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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS
COMPENSATION COMMISSION

Appellate Case No. 2021-000695

South Carolina Uninsured Employers FundAppellant

v.

Jeff Quinn, Yeamans Hall Club, Accident Fund Insurance Co. of
America, Travelers Property Casualty Company of America, and
Michael Hannaway d/b/a Hannaway Painting Defendants

RESPONDENT TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA'S
INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Did SCUEF waive its right to appeal the issues argued in this appeal pursuant to the two-issue rule, where it did not argue or address the full Commission's alternative ground of exhaustion of remedies under Rule 4 of the WCIP?**

SUGGESTED ANSWER: Yes.

- II. Did the full Commission properly conclude that the issue of whether Hannaway was insured on the date of Claimant's accident had already been determined by Commissioner Campbell?**

SUGGESTED ANSWER: Yes.

- III. Did the full Commission properly conclude that Travelers properly canceled the Policy under the terms of that Policy, the WCIP and South Carolina law?**

SUGGESTED ANSWER: Yes.

- IV. Did the full Commission correctly conclude that the *Crews* case did not prohibit or preclude Travelers from canceling the Policy under the facts of this case?**

SUGGESTED ANSWER: Yes.

- V. Did the full Commission correctly conclude that Hannaway failed to exhaust his remedies under Rule 4 of the WCIP?**

SUGGESTED ANSWER: Yes.

COUNTERSTATEMENT OF THE CASE

A. The Insurance Policy At Issue in This Case

On April 3, 2017, Michael Hannaway, d/b/a Hannaway Painting ("Hannaway") submitted a Workers Compensation Application (ACORD Form 130) and Workers Compensation Insurance Plan Assigned Risk Section (ACORD Form 133) (collectively the "Application"), identifying Davide E. Rowell, Inc. - Rowell Insurance as the agency and Patsy Bootle as producer. (*See* Travelers APA 761-68). The Application was for an assigned risk policy. (*See* Travelers APA 761). The Application stated that "coverage will be bound in accordance with WCIP [(i.e., the South Carolina Workers Compensation Insurance Plan)] rules."¹ (*See* Travelers APA 766). Hannaway further agreed that he would "comply with all WCIP rules and procedures and policy terms and conditions, including without limitation, those relating to audits, inspections, loss prevention, and/or premium payments, to maintain WCIP eligibility and coverage." (*See id.*). Hannaway also promised that he understood and agreed that "violation of or non-compliance with any of the above agreements or certifications may result in cancellation of the policy issues under a Workers Compensation Insurance Plan and/or ineligibility for coverage under a Workers Compensation Insurance Plan." (*See* Travelers APA 767). As the producer, Ms. Bootle certified that she was authorized to submit the Application on behalf of Hannaway. (*See* Travelers APA 768).

In his Assigned Risk Application, Hannaway represented that he had zero employees or payroll, used no subcontractors and did not sublet without receiving a certificate of insurance. (*See* Travelers APA 749 ¶ 8). Based on those representations, the National Council on Compensation Insurance ("NCCI") calculated a minimal initial premium for the issuance of the initial assigned risk policy. (*See id.*).

On or about April 7, 2017, the NCCI sent a notice to Hannaway concerning the issuance

¹ "The WCIP, as administered by NCCI, is the only 'mechanism' in the state for implementing the assigned risk pool and has been approved by the Director of the Department of Insurance for use in this State." *Avant v. Willowglen Acad.*, 356 S.C. 181, 187-88, 588 S.E.2d 125, 128 (Ct. App. 2003).

of a workers compensation liability policy binder number 39-10804-17097-337145 from Respondent Travelers. (See Travelers APA 769). Hannaway was additionally notified:

Coverage is provided under the Workers Compensation Law of SOUTH CAROLINA . . . in accordance with the Plan rules. . . . COVERAGE FOR THIS EMPLOYER HAS BEEN PLACED THROUGH THE ASSIGNED RISK PLAN. AS THE PLAN IS THE MARKET OF LAST RESORT, COVERAGE SHOULD CONTINUE TO BE SOUGHT THROUGH THE STANDARD VOLUNTARY MARKET. PLEASE NOTE THAT PREMIUMS IN THE ASSIGNED RISK PLAN MAY BE HIGHER THAN THE STANDARD/VOLUNTARY MARKET.

If a policy Issued by an Insurance carrier, pursuant to an assignment under the Workers Compensation Insurance Plan, is canceled due to the employer's failure to comply with terms or conditions of the policy, such employer may be Ineligible for further coverage under the Plan.

(See Travelers APA 770).

The Policy contained numerous terms concerning the requirement that Hannaway promptly pay all premiums in full:

A. Our Manuals All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

C. Remuneration . . . This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. All your officers and employees engaged in work covered by this policy; and
2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis

D. Premium Payments You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. Final Premium The premium shown on the Information Page, schedules, and endorsements is an estimate. 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. . . . If this policy is canceled, final premium will be determined in the following way ... ,

F. Records You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

(See Travelers APA 750-51 ¶ 12; Travelers APA 772-857). The Policy further granted Travelers a broad right to cancel the Policy:

We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancelation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page^[2] will be sufficient to prove notice.

(See Travelers APA 787).

On April 12, 2017, Travelers notified Hannaway that it had been assigned as the servicing center for Hannaway's assigned risk policy. (See Travelers APA 772). Travelers issued a Workers Compensation and Employer's Liability Policy No. 6JUB-8H01798-A-17 (the "Policy") to Hannaway, with a policy period of May 5, 2017 to May 5, 2018. (See Travelers APA 778). The Policy provides to the payment of both an estimated initial premium and a final premium based upon the insured's actual exposure:

The premium shown on the Information Page, schedules, and endorsements is an estimate. 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. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

(See Travelers APA 786). Hannaway agreed to "pay all premium when due" and that "[t]he due date for audit and retrospective premiums is the date of the billing." (See Travelers APA 797).

At the issuance of the Policy, the estimated annual premium (and deposit amount due upon

² In the case of Hannaway's Policy, that address was: Michael Hannaway, d/b/a Hannaway Painting, 3955 Rivers Avenue, Charleston, SC 29406- 4550. (See Travelers APA 778).

issuance) was \$1,325. (See Travelers APA 779). Hannaway paid this estimated premium amount for the 2017-18 policy period. (See Travelers APA 754 ¶ 30). In May of 2018, Travelers conducted a premium audit for the 2017-18 Policy year. (See Travelers APA 938-55). "The audit revealed that Hannaway's application was incorrect and that Hannaway's actual exposure was \$60,251 based on his uninsured workers." (See Travelers APA 752 ¶ 18). As a result, on May 8, 2018, Travelers sent Hannaway a Premium Adjustment Notice for the April 5, 2017 to April 5, 2018 Policy year, indicating a \$9,877 earned premium. (See Travelers APA 752 ¶ 19 & 963). It is undisputed that these "additional charges were correctly and appropriately assessed in accordance with the WCIP." (See Travelers APA 752 ¶ 19). On May 10, 2018, Travelers billed Hannaway \$8,552 (\$9,877 minus the \$1,325 deposit premium payment made in 2017) as an additional earned premium for the 2017-18 policy year. (See Travelers APA 752 ¶ 20 & 966).

