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Workers' Compensation Law

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WORKERS' COMPENSATION LAW

I. VOLUNTEERS INELIGIBLE FOR WORKERS' COMPENSATION: SUBJECT MATTER JURISDICTION OVER COMPENSATION AGREEMENTS UNSETTLED

In *McCreery v. Covenant Presbyterian Church*¹ the South Carolina Court of Appeals held that a volunteer is not an employee under the South Carolina Workers' Compensation Act² and that the issue of subject matter jurisdiction can be raised in a workers' compensation case even though the Workers' Compensation Commission approved a prior compensation agreement.³

In 1984 the Session of Covenant Presbyterian Church (Covenant) decided to assist in the formation of a new church, Grace Presbyterian Chapel (Grace), in Murrells Inlet, South Carolina. Grace entered into a contract with A.B.C. Enterprises, Inc. (A.B.C.) to build the new church. A.B.C. provided the building materials and the churches furnished volunteer labor.⁴

In September 1985 James McCreery, a volunteer and A.B.C.'s President, injured himself when he fell at the construction site. In January 1986 McCreery and Auto-Owners Insurance Company, Covenant's insurance provider, reached a compensation agreement that the Workers' Compensation Commission accepted in a form order.⁵

In July 1986 Auto-Owners stopped making payments to McCreery. Thereafter, Auto-Owners and Covenant petitioned the Workers' Compensation Commission to set aside the award. They asserted that McCreery was not Covenant's employee and that the Commission was without subject matter jurisdiction to order an award.⁶ A single commissioner held that (1) the mistake about McCreery's status could not be used to set aside the award; (2) the Commission's award was not subject to a collateral attack; and (3) McCreery was Covenant's employee.⁷ The full commission affirmed. The circuit court, on appeal, held that the compensation was the law of the case and was not subject

1. 299 S.C. 218, 383 S.E.2d 264 (Ct. App. 1989).

2. *Id.* at 223-24, 383 S.E.2d at 267. The South Carolina Workers' Compensation Law's definition of employee is found in section 42-1-130 of the South Carolina Code. S.C. CODE ANN. § 42-1-130 (Law. Co-op. Supp. 1989).

3. *McCreery*, 299 S.C. at 222-23, 383 S.E.2d at 266.

4. *Id.* at 220, 383 S.E.2d at 265.

5. *Id.*

6. *Id.*

7. *Id.* at 220-21, 383 S.E.2d at 265.

to collateral attack. The court of appeals reversed.⁸

The court of appeals first examined the effect of the compensation agreement on the Workers' Compensation Commission's jurisdiction over McCreery's claim. The court held that "the issue of subject matter jurisdiction may be raised although an agreement for compensation was executed and approved by the Commission,"⁹ because the Commission's jurisdiction depends on the existence of an employer and employee relationship at the time of the alleged injury.¹⁰ The court relied primarily on North Carolina case law to reach this decision.¹¹ In *Reaves v. Earle-Chesterfield Mill Co.*,¹² a case similar to *McCreery*, the North Carolina Supreme Court held that the parties' original compensation agreement and subsequent compensation payments could not constitute waiver of jurisdiction.¹³

In an earlier case, *Carter v. Associated Petroleum Carriers*,¹⁴ the South Carolina Supreme Court applied the general principle that subject matter jurisdiction cannot be waived to the Workers' Compensation Commission. The *McCreery* holding can be viewed as a logical but limited extension of *Carter*. The *McCreery* court, however, emphasized that the doctrine of res judicata did not apply because no evidentiary hearing occurred before the Commission approved the compensation agreement.

The court decided that the compensation agreement did not foreclose review of the existence of an employer and employee relationship and held that McCreery was a volunteer rather than an employee under the South Carolina Workers' Compensation Act.¹⁵ The Act defines an "employee" as a "person engaged in an employment under any appointment, contract of hire or apprenticeship express or implied"¹⁶ In the absence of a South Carolina court's interpretation of the law on the issue, the court looked to North Carolina Workers' Compensation cases. The North Carolina courts interpret "employee" as a person who works for wages or salary and has the right to demand payment for services.¹⁷ In the absence of any evidence that Covenant

8. *Id.* at 220, 383 S.E.2d at 265.

