising under Title 42 of the S.C. Code of Laws. (R.p. 68). Moreover, the Single Commissioner also found that if the Zurich policy was *not* in effect at the time of the injury, then Respondent Fund would be responsible for payment of all benefits arising under Title 42. (R.p. 69-70).

Respondents Zurich and Fund appealed the Single Commissioner's Decision alleging that Commissioner Wilkerson made errors of fact and law in his Order. Specifically, Respondent Zurich alleged 27 errors of law or fact while Respondent Fund alleged 10 errors of law or fact. (R.pp. 82 and 88).

On April 30, 2019, the Appellate Panel of the SC Workers Compensation Commission issued a Decision reversing the Single Commissioner, in part, and found that the Claimant had substantially breached his contract with Respondent Zurich by not timely providing audit information. (R.p. 35). The Appellate Panel determined that the employer, Metro Construction, was responsible for all benefits due Mr. Long. However, if the employer was unable to pay these benefits, then Respondent Fund would be responsible for the Claimant's damages. (R.p. 38). Both Mr. Long and the SC Uninsured Employers' Fund filed an appeal of the Appellate Panel decision.

ARGUMENTS

I. THE APPELLATE PANEL ERRED IN FINDING THAT THE CLAIMANT SUBSTANTIALLY BREACHED HIS CONTRACT WITH THE AMERICAN ZURICH INSURANCE COMPANY AND THAT RESPONDENT ZURICH PROPERLY CANCELLED THE POLICY

A. No Statutory Violation Finding by Appellate Panel

The Appellate Panel ruled that the Zurich "policy was properly cancelled on August 8, 2014 due to Metro's failure to provide the requested audit information" which constituted a "substantial breach of the terms of the policy." (R.p. 35). Although Respondent Zurich argued that this substantial breach of contract was a violation of S.C. Code § 38-75-730(a)(4), the Appellate Panel did not make a statutory violation finding. The Decision only states that that Metro Construction's failure to provide audit information constituted a substantial breach of contract. (R.p. 35). The only reference to a statutory violation in the Full Commission Decision is found in Finding of Fact No. 12 which states that Respondent Zurich believed that a statutory violation had occurred. (R.p. 33).

Since the finding of a statutory violation of S.C. Code § 38-75-730(a)(4) is a contested material fact in this case, then [the Commission] "must make a specific, express finding on it." *Aristizabal v. I.J. Woodside-Division of Dan River, Inc.*, 268 S.C. 366, 234 S.E. 2d 21, 22 (1977).

The Claimant contends that the Appellate Panel's failure to make a finding of a statutory violation means that no statutory violation occurred.

B. Insurance Policy No. UB-2E14299A

The Claimant, Giles Long, contracted with Respondent Zurich to procure workers' compensation coverage for his business, Metro Construction, Inc., Policy No. UB-2E14299A. (R.pp. 1159-1207). **Policy No. UB-2E14299A states:**

> **The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.**

(R.p. 1171). The policy also permits the carrier to examine "records related to the policy." (R.p. 1175). While the policy requires Mr. Long to provide audit information to the carrier, it does not state when the materials must be delivered. Specifically, the policy requires the insured to "provide us [carrier] with copies of those records when we ask for them" and that an audit can occur "during the policy period and within three years after the policy period ends." (R.p. 1175). The Policy also states that the "final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy." *Id.*

During the hearing, Respondent Zurich provided Timothy Lukes as a witness. (R.pp. 945-1053). Mr. Lukes was employed with Travelers Indemnity Company and its property and casualty affiliates and worked as a senior underwriter for the Assigned Risk market. (R.p. 946, ln. 20 – R.p. 947, ln. 3) Mr. Lukes testified that there was "not a particular timeframe . . . stated in the policy "other than they need to provide us copies of records when we ask for them. (R.p. 1007**). Mr. Lukes added that:**