On January 24, 2018, Travelers billed Hannaway \$1,325, the estimated premium deposit amount required for renewal of the Policy for the April 2018-2019 period. (See Travelers APA 76). On March 30, 2018 and April 30, 2018, Travelers sent Hannaway bills in the additional amount of \$250.00 for deposit estimated premium for the 2018-19 Policy term. (See Travelers APA 901-06).

Pursuant to the WCIP, on or about May 11, 2018, due to the recent activity and additional premium owed under the initial policy (because of Hannaway's erroneous Application representations), Travelers issued an Endorsement advising Hannaway that his total balance of premium owed for the initial and renewal Policies was \$18,957, with a minimum payment of \$10,155 due by May 26, 2018. (See Travelers APA 752 ¶ 21 & 968-69). This bill, like all others sent to Hannaway, afforded the insured the opportunity to dispute the accuracy of the amount due:

If you dispute any of the amount due on this bill, you must do the following by the due date in order to avoid cancellation procedures from being initiated.

- 1) Provide to us written documentation outlining and explaining the specific areas of dispute as well as your estimate of the undisputed amount due and your method of calculation. You must pay the undisputed amount by the "due date".
- 2) Make a written request to the plan administrator for a hearing on the dispute.

You may contact us in writing for the name of the plan administrator in your state. (See e.g., Travelers APA 137, 194, 199, 527, 553, 656, 658, 734, 740, 830, 966, 968, 1008).

When Hannaway failed to pay the amount due, Travelers sent Hannaway a Notice of Cancellation, effective July 3, 2018, allowing Hannaway the opportunity to cure his default:

We are pleased to have you as a customer and would like to continue to provide your insurance. Unfortunately, we have not received the premium payment due on this policy. Therefore, your policy shown on this notice will be cancelled on the effective date of cancellation shown above, at 12:01 am and we will refund any premium due you. We regret having to take this action, and will be pleased to rescind the cancellation if we receive the minimum due before 12:01 am of the effective date of the cancellation. In that event, we will send you a notice of reinstatement continuing your coverage.

(See Travelers APA 971). The Notice of Cancellation " was mailed to Hannaway's correct address noted on the application and policy, and mailed to the producer"; it was also sent to the NCCI/WCC, as the WCIP requires. (See Travelers APA 752-53 ¶¶ 22 & 23).

On or about June 6, 2018, as a courtesy, Travelers called Hannaway at the phone number listed on the Application, which was incorrect. (See Travelers APA 753 ¶ 24). Travelers called the producer to obtain updated phone numbers for Hannaway, and left detailed voice messages with the insured at the numbers it was given. (See *id.*).

Hannaway failed to pay the premiums owed to Travelers by July 3, 2018, so the Notice of Cancellation became effective because of his failure to comply with underwriter requirements pursuant to the WCIP. (See Travelers APA 753 ¶ 26). As a result, the Travelers Policy was effectively canceled and was not in effect on the date of Claimant's loss (August 29, 2018). (See Travelers APA 754 ¶ 28).

B. The Workers' Compensation Commission's Determination That the Policy Was Not in Effect on the Date of Claimant's Accident Because of Hannaway's Failure to Pay Premiums.

On July 19, 2019, a hearing was conducted "pursuant to an Order and Rule to Show Cause, 25A S.C. Regs. 67-1404 (1985), directing [Hannaway] to appear and show cause why it should not be found in violation of S.C. Code Ann. § 42-5-10 (1976) and § 42-5-20 for failing to secure the payment of compensation and maintain proper insurance coverage." (See Travelers APA 1-

4). On July 25, 2019, Commissioner Mike Campbell entered a Decision and Order determining that Hannaway was not insured under the Travelers Policy on the date of the alleged injury:

The greater weight of the evidence, including the records contained in the Commission's file, and the unrefuted testimony of Emillie Boggs, Coverage and Compliance Officer, establish that Respondent did not secure the payment of compensation under the Act by obtaining workers' compensation insurance or qualifying as a self-insurer between July 3, 2018 through the date of Hearing on June 19, 2019. . . .

Respondent violated the provisions of § 42-5-10 and § 42-5-20 by refusing or neglecting to secure the payment of compensation by failing to insure and keep insured its liability under the Act for the period of July 3, 2018 through June 19, 2019.

(See Travelers APA 2-3).

C. The Procedural History of the Issues in This Appeal

This matter arises out of an August 29, 2018 accident, in which Jeff Quinn ("Claimant") was allegedly injured while power washing a residence owned by the Yeamans Hall Club. Claimant alleges that he fell from a ladder, causing him injuries, while employed by Michael Hannaway, d/b/a Hannaway Painting ("Hannaway") at the time of the accident. Claimant asserted a claim for workers compensation benefits from Hannaway via Form 50.

On or about September 18, 2018, Claimant filed a Form 50 naming Hannaway as his employer and Travelers as the insurer. (See Sept. 18, 2018 Form 50). On or about December 17, 2018, Claimant filed another Form 50, serving a copy upon SCUEF. (See Dec. 17, 2018 Form 50 with Proof of Service). On January 11, 2019, Commissioner Avery B. Wilkerson, Jr. entered an order that SCUEF be added as a party to this claim to pay or defend the claim as appropriate, because "substantial evidence exists indicating that the employer may be subject to Title 42 and operating without insurance." (See Jan. 11, 2019 Order of Commissioner Wilkerson). On the same day (represented by Attorney Timothy B. Killen) filed a Form 51. (See Jan. 11, 2019 SCUEF Form 51). On January 22, 2019, Claimant resubmitted his Form 50, serving it upon Timothy H. Killen, Esq. and Lisa C. Glover, Esq., counsel for SCUEF. (See Jan. 29, 2019 Resubmitted Form 50 with Proof of Service). On or about February 13, 2019, SCUEF (represented by Attorney

Timothy B. Killen) filed another Form 51. (*See* Feb. 13, 2019 SCUEF Form 51).

On June 26, 2019, SCUEF filed a Notice of Motion and Motion to Add with the Commission, which sought to add Travelers as the employer's insurer, based upon an alleged improper cancellation of the Policy:

3. The Fund believes that this purported cancellation of coverage to be invalid in that the asserted basis of the cancellation included amounts allegedly for a prior year's coverage. *See* attached documentation from the producer and the carrier related to that cancellation.

4. Accordingly, the Fund, seeks to Travelers Property Casualty Company of America as the carrier for the direct employer in this claim.

(*See* June 26, 2019 Notice of Mot. and Mot. to Add ¶¶ 3-4). On July 8, 2019, Commissioner Avery B. Wilkerson entered a Motion Order granting SCUEF's Motion to Add. (*See* July 8, 2019 Motion Order of Commissioner Wilkerson).

