RECEIVED
May 31 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case Number 2022-000154

Steven M. Brant, Employee, Employee, Claimant,

-vs-

Core Services, LLC and South Carolina Department of Transportation, Employer, Berkshire Hathaway Direct Insurance Co., Carrier, Markel Ins. Co. and South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employers' Fund; Defendants.

Of which Berkshire Hathaway Direct Insurance Company is the Appellant,

And South Carolina Department of Transportation, South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employer's Fund are the Respondents.

INITIAL BRIEF OF THE APPELLANT BERKSHIRE HATHAWAY DIRECT INSURANCE COMPANY

Berkshire Hathaway Guard Insurance Company, appeals the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated January 11, 2022.

May 31, 2022

George D. Gallagher
S.C. Bar No. 12149
Speed, Seta, Martin, Trivett, Stubley & Fickling
Post Office Box 11669
Columbia, SC 29211
803.748.2259
ggallagher@speed-seta.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Foreign Jurisdiction Cases

South Carolina Statutes

Foreign Jurisdiction Statutes

Other Authorities

STATEMENT OF ISSUE ON APPEAL

I. **DID THE COMMISSION ERR IN FINDING THAT THAT THE S.C. UNINSURED EMPLOYERS FUND AND/OR THE S.C. DEPARTMENT OF TRANSPORTATION AS AN "UPSTREAM" EMPLOYER CAN ENFORCE THE CONTRACTUAL RIGHTS OF A THIRD-PARTY UNINSURED EMPLOYER TO ESCAPE THEIR LIABILITY UNDER THE ACT?**

II. **DID THE COMMISSION ERR AS A MATTER OF LAW BY APPLYING SOUTH CAROLINA LAW TO THE CANCELLATION OF CORE SERVICE'S WORKERS COMPENSATION COVERAGE WHEN KENTUCKY HAS THE ONLY NEXUS WITH THAT ISSUE?**

III. **WAS THE WORKERS COMPENSATION POLICY IN QUESTION EFFETIVELY CANCELLED PRIOR TO THE DATE OF ACCIDENT IN ACCORDANCE WITH KENTUCKY LAW, THEREBY RENDERING THE UNINSURED EMPLOYERS FUND OR THE DEPARTMENT OF TRANSPORTATION LIABLE FOR THE UNDERLYING CLAIM?**

IV. **IN THE ALTERNATIVE, WAS THE POLICY IN QUESTION NEVERTHELESS EFFECTIVELY CANCELLED PURSUANT TO SOUTH CAROLINA LAW AS WELL?**

STATEMENT OF THE CASE

Berkshire Hathaway Direct Insurance Company ("BiBerk") appeals the Decision and Order of the Full Worker's Compensation Commission ("Commission") finding BiBerk liable for medical/compensation benefits under the Workers Compensation Act stemming from injuries by accident sustained by Steven Brant ("Claimant") arising out of and in the course of his employment with Core Services, LLC ("Core") on May 6, 2019 in Beaufort County, South Carolina. It is undisputed that Claimant was directly employed by Core on the date in questioning performing services pursuant to Core's contract with the S.C. Department of Transportation ("DOT") to provide roadside mowing and right of way maintenance in certain South Carolina counties. It is also apparent that Core's work for DOT was an essential and necessary part of DOT's mission to maintain the public highways in South Carolina to the extent that DOT should be considered

Claimant's "statutory employer" and potentially liable for benefits as an "upstream" employer pursuant to S.C. Code §42-1-400 *et seq.* The South Carolina Uninsured Employers Fund ("UEF") was added as a party to the claim as well.

Prior to the accident, Core procured worker's compensation insurance directly from BiBerk without an agent or broker. The coverage period on the BiBerk policy was March 6, 2019 to March 6, 2020. BiBerk submits that it properly cancelled Core's policy prior to Claimant's date of accident in accordance with the policy terms and applicable law [BiBerk APA p. 860-861]. It is imperative to note from the outset that Core has **never** claimed it failed to receive BiBerk's notice of cancellation, nor has it otherwise disputed BiBerk's cancellation of its policy. **In fact, Core executed a "Compliance Agreement" with the South Carolina Worker's Compensation Commission stipulating that it was operating without worker's compensation coverage in violation of South Carolina law for the period between April 21, 2019 and May 15, 2019.** [UEF APA p. 94]. Claimant's accident occurred during that gap in coverage. The Agreement notes that Core does not waive any rights, causes of action, or defenses *it* may have to any claims against third-parties. *Id.*