> **As far as the – the individual information contained within the policy language, there is no reference as to specific times that are required to – in which they have to complete the audit.**

(R.p. 1007, ln. 23 – R.p. 1008, ln. 1). Respondent Metro's attorney asked Mr. Lukes whether the insured in this case had a right to rely upon the policy. (R.p. 1008, lns. 2 - 8). Mr. Lukes responded, "I believe that they would have to follow the provisions of the policy *in addition* to other documentation that we would send along the – policy cycle." (R.p. 1008, lines 5 – 8). (emphasis

added). Hence, Respondent Zurich asserts that the insured is not only subject to the terms stated in the policy, but also to external terms subsequently created by the carrier. Assuming this is true, which Claimant refutes, Respondent Zurich failed to abide by the exclusivity provision of the policy agreement by *adding terms* to the agreement without issuing an endorsement--*as required by the policy. Id.* (R.p. 1171).

It is undisputed that during the formation of the insurance contract Mr. Long provided all necessary personal and financial information requested by Respondent Zurich and continued to cooperate with the carrier during the policy term. (R.p. 1084, ln. 17 – R.p. 1085, ln. 5). He paid the full amount of the policy premium up front and even received a refund of approximately $2,000.00 after his initial premium was recalculated. (R.p. 1085, lns. 9 – 14). Second, when Mr. Long received his first and only request for payroll information in the July 5th letter, he immediately made arrangements to procure this financial information and hired a bookkeeper to assist in his efforts. (R.p. 1083, R.p. 1122, lns. 12 – 15, R.p. 1132, lns. 21 - 23). (Mr. Lukes, testified that he could find no evidence that Respondent Zurich had sent any prior documents to the Claimant and that the July 5th form letter "seems to be the first." (R.p. 982, ln. 22 – R.p. 983, ln. 4, R. p. 1014, lns. 7– 12). Hence, no request for audit information was sent by the carrier until after the cancellation notice was sent on July 4, 2014.

Third, on August 20, 2014—twelve days after policy cancellation—Mr. Long provided a 941 form containing payroll and financial information to the carrier. (R.p. 1087, lns. 5 - 17 and R.p. 1329). According to Mr. Lukes, the 941 is required by the carrier as part of its audits and Respondent Zurich requested this information from Mr. Long. (R.p. 996, lns. 11 – 21).

There is substantial evidence that Mr. Long made every effort to comply with the Zurich policy and provided detailed financial information on very short notice. Respondent's allegation

that the Claimant substantially breached his contract is not supported by either the language in the policy or witness testimony. The Claimant contends that his failure to provide the audit information to Respondent Zurich within the 30-day timeframe was not specified in the policy and did not constitute a substantial breach of contract under the policy terms.

Mr. Lukes testimony further reveals the ambiguity contained in the Zurich policy. There was "not a particular timeframe . . . stated in the policy" to provide the information. (R,p. 1007, lns. 8-17). Moreover, Mr. Lukes added that "within the policy language, there is no reference as to specific times that are required to – in which they have to complete the audit."(R.p. 1007, ln. 23 – R.p. 1008, ln. 1). Based on Mr. Lukes' testimony, the Claimant had to adhere to deadlines that were not listed in the policy or in subsequent endorsements.

Therefore, the Appellate Panel erred in finding that a substantial breach of contract and the Court should reverse given the substantial evidence to the contrary.

II. THE APPELLATE PANEL ERRED IN CONCLUDING THAT THE TERMS OF THE AMERICAN ZURICH INSURANCE POLICY, THE NOTICE OF NONCOOPERATION AND NOTICE OF CANCELLATION WERE CLEAR AND UNEQUIVOCAL

The Appellate Panel found that the Zurich insurance policy, as well as the notice of noncooperation and notice of cancellation were clear and unequivocal and that none of the correspondence subsequent to the cancellation could reasonably be construed as a reinstatement of the policy or revocation of the cancellation." (R.pp. 34 and 36).