On July 29, 2019, Claimant filed an Amended Form 50 naming as employers both Hannaway and Yeamans; the Amended Form 5 identified as potential insurers Travelers, SCUEF and Accident Fund Insurance Co. of America. (*See* July 29, 2019 Amended Form 50). On August 7, 2019, SCUEF filed its Form 51, which noted that the insurance carrier was "Travelers Property & Casualty Insurance Co. of America (added by 7/8/19 order)." (*See* Aug. 7, 2019 SCUEF Form 51.) On September 27, 2019, Travelers filed (and served on counsel for SCUEF) its Form 51 alleging, *inter alia*, that "[n]o coverage exists under any Travelers policy as the Travelers policy . . . was effectively cancelled for non-payment on 7/3/2018." (*See* Sept. 27, 2019 Travelers Form 51).

On June 29, 2020, Commissioner Aisha Taylor entered a Decision and Order following a hearing "[t]o determine Claimant's entitlement to benefits under the Workers' Compensation Act and determine issues set forth in Forms 50 and 51 submitted by the parties, including which employer and carrier is liable for compensation to the Claimant" ("Single Commissioner Decision"). (*See* June 29, 2020 Decision and Order of Commissioner Aisha Taylor). Of relevance to this appeal, Commissioner Taylor carefully considered the facts and determined that

Commissioner Campbell's July 25, 2019 determination that Hannaway did not have insurance coverage on the date of the accident at issue was binding on SCUEF. (*See id.*, at 16). She also found that:

pursuant to the South Carolina assigned risk policy terms itself and the WCIP, the Travelers South Carolina assigned risk policy was effectively cancelled on July 3, 2018 and was not in effect on the date of loss of the Claimant, August 29, 2018; moreover, I hereby find that the Travelers' South Carolina assigned risk policy does not provide workers' compensation coverage in the State of South Carolina for such date of loss.

(*See id.*, at 25). As an alternative ground for her ruling, Commissioner Taylor also concluded in the Single Commissioner Decision that "as Hannaway failed to timely appeal Travelers' decision to the NCCI, the administrative body charged with administering the WCIP, I hereby find and conclude that Hannaway cannot collaterally attack Travelers unappealed decision via this present claim." (*See id.*, at 27).

On June 1, 2021, the Commission entered the Decision and Order of Full Commission ("Full Commission Decision") that is at issue in this appeal. The Full Commission Decision fully affirmed Commissioner Taylor's Single Commissioner Decision. Of particular relevance to SCUEF's appeal as to Travelers, the Full Commission Decision held that:

- "[B]y prior Decision and Order of the Commission, which was not appealed, Hannaway was subject to the South Carolina Workers' Compensation Act based on his prior election to come under the Act, when he obtained workers' compensation insurance coverage and then violated the provisions of the Act by failing to insure and keep insured its liability under the Act." (*See* June 1, 2021 Full Commission Decision, at 17). The Full Commission Decision held that Commissioner Campbell's show cause determination was the "law of the case" and has preclusive effect. (*See id.*).
- "Travelers properly cancelled Hannaway's policy within the requirements and parameters set forth by the WCIP and that Claimant did receive notice of the pending cancellation and right to cure directly and also by and through his agent - the producer - Ms. Patsy Bootle, both verbally over the telephone and via mail." (*See id.*, at 18).
- SCUEF failed to brief Commissioner Taylor's alternative ground that Travelers was not required to provide coverage for the Claimant's claim because Hannaway "failed to avail himself of the mandatory appeal mechanism to NCCI as set forth in WCIP Rule 4." (*See id.*, at 27).

On or about June 30, 2021, SCUEF filed a Notice of Appeal from the Full Commission Decision based on the following claimed errors as to Travelers:

2. The Commission erred ,in finding and holding that the South Carolina Uninsured Employers Fund was bound by the Commission's order dated 7/25/19 and could not contest the issue of coverage as to Travelers Property Casualty Co. of America as a result.

3. The Commission erred in failing to find and hold that Travelers Property Casualty Co. of America improperly cancelled its coverage and that the South Carolina Uninsured Employers, Fund was responsible for this claim.\

(*See* June 30, 2021 Notice of Appeal).

For the reasons set forth below, the Full Commission Decision was not in error, and the Court should affirm.

ARGUMENTS

A. STANDARD OF REVIEW

The Administrative Procedures Act governs this Court's review of the South Carolina Workers' Compensation Commission's Full Commission Decision:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See S.C. Code § 1-23-380(5); *accord Ashford v. Prysmian Power Cables & Sys., USA*, 427 S.C. 361, 365, 830 S.E.2d 912, 914 (Ct. App. 2019) ("The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission.").

"An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Lemon v. Mount Pleasant Waterworks*, 429 S.C. 59, 63, 837 S.E.2d 738, 740 (Ct. App. 2019) (*quoting Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010)); *Avant v. Willowglen Acad.*, 356 S.C. 181, 186, 588 S.E.2d 125, 128 (Ct. App. 2003) ("The appellate court's review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law.") (*quoting Hendricks v. Pickens County*, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)); *accord Roper Hosp. v. Clemons*,

326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997) ("On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law."). "An appellate court normally owes deference to the Commission's factual findings because the Administrative Procedures Act mandates that those findings will stand unless they are clearly erroneous in the view of the reliable, probative, and substantial evidence on the record as a whole." *Ramirez v. May River Roofing, Inc.*, 860 S.E.2d 680, 683 (Ct. App. 2021).

For the reasons that follow, the Court should affirm the South Carolina Workers Compensation Commission's June 1, 2021 Decision and Order of Full Commission, particularly its holding that Travelers is not liable for any benefits or compensation which may be paid to the Claimant.

B. SCUEF HAS WAIVED ITS RIGHT TO APPEAL THESE ISSUES AS TO TRAVELERS PURSUANT TO THE TWO-ISSUE RULE.

As an initial matter, SCUEF's appeal fails because it failed to properly address (either in this Court or before the full Commission) an alternative sustaining ground set forth in the Single Commissioner Decision. As a consequence, the "two issue-rule" prohibits SCUEF from now seeking reversal of the Full Commission Decision affirming Commissioner Taylor.

One of the grounds Commissioner Aisha Taylor set forth the Single Commissioner Decision for her ruling that the Travelers Policy was not in effect on the date of Claimant's injury was that Hannaway's Policy was canceled because he did not engage in the mandatory appeal process:

44. I hereby find and conclude, as an alternate sustaining ground, Hannaway failed to appeal Travelers' premium or cancellation determination pursuant to WCIP Rule 4. The WCIP provides Hannaway with an opportunity to appeal Travelers premium determination or cancellation pursuant to Rule 4. I find that Hannaway was provided with ample opportunities to cure, but he failed to avail himself of the mandatory appeal mechanism to NCCI as set forth in WCIP Rule 4. The WCIP appellate process requires Hannaway to appeal any such dispute to NCCI and, if unsatisfied, the appeal process provides further appropriate venues for Hannaway's appeal to continue. The NCCI/WCIP unappealed premium and cancellation determination binds Hannaway (and thereby the UEF) per the WCIP

due to his failure to appeal and avail himself of such administrative appeal mechanism.