9. *Id.* at 222-23, 383 S.E.2d at 266.

10. S.C. CODE ANN. § 42-1-130 (Law. Co-op. Supp. 1989).

11. See *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83 (1986); *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976).

12. 216 N.C. 462, 5 S.E.2d 305 (1939).

13. *Id.* at 465, 5 S.E.2d at 306.

14. 235 S.C. 80, 110 S.E.2d 8 (1959).

15. *McCreery*, 299 S.C. at 221, 383 S.E.2d at 265.

16. S.C. CODE ANN. § 42-1-130 (Law. Co-op. Supp. 1989).

17. See *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 585-86, 350 S.E.2d 83, 89 (1986); *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 219, 221 S.E.2d 257, 261 (1976). The legislature patterned the Workers' Compensation Act after North Carolina's Act. Conse-

paid McCreery or that McCreery could demand payment, the court of appeals held that McCreery was not eligible for compensation.¹⁸

The *McCreery* court wisely excluded volunteers from workers' compensation benefits. Although this exclusion admittedly may work a hardship on injured volunteers, the decision relieves organizations that are heavily dependent on volunteer labor from the burden of expanding their workers' compensation coverage to include volunteers. The *McCreery* decision is unsettling, however, because it is not clear when a compensation agreement that is approved by the Workers' Compensation Commission is the final conclusion of a dispute. If parties can relitigate seemingly settled cases because they did not have an evidentiary hearing, attorneys can refuse to accept a settlement offer until the Commission has held an evidentiary hearing. This uncertainty will discourage negotiated claim settlements and, thus, will increase the Commission's case load, hamper judicial economy, and retard dispute resolution. The courts need to clarify the law in this area to restore confidence in negotiated settlements.

Michael Don Stokes

II. WORKERS' COMPENSATION COMMISSION HAS EXCLUSIVE SUBJECT MATTER JURISDICTION OVER DISPUTE BETWEEN INSURER AND INSURED

In *Labouseur v. Harleysville Mutual Insurance Co.*¹⁹ the South Carolina Court of Appeals held that the South Carolina Workers' Compensation Commission (Commission) has exclusive subject matter jurisdiction over an action "brought by an employer against a workers' compensation insurance carrier and the carrier's agent for an alleged cancellation of a workers' compensation insurance policy."²⁰ The court found that the Commission had jurisdiction even though the employee's rights were not directly involved.²¹

John Labouseur, owner and operator of Turpins, a restaurant, sued Harleysville Mutual Insurance Company (Harleysville) and its

quently, the opinions of North Carolina courts interpreting the Act are given substantial weight by South Carolina courts. *Carter v. Penney Tire and Recapping Co.*, 261 S.C. 341, 348-49, 200 S.E.2d 64, 67 (1973).

18. *McCreery*, 299 S.C. at 223-24, 383 S.E.2d at 267.

19. 298 S.C. 213, 379 S.E.2d 291 (Ct. App. 1989).

20. *Id.* at 214, 379 S.E.2d at 292. Authorization for the Commission's jurisdiction is found in section 42-3-180 of the South Carolina Code. S.C. CODE ANN. § 42-3-180 (Law. Co-op. 1976).

21. A workers' compensation claim was pending before the Commission at the time of the decision. Record at 31.

agent R.V. Chandler and Sons, Inc., (Chandler)²² over the alleged cancellation of Labouseur's workers' compensation insurance policy. Labouseur asserted two causes of action in his complaint. He sought a declaratory judgment to determine his policy coverage at the time of an employee's employment related accident, and he requested damages for wrongful termination of his workers' compensation policy.²³

The Court of Common Pleas in Greenville denied Harleysville's motion to dismiss for lack of subject matter jurisdiction, and the insurance company appealed. The circuit court based its decision on *Nichols v. State Farm Insurance Co.*²⁴ in which the South Carolina Supreme Court recognized a cause of action for bad faith refusal by an insurer to pay first-party benefits to the insured. The circuit court determined that Labouseur's cause of action concerned a similar bad faith cancellation and failure to maintain a contract of insurance, and, therefore, the court denied Harleysville's motion to dismiss for lack of subject matter jurisdiction.²⁵