Claimant contends that there is substantial evidence in the Record proving that that Respondent Zurich's documents were confusing and would be misconstrued. Moreover, Mr. Lukes' testimony reveals this ambiguity in the Policy and subsequent communications.

It is well established that terms of an insurance policy are to be construed most liberally

in favor of the insured.

> The well settled rule that the terms of an insurance policy must be construed most liberally in favor of the insured and where the words of the policy are ambiguous, or where they are capable of two reasonable interpretations that construction will be adopted which is most favorable to the insured. However, in cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the agreement between the insurer and the insured, a condition or stipulation not contemplated either by the law or by the contract between the parties.

Quinn v. State Farm Mut. Auto. Ins. Co. 238 S.C. 301, 120 S.E.2d 15; *Garrett v. Pilot Life Ins. Co.,* 241 S.C. 299, 128 S.E.2d 171 as cited in *W. Kingman v. Nationwide Mutual Insurance Company*, 243 S.C. 405, 134 S.E.2d 217 (S.C. 1964).

A. The Policy

As stated earlier, the terms of the Zurich Policy are ambiguous as to when performance is expected from the Claimant. While the policy clearly requires Mr. Long to provide audit information to the carrier, it does <u>not</u> give a deadline as to when they must be delivered. The policy only states that "you will provide us with copies of those records when we ask for them" and that "we may conduct the audits during the policy period and within three years after the policy period ends." (R.p. 1175). <u>More importantly, the document states that the "final premium will be determined after this policy ends by using the actual, not the estimated, premium basis</u>." *Id.*

B. Notice of Non-Cooperation with Preliminary Audit Letter

On July 5, 2014, Respondent Zurich sent the Claimant a letter stating that "several attempts {had} been made to obtain payroll, classification and tax information" to prepare the audit. (R.p. 1307). The letter further stated that failure to "allow access for audit of the policy term *may* result

in cancellation of your Workers Compensation and Employers Liability Insurance Policy." (R.p. 1307). (emphasis added). Hence, according to this document, the policy was still in effect as of July 5, 2014.

C. Cancellation Notice - Failure to Audit Payroll or Permit an Audit Letter

On July 4, 2014—the day before Respondent Zurich sent the notice of non-cooperation letter, it notified the Claimant that "your policy designated herein is cancelled in accordance with its terms as of the effective date of cancellation. (08-08-14)" (R.p. 1306). Significantly, the notice of cancellation letter was sent *prior* to the notice of non-cooperation. Mr. Lukes admitted the ambiguity pertaining to these letters. When asked if the notice of cancellation was meant to confer an *intent to cancel* rather than a *notice of cancellation*, Mr. Lukes responded, "I don't know that anybody would understand language like that if we did put it in there." (R.p. 1019, lns. 18 – 22, R.p. 1020, lns. 6 - 9). Mr. Lukes' testimony is evidence that the July 4, 2014 letter was confusing. He added "well, that's why we [Respondent Zurich] send the second letter [referring to the July 5, 2014 notice of non-cooperation with preliminary audit]." (R.p. 1021, lns. 6 – 14, R.p. 1307).

D. Second notice of non-cooperation with preliminary audit letter

On October 23, 2014, Respondent Zurich mailed a second notice of non-cooperation to Mr. Long. (R.p. 1286). The policy term specified in this letter was "4/4/14 to 4/4/15" and, more importantly, stated that "*failure to allow access for audit of the policy term **may** result in cancellation of your Workers Compensation and Employers Liability Insurance Policy.*" *Id.* (emphasis added). The use of the word "may" in conjunction with the policy termination date of April 4, 2015, clearly indicates that the policy was still in effect. Again, Mr. Lukes was asked to explain why Respondent Zurich sent this letter that contained language stating failure to act *might* result in policy cancellation. Mr. Lukes responded:

> The reason that's not inconsistent why the—letter is worded as such is because of reinstatements, as we've talked about beforehand. Now a reinstatement—when a policy is reinstated with a lapse, it's assigned a new policy number. Now the system isn't necessarily smart enough to know to go out and look at this policy number to see if there is future coverage, ergo the word, may.