45. I hereby find and conclude that the WCIP Rule 4 (Travelers APA 235-236) provided Hannaway with a mandatory appeal mechanism/process to appeal to NCCI, an administrative body, concerning any premium or cancellation dispute between the parties.

(See June 29, 2020 Decision and Order of Commissioner Aisha Taylor, at 26). As a result, "as Hannaway had failed to timely appeal Travelers' decision to the NCCI, the administrative body charged with administering the WCIP, I hereby find and conclude that Hannaway cannot collaterally attack Travelers unappealed decision via this present claim." (See *id.*, at 27). Commissioner Taylor premised her conclusion upon Hannaway's failure to exhaust the mandatory appeal process set forth in Rule 4 of the WCIP. (See *id.*, at 25-27).³

The June 1, 2021 Full Commission Decision affirmed Commissioner Taylor, in part, because SCUEF did not brief or argue that ground to it:

IT IS FURTHER ORDERED that, as an alternate sustaining ground as to Travelers, this appeal is also dismissed pursuant to the two issue rule based on the single Commissioner's alternate sustaining ground (Hannaway's failure to exhaust administrative remedies pursuant to the WCIP Rule 4 appeal mechanism) and the *UEF's failure to brief or present any argument against such ground, as the unappealed ground becomes the law of the case;*

(See June 1, 2021 Decision and Order of Full Comm'n, at 33 (emphasis added)). For the reasons that follow, because SCUEF has failed to properly brief and preserve this question before the Full Commission or this Court, the two-issue rule requires that the Court affirm the Full Commission Decision.

"Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm *unless the appellant appeals all grounds* because the unappealed ground will become the law of the case." *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432,

³ Travelers will discuss the merits of this argument in another section of this brief. For purposes of the application of the two-issue rule, it is not relevant whether Commissioner Taylor's application of Rule 4 was correct or in error. SCUEF has failed to properly raise and preserve that issue for appellate consideration and, as a result, this Court must affirm the Full Commission Decision.

451, 814 S.E.2d 643, 653-54 (Ct. App. 2018) (emphasis added) (*quoting Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). "[A]n unappealed ruling, right or wrong, is the law of the case." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (*citing Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970)).

"[E]ven if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court." *South Carolina Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008); *accord Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993) ("An issue . . . not argued in the brief is deemed abandoned and will not be considered by the appellate court."); *Bell v. Bennett*, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992). Likewise, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

To properly preserve the issue on appeal, the appellant must fully argue the issue with citation to supporting legal authority. *See Divine v. Robbins*, 385 S.C. 23, 37-38, 683 S.E.2d 286, 294 (Ct. App. 2009) ("Mother sets forth no argument or supporting authority to indicate how the family court's ruling was in error or how it prejudiced her at the final hearing."); *Hunt v. Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (holding that issues raised in brief without citation to supporting authority are deemed abandoned).

In the instant matter, SCUEF did not make any argument about Commissioner' Taylor's alternative ground in the Single Commissioner Decision to either the full Commission or to this Court. Moreover, SCUEF does not address in its Appellant's Brief the Full Commission Decision's determination that SCUEF did not properly raise and preserve the issue at that level. SCUEF has not mentioned Rule 4 of the WCIP or the impact of Hannaway's failure to exhaust administrative remedies. SCUEF has not properly preserved or made any arguments about the alternative sustaining ground set forth in the Single Commissioner Decision and the Full Commission

Decision. Therefore, SCUEF has not preserved any appellate review of the alternative grounds relied upon in both the Single Commissioner and Full Commission Decisions.

Additionally, "no point will be considered which is not set forth in the statement of the issues on appeal." *See* S.C.A.C.R., Rule 208(b)(1)(B); *accord Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal."). SCUEF's statement of issues on appeal did *not* include the additional sustaining ground of exhaustion that both the Commissioner Taylor and the full Commission relied upon:

2. Did the Full Commission err in ruling that the UEF was bound by the Commission's coverage and compliance order dated 7/25/19 and could not contest the issue of coverage as to Travelers as a result?
3. Did the Full Commission err in failing to rule that Travelers improperly cancelled its coverage and that the UEF was responsible for this claim?

(*See* Appellant's Br., at 1). As a result, SCUEF has not properly preserved that specific issue for this Court's review.

Therefore, in light of the foregoing, the Court should affirm the Full Commission Decision under the two-issue rule.

C. THE FULL COMMISSION CORRECTLY HELD THAT COMMISSIONER CAMPBELL'S FINDING THAT HANNAWAY WAS UNINSURED ON THE DATE OF LOSS IS BINDING ON SCUEF.

The Court should also affirm the Full Commission Decision because the Commission had previously determined that Travelers had canceled Hannaway's Policy prior to the date of Claimant's accident. Contrary to SCUEF's arguments, the full Commission did not err in giving effect to that prior, unappealed determination that Travelers did *not* insure Hannaway on the date of Claimant's accident.

On July 25, 2019 (before the final hearing of this matter by the full Commission), Commissioner R. Michael Campbell, II conclusively determined that Hannaway was uninsured on the date of the alleged loss:

The greater weight of the evidence, including the records contained in the Commission's file, and the unrefuted testimony of Emillie Boggs, Coverage and Compliance Officer, establish that Respondent did not secure the payment of compensation under the Act by obtaining workers' compensation insurance or qualifying as a self-insurer between July 3, 2018 through the date of Hearing on June 29, 2019. . . .

Respondent violated the provisions of § 42-5-10 and § 42-5-20 by refusing or neglecting to secure the payment of compensation by failing to insure and keep insured its liability under the Act for the period of July 3, 2018 through June 19, 2019).

(See Travelers APA 1-3). This order was entered as part of an enforcement action based on an investigation that determined that Hannaway might not have been insured at the time of the accident. Neither Hannaway nor SCUEF appealed from Judge Campbell's determination that Hannaway was uninsured.

The full Commission relied upon Commissioner Campbell's determination as a primary basis for its Decision and Order of Full Commission, which is at issue in this appeal:

Commissioner Campbell's Decision and Order is the "law of the case." Commissioner Campbell has already decided that Hannaway was uninsured on the date of loss and his Order was unappealed. As such, the Full Commission further finds and concludes that neither Hannaway, nor the UEF, which steps in Mr. Hannaway's shoes, can subsequently collaterally attack Commissioner Campbell's Order via this subsequent action as a single Commissioner cannot overrule and overturn the decision of another single commissioner (Commissioner Campbell). As such, Commissioner Campbell's Decision and Order is binding on Hannaway and the UEF, and Travelers, as the assigned risk carrier, did not provide any coverage on the date of loss pursuant to such Order.