In its analysis the court of appeals focused on the language of the South Carolina statute that vests exclusive jurisdiction in the Commission over "[a]ll questions arising under" the South Carolina Workers' Compensation Act unless otherwise agreed on by the parties or provided for in the Code.²⁶ Because no specific provision in the statute exempts the cancellation of a workers' compensation policy from the Commission's jurisdiction, the court of appeals determined that this exclusive jurisdiction necessarily included jurisdiction over issues of policy coverage and carrier liability.²⁷ Furthermore, both of Labouseur's causes of action were based on the alleged policy cancellation by Harleysville and Chandler.²⁸ The court of appeals restated the settled South Carolina law that "the Court will refuse a declaration 'where a special statutory remedy has been provided'"²⁹

The court of appeals also examined two decisions from other jurisdictions that addressed issues and statutes similar to those presented in *Labouseur*. In *Greene v. Spivey*³⁰ the insurance carrier challenged

22. The court of appeals rejected Labouseur's contention that the agent was not subject to the Commission's jurisdiction and found that, if it was necessary, Chandler could be made a party to the proceeding to rule on the coverage and cancellation issues. *Labouseur*, 298 S.C. at 218, 379 S.E.2d at 293-94.

23. *Id.* at 215, 379 S.E.2d at 292.

24. 279 S.C. 336, 306 S.E.2d 616 (1983).

25. Record at 32.

26. S.C. CODE ANN. § 42-3-180 (Law. Co-op. 1976).

27. *Labouseur*, 298 S.C. at 215, 379 S.E.2d at 292.

28. *Id.*

29. *Id.* at 216, 379 S.E.2d at 292 (citing *Williams Furniture Corp. v. Southern Coatings and Chem. Co.*, 216 S.C. 1, 7, 56 S.E.2d 576, 578 (1949)).

30. 236 N.C. 435, 73 S.E.2d 488 (1952).

the North Carolina Industrial Commission's jurisdiction to determine the carrier's liability under a workers' compensation insurance contract. The North Carolina Supreme Court ruled that the language of the state's Workmen's Compensation Act vested jurisdiction in the North Carolina Industrial Commission "to hear and determine questions of fact and law [on] the existence of insurance coverage and liability of the insurance carrier."³¹

In *Travelers Insurance Co. v. Hawaii Roofing, Inc.*³² the Hawaii Supreme Court interpreted the state's workmen's compensation statute to give the state's commission exclusive jurisdiction over a controversy between two insurance carriers. The court stated that the statutory language "preclude[d] original court action to settle controversies involving the workers' compensation law" and, thereby, "relegate[d] the circuit court to a secondary role where workers' compensation is concerned — the enforcement of the [Commission's] decisions."³³

With support from other jurisdictions in decisions that addressed statutory language and issues similar to those in *Laboureur*, the South Carolina Court of Appeals proceeded to analyze South Carolina case law on the exclusive jurisdiction of the Commission. The court focused on the two basic issues of policy cancellation and damages under the South Carolina Workers' Compensation Act to determine the proper jurisdiction of the dispute between the insurer and *Laboureur*.³⁴

In analyzing the policy cancellation issues under South Carolina case law, the court of appeals closely examined the South Carolina Supreme Court's opinion in *Banks v. Batesburg Hauling Co.*³⁵ and found support in *Banks* for the Commission's exclusive subject matter jurisdiction on the issue of policy cancellation.³⁶ In *Banks* the insurance carrier challenged the Commission's regulation that required carriers to notify the Commission of policy cancellations.³⁷ The South Carolina Supreme Court upheld the regulation and the Commission's finding on the policy cancellation in *Banks*, and, therefore, the court of appeals in *Laboureur* reasoned "that the supreme court recognized, albeit implicitly, that subject matter jurisdiction to decide questions relating to the cancellation of a workers' compensation policy reposes exclusively in the Commission"³⁸ Moreover, the court of appeals determined that the regulation of policy cancellations in this manner "served

31. *Id.* at 445, 73 S.E.2d at 495-96 (citations omitted).

32. 64 Haw. 380, 641 P.2d 1333 (1982).