UEF and the SAF argue that BiBerk's cancellation of the Core policy was ineffective under South Carolina law and remained in effect to cover Claimant's accident. They rely upon clerical discrepancy between Core's mailing address noted in the policy's information page and the address noted in BiBerk's proof of mailing log. BiBerk initially counters that, as an elementary matter of black letter contract law, neither the UEF nor the SAF can contest the cancellation of Core's policy since they are not parties to it. Moreover, Core, *as the insured under the policy*, essentially stipulated that the policy was effectively cancelled when it executed the Agreement with the Commission admitting it was uninsured at the time of Claimant's accident. Again, Core itself has

never contested the cancellation of its coverage. In the alternative, BiBerk submits that Core's policy was effectively cancelled under the governing law of Kentucky regardless of the discrepancy relied upon by UEF and SAF. Finally, even if South Carolina law governs the cancellation issue, the evidence in the Record confirms the policy was not in effect on the Claimant's date of accident.

By Order dated June 9, 2021 Commissioner Susan Barden found that BiBerk did not effectively cancel Core's policy under South Carolina law and that coverage remained in effect on Claimant's date of accident. She awarded Claimant temporary total disability (TTD) and permanent partial disability (PPD) compensation benefits, as well as ordered payment of incurred causally related medical expenses against BiBerk. The Full Commission affirmed by essentially adopting Commissioner Barden's findings and Order. BiBerk now appeals to this Court pursuant to S.C. Code §42-17-60.

STANDARD OF REVIEW

The usual standard of judicial review of a decision and order of the Workers Compensation Commission is the "substantial evidence rule." Under this standard, the court may not substitute its judgement for that of the Commission on questions of fact but may reverse if the decision is clearly erroneous or affected by an error of law. S.C. Code Ann. §1-23-380 (5); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). While appellate courts are required to be deferential to the commission regarding questions of fact, this deference does not prevent courts from overturing the commission's decision when it is legally incorrect. Grant v. Grant Textiles, 372 S.C. 196, 202 641 S.E.2d 869 (SC 2007).

FACTUAL BACKGROUND

Core is a landscaping/maintenance contractor headquartered in Lexington, Kentucky. It is undisputed that Core does not maintain any locations or own property in South Carolina. Core purchased a workers' compensation policy with BiBerk (policy period 3/6/2019-3/6/2020) that specifically endorses coverage in Kentucky under Part 3 A of the policy.[1] The policy also contains a cancellation endorsement designating Kentucky as the choice of state law governing its cancellation. [UEF APA p. 167]. The language of the endorsement mirrors Kentucky statutes governing cancellation of an insurance policy. *Id.* Part 3 C of the policy contains a standard "Other States" endorsement that provides coverage under the laws of all states other than those specifically enumerated. [BiBerk APA p. 872).[2]. Tree removal and excavation is specifically disavowed on the business description of the Information Page. *id.* DOT contracted with Core to perform highway right of way maintenance and roadside mowing via contract executed March 4, 2019. [UEF APA pp. 96-98].

Within thirty (30) days after the policy went into effect, BiBerk moved to cancel Core's policy for misrepresentation of its business operations, specifically, its land clearing operations. [Margaret Yoh Depo.]. In accordance with policy terms and Kentucky statutes, the notice of

---

[1] States typically listed as 3.A "primary states" in a standard workers compensation policy include the following: the state where the insured's home office is located; states where the insured's branch offices are located; the insured's state of incorporation; where the insured is required to register to conduct business; any state where a contract of hire is made; any states where a subcontractor is hired to perform work; and any state that has "significant contact" with an employee. [Valley Insurance Agency Alliance, *Which States Should Be Listed In Item 3A In the Workers Compensation Policy?* https://viaa4u.com/which-states-should-be-listed-in-item-3a-in-the-workers-compensation-policy/

[2] "Other States Coverage" in a standard workers' compensation policy provides coverage for an insured's employees temporarily working in states other than the insured's home state, as specifically listed in item 3.C of the information page of the policy. This endorsement expands the policy so that an injured employee can receive compensation benefits as prescribed by other states listed in the endorsement. [International Risk Management Institute Glossary of Insurance Terms, *"Other States Coverage," http: https://www.irmi.com/term/insurance-definitions/other-states-coverage*]. BiBerk concedes this endorsement would apply to South Carolina.

cancellation was mailed by BiBerk to Core on April 2, 2019 at the policyholder address noted in the contract. [BiBerk APA p. 860]. The effective date of cancellation was April 21, 2019 per that notice. *Id.* The National Council on Compensation Insurers ("NCCI") received notice of the cancellation on behalf of the commonwealth of Kentucky on April 2, 2019. [BiBerk APA p. 863]. Incidentally, NCCI is also the S.C. Worker's Compensation Commission's authorized agent for notice of cancellations per WCC R. 67-405 (C).