(See June 1, 2021 Decision and Order of Full Comm'n, at 17).

SCUEF asserts that the Decision and Order of Commissioner Campbell does not bind it because SCUEF was not a party to the enforcement proceeding. However, it does not cite any authority permitting it to avoid the implications of Commissioner Campbell's decision that Hannaway was uninsured on the date of Claimant's injury. The record is clear that the Commission properly precluded SCUEF from relitigating the question of whether Hannaway was insured on the date of Claimant's accident.

Ordinarily, the decision of an administrative tribunal precludes the re-litigation of the same issues in a collateral action. *Bennett v. South Carolina Dep't of Corrections*, 305 S.C. 310, 408 S.E.2d 230 (1991); *see also Derrick v. Gaston School District of Lexington County*, 172 S.C. 472, 478, 174 S.E. 431 (1934) (stating “[Appellant] is precluded from raising the validity of the discharge in a collateral action as the decision of the committee became the law of the case, and the doctrine of res judicata bars the re-litigation of this issue.”).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). "Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). "The doctrine of estoppel, being an equitable one, is essentially flexible, and therefore to be applied or denied as the equities between the parties may preponderate." *Kane v. Kane*, 280 S.C. 479, 482, 313 S.E.2d 327, 329 (Ct. App. 1984).

The South Carolina Supreme Court has stated that "mutuality is no longer a requirement of collateral estoppel." *See Doe v. Doe*, 346 S.C. 145, 149, 551 S.E.2d 257, 259 (2001) (*citing Graham v. State Farm Fire and Cas. Ins. Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982) (modern trend is to disregard privity requirement in applying estoppel by judgment); *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982) (same), *quoted in Carolina Renewal, Inc. v. South Carolina Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) (“[T]he identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel.”).

SCUEF contends that Commissioner Campbell's order did not bind it because it was not a party to that enforcement proceeding. The legislature created the SCUEF within the office of the Second Injury and State Accident Funds "to ensure payment of workers' compensation benefits to

injured employees whose employers have failed to acquire necessary coverage for employees."

See S.C. Code § 42-7-200(A)(1) & (1). Under statute:

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 Title 42 and is operating without insurance or as an unqualified self-insurer, the commission shall notify the fund of the claim. The fund shall pay or defend the claim as it considers necessary in accordance with the provisions of Title 42.

See S.C. Code § 42-7-200(B). The legislature protects SCUEF by granting it a lien on the uninsured employer's assets. *See* S.C. Code § 42-7-200(C). "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 monies paid with the clerk of court in any county in which the employer has assets and 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." *See* S.C. Code § 42-7-200(D).

Under this regulatory and statutory scheme, it is beyond doubt that, in this context, SCUEF steps into the shoes of Hannaway. SCUEF's argument that Travelers, in fact, insured Hannaway is dependent solely on Hannaway's contractual status with Travelers (including *Hannaway's* compliance with the Policy). The South Carolina Uninsured Employers Fund statute contains no provision giving SCUEF rights superior to those of the employer. The full Commission correctly concluded that Commissioner Campbell's Decision and Order precluded both with the uninsured employer *and* SCUEF from collaterally attacking that conclusion.

Citing no authority or evidence to support its proposition, SCUEF argues that the Court should disregard Commissioner Campbell's order because "enforcement proceedings resemble default hearings more than they resemble evidentiary hearings." (*See* Appellant's Br., at 14). It continues that "the normal practice of the Commission" has been to allow it to contest coverage issues separate from enforcement proceedings because the alleged uninsured employer often "almost always" cannot properly dispute policy cancellations.

However, SCUEF can direct the Court to no law or record evidence supporting its characterization of Commission enforcement proceedings. Moreover, SCUEF has not cited a single case allowing it to enforce coverage under a policy that the Commission previously determined did not exist. It has not cited to any evidence or law establishing that there was anything unfair in the process leading up to Commissioner Campbell's order. Instead, SCUEF relies on speculation and the *ipse dixit* of its counsel.

Contrary to SCUEF's assertions, Commissioner Campbell's order concerning Hannaway's lack of insurance was not a mere "default" proceeding. While Hannaway chose not to appear at that hearing, he received proper notice of that hearing. Specifically, the record discloses that "[t]he Insurance and Medical Services Division produced proof of proper and timely service of notice of the Hearing set for June 19, 2019." (*See Travelers APA 2*). The record further shows that Commissioner Campbell's decision was based not on Hannaway's "default," but on the greater weight of the evidence, which showed that Hannaway "did not secure the payment of compensation under the Act by obtaining workers' compensation insurance or qualifying as a self-insurer between July 3, 2018 through the date of Hearing on June 19, 2019." (*See id.*). "The Commission's file was made part of the record in this matter including the investigator's report, the South Carolina Department of Employment and Workforce Reports, and reports from the National Council on Compensation Insurance." (*See id.*). In addition, Commissioner Campbell considered the testimony of Emillie Boggs, Coverage and Compliance Officer. (*See id.*).

SCUEF has not refuted that Commissioner Campbell determined this issue based on a careful consideration of the evidence. SCUEF does not dispute that the Commission properly investigated and litigated this issue. SCUEF does not identify any evidence that Commissioner Campbell improperly considered. The fact that SCUEF was not a party to the enforcement proceeding does not undercut Commissioner Campbell's authority to make a binding decision that Hannaway did not have insurance coverage. Because SCUEF's legal status is dependent upon Hannaway's insurance coverage, its rights cannot rise above those of Hannaway.

As the full Commission noted, SCUEF's approach would create a risk of inconsistent and contradictory rulings:

[I]t is untenable that the Workers' Compensation Commission would find the uninsured employer to be uninsured and require him to pay a fine into the Workers' Compensation Commission on the one hand via one Commissioner's Order, but then another Commissioner would subsequently issue a contradictory Order finding the exact opposite, i.e., that the assigned risk insured was insured in a separate proceeding. Accordingly, the Rule to Show Cause hearing findings and the Decision and Order of Commissioner Campbell has binding effect on both the assigned risk insured and the UEF.

(See June 1, 2021 Decision and Order of Full Comm'n, at 18 n.10). In other words, SCUEF's proposed reading of the law would have the Commission decide in one proceeding that Hannaway was not insured by Travelers and that another proceeding would find him to be insured. It would defy logic and fairness for the same Commission to fine Hannaway for not having insurance, while requiring Travelers to provide coverage under the same policy that it already determined the employer did not have.

Accordingly, the full Commission properly held that the Decision and Order of Commissioner Campbell is binding upon both the insured (Hannaway) and SCUEF.⁴ As a consequence, the Full Commission Decision was not entered in error.