(R.p. 1027 ln. 22 – R.p. 1028, ln. 4).

The policy number and dates of service in the second notice of non-cooperation letter were the same as the original policy. Hence, if Respondent Zurich's documents do not clearly articulate policy cancellation, how can the insured be expected to discern that the policy had been cancelled with a termination date months in the future. Mr. Long maintains that the clear and unambiguous meaning of the October 23rd letter stating that failure to act *may* result in policy cancellation means that coverage was in effect at the time.

E. First Earned Premium Notice

On November 5, 2014 Respondent Zurich mailed the Claimant an earned premium notice requesting an additional payment of $128.00. This letter listed the policy term as "4/4/14 to 4/4/15." (R.p. 1321). Moreover, the Notice indicated that the bill was for "an additional amount as a result of recent audit activity for *policy number 2E14299A*." *Id.* (emphasis added) Mr. Long paid this bill in full. (R.p. 1333, R.p. 969, lns. 11-13, R.p. 991, lns. 5-16). The only interpretation of this communication is that the workers' compensation coverage was in effect.

F. Second Earned Premium Notice

On January 7, 2015, Respondent Zurich sent Mr. Long an "earned premium" letter requesting an additional $2,095.00 payment based on a "recent audit." According to this letter, if the Respondent had a dispute with the bill he must take action before the "due date to avoid cancellation." (R.p. 1334). This letter again stated the same policy number and policy term dates

as the original policy. *Id.* During the hearing Mr. Lukes agreed that the letter stated "if you don't want coverage to be canceled you need . . . to do certain things" and that the letter referenced "avoiding cancellation." (R.p. 1029, lns. 4 – 21 and R.p. 1030, lns. 8 – 11) Again, based on the clear meaning of the language used in the Respondent Zurich's letter, Mr. Long (and a Court) could only conclude that his coverage was still in effect.

G. Financial Information Provided by Claimant

According to Mr. Long, updated financial and payroll information was provided to the carrier on August 20, 2014. (R.p. 1329, R.p. 1087, lns. 5 – 17). However, Respondent Zurich's chief witness was unclear as to when it actually received the 941 form. Mr. Lukes testified to different accounts during the hearing. First, he said that he had not seen the 941 document in "our files." (R.p. 984, lns. 16 – 21, R.p. 992, lns. 1 - 11). Later he testified that Respondent Zurich received the 941 form in early January 2015. (R.p. 997, ln. 14 – R.p. 998, ln. 6, R.p. 1036, lns. 5 – 15).

During the hearing Mr. Lukes testified that policy reinstatement could occur if the "the fault that caused the cancellation [was] corrected within that 60 days" of cancellation. (Tr. p. 984 lns. 12 – 15). Therefore, when Respondent Zurich received the 941 is especially relevant to Mr. Long's belief that he provided the required information in time to have his policy reinstated (if it was in fact cancelled) and that his coverage was in effect at the time of his injuries.

H. Sufficiency of Updated Financial Documentation

During the hearing Mr. Lukes was asked if the information provided by the Claimant was sufficient for the audit to be completed. He replied: "I can't say if that was the only – the only piece of information they were looking for or not." (R.p. 984, lns. 24 – 25). When asked whether the 941 information provided by Mr. Long would have been sufficient for the audit, Mr. Lukes testified that he did not know, and only "someone from the Audit Department" would know. (R.p. 1036,

ln. 19 – R.p. 1037, ln. 11). Hence, even the Respondent's witness can't give clarity as to what was required by the Claimant.

