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

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

AMENDED FINAL BRIEF OF APPELLANT GILES LONG

Nicholas G. Callas, S.C. Bar#15193
Law Office of Nicholas G. Callas, P.A.
1901 Gadsden Street, STE B
Columbia, South Carolina 29201
(803) 369-3968
Nick@callaslawfirm.com

Attorney for Claimant, Appellant

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STATEMENT OF THE CASE

The Claimant, Appellant/Respondent, Giles "Gregg" Long (hereinafter "Claimant" or "Mr. Long") is an employee and owner of Metro Construction Company (hereinafter "Respondent Metro") in Leesville, South Carolina. (R.p. 1073). The Claimant purchased a workers' compensation policy from the American Zurich Insurance Company (hereinafter "Respondent Zurich") that commenced on April 4, 2014. (R.p. 1217). On November 20, 2014, Mr. Long was injured in an on-the-job accident and subsequently made a claim under his worker's compensation policy for medical expenses and payment of temporary total benefits which was denied by Respondent Zurich. (R.p. 1080, lns. 9-11). Mr. Long asserts that the applicable statutory and case law supports his position that his claim for benefits should be accepted and that he is entitled to payment of medical expenses and temporary total benefits under Section 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 when Mr. Long failed to timely provide audit information resulting in a material breach of the insurance policy and in violation of S.C. Code § 38-75-730(a) (2012).

On July 4, 2014, Respondent Zurich sent the Claimant a letter stating his policy *would be cancelled* on August 8, 2014 for "failure to audit or permit and audit." (R.p. 1302). 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).

Mr. Long was unable to provide the requested audit information by August 8, 2014 but

allegedly provided this information on August 20, 2014. (R.p. 1329, R.p. 1087, lns. 5-17). After Mr. Long was injured he made a claim for benefits under his worker's compensation policy. Respondent Zurich denied coverage for the November 20, 2014 accident on the basis that the policy had been previously cancelled. Consequently, Mr. Long filed a claim with the SC Uninsured Employer's Fund (hereinafter "Respondent Fund"). (R.p. 864).

Respondent Fund argues that either Respondent Zurich is responsible for the Claimant's damages or, conversely, that Mr. Long is individually responsible for his medical bills and damages. (R.pp. 63-64). Specifically, Respondent Fund argues that either the insurance contract between Zurich and the Claimant had not been cancelled or, in the alternative, that Mr. Long—as the owner of Metro Construction—had improperly operated his business after it was administratively dissolved by the SC Secretary of State's office. (R.p. 64). In support of this argument Respondent Fund filed a motion with the South Carolina 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 the Metro Construction when he was injured and since Metro Construction was administratively reinstated by the Secretary of State's office in December 2016. (R.p. 1508). Specifically, Mr. Long relies on S.C. Code § 33-14-220 (2012) which states that the restoration of a company retroactively corrects any prior deficiencies or errors as if the dissolution had never occurred.

On April 19, 2017, Commissioner Aisha Taylor ruled in favor of the Claimant and denied Respondent Fund's motion to add Giles Long individually as a party-defendant. (R.p. 76). Moreover, Respondent Fund's appeal to the Appellate Panel was denied on May 15, 2017 as Commissioner Taylor's ruling was deemed interlocutory and not subject to further appeal. (R.pp.

75 and 849).

A hearing was held before a single Commissioner of the SC Workers' Compensation Commission. On August 22, 2018, Commissioner Avery Wilkerson, Jr. issued a Decision and Order finding that Respondent Zurich was responsible for the Claimant's damages under Title 42 of the South Carolina Code of Laws. (R.pp. 68-69). Commissioner Wilkerson also found that if Respondent Zurich's policy was properly cancelled, then Respondent Fund would be responsible for Mr. Long's damages. Both Respondent Zurich and Respondent Fund appealed the Single Commissioner's Decision and Order. (R.pp. 69-70).

On April 30, 2019, the Appellate Panel of SC Workers' Compensation Commission issued a Decision and Order reversing the Single Commissioner, in part, and found that Claimant Long had substantially breached his contract with Respondent Zurich by not timely providing audit information. (R.p. 35). Consequently, the employer was found to be responsible for the Claimant's damages. The Appellate Panel also found that if the employer was unable to pay the Claimant's benefits, then Respondent Fund would be responsible for Mr. Long's damages. (R.p. 38).