BiBerk submitted an entry from its mail room log and postmark, along with other evidence, confirming the cancellation notice was mailed to Core. [BiBerk APA p. 857]. There is admittedly a discrepancy between the address noted in the log and Core's mailing address in the policy information page. The mailing log notes Core's address is "828 E. Hight Street Lexington, Ky 40502," but its address per the policy is "828 E. High Street **PMB 272** Lexington, KY 40502." (emphasis added). The designation "PMB" presumably refers to a private mailbox.[3] The actual cancellation documents themselves contain the PMB number. [There is no evidence in the record establishing that Core never actually received the cancellation notice despite the discrepancy. In fact, there is circumstantial evidence that Core in fact did receive the notice of cancellation, including, but not limited to, the undisputed facts that it never appeared in this matter to dispute the cancellation, as well as its stipulation that it was operating in South Carolina without coverage at the time of Claimant's accident. For the foregoing reasons, BiBerk submits that the policy was effectively cancelled.

[3] A Google search of the 828 E. High Street address in Lexington confirms a UPS Store at that location.

ARGUMENTS

I. UEF and SAF cannot contest cancellation of Core's policy when a) neither entity was a party or third-party beneficiary to the insurance contract between Core and BiBerk; and b) Core has not made an appearance in this case to protest the cancellation itself.

As an initial matter, BiBerk emphasizes the well settled principle that an insurance policy is essentially a contract between the insured and its insurer. As such, the rules of contract law apply to construction and effect of the policy. *See* B.L.G Enterprises v. First Financial Insurance Co., 334 S.C. 529, 514 S.E.2d 327 (1999) (insurance policies are subject to the general rules of contract construction and the Court must give policy language its plain, ordinary, and popular meaning). South Carolina contract law carries a presumption that an individual who is not a party to a contract, including an insurance policy, lacks privity to enforce it. Trancik v. USAA Insurance Co., 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003). Further, a third party not in contractual privity with the contracting parties has no right to enforce the contract unless the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to that third person. Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). As such, a party not in privity of contract with another cannot maintain an action for breach of the contract, and any damage resulting from such breach is not recoverable by the third party lacking privity. *Id.*

In this case, SAF and UEF were clearly not parties to, or otherwise in privity with, the insurance contract between Core and BiBerk. Moreover, Core and BiBerk did not specifically intend to make SAF or UEF a third-party beneficiary to the contract either. The only third-party beneficiary to the workers compensation policy is Claimant himself. *See* S.C. Code §42-5-80 (B) (an insurance policy "must be construed to be a direct promise by the insurer to the person entitled to

compensation enforceable in his name."). The mere fact that UEF and SAF may become liable for this claim by operation of law merely renders them incidental or consequential casualties of any alleged breach of the insurance contract. Consequently, UEF and/or SAF lack legal standing to contest BiBerk's alleged breach of its contract with Core.

Next, there is no other contractual or statutory mechanism by which UEF or SAF can "step into the shoes" of Core to contest the cancellation. S.C. Code §42-7-200 provides the UEF with powerful remedies to secure repayment/reimbursement from uninsured employers for claims the UEF must pay. Likewise, a purported statutory employer and/or its carrier have a cause of action for indemnification against an uninsured subcontractor pursuant to S.C. Code §42-1-440 and other applicable law. BiBerk submits these statutory remedies are the UEF's and SAF's respective recourses against Core in this case since they cannot enforce coverage for Core under the policy.

Whatever standing UEF and SAF have to protest the cancellation of Core's policy is merely derivative from, or vicarious to, Core's right to enforce coverage of Claimant's loss under the contract against BiBerk. The Compliance Agreement between Core and the Commission only reserves *Core's* rights; it does not create rights or causes of action by any third-parties like DOT, SAF, and UEF. Again, it is telling that Core, the alleged aggrieved party here, has not made an appearance in this case or otherwise to remedy the alleged harm that has befallen it as a result of the cancellation. If Core does not contend that it has been harmed by the purportedly invalid cancellation of its policy, then SAF and UEF cannot make that claim on Core's behalf just because one of them may ultimately be responsible for this claim by operation of law.

Finally, contrary to arguments presented by the UEF and SAF at the Hearing before Commissioner Barden, there are no reported South Carolina cases specifically holding that the UEF or SAF has independent standing to contest the cancellation of a purported uninsured

employer's coverage under the Act by an insurer. Several cases deal with uninsured employers whose coverages were allegedly not cancelled properly, thus making the UEF potentially liable for the underlying claims. *See* Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (SC 2005); Burris v. Propst Lumber & Logging, 396 S.C. 85, 719 S.E.2d 695 (Ct. App. 2011); Crews v. W.R. Crews Inc., 380 S.C. 15, 699 S.E.2d 189 (Ct. App. 2010); and Jefferey v. Sunshine Recycling Inc., 386 S.C. 174, 687 S.E.2d 322 (Ct. App. 2009). **In all those cases the alleged uninsured employers appeared before the Commission to contest the validity of the cancellation of their respective policies.** The UEF was also a party to those aforementioned cases and obviously joined the aggrieved employers' arguments to deflect its own liability. In contrast, Core has not made such an appearance in this case.