33. *Id.* at 384, 641 P.2d at 1336.

34. See *Laboureur*, 298 S.C. at 216-18, 379 S.E.2d at 293-94.

35. 202 S.C. 273, 24 S.E.2d 496 (1943).

36. *Laboureur*, 298 S.C. at 216-17, 379 S.E.2d at 293.

37. 202 S.C. at 276-77, 24 S.E.2d at 497.

38. 298 S.C. at 216-17, 379 S.E.2d at 293.

merely to effectuate the purposes of the workers' compensation act."³⁹

The court of appeals then examined the relationship of damages to subject matter jurisdiction. Laboureur sought damages equal to the amount he would have received to compensate the injured employee.⁴⁰ The court of appeals' analysis on this point was straightforward: "Clearly, the question of the amount of compensation, if any, payable to an employee injured in an industrial accident is one that 'aris[es] under' the act."⁴¹ Thus, the court of appeals determined that the Commission must retain exclusive jurisdiction based upon the issue of damages. The court cited *Cook v. Mack's Transfer & Storage*⁴² to support its logic.⁴³

In *Cook* an injured employee sued his employer and its workers' compensation insurance carrier for bad faith refusal to pay workers' compensation benefits. As in *Laboureur*, the plaintiff in *Cook* relied on *Nichols v. State Farm Mutual Automobile Insurance Co.*⁴⁴ in which the court recognized a cause of action for an insurer's bad faith refusal to pay first party benefits.⁴⁵ The plaintiffs in both *Laboureur* and *Cook* argued that they were injured by the insurer's refusal to pay benefits under the contract, which was a claim that appeared to go beyond the Commission's jurisdiction.⁴⁶ In *Cook*, however, the court awarded damages based on the benefits owed to the plaintiff under the Workers' Compensation Act. The *Laboureur* opinion, therefore, built upon the precedent established in *Cook* when it maintained the Commission's jurisdiction of all issues that arise under the Workers' Compensation Act.

The court of appeals in *Laboureur* also concluded that the questions which concerned policy coverage and policy cancellation should be resolved by the Commission in its regular administrative proceedings on the injured employee's claim.⁴⁷ The court cited Larson's treatise on workers' compensation law⁴⁸ in support of its conclusion on the resolution of the policy and coverage cancellation. The court, however, failed to note that Larson distinguishes cases that require a determina-

39. *Id.* at 217, 379 S.E.2d at 293.

40. *Id.*

41. *Id.*

42. 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986), *cert. denied*, 292 S.C. 230, 355 S.E.2d 861 (1987).

43. *Laboureur*, 298 S.C. at 217, 379 S.E.2d at 293.

44. 279 S.C. 336, 306 S.E.2d 616 (1983).

45. *Cook*, 291 S.C. at 88-89, 352 S.E.2d at 299.

46. Compare *id.* with *Laboureur*, 298 S.C. at 215, 379 S.E.2d at 292 (similarity of plaintiffs' claims in *Cook* and *Laboureur*).

47. 298 S.C. at 217, 379 S.E.2d at 293.

48. 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 92.40 to -42 (1989).

tion of an employee's rights from those cases that do not require this determination.⁴⁹ Larson asserts that a Commission's exclusive jurisdiction in cases that involve employee's rights is "in harmony with the conception of compensation insurance as being something more than an independent contractual matter between insurer and insured."⁵⁰ When the employee's rights are not involved, however, Larson asserts that many commissions "disavow jurisdiction and send the parties to the courts for relief."⁵¹

Larson particularly observes that disputes about liability or policy coverage between an insurer and the insured that do not directly concern an employee's rights probably will be resolved in court.⁵² The Hawaii Supreme Court, however, in *Travelers Insurance Co. v. Hawaii Roofing, Inc.*⁵³ rejected an argument similar to Larson's theory and emphasized the need to examine closely each jurisdiction's workers' compensation law when it stated that "[w]hat appears persuasive at first sight is nevertheless vitiated by its inappropriateness, as [such] cases [construe] statutory grants of authority definitely narrower in scope"⁵⁴ The Hawaii court's approach was not unique, "[f]or courts in other states have rejected efforts to evade the authority of administrative agencies entrusted with the administration of workers' compensation laws"⁵⁵ Thus, in some cases in which a court ruled against a commission's jurisdiction over disputes that were not ancillary to the employee's claim, the court's ruling was founded on narrow language in the jurisdiction's workers' compensation statutes.⁵⁶