⁴ In its Appellant's Brief, SCUEF asserts that "[b]y way of comparison and contrast, the Guaranty Association is specifically provided with 'all rights, duties and obligations of the insolvent insurer' and is 'considered the insurer.' Section 38-31-60(b). This simply shows that the legislature can successfully use alter ego or 'step into the shoes' type language when it wishes to do so." (See Appellant's Br., at 13). Respectfully, this is not an appropriate analog. Nothing in the Guaranty Association suggests that the SCUEF should be insulated from an employer's actions that cause it to become uninsured. To the contrary, that is precisely the role that the SCUEF fulfills: "to ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees in accordance with provisions of this section." See S.C. Code § 42-7-200(A)(1).

D. THE FULL COMMISSION CORRECTLY HELD THAT TRAVELERS' CANCELANATION OF HANNAWAY'S POLICY WAS PROPER AND IN ACCORDANCE WITH THE WCIP.

The Court should also affirm the Full Commission Decision because SCUEF has not shown that the Full Commission Decision was clearly erroneous and unsupported by evidence.

In its appeal, SCUEF does not contest that Travelers canceled the Policy in accordance with its terms. SCUEF does not contest that Hannaway materially breached the terms of the Policy by failing to make payments when due. SCUEF does not contest that Travelers provided Hannaway with ample opportunity to cure its defaults and that Hannaway never did so. SCUEF does not contest that Hannaway, in fact, owed the premiums charged. SCUEF does not contest that Hannaway never disputed the premium prior to cancelation as or filed an appeal. SCUEF does not contest that Travelers provided Hannaway and producer David E. Rowell Co. Inc. with proper notice of cancelation. SCUEF does not contest that Travelers complied with the Policy's requirements for cancelation. Indeed, SCUEF begrudgingly concedes that these statements are "more or less accurate." (*See* Appellant's Br., at 15). They are, in fact, absolutely accurate, and SCUEF has not suggested otherwise.

Instead, SCUEF contends that "the root question in all this is whether or not Travelers had the right to cancel the policy at all." (*See id.*). SCUEF *only* argues in this appeal that the cancelation of the Policy was impermissible under this Court's opinion in *Crews v. W.R. Crews, Inc.*, 390 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010), because "current year coverage under an assigned risk policy cannot be validly cancelled based upon a default in an obligation owed under the prior year's policy." (*See id.*, at 16). For the reasons that follow, SCUEF's arguments are misplaced and, as a result, this Court should affirm the Commission's determination that the Travelers Policy was properly canceled and was not in effect on the date of Claimant's alleged injury.

In *Crews*, Liberty Mutual issued an assigned risk policy using estimated payroll information. On September 22, 2003, Liberty Mutual issued Crews a policy covering the period August 8, 2003-August 8, 2004 ("Policy 1"). On May 11, 2004, Liberty Mutual sent a renewal

quote for the policy period beginning August 8, 2004-August 8, 2005 ("Policy 2"). However, because Crews did not pay the premium on Policy 2 when due, so it did not issue. Instead, Crews paid the premium for that policy year three days later, and a new policy issued effective August 11, 2004-2005 ("Policy 3"). Like Policy 1, Policy 3 was financed, such that the whole year's estimated premium was paid in advance.

On August 2, 2004, near the end of the term of Policy 1, Liberty Mutual sent Crews an audit request to determine whether additional premium payments were necessary under Policy 1. When Crews did not respond, Liberty Mutual sent an additional audit request on August 30, 2004. When Crews again failed to respond, on October 14, 2004, Liberty Mutual issued an estimated audit indicating not additional premium due, but stating that it was subject to revision upon actual audit. On the same day, Liberty Mutual informed Crews that Policy 3 "has been canceled" effective November 18, 2004. The letter further stated the reason for the cancellation was "non-compliance with plan rules," *i.e.*, failure to comply with auditing requests. On November 17, 2004, the NCCI received a notice that Policy 3 had been canceled on October 21, 2004. Crews suffered a serious workplace injury on February 2, 2005. Liberty Mutual advised Crews it was denying his claim for benefits because his workers' compensation policy had been canceled effective November 18, 2004. On February 14, 2005, Liberty Mutual issued a revised audit bill, showing that Crews owed an additional \$ 1,347 on Policy 1.

This Court determined that Liberty Mutual could not cancel Policy 2 based on the insured's failure to comply with its audit obligations under Policies 1 or 3:

Loadholt and Thiel testified that Crews was in full compliance with the policy requirements of the [Policy 3]. Although Thiel asserted the plan rules in the NCCI manual required Liberty Mutual to cancel any current policy due to noncompliance with an audit request for a prior policy, we found no rules with this precise language in the record. Moreover, as the circuit court noted: "There is no provision of the Plan requiring or allowing cancellation of a current policy due to an alleged failure to comply with the requirements of a previous policy, Policy [1] in this case." We believe the circuit court's interpretation of the Assigned Risk Plan is correct as a matter of law, and based on this interpretation, the court's reversal of the appellate panel's order was proper.

The Assigned Risk Plan specifies five circumstances allowing a carrier to cancel an insurance policy: (1) the employer is not in good faith entitled to workers' compensation coverage, (2) the employer has failed to comply with reasonable health, safety, or audit and loss prevention requirements, (3) the employer has violated one or more of the terms under which the insurance was issued, (4) the employer refuses to allow the assigned carrier reasonable access to its facilities or its files and records for audit or inspection, and (5) the employer refuses to disclose to the assigned carrier the full nature and scope of the assigned carrier's exposure. The only circumstance applicable here was Crews' alleged failure to comply with reasonable audit requirements. We hold that under the terms of both [Policy 3] and the Assigned Risk Plan, Crews' alleged noncompliance with an audit request for [Policy 1] does not constitute a failure to comply with a "reasonable" audit request for [Policy 2].

As to audit requirements, the Plan requires carriers "to complete a final audit and to bill for any additional premium or refund any excess premium paid during the policy year." The wording of this provision indicates that settlement of any discrepancies between the amount paid by an insured for the policy period and the amount owing for the corresponding term is to be handled directly between the carrier and the insured, without adjustments to any subsequent policies between them. That is exactly what happened here; once Liberty Mutual completed the final audit on [Policy 1], it advised Crews it would be sending him an invoice for the surcharge.

See Crews, 390 S.C. at 23-24, 699 S.E.2d at 193-94.

For the reasons that follow, SCUEF's reliance on *Crews* is misplaced, and that case does not support its argument that the Full Commission erred in concluding that Travelers canceled the Policy before the date of Claimant's accident.