For these reasons, the Commission erred as a matter of law by allowing the UEF and SAF to enforce Core's contractual rights to coverage. As such, the Court must REVERSE.

II. In the alternative, even if the UEF and/or the SAF have standing to contest cancellation of Core's coverage, BiBerk effectively cancelled Core's policy under Kentucky law prior to Claimant's date of accident.

A. Kentucky law governs the cancellation issue.

BiBerk submits that Core's policy was effectively cancelled under the law of Kentucky prior to Claimant's accident. *See* Labouseur v. Harleyville Mutual Insurance Co., 302 S.C. 540, 397 S.E.2d 526 (SC 1990) (the Commission has jurisdiction over all coverage and cancellation issues when a claim for benefits under the Act is actively pending). Although South Carolina certainly has subject matter jurisdiction over the merits of the claim under S.C. Code §42-15-10 because the accident occurred in South Carolina, South Carolina law is not applicable to the coverage cancellation **because BiBerk initiated efforts to cancel Core's coverage on April 2, 2019, an entire month before South Carolina interests were even implicated by the occurrence of**

Claimant's accident on May 6, 2019. Simply put, South Carolina had no interest in BiBerk's cancellation of Core's policy at the time those efforts were initiated. *See* Lister v. NationsBank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) (South Carolina contract choice of law jurisprudence holds that in the absence of an effective choice of law by the parties Courts will typically look to which state has the most significant relationship to the *transaction and the parties at issue*)(emphasis added).

In this case, Kentucky has the most significant relationship to the cancellation transaction and parties (BiBerk, and Core) as of April 2, 2019. Core is a Kentucky registered LLC headquartered in Lexington, Kentucky and Kentucky is the Part 3 A endorsed state of coverage in the policy [UEF APA p. 149]. The policy was purchased directly from BiBerk without an agent or broker in Kentucky, but the policy for all practical intents and purposes was entered into in Kentucky. South Carolina's interests did not arise until the accident occurred on May 6, 2019 and conferred jurisdiction of the underlying claim via Part 3.C of the policy. As such, there is no basis for application of South Carolina law to the cancellation issue.

Most significantly, however, the policy contains a cancellation endorsement designating Kentucky as the choice of state law governing its cancellation. [UEF APA p. 167]. The language of this endorsement precisely mirrors Kentucky statutes governing cancellation of an insurance policy. Kentucky Revised Statutes (K.R.S.) §304.20-320. As noted previously, insurance policies are essentially contracts. By the same token, insurance is obviously a regulated industry by the state. Consequently, it is common for policy language/terms governing cancellation of a policy to mirror statutory requirements; however, the validity of the cancellation is still a matter of contract law. *See* Jordan v. Aetna Casualty and Surety Co., 264 S.C. 294, 214 S.E.2d 818 (1975) (statutory provisions relating to an insurance contract are incorporated into the contract as

a matter of law). Here, the Kentucky cancellation endorsement in Core's policy operates as a choice of law provision and South Carolina as the forum state must honor that contractual term. *See* Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011) (Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law).

For these reasons, the Commission's determination that South Carolina law applied to the cancellation issue is clearly erroneous and based on an error of law. The Court, therefore, must REVERSE.

B. BiBerk properly cancelled the policy under Kentucky law.

Kentucky Revised Statutes (K.R.S.) §304.20-320 provides that notice of cancellation of an insurance policy must be mailed to the insured "at least fourteen (14) days prior to the effective date of the cancellation if the cancellation is for nonpayment of premium *or occurs within sixty (60) days* of the date of the insurance policy." (emphasis added). K.R.S §304.20-320 (c) further states "proof of mailing of notice of cancellations or of reasons for cancellation to the named insured at the address shown in the policy shall be sufficient proof of notice." Further, K.R.S §342.340(2) also governs cancellation of workers compensation policies in Kentucky. The statute provides, in pertinent part, the following:

> [e]very insurance carrier or self-insured group shall in like manner notify the commissioner upon the cancellation, lapse, termination, expiration by reason of termination of the policy period, or non-renewal of any policy issued by it....The above filings are to be made on the forms prescribed by the commissioner. *Termination of any policy of insurance under the provisions of this chapter shall take effect no greater than ten (10) days prior to the receipt of the notification by the commissioner....* (emphasis added).