STATEMENT OF THE FACTS

On April 4, 2014, Mr. Long, purchased an assigned risk workers' compensation policy from Respondent Zurich (R.pp. 1159-1207). Mr. Long is both an employee and owner of Metro Construction, a commercial construction and demolition company. 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 before policy coverage started on April 4, 2014. (R.p. 1302). The Policy term was to run until April 4, 2015. (R.pp. 1159-1207).

On July 5, 2014 Respondent Zurich sent a Notice of Non-Cooperation with Preliminary Audit to the Claimant stating that several attempts have been made to obtain payroll, classification

and tax information. (R.p. 1307). This notice letter was dated one day *after* Respondent Zurich sent a letter notifying Mr. Long that his policy would be cancelled effective August 8, 2014 for "failure to Audit or permit an audit." (R.p. 1306). During the hearing before the Commission, 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 for the carrier. (R.p. 1329; R.p. 1087, lns. 5 - 17). Additionally, on November 5, 2014, Mr. Long paid an additional $128.00 on an Earned Premium Notice received from Respondent Zurich. (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 the work-related accident, Mr. Long has sustained over two million dollars in medical expenses from various healthcare providers. (R.pp. 757-848). Most of these bills remain unpaid because Respondent Zurich denied the claim and Mr. Long's health insurance carrier filed bankruptcy. (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 to cover the policy premium. (R.p. 1327). Mr. Long's brother—also an employee of Metro Construction—timely paid this additional charge. (R.p. 1090, ln. 23 – R.p. 1091, ln. 3).

Since Respondent Zurich denied any coverage for the injuries that Mr. Long had sustained,

he filed a claim for workers' compensation benefits against the SC Uninsured Employers' Fund on March 12, 2015. (R.p. 864). Respondent Fund also denied coverage for Mr. Long's injuries. (R.p. 862). On April 6, 2016, Respondent Fund and the Claimant filed a motion to add Respondent Zurich as a party-defendant. (R.p. 855). On April 14, 2016, Commissioner Susan Barden granted Respondent Fund's motion to add Respondent Zurich as a party-defendant. (R.p. 78).

Respondent Fund maintains that either 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 against Mr. Long 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. (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). Specifically, Mr. Long cited to SC 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 ruled in favor of Claimant Long and denied the Respondent Fund'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 Giles 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 not 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.pp. 69-70).

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

Respondent Fund asserted that the hearing Commissioner erred in finding that it would be responsible for Mr. Long's damages if Defendant Zurich were not the responsible party. Specifically, Respondent Fund alleged that the hearing Commissioner made 10 errors of law or fact. (R.p. 88).

Respondent Fund asserted that the Commissioner erred in finding that it would be responsible for Mr. Long's damages if Respondent Zurich were not the responsible party alleging that Mr. Long failed to obtain workers' compensation coverage after his policy was cancelled and improperly continued to operate his business after it was administratively dissolved by the SC Secretary of State's office.

On December 17, 2018, a hearing before the Appellate Panel of the SC Workers' Compensation Commission was held. On April 30, 2019, the Full Commission issued a Decision reversing the Single Commissioner, in part, and found that Claimant Long had substantially breached his contract with Respondent Zurich by not timely providing audit information. (R.p. 35). Consequently, the Appellate Panel found that the employer, Metro Construction, was responsible for all benefits due Mr. Long. Moreover, if the employer was unable to pay these benefits, then Respondent Fund would be responsible for the Claimant's damages. (R.p. 38).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. *Hargrove v. Titan Textile Co., 360* S.C. 276, 288, 599 S.E.2d 604 (Ct. App. 2004); *(see also Lark v. Bilo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); *Gibson v. Spartanburg Sch. Dist. No.* 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Bursey v. South Carolina Dep't of Health & Envtl. Control,* 360 S.C.135, 141, 600 SE.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003).

ARGUMENTS

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

The Appellate Panel of the SC Workers' Compensation Commission ruled that "the policy was properly cancelled as of August 8, 2014 due to Metro's failure to provide the requested audit information." (R.p. 35). The Appellate Panel found this failure constituted "a substantial breach of the terms of the policy." *Id.* Although Respondent Zurich also argued that the Claimant's failure to provide audit information constituted a substantial breach of contract under S.C. Code § 38-75-730(a)(4), the Appellate Panel did not address the alleged statutory violation and based its entire decision on the breach of contract argument. (R.p. 35).