1. SCUEF Has Not Shown That the Full Commission Decision Was Clearly Erroneous in Light of Crews.

In *Crews*, the South Carolina Court of Appeals held that Crews' renewal policy could not be canceled for failure to comply with the audit requirements of a prior policy because: (a) the insured was fully compliant with the third policy; (b) the insured had substantially complied with the audit request on the prior policy; (c) the insurer did not provide an opportunity to cure any non-compliance. For the following reasons, the record supports that Hannaway was completely non-compliant as to both the initial and renewal Policy periods because he did not pay premiums when due. Furthermore, Hannaway had ample opportunity to cure his non-compliance, including additional time to pay and an administrative appeal process. Hannaway did not take advantage of

either chance to cure. As such, *Crews* does not apply to this case. As a result, SCUEF has not shown that the Full Commission Decision was erroneous in finding that *Crews* did not preclude Travelers from canceling the Policy.

a. **This Case Is Distinguishable From *Crews* Because Hannaway Was in Clear Violation of His Premium Payment Obligations With Regard to Both the Initial and Renewal Policy Periods.**

First, this case is distinguishable from *Crews* in that Hannaway was in violation of the provisions of the policy for *both* the initial 2017-18 and renewal 2018-19 Policy periods. As a result, Travelers' cancellation of the Policy was distinguishable from *Crews*.

The full Commission considered the Affidavit of Mary Ellen Belins, Travelers' Senior Underwriter representative — an "expert in the areas of South Carolina assigned risk policy underwriting, the WCIP and Basic Manual, the South Carolina assigned risk rules, and all relevant aspects related thereto" — along with twenty-four exhibits thereto. (See Travelers APA 748-1031). Ms. Belin detailed the events leading up to the 2018 cancellation of the Policy:

13. Pursuant to the WCIP, on or about January 24, 2018, Travelers issued Hannaway's renewal quotation with policy number 6JUB-8H01798-A-18 (a renewal of 6JUB-8H01798-A-17), and the renewal policy contained identical Endorsements as mandated by the NCCI and the WCIP, as well as the same premium and cancellation provisions as the initial policy. . . .

15. Pursuant to the WCIP, on or about March 30, 2018, and then again on April 30, 2018, Travelers issued an account bill of \$250 for additional deposit premium owed for the renewal policy. The additional \$250 payment was due on or before April 14, 2018 (per the March 27 letter) and then May 14, 2018 (per the April 30 letter). The bills further provided the insured or his producer with an opportunity to dispute the additional amount due and the WCIP required procedure to avoid cancellation if a premium dispute were to arise. . . .

19. Pursuant to the WCIP, and based on the annual physical audit, Travelers issued a Premium Adjustment Notice on May 8, 2018, advising Hannaway of the \$9,877 for the 2017 policy premium owed (based on the additional audited payroll/exposure of \$60,251). See Exhibit 12. The additional charges were correctly and appropriately assessed in accordance with the WCIP.

20. Pursuant to the WCIP, on May 10, 2018, Travelers issued an Earned Premium Invoice for \$8,552 (the audited results minus the deposit premium paid in 2017) to Hannaway for the additional 'premium owed for the 2017 policy, with a payment

deadline of May 25, 2018 and advising Hannaway of his ability to dispute the amount due and the required WCIP procedure if Hannaway disputed the amount owed.

(*See* Travelers APA 751-53).

Under the terms of the WCIP, on or about May 11, 2018, due to recent activity (and the additional premium owed under the initial policy), Travelers issued a required Endorsement, advising Hannaway that his total balance of premium owed to Travelers for the initial and renewal assigned risk policies was \$18,957 and that payment of \$10,155 was due by May 26, 2018. (*See* Travelers APA 751-53). This Endorsement was for Policy year April 5, 2018-April 5, 2019 and "includes an additional amount as a result of recent activity for policy number 8H01798A UB effective 04/05/18 - 04/05/19. This amount is due and payable upon receipt of this notice." (*See* Travelers APA 968). The Endorsement additionally indicated an additional premium of \$10,155 for the 2018-2019 Policy year. (*See* Travelers APA 969). The Endorsement further provided Hannaway with the WCIP required procedure if Hannaway disputed the amount of premium owed pursuant to the Endorsement. (*See* Travelers APA 751-53).

When Hannaway failed to pay the amount due, Travelers sent Hannaway a Notice of Cancellation, effective July 3, 2018, allowing Hannaway the opportunity to cure his default:

We are pleased to have you as a customer and would like to continue to provide your insurance. Unfortunately, we have not received the premium payment due on this policy. Therefore, your policy shown on this notice will be cancelled on the effective date of cancellation shown above, at 12:01 am and we will refund any premium due you. We regret having to take this action, and will be pleased to rescind the cancellation if we receive the minimum due before 12:01 am of the effective date of the cancellation. In that event, we will send you a notice of reinstatement continuing your coverage.

(*See* Travelers APA 971). The Notice of Cancellation "was mailed to Hannaway's correct address noted on the application and policy, and mailed to the producer"; it was also sent to the NCCI/WCC, as the WCIP requires. (*See* Travelers APA 752-53 ¶¶ 22 & 23). On or about June 6, 2018, as a courtesy, Travelers called Hannaway at the phone number listed on the Application, which was incorrect. (*See* Travelers APA 753 ¶ 24). Travelers called the producer to obtain updated phone numbers for Hannaway, and left detailed voice messages with the insured at the

numbers it was given. (*See id.*). Hannaway did not pay the premiums owed to Travelers by July 3, 2018; as a result, the Notice of Cancellation became effective because of his failure to comply with underwriter requirements pursuant to the WCIP. (*See* Travelers APA 753 ¶ 26).

These facts set forth circumstances far different from *Crews*. First, and foremost, the premiums due to Travelers were for both the 2017-2018 initial *and* 2018-2019 renewal Policy periods. Hannaway's failure to pay premiums due impacted the initial and *renewal* periods. Unlike *Crews*, which involved a breach of the policy limited exclusively to the first policy year, Hannaway's failure to pay premiums involved both policy years.

Additionally, the insured in *Crews* failed to fully cooperate with an audit request. While this is a substantial breach of the policy provisions, this case involves a more fundamental failure by Hannaway. Specifically, this case involves a failure to pay premiums, the very basis for the provision of coverage. Travelers' cancelation goes to the very foundation of the insurer-insured relationship.

SCUEF's contention that "the WCIP itself does not contain any provision regarding premium payment compliance" is erroneous. (*See* Appellant's Br., at 16). WCIP Supplement, Part 1, Section (I)(c)(5) confirms that the employer's responsibilities include "[c]ompl[ying] strictly with all terms and conditions of the policy, including . . . paying all premium when due." (*See* Travelers APA 1347). Moreover, WCIP Supplement Rule 12 permits Travelers to cancel the Policy if it violates the provisions of the Policy (or any previous workers compensation policy) by:

- Not being in good faith entitled to workers compensation insurance
- Failing to comply with reasonable health, safety, audit, and/or loss prevention requirements
- Violating any of the terms and conditions under which the insurance was issued
- Refusing to allow the carrier or NCC! reasonable access to its facilities or its files and records for audit or inspection
- Refusing to disclose to the carrier the full nature and scope of the employer's exposure

(See Travelers APA 1030). An insured's failure to pay a premium violates a policy term and the WCIP requires that the insured pay premium for *all* prior and current policies in full or his policy must be canceled. That is exactly what happened in this case.