In this case, the policy in question had been in effect less than 60 days prior to BiBerk initiating cancellation of same. As such, the fourteen (14) day effective date provision of Kentucky law applies. Notice of cancellation ("NOC") was mailed on 4/2/2019 and the effective cancellation

date was 4/21/2019. This is greater than the fourteen (14) day statutory period. The effective cancellation date time requirements of K.R.S. §342.340(2) have clearly not been implicated here- the statute states that the effective date of coverage cancellation cannot be more than ten (10) days ***prior to*** notice to the Kentucky workers compensation commission and the effective cancellation date here occurred greater than 14 days ***after*** notice was provided. There is no evidence that BiBerk failed to comply with K.R.S. §342.340(2)'s requirements on the form of notice to the applicable workers compensation authority in Kentucky. Indeed, the coverage verification screen on the Kentucky government website confirms the cancellation was effective as of April 21, 2019 [BiBerk APA p. 864]. NCCI's website also confirms receipt of notice to cancel on April 2, 2019 and effective date of cancellation of April 21, 2019. [BiBerk APA p. 863].

Next, the discrepancy between Core's address as noted in the policy and the address to which the NOC was mailed according to BiBerk's proof of mailing is inconsequential under Kentucky law. BiBerk substantially complied with Kentucky law governing cancellation of insurance and Core has not rebutted the statutory presumption that a letter properly mailed has been received. The Kentucky Supreme Court specifically addressed these issues in Goodin v. General Accident Fire and Life Assurance Corp, 450 S.W.2d 252 (1970). The Court in that case deemed similar discrepancies harmless, where the name of the addressee to whom a cancellation notice was mailed differed slightly from the named insured policyholder. In addition, the address itself in that case was purportedly misleading because it denoted both the city and the county in the insured's address. Despite the insured's protests in Goodin that he never received the notice of cancellation, the Court ultimately concluded the policy was effectively cancelled because the insured could not rebut the presumption under Kentucky law that a properly mailed document had been received. 450 S.W.2d at 255 ("[p]roof of mailing from the office of the insurer is sufficient to sustain a

finding the notice was effective without proof that such notice was actually received by the insured and even though the insured denies receipt of the communication." [internal citations omitted]).

In this case, it cannot be stressed enough that Core, as the insured, has never claimed that it did not receive BiBerk's notice of cancellation. Moreover, no reasonable inference of non-delivery can be drawn from any purported omission of the private mailbox number from Core's address. There is no evidence that the notice addressed to Core was returned to BiBerk as undeliverable by the private mail vendor. Further, it is certainly reasonable to expect that a private mail vendor would know to deposit mail addressed to a customer at its location without the actual box number noted in the address line.

Other evidence in the Record supports the inference that the notice of cancellation was indeed mailed to Core at the address noted in the policy, including the PMB number. Specially, APA p. 176 is an address page from the NOC package sent to Core that clearly contains the PMB number from the policy information page on its face. This address would have been clearly visible to the mail carrier through the address window of a standard 9 x 11 catalog envelope. It is also significant to note that Core's PMB address is also noted on every other notice of cancellation document mailed to it. [UEF APA pp. 176-182]. The fact Core has not even made an appearance in this case alleging it did not receive the NOC is further proof that it received the notice. To that extent this case is distinguishable from Goodin *supra* where the insured in that case at least protested receipt of the notice and rebutted the presumption of a valid mailing. Again, Core has never done so here., which means Core has not rebutted the presumption of a valid mailing under Kentucky law.

Finally, the fact Core subsequently executed a Compliance Agreement with the Commission acknowledging that it was operating without insurance from 4/21/2019 until 5/15/2019 in violation of the Act also eviscerates any claim Core had no notice of the cancellation. From this undisputed

fact, it can be inferred that Core have in fact received the notice of cancellation. For these reasons BiBerk properly cancelled Core's policy under Kentucky law and the Court must REVERSE the Commission's Decision and Order.

III. In the alternative, Core's policy was also effectively cancelled under South Carolina law prior to Claimant's date of accident

The Commission found that South Carolina law governs the cancellation issue despite overwhelming factual and legal authority to the contrary. (Finding of Fact # 36 -"Both S.C. Code §38-75-730 and Core's policy require that the insured *receive* notice of the cancellation ..." and Finding of Fact # 37- "South Carolina law governs insurance policies effective in South Carolina, and *this matter arises in South Carolina."* Assuming *arguendo* the Commission is correct on this choice of law issue, BiBerk's policy was still effectively cancelled under South Carolina law prior to Claimant's accident.