The Claimant submits this appeal and contends that his failure to provide the audit information to Respondent Zurich within the 30-day timeframe did not constitute a substantial breach of contract under the policy terms.

A. 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). The contract was intended to provide coverage for one year beginning on April 4, 2014 and was allegedly cancelled on August 8, 2014.

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 states that Mr. Long would permit the carrier to examine and audit all

of his "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 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). The Policy also states that "the final premium will be determined after the 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 has been employed with Travelers Indemnity Company and its property and casualty affiliates for the past 12 years and works as a senior underwriter for the Assigned Risk market. (R.p. 946, ln. 20 – R.p. 947, ln. 3). His responsibilities include "servicing a book of business offering management and executive's opinion on more complex cases and appearing in hearings and/or depositions as needed." (R.p. 947, lns. 6 - 9).

Mr. Lukes testified that there was "not a particular timeframe . . . stated in the policy other than they need" to provide the information. (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 further questioned witness Lukes and queried 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—through its witness—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, Claimant asserts that 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, ln. 9 – 14). Second, prior to the policy cancellation, Mr. Long received his first and only request for payroll information from Respondent Zurich in a letter dated July 5, 2018. (R.p. 1083; R.p. 1122 lns. 12 - 15; R.p. 1132, lns. 21 - 23). Moreover, Respondent Zurich's witness, Timothy Lukes, testified that he could find no evidence of prior communications from the carrier proving that attempts were made to contact Mr. Long before the July 5th form letter. (R.p. 982, ln. 22 – R.p. 983, ln. 4; R.p. 1014, lns. 7 –12).

Upon receiving this request from Zurich, Mr. Long immediately made arrangements to procure this financial information by hiring a bookkeeper to assist his efforts. (R.p. 1092, lns. 15 – 25, p. 1122, lns. 12 – 15, p. 1127, lns. 2 – 5, and p. 1132, lns. 21 - 23).

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 Form 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).

The substantial evidence shows that Mr. Long made every effort to cooperate with the

Respondent Zurich and substantially complied with the Respondent's request on very short notice. Respondent Zurich's allegation that the Claimant failed to cooperate is not substantiated by either testimony or documentation and the Appellate Panel erred in finding to the contrary. The Court should reverse, and find that the Claimant complied with the applicable terms of the policy.

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 of the SC Workers' Compensation Commission found that 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).

A review of the Record clearly shows that Respondent Zurich's documents were confusing and ambiguous and could easily be misconstrued. Moreover, the testimony provided by Respondent Zurich's only witness illustrates the ambiguity of the carrier's documents and actions.

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. 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 preliminary 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.

In regard to this letter, Timothy Lukes testified that he was unaware of any prior letters or other forms of communication that were made to Mr. Long. (Tr. p. 1083, lines 14 - 17). Moreover, he was unaware of what actions Mr. Long did—or failed to do—to comply with the audit since he never spoke to Mr. Long. (Tr. p. 992, lns. 12 – 15, p. 994, lns. 3 – 9).

B. 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. 1-19, 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).

C. Second Notice of Non-cooperation with Preliminary Audit Letter

On October 23, 2014, after the policy was allegedly cancelled, 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, it 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 effective date of the policy ending on April 4, 2015, clearly indicate to the insured that the policy is still in effect. Again, Mr. Lukes was asked to explain why Respondent Zurich sent this letter--months after it allegedly cancelled coverage--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 computer system cannot produce documents that clearly articulate its position regarding policy coverage, it cannot expect the insured reading the letter to discern that the policy is cancelled with a direct communication from the insurer stating a coverage end 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.

D. 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 from Respondent Zurich is that his workers' compensation coverage was in effect. There would be no need to pay money for a cancelled policy.

E. 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.

F. 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. (R.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.

G. Sufficiency of Updated Financial Documentation

During the hearing, Respondent Zurich's witness was asked if the information provided by the Claimant was sufficient for the audit to be completed. Mr. Lukes replied: "I can't say if that was the only – the only piece of information they were 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).

Therefore, 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 particular 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 Mr. Long's belief that coverage was in effect on the date of his work-related accident.

Based on the ambiguity of the Respondent's written communications with the Claimant

and the testimony of Mr. Lukes, it was reasonable for Mr. Long to construe, and there is evidence in fact, that his policy was not cancelled or had been reinstated.

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 of the SC Workers' Compensation Commission 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).