The carrier's letters of non-compliance and notice of cancellation as well as the testimony of its witness, do not explain what specific financial information was required from the Claimant and whether Mr. Long actually failed to provide any of the required information. Moreover, Mr. Long contends he provided the requested payroll information and that the letters and notices received from Respondent Zurich after the alleged cancellation date supports his belief that coverage was in effect on the date of his work-related accident.

Therefore, the Appellate Panel erred in finding that the Policy and subsequent communications were clear and unambiguous. The Court should reverse and find that the Claimant substantially complied with the terms of the policy.

III. THE APPELLATE PANEL DID NOT ERR IN FINDING THAT RESPONDENT FUND WAS RESPONSIBLE FOR PROVIDING BENEFITS TO THE CLAIMANT UNDER TITLE 42 OF THE SOUTH CAROLINA CODE OF LAWS

The Appellate Panel agreed with the Single Commissioner's findings that Respondent Fund was responsible for the Claimant's damages pursuant to S.C. Code Ann. § 42-7-200(B) (2012). This decision was premised on Mr. Long acting in his capacity as an employee of Metro Construction when he brought the claim. (R.p. 37).

Respondent Fund also alleges the Appellate Panel erred in finding it potentially responsible for the Claimant's damages by arguing that Metro Construction was administratively dissolved at the time of his accident and that the Claimant was not entitled to the protections afforded by the Uninsured Employer's Fund.

A. Mr. Long Filed Claim in his Capacity as an Employee

Respondent Fund's function and responsibility in this case is clear. S.C. Code Ann. § 42-7-200 (2012) states that the SC Uninsured Employers' Fund was "created to ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees." *Id.* (emphasis added). If it is determined that Respondent Zurich properly cancelled the policy with Metro Construction, then Claimant should be entitled to pursue a claim with the SC Workers' Compensation Uninsured Employers' Fund.

Respondent Fund asserts that the Mr. Long—as owner of Metro Construction—should have pursued coverage elsewhere following policy termination with Respondent Zurich. The argument presumes that Mr. Long was acting in his capacity as the owner of Metro Construction at the time he filed his workers' compensation claim. On the contrary, Mr. Long brought this claim against Respondent Fund in his capacity as an injured employee of Metro Construction. § 42-7-200(B) of the South Carolina Code states that:

> When an employee makes a claim for benefits pursuant to Title 42 and the State Workers' Compensation Commission determines that the employer is subject to and is operating without insurance or as an unqualified insurer, the commission shall notify the fund of the Claim. The fund shall pay or defend as it considers necessary in accordance with the provisions of Title 42.

Hence, under the statutory provisions of Title 42, Respondent Fund is obligated to pay or defend claims brought by employees of an uninsured employer. There is no dispute that Mr. Long is an employee of Metro Construction.

Moreover, § 42-7-200 (D) provides a remedy for Respondent Fund:

> The fund has all rights of attachment set forth in Section 15-19-10 and has the right to proceed otherwise in the collection of its lien in the same manner as the Department of Revenue is allowed to enforce a collection of taxes generally pursuant to Section 12-49-10, et seq. When all benefits

> due the claimant, as well as all expenses and costs of litigation, have been paid, the fund shall file notice of the total of all the monies paid with the clerk of court in any count in which the employer has assets with the Secretary of State. This notice constitutes a judgment against the employer and has priority as a first lien in the same manner as liens of the Department of Revenue.

All of the issues presented by Respondent Fund have been addressed by statute and the result is to ensure coverage for the Claimant. Respondent Fund is obligated to pay Mr. Long's claim but will be able to seek a judgment against Metro Construction for its payment. Metro Construction is an active and viable business in the State of South Carolina and is subject to the penalties of not having coverage as envisioned by the legislature when Section 42-7-200 was enacted.