A. ***Applicable South Carlina Law***

Again, the Commission found that §38-75-730 governs the cancellation of Core's policy but fails to specify which subsection applies to this case. To clarify, §38-75-730 (b) addresses cancellation due to nonpayment of premium, which is not applicable here since the reason for BiBerk's cancellation was Core's material misrepresentation of the scope/nature of its business operations (BiBerk APA p. 860]. Subsection (b) also requires the mailing of a proposed effective date of cancellation" to the insured with ten (10) days of notice for nonpayment of premium and thirty (30) days of notice for any other reason, including material misrepresentation. Subsection (c) of the statute exclusively governs cancellation for any reason where the policy was not a renewal and has been in effect less than 120 days. In this case, Core applied for the coverage with BiBerk in March of 2019, so it is not a renewal policy [Core Application UEF APA p. 144]. The policy's inception date is March 6, 2019 and cancellation was initiated on April 2, 2109.

Therefore, the policy in question was in effect less than 120 days at the time of the cancellation, so S.C. Code §38-75-730 (c) is the specific section that should apply per the Hearing Commissioner's reasoning.

Regarding the mode and manner of an effective cancellation, §38-75-730 (c) provides that the policy may be cancelled for any reason "by *furnishing to the insured* at least thirty days written notice of cancellation.. ." While subsection (b) states that notice may "delivered" or "mailed" and that "proof of mailing is sufficient proof of notice" to the insured for purposes of that subsection, **§38-75-730 (c) contains no such provisions**. The distinct differences between the statutory requirements of subsections (b) and (c) are obviously meaningful and significant as a general rule of statutory construction. As such, the questions become what constitutes "furnishing" to the insured thirty days written notice of cancellation for policies in effect in less than 120 days? This is a two part inquiry. First, furnishing notice is not defined term under this section, therefore the term must be ascribed its plain and ordinary meaning. "furnish" is defined by *Black's Law Dictionary* as to "provide." BiBerk submits that the "furnishing" of notice within the meaning of §38-75-730 (c) allows a broader standard than the proof of mailing presumed acceptable under §38-75-730 (b). For these reasons, the Commissioner's sole focus on a single dispositive piece of evidence for "proof of mailing" of notice as the standard for effective cancellation in this case is misplaced. As such, the Commission's decision was clearly affected by yet another error of law and must be REVERSED.

B. Facts confirming effective cancellation S.C. Code §38-75-730 (c)

BiBerk submits that the preponderance of the evidence in the record establishes that it "furnished" Core written notice of the cancellation within 30 days of its effect in accordance with S.C. Code §38-75-730 (c). *See* Noisette v. Ismail, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989) (cancellation of an insurance policy must be proved by a preponderance of the evidence). The

following undisputed facts in the Record confirm same: a) BiBerk generated a written document addressed to Core at its full address noted in the policy- "828 E. High Street **PMB 272** Lexington, KY 40502- advising of the cancellation of its policy due to "material misrepresentation/fraud" [BiBerk APA p. 860]; b) Core's full address, including the PMB number, was generated on the address label page of the notice of cancellation packet forwarded to Core in a position in the paper that would be visible to the mail carrier through the address window of a standard 9 x 11 catalog envelope [UEF APA p. 176]; c) BiBerk produced a notice of cancellation proof of mailing log referencing Core Services, including a postmark dated April 2, 2019, confirming the notice was placed in the U.S. Mail [APA p. 862] [4]; d) Margaret Yoh, BiBerk's underwriting coordinator whose deposition was noticed and conducted by counsel for the SAF, testified that the notice of cancellation was mailed to Core at 828 E. High Street PMB 272 Lexington, KY 40502 [Yoh Depo. p. 8 ll. 6-24; p. 13 ll. 2-5]; e) there is no evidence that the NOC was returned to sender or was otherwise undeliverable to Core for any reason [Yoh Depo. p. 15 ll. 11-25; f) Core has never appeared in this matter or otherwise represented that it never received the notice of cancellation; g) Core has not appeared in this matter or taken any other action to contest the cancellation of its coverage based on insufficiency of notice; and h) Core entered into a Compliance Agreement with the Commission acknowledging that it was operating without coverage in South Carolina at the time of Claimant's accident.

Noisette *supra* is substantially on point with the instant case. The Court in that case reversed the trial court's conclusion that Allstate "failed to present conclusive evidence that it sent notice of cancellation" to its insured simply because Allstate failed to present the actual notice of

[4] BiBerk redacted the names and addresses of other insureds to whom notices were sent on copy of the mailing log submitted into evidence.

cancellation it claimed it sent. 299 S.C. 243 at p. 257. In rejecting this reasoning, the Court stated, "the fact, then, that neither Allstate nor Owens was able to produce the actual cancellation notice, *without more*, does not warrant the conclusion that the notice was neither mailed by Allstate nor received by Owens." 299 S.C. 243 at p. 258. (emphasis added). Further, the Court upheld Allstate's cancellation of its policy under facts similar to the instant case, including Allstate's introduction of evidence that its insured's name appeared on a computer generated list of named insureds whose policies were being cancelled similar to BiBerk's proof of mailing log [APA p. 862]. Therefore, because Core has never appeared in this claim to attest that it never received the NOC, and BiBerk has established that it "furnished" notice of the cancellation by a preponderance of the evidence, SAF and UEF cannot rebut the presumption of an effective cancellation per S.C. Code §38-75-730 (c).