Although Respondent Fund did not specify the errors made by the Appellate Panel in its notice of appeal, it provided two arguments to the Appellate Panel as to why the Claimant should not be afforded the protections provided by the Uninsured Employers' Fund. First, Respondent Fund alleged that Mr. Long—as the owner of Metro Construction—should have procured other workers' compensation coverage upon notice that his policy had been cancelled. Second, Respondent Fund alleged that, at the time of Mr. Long's accident, Metro Construction had been administratively dissolved by the SC Secretary of State's Office.

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 S.C. 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 27, 2017, Respondent Fund filed a motion to add Claimant, Giles Long, 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). Hence, 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. Defendant Fund based its position on S.C. Code Ann. § 33-14-200 (2013) (entitled "Grounds for an Administrative Dissolution", and *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 filed a brief alleging that S.C. Code Ann. § 33-14-220 (2013), *Grounds for an Administrative Dissolution*, addresses the issues raised by Respondent Fund. Specifically, § 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.* (R.pp. 1508 – 1512).

The controlling statutes governing the dissolution and reinstatement of a corporation in South Carolina are SC Code Ann. § 33-14-200 (2013) addresses the issue raised by Respondent Fund. Specifically, §33-14-220 provides that proper reinstatement of a corporation relates back to the effective date of administrative dissolution as if the administrative dissolution had never occurred.

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). Paragraph (c) of § 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." *Id.* The reinstatement treats the dissolution as if it had never occurred thereby nullifying Respondent Fund's argument.

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 this reinstatement and § 33-14-220, the dissolution must be treated as if it 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." *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.*

Finally, Respondent Fund improperly relies on the analysis in *Moore* by stating that during the forfeiture, the corporation has been stripped of its legal mandate to exist. However, the facts addressed in *Moore* are materially different from the case at hand. While the corporation in *Moore* was in forfeiture at the time of the proceedings against it, Metro Construction was not in forfeiture at the time of Mr. Long's hearing before the SC Workers' Compensation Commission. Accordingly, due to Metro Construction's reinstatement prior to the Commission's proceeding, the corporation is entitled to all protections afforded under the statute and resumes carrying on its business as if the administrative dissolution had never occurred.

Therefore, Respondent Fund's argument to add the Claimant as a party-defendant is without merit and its motion should be denied.

CONCLUSION

Mr. Long asserts that Metro Construction did not breach the terms of the policy with Respondent Zurich. Metro Construction provided the requested financial information 47 days after he received his first notice and 12 days after a deadline imposed by the carrier. However, the policy does not specify a timeframe when audit material or financial information must be provided. Testimony from Respondent Zurich's only witness substantiates the fact that no deadline is

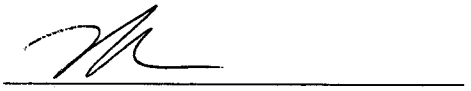
specified in the policy. Moreover, Mr. Lukes' testimony reveals that the Claimant must adhere to carrier demands not included in the policy despite the exclusivity clause in the Plan stating all terms of the contractual agreement are in the policy.

Claimant asserts that it was reasonable for him to believe that Metro Construction's coverage was in effect at the time of his work-related accident based on the explicit language of numerous communications received from Respondent Zurich.

Finally, Respondent Fund is responsible for the Claimant's damages if Respondent Zurich is found to have properly cancelled its policy. Section 42-7-200 states that the S.C. Uninsured Employers' Fund was created to ensure payment of claims brought by employees who work for uninsured employers. It is undisputed that Mr. Long was an employee of Metro Construction at the time of his work-related accident.

The Claimant asserts that Respondent Fund's motion to add Mr. Long as a Party Defendant is without merit and that should have been denied. Further, Claimant requests that Respondent Zurich be held responsible for the Claimant's damages and provide benefits as required under Title 42 of the South Carolina Code of Laws. Claimant requests the Court reverse the decision below for the reasons stated herein.

Respectfully submitted,



February 18, 2020

Nicholas G. Callas, Esq.
LAW OFFICE OF NICHOLAS G. CALLAS, PA
1901 Gadsden Street, STE B
Columbia, SC 29201
(803)369-3968 (phone)
(803)862-1002 (facsimile)
nick@callaslawfirm.com

ATTORNEY FOR CLAIMANT/APPELLANT

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

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 the foregoing ***Amended Final Brief, Final Reply Brief and Final Respondent's Brief*** complies with Rule 211(b), South Carolina Appellate Court Rules.

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

Attorney for Claimant, Appellant/Respondent

February 18, 2020