B. Administrative Reinstatement of Metro Construction

On March 24, 2017, Respondent Fund filed a motion to add the Claimant as a party-defendant since he was the owner of Metro Construction and had procured the workers' compensation policy for the company. (R.p. 852). Fund alleges that since Metro Construction was administratively dissolved on the date of the Claimant's work-related accident, this dissolution "potentially" exposed the Claimant to "personal liability" for any business liability of the corporation. Respondent Fund bases its position on S.C. Code Ann. § 33-14-200 (2013) (entitled "Grounds for an Administrative Dissolution" and the case of *Moore v. Occupational Safety & Health Review Comm'*, 591 F.2d 991, 994 – 95 (4th Cir. 1979). (R.pp. 852-853).

In response to Respondent Fund's motion, Mr. Long relies on S.C. Code Ann. § 33-14-220 (2013) which 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*. (R.pp. 1508-1512).

The motion to add Mr. Long as a party defendant was denied by Commissioner Aisha Taylor. (R.p. 76). On appeal, the South Carolina Workers Compensation Judicial Conference issued an order denying further review of the Single Commissioner's decision on the grounds that the motion was interlocutory. (R.p. 75). Finally, Respondent Fund renewed its argument before the Full Commission. The Appellate Panel also denied review of the Single Commissioner's decision on the same procedural grounds. (R.pp. 36-37).

C. S.C. Code Ann. §§ 33-14-200 (2013)and 33-14-220 (2013).

The controlling statutes governing the dissolution and reinstatement of a corporation in South Carolina are S.C. Code Ann. §§ 33-14-200 (2013) and 33-14-220 (2013). The pertinent portions of this statute state the following:

§ 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.

§ 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**.

S.C. Code Ann. §§ 33-14-200 and 33-14-220 (emphasis added).

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." *Thompson ex rel. Harvey v. Cisson Const. Co.*, 377 S.C. |137, 157,659 S.E.2d 171 (2008). "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." *Id.*

Claimant asserts the "plain meaning" of §§ 33-14-200 and 33-14-220 are clear and unambiguous. 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. (R.pp. 1335-1336). Given that the corporation reinstatement occurred prior to the Claimant's worker's compensation hearing under the reinstatement provisions in § 33-14-220, Mr. Long should be permitted to file a claim with the Uninsured Employers' Fund.

Therefore, Respondent Fund's argument to add the Claimant as a party-defendant is without merit.

D. Appellate Panel Did Not Err in Failing to Apply the Majority Rule Regarding Corporate Officer Liability in Forfeiture

Respondent Fund argues that since Metro Constructions was administratively dissolved at the time of Mr. Long's accident, the Claimant should be barred from pursuing a claim against the SC Uninsured Employers' Fund. This rationale is based on S.C. Code Ann. § 33-14-210(d), which

states that an administratively dissolved corporation continues its existence only to wind up and liquidate its business affairs. *Id.* While Claimant acknowledges the language of § 33-14-210(d), the statutory provisions pertaining to corporate reinstatement are controlling.

The governing statutes regarding corporate dissolution and reinstatement are S.C. Code Ann. §§ 33-14-200 (2013) and 33-14-220 (2013). Neither of these sections impose personal liability on corporate officers or directors and prove that the legislature did not intend to create this liability. Therefore, Mr. Long cannot be held personally liable for his actions once Metro Construction was properly reinstated. Respondent Fund concedes that there is no statutory or case law opinion in South Carolina imposing personal liability on officers acting on behalf of a dissolved corporation.

With no statutory authority available in South Carolina to impose personal liability, Respondent Fund urges the Court to alter the plain meaning of S.C. Code Ann. § 33-14-220 (2013) by *adopting opinions* from other jurisdictions where the liability of corporate officers was imposed after the corporation was administratively dissolved. In support of its argument, Respondent Fund cites the alleged "majority rule" outlined in the Virginia case of *Moore v. Occupational Safety & Health Review Comm'*, 591 F.2d 991 (4th Cir. 1979). While Respondent Fund relies on this case, the statutory provisions ruled upon in *Moore* have been repealed and are not similar to the statutes applicable in the current case before the Court.