Further, there is no authority for the proposition that "proof of mailing" even within the meaning of §38-75-730 (b) refers to a single dispositive evidentiary quantum of proof as Commissioner Barden and the Commission seemingly believed in fixating on the discrepancy between Core's PMB # and the address noted in BiBerk's mailing log. Where a cancellation clause provides that an insurer may cancel by mailing to the insured's address, or were it contains *substantially similar language*, the mere mailing is sufficient to effect cancellation. J.M. Edens v. S.C. Farm Bureau Mutual Ins. Co., 279 S.C. 377, 308 S.E.2d 670 (Ct. App. 1983). The discrepancy between the proof of mailing log and Core's address in the policy is totally immaterial when the other evidence in the record establishes the that the notice was indeed mailed to and received by Core, despite the discrepancy. To hold otherwise, as the Commission did, is a nothing but an inane elevation of form over substance.

For these reasons, the evidence unequivocally establishes that BiBerk "furnished notice" to Core of the cancellation of its policy in accordance with South Carolina law.

C. ***Effect of BiBerk's notice of cancellation to Core***

S.C. Code §38-75-730 (c) provides that an insurer must furnish an insured thirty (30) days written notice of cancellation of its policy. Unlike S.C. Code §38-75-730 (b), subsection (c) does not require designation of a "proposed effective date" for cancellation of the policy. BiBerk's notice in this case is dated April 2, 2019 and it designates April 21, 2019 as the purported effective date of cancellation of the policy, which again, is not even required by the applicable South Carolina statute. April 21, 2019 is clearly less than thirty days from April 2, so BiBerk's designation of April 21, 2019 as the effective date of cancellation is superfluous and without legal effect. Nevertheless, BiBerk's cancellation is still effective no less than thirty (30) days after date of notice to Core on April 2, 2019 within the meaning of §38-75-730 (c). Again, the statute's only requirement is that an insured be furnished thirty days-notice of the cancellation. Thirty days from April 2, 2019 is May 2, 2019, which is still four (4) days prior to Claimant's accident on May 6, 2019. In other words, Core's policy may have still remained in effect after the superfluous April 21, 2019 ineffective cancellation date, but under no circumstances could it have remained in effect later than May 2, 2019.

This rationale also coincides with South Carolina WCC regulations governing effective date of cancellation of policies pending notice to the Commission. Specifically, WCC R. 67-405 (C)(1) provides that cancellation is not effective until thirty (30) days after notice to the Commission's authorized agent, which is the National Council on Compensation Insurance ("NCCI'). The Record establishes that NCCI received the notice of cancellation in this case on April 2, 2019 (APA p. 863). Therefore, the policy was effectively cancelled no later than May 2, 2019, which

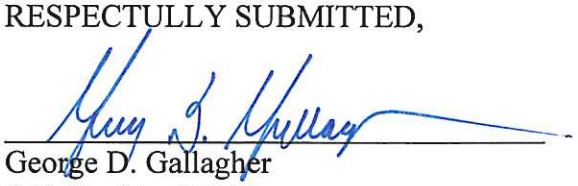
is still four (4) days prior to the date of accident in this claim. For these reasons, BiBerk cancellation of Core's policy complied with South Carolina statues and WCC regulations for effective cancellation prior to Claimant's accident.

CONCLUSION

The Commission erred as a matter of law by allowing third-parties- SAF and UEF- to contest BiBerk's cancellation of Core's policy and/or to enforce coverage under an insurance contract between BiBerk and Core. Core's failure to appear in this matter, as well as its execution of the Compliance Agreement with the Commission stipulating that it was uninsured at the time of Claimant's accident, amplifies the egregiousness of the Commission's error. Because the Commission's decision was affected by this error of law it must be REVERSED.