In light of the foregoing, it is clear that this case is distinguishable from *Crews* because of the nature of Hannaway's default of the Policy. As a result, Plaintiff's appeal must fail.

b. This Case Is Distinguishable From Crews Because Hannaway Was Provided Ample Opportunity to Cure.

This case is also distinguishable from *Crews*, in that Travelers provided Hannaway with ample opportunities to cure his default or to appeal the premium due.

On or about May 11, 2018, due to the recent activity and additional premium owed under the initial policy (because of Hannaway's representations in his false Application), Travelers issued an Endorsement advising Hannaway that his total balance of premium owed for the initial and renewal Policies was \$18,957, with a minimum payment of \$10,155 due by May 26, 2018. (See Travelers APA 752 ¶ 21 & 968-69). This bill, like all others sent to Hannaway, provided Hannaway the opportunity to dispute the amount due:

If you dispute any of the amount due on this bill, you must do the following by the due date in order to avoid cancellation procedures from being initiated.

1) Provide to us written documentation outlining and explaining the specific areas of dispute as well as your estimate of the undisputed amount due and your method of calculation. You must pay the undisputed amount by the "due date".

2) Make a written request to the plan administrator for a hearing on the dispute. You may contact us in writing for the name of the plan administrator in your state.

(See *e.g.*, Travelers APA 137, 194, 199, 527, 553, 656, 658, 734, 740, 830, 966, 968, 1008).

On or about May 24, 2018, Travelers sent Hannaway a Notice of Cancellation, effective July 3, 2018, allowing Hannaway the opportunity to cure his default:

We are pleased to have you as a customer and would like to continue to provide your insurance. Unfortunately, we have not received the premium payment due on this policy. Therefore, your policy shown on this notice will be cancelled on the effective date of cancellation shown above, at 12:01 am and we will refund any premium due you. We regret having to take this action, and will be pleased to

rescind the cancellation if we receive the minimum due before 12:01 am of the effective date of the cancellation. In that event, we will send you a notice of reinstatement continuing your coverage.

(See Travelers APA 971). The Notice of Cancellation " was mailed to Hannaway's correct address noted on the application and policy, and mailed to the producer"; it was also sent to the NCCI/WCC, as the WCIP requires. (See Travelers APA 752-53 ¶¶ 22 & 23). On or about June 6, 2018, as a courtesy, Travelers called Hannaway at the phone number listed on the Application, which was incorrect. (See Travelers APA 753 ¶ 24). Travelers called the producer to obtain updated phone numbers for Hannaway, and left detailed voice messages with the insured at the numbers it was given. (See *id.*).

Despite all of these efforts and chances to cure his default, Hannaway failed to pay the premiums owed to Travelers by July 3, 2018, so the Notice of Cancellation became effective because of his failure to comply with underwriter requirements pursuant to the WCIP. (See Travelers APA 753 ¶ 26). Unlike the insured in *Crews*, Hannaway was given ample time to cure his failure to pay premiums (which existed, to a great extent, because he made incorrect representations on his Application).

For the foregoing reasons, SCUEF's reliance on *Crews* is misplaced.

2. **SCUEF's Reliance on *Crews* Is Misplaced Because It Is Premised Upon a Prior Version of the WCIP That Has Since Been Amended to Expressly Permit Termination Under the Circumstances in This Case.**

In addition to the foregoing, *Crews* is inapplicable in this appeal because it construes an earlier version of the WCIP. Contrary to SCUEF's interpretation of *Crews*, the correct version of the WCIP expressly authorized Travelers to cancel the 2018-19 Policy for Hannaway's failure to pay premiums on the initial 2017-18 Policy.

As the Full Commission properly observed "*Crews* interpreted the 2003 WCIP, which did not reference WCIP Supplement Rule [T]he applicable WCIP in 2018 sets forth Supplement Rule 12, which specifically requires Travelers to cancel the subsequent renewal policy for Hannaway's failure to pay premium for the initial and renewal policy period." (See June 1, 2021 Full Commission Decision, at 25-26). WCIP Supplement Rule 12.B expressly provides that

cancellation is appropriate "[i]f, after the issuance of a policy, the assigned carrier determines that an employer is in noncompliance with any of the following policy provisions of a current *or previous* workers compensation policy." (See Travelers APA 1030). As a result, under the provisions of the WCIP in effect, Travelers was expressly permitted to terminate the 2018-2019 renewal Policy, even for Hannaway's failure to pay premiums on the 2017-2018 initial Policy term.

As a result, this Court should affirm the Full Commission Decision as to Travelers.

E. THE COURT SHOULD AFFIRM THE FULL COMMISSION'S DECISION BASED ON THE ALTERNATE SUSTAINING GROUND OF A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

As an additional supporting ground, the Full Commission Decision held that the Policy could be canceled because "Hannaway failed to appeal Travelers' premium or cancellation determination pursuant to WCIP Rule 4." (See June 1, 2021 Full Commission Decision, at 27). That Rule sets forth a mandatory appeal process to the NCCI, concerning any premium or cancellation dispute:

Any assigned risk policyholders and their producers affected by the actions of their assigned carrier or NCCI are provided with a process in which grievances can be reviewed, resolved, or heard by the mechanism that has been established and approved in the state for such grievances. . . .

c. WCIP Disputes

Any Plan participants (Association members and/or assigned carriers) who have a dispute with respect to any aspect of the Plan or Reinsurance Agreement(s) (including any dispute arising out of the Association Bylaws) **must first seek a review of the matter** under this section by providing the following to Plan Administrator:

- Written documentation detailing specific areas of the dispute
- Specific request for a review of all documentation
- Appropriate actions of areas to resolve the dispute

The Plan Administrator may request additional information, as it deems necessary to make a decision.

(See Travelers APA 235-36). Hannaway never filed the mandatory Rule 4 appeal to the NCCI of Travelers' premium or cancelation decision. As a consequence, Hannaway did not exhaust his administrative remedies. In South Carolina, failure to exhaust administrative remedies requires the administrative ruling, right or wrong, to be affirmed. See *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011) (citing *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating "an unchallenged ruling, right or wrong, becomes law of the case."); *Bennett v. South Carolina Dep't of Corrections*, 305 S.C. 310, 408 S.E.2d 230 (1991) ("decision of administrative tribunal precludes the re-litigation of the issues addressed by that tribunal in a collateral action").

If Hannaway wished to challenge Travelers' premiums or cancelation, he was required to first exhaust arguments before the NCCI. Accordingly, because Hannaway failed to timely appeal Travelers' decisions to the NCCI, Hannaway he could not collaterally attack Travelers' unappealed decision. Hannaway (or SCUEF standing in his shoes) could not avoid the mandatory dispute-resolution process. Because Hannaway failed to exhaust his rights under Supplement Rule 4, he could not pursue those rights in the Commission or before this Court.

CONCLUSION

For the foregoing reasons, Respondent Travelers Property Casualty Company of America respectfully requests that this Honorable Court affirm the June 1, 2021, Decision and Order of Full Commission that is the subject of this appeal.

October 29 2021

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