S.C. Code Ann. § 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.

V.A. Code Ann. § 13.1-92 (1950), Reinstatement:

> A corporation that has been dissolved may apply to the Commission for reinstatement within five years thereafter . . . Upon the entry by the Commission of reinstatement, the corporate existence shall be deemed to have continued
>
> from the date of dissolution except that reinstatement shall have no effect on any question of personal liability of the directors, officers or agents in respect of the period between dissolution and reinstatement.

The differences between the Virginia and South Carolina statutes are significant. First, the reinstatement statute in *Moore*, V.A. Code Ann. § 13.1-92 (1950), specifically allowed for the imposition of personal liability of corporate officers acting after the company had been administratively dissolved. Moreover, the notes to this section adds "directors, etc., not relieved of liability by reinstatement." *Id.* Based on the language of this statute the Court in *Moore* added:

> By operation of law thereby stripping the corporation's legal mandate to exist," it has been accurately said that, upon dissolution by operation of law under the statute, "there is no corporation at all, and any action performed by the directors or officers not looking to the dissolution of the corporation should be deemed Individual (sic) actions with concomitant individual liability therefor."

Id. p. 995.

Although Virginia imposed personal liability on corporate officers pursuant to § 13.1-92, South Carolina did not mandate this liability in its reinstatement statutes. Clearly, the Virginia legislature intended to hold corporate directors and officers personally liable for their actions after dissolution because specific language was included in their statute.

Second, relying on the holding in *Moore* is inappropriate because the statute addressed, V.A. Code Ann. § 13.1-92, was repealed in 1985 and replaced with V.A. Code Ann. § 13.1-754 (2018). Section 13.1-754(C) states:

> If the corporation complies with the provisions of this section, the Commission shall enter an order of reinstatement of corporate existence. Upon entry of the order, the corporate existence shall be deemed to have continued from the date of termination as if the termination had never occurred, <u>and any liability incurred by the corporation or a director, officer, or other agent after the termination and before the reinstatement is determined as if the termination of the corporation's existence had never occurred</u>.

Hence, under the <u>current</u> Virginia statute, personal liability is not imposed on the corporate directors or officers who operate the business after dissolution. Instead, their activities are treated as actions of a business that had never been dissolved.

Respondent Fund also relies on a decision from the state of Vermont, *Daniels v. Elks Club of Hartford*, 58 A.3d. 925, 192 VT 114 (2012). Respondent Fund cites a portion of the *Daniels* case indicating that the "majority rule" <u>appears</u> to impose personal liability on those acting on behalf of a dissolved corporation. However, Court in *Daniels* specifically held that its decision would not apply in all cases. The Court stated: "In most jurisdictions, the reinstatement of a corporation following dissolution by administrative action of the state relates back to the effective date of dissolution, and directors or officers are not personally liable for actions undertaken during the period of dissolution or suspension." (emphasis added) *Id.* The Court held:

> after reviewing the precedents from other jurisdictions, we conclude that it is <u>unwise to adopt one hard-and-fast personal liability rule for reinstated corporations</u>.
>
> *Id.* p. 945.

Therefore, both the *Moore* and *Daniels* cases cited by Respondent Fund provide no clear-cut "majority rule" from other jurisdictions. The statutory provision addressed in *Moore* is

distinguishable from the applicable the South Carolina statute while the Court in *Daniels* did not intend to create a broad-based rule imposing liability on corporate officers.

CONCLUSION

Claimant asserts that he did not substantially breach the terms of the policy with Respondent Zurich and that the Court should reverse the findings of Appellate Panel of the SC Workers Compensation Commission.

Respectfully submitted,

January 31, 2020

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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

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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

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that the foregoing ***Final Brief of Appellant*** complies with Rule 211(b), South Carolina Appellate Court Rules.

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