In the alternative, BiBerk submits that its cancellation of Core's policy was otherwise valid and effective prior to Claimant's date of accident in accordance with Kentucky and/or South Carolina law. The Commission erred as a matter of law in concluding otherwise and by finding BiBerk liable for benefits awarded to Claimant under the Act. The Court must REVERSE this clearly erroneous decision and REMAND back to the Commission for a determination of whether liability for the benefits awarded should be imposed on the UEF pursuant to S.C. Code §42-7-200 and/or on the SAF as Claimant's statutory employer under S.C. Code §42-1-400 *et seq.*

RESPECTULLY SUBMITTED,



George D. Gallagher
S.C. Bar No. 12149
Speed, Seta, Martin, Trivett, Stubley & Fickling
Post Office Box 11669
Columbia, SC 29211
803.748.2259
ggallagher@speed-seta.com

RECEIVED
May 31 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case Number 2022-000154

Steven M. Brant, Employee, Employee, Claimant,

-vs-

Core Services, LLC and South Carolina Department of Transportation, Employer, Berkshire Hathaway Direct Insurance Co., Carrier, Markel Ins. Co. and South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employers' Fund; Defendants.

Of which Berkshire Hathaway Direct Insurance Company is the Appellant,

And South Carolina Department of Transportation, South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employer's Fund are the Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant Berkshire Hathaway Direct Insurance Company's Initial Brief and Designation of Matter by electronic mail and/or by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2022, addressed to all attorneys of record at the addresses below:

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202
judicial@wcc.sc.gov

Alan M. Tanenbaum, Esquire
Attorney at Law
alan@tanlaw.com

Erin Farthing, Esq.
State Accident Fund
PO Box 1166
Lexington, SC 29071
EFarthing@saf.sc.gov

Lisa C. Glover, Esq.
SC Uninsured Employers' Fund
P:O Box 1815
Lexington, SC 29071
lglover@saf.sc.gov

Timothy B. Killen, Esquire
Holder Padgett Littlejohn & Prickett, LLC
tkillen@hplplaw.com

CERTIFIED AND REGULAR MAIL
RETURN RECEIPT REQUESTED
Core Services LLC
828 E. High St.
Lexington, KY 40502-2107

Margaret M. Urbanic, Esquire
Clawson and Staubes
purbanic@clawsonandstaubes.com

Matthew J. Story, Esquire
Clawson and Staubes
mstory@clawsonandstaubes.com

May 31, 2022

George D. Gallagher
Speed, Seta, Martin, Trivett & Stubley
Bar No. 12149
Post Office Box 11669
Columbia, South Carolina 29211
Attorney for Appellant-Respondent
Condustrial, Inc.

SPEED, SETA, MARTIN, TRIVETT, STUBLEY & FICKLING, LLC
ATTORNEYS AT LAW

WALLACE SPEED (1940-2020)
LESLI R. SETA (GA & FL)
SETH C. MARTIN (GA & FL)
ERIC L. TRIVETT (GA)
M. STEPHEN STUBLEY (SC)
JAMES E.L. FICKLING (SC & NC)
STEPHANIE A. ROCKWELL (GA & TN)
ANDREA S. OWEN (GA)
HUNTER CHANDLER (GA & TN)

REPLY TO
P.O. BOX 11669
COLUMBIA, SOUTH CAROLINA 29211
PHONE (803) 748-2919
FAX (803) 748-2735
www.Speed-Seta.com

ALEXANDER ADKINS (GA & TN)
ANDYNE B. ANDERSON (GA)
SCOTT H. ANDREWS (GA)
LILY WILKERSON BURKHART (GA & FL)
JEREMY T. ENGLAND (AL & MS)
C. BENTON HILBURN (GA)
R. HEATH OWEN (SC)
CALEY A. PITTS (GA)
KELSIE L. QUEEN (SC & NC)
JENNIFER S. RAY (GA)
LAWRENCE ROSS (GA)
LINDSEY R. STEWART (GA)
BRIGGS P. TUCKER (SC)
BRITTANY BELL TURNER (GA & FL)

GEORGE D. GALLAGHER (SC)
CHARLES A. KINNEY (GA, NC & SC)

May 31, 2022

VIA EMAIL: CTAPPFILINGS@SCCOURTS.ORG
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: ***Steven Brant v. SC Dept. of Transportation 1701-0101***
WCC No.:1907252
Claim No.: 2019-00692
DOA: 05/06/2019
Our File No.: 1701-0101

Dear Ms. Kitchings:

Please find enclosed Appellant Berkshire Hathaway Direct Insurance Company's Initial Brief and Designation of Matter in the above-referenced matter.

By copy of this letter to all counsel of the involved parties, I am serving them with this Initial Brief and the Designation of Matter.

Sincerely,

George D. Gallagher
GDG/rco
Enclosures

cc: Alan Tanenbaum, Esquire (w/encl) via email
The Honorable Amy Bracy (w/encl) via email
Erin Farthing, Esquire (w/encl) via email
Timothy B. Killen, Esquire (w/encl) via email
Lisa C. Glover, Esquire (w/encl) via email
Peggy Urbanic (w/encl) via email
Matthew Story (w/encl) via email
Core Services (w/encl) CERTIFIED & REGULAR
Rosemarie Farrell (NLF) (w/encl) via email