

STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission

SCWCC File No. 1521141

Appellate Case No. 2018-000939

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SC Court of Appeals

Calvin Felder, Claimant

v.

Central Masonry, Inc. & Arnold Construction Co., Employer, and AmGuard Insurance Co./Old Republic Insurance Co., and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and Central Masonry Inc. and South Carolina Uninsured Employers Fund are the Respondents.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

The Commission erroneously found that AmGuard is estopped from denying policy coverage. The Commission based its determination on the following: 1) Central was unaware of the fact that the Certificate of Insurance did not include South Carolina; 2) AmGuard told Lloyd Pro Group (Lloyd) that South Carolina was added to the policy, and Lloyd issued a Certificate of Insurance based on that assurance; 3) Central relied on the Certificate of Insurance to apply for and secure a job in South Carolina; and, 4) Because of its reliance, Central failed to add South Carolina to its policy correctly.¹

First, as the Appellants initial brief and the single Commissioner's order² make clear, AmGuard's agent (Carly) did not tell Lloyd that South Carolina was added to Central's policy, and the conversation did not result in the subsequent addition of South Carolina to the policy. Lloyd, moreover, issued the Certificate of Insurance before the conversation with Carly occurred; it was not relying on any statements from Carly when it issued the certificate.

Second, Central should not have relied on the Certificate of Insurance from Lloyd. In section 3A of the contract between AmGuard and Central, the only States listed as covered for workers' compensation are Georgia and North Carolina. Central is an out-of-state employer. Regulation 67-415(A)(2) states: "For an out-of-state employer, the ACORD Form 25-S is acceptable [documentation of insurance], provided the authorized representative of the insurance carrier for the insured affirms the following in an accompanying statement: South Carolina is a named state in section 3A or 3C of the declaration page of the insured's policy."³ This required

¹ Order of full Commission, pp.23-24.

² Order of the Full Commission, pp. 15-6 (reciting findings of single Commissioner).

³ S.C. Code Ann. Regs. 67-415(A)(2).

statement is absent from Central's Form 25-S; thus, it is not an acceptable documentation of insurance under the Commission's regulations.⁴

Furthermore, though the regulation does not define "authorized insurance representative," Lloyd Pro Group is not AmGuard's agent, which the Commission recognized.⁵ Nevertheless, the Commissioner determined that, "Based on the greater weight of evidence, [] the contract of insurance Central [] had with AmGuard Insurance Company for South Carolina and other states clearly and unambiguously invites it to rely on the agent [Lloyd] to obtain proof of insurance." The problem is that the language the Commission is referring to is not part of the contract between Central and AmGuard. The "To request Certificates of Insurance" language is on the service information page; the actual contract starts on the next page, the one with "Policy Information Page" written at the top. In addition, a certificate of insurance is not a contract of insurance⁶ and cannot—standing alone—extend policy coverage, as the language on the face of the certificate makes clear. Thus Lloyd Pro Group had no authority, real or apparent, to extend policy coverage into South Carolina. This is not unusual: Lloyd Pro Group is an insurance broker, and insurance brokers are typically agents for the insured, not the insurer.⁷ Although brokers can be considered

⁴ Neither Central nor the general contractor (Arnold Const. Co.) should have accepted or relied on it. The South Carolina Uninsured Employers Fund should not have liability in this case. *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 680 S.E.2d 1, 4 (2009) ("We hold that an incomplete Accord Form does not constitute documentation [sufficient to transfer liability to the Fund]...")

⁵ Order of the full Commission, p. 24 ¶10 ("[W]e find that Amguard's agent and servant, Carley, assured the agent [Lloyd] that South Carolina was to be added to [Central's] workers' compensation policy."); Order of the full Commission, pp. 24-5 ¶1 ("Equitable and legal principles and doctrine prevent AmGuard from denying the very coverage it [through Carley] assured the agent [Lloyd] and, by way of the agent [Lloyd], [Central]...")

⁶ *Sevenson Envtl. Serv., Inc. v. Sirius Am. Ins. Co.*, 902 N.Y.S.2d 279, 280, 74 A.D.3d 1751, 1753 (N.Y. App. Div. 2010) ("A Certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists.") (internal citation omitted).

⁷ S.C. Code Ann. §38-45-10(8); see also *Apartment Inv. and Management Co. v. Nutmeg Ins.*, 593 F.3d 1188, 1197 (10th Cir. 2010) ("[A]n insurance broker [is] a person who, for compensation,

agents of insurance companies by statute,⁸ the Commission did not find that Lloyd was an agent of AmGuard; again, it found that AmGuard's agent (Carly) told Lloyd (Central's agent) that South Carolina was added to Central's policy coverage.

Finally, although a court (or in this case, the full Commission) can use its equitable powers to prevent an insurance company from denying coverage after issuance of a Certificate of Insurance, the doctrine of equitable estoppel does not apply in this case. For estoppel based on the issuance of a Certificate of Insurance to apply, either the insurer or its agent had to issue the certificate.⁹ The Commission found that Lloyd was Central's agent, not AmGuard's.¹⁰ Consequently, neither AmGuard nor its agent issued the Certificate of Insurance, precluding a finding of estoppel.

The Workers' Compensation Commission erred in finding that AmGuard was estopped from denying workers' compensation coverage for Central. This Court should reverse the Commission's order.

brings about or negotiates contracts of insurance as an agent for someone else, but not as an officer, salaried employee, or licensed agent of an insurance company.") (quoting Black's Law Dictionary 206 (8th ed. 2004)).

⁸ *Holmes v. McKay*, 334 S.C. 433, 441, 513 S.E.2d 851 (Ct. App. 1999) (internal citation omitted).

⁹ *Sevenson Envtl. Serv., Inc. v. Sirius Am. Ins. Co.*, 902 N.Y.S.2d 279, 281, 74 A.D.3d 1751, 1753 (N.Y. App. Div. 2010) (internal citation omitted).

¹⁰ See n. 5

Respectfully submitted,



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