In the court of appeals' analysis of ancillary claims and jurisdiction in *Labouseur* the South Carolina Court of Appeals cited certain cases used by the Hawaii Supreme Court in *Travelers* and by Larson in his treatise. One example is *Spivey v. Oakley's General Contractors*⁵⁷ in which the North Carolina Court of Appeals examined the same issue as the court in *Labouseur* examined, which was "whether,

49. See *id.* § 92.41, at 17-44 to -54.

50. *Id.*

51. *Id.* § 92.42, at 17-54.

52. See *id.* § 92.42, at 17-54 to -58.

53. 64 Haw. 380, 641 P.2d 1333 (1982).

54. *Id.* at 386, 641 P.2d at 1337.

55. *Id.* at 387, 641 P.2d at 1338.

56. In *State Accident Ins. Fund Corp. v. Broadway Cab Co.*, 52 Or. App. 689, 629 P.2d 829 (1981), the court found that the board lacked subject matter jurisdiction over the issue of insurance coverage. The relevant statute, however, strictly limited the jurisdiction of the commission to matters concerning claims. In *Jordan v. Ferro*, 67 N.J. Super. 188, 170 A.2d 69 (Law. Div. 1961), the court similarly construed strictly the statutory jurisdiction of the commission over all claims to exclude questions that concern coverage.

57. 32 N.C. App. 488, 232 S.E.2d 454 (1977).

after the employer has settled with the employee, the North Carolina Industrial Commission has jurisdiction to determine whether a policy of compensation insurance has been properly cancelled.”⁵⁸ The North Carolina court held that the “[j]urisdiction of the Commission is not limited solely to questions arising out of an employer-employee relationship or to the determination of rights asserted by or on behalf of an injured employee.”⁵⁹

In *Williams Furniture Corp. v. Southern Coatings and Chemical Co.*⁶⁰ a South Carolina case cited by the *Laboureur* and *Travelers* courts, the supreme court found that the Commission had exclusive jurisdiction “ordinarily, [and] particularly where questions of fact are involved, the courts should refrain from invading the jurisdiction of the Industrial Commission.”⁶¹ Thus, the *Laboureur* opinion has support for its recognition of the exclusive jurisdiction of the Commission to decide all questions arising under the South Carolina Workers’ Compensation Act in both statutory and case law.

The purpose of the Act is “to provide a remedy for employees who sustain work related injuries.”⁶² Furthermore, “[t]he Workers’ Compensation Act provides an exclusive system of compensation in derogation of common law rights and is not cumulative or supplemental thereto, but wholly substitutional.”⁶³ Therefore, if the court of appeals recognized an independent cause of action for bad faith refusal to pay benefits as in *Cook* or bad faith cancellation of compensation policy as in *Laboureur*, it would “deprive the Commission of a jurisdiction the Legislature has decreed that it, and it alone, possesses to decide workers’ compensation claims.”⁶⁴ The court of appeals in *Laboureur* refused to recognize an independent action outside the legislative framework of the Workers’ Compensation Act for any action arising under the South Carolina Workers’ Compensation Act. This decision is a straightforward interpretation of the statutory language that creates the exclusive jurisdiction of the Commission over all actions “arising under” the South Carolina Workers’ Compensation Act.

ADDENDUM

On October 29, 1990, the South Carolina Supreme Court affirmed

58. *Id.* at 489, 232 S.E.2d at 455.

59. *Id.* at 491, 232 S.E.2d at 456 (citation omitted).

60. 216 S.C. 1, 56 S.E.2d 576 (1949).

61. *Id.* at 9, 56 S.E.2d at 579.

62. *Cook v. Mack’s Transfer & Storage*, 291 S.C. 84, 86, 352 S.E.2d 296, 298 (Ct. App. 1986), *cert. denied*, 292 S.C. 230, 355 S.E.2d 861 (1987).

63. *Id.* at 87, 352 S.E.2d at 298.

64. *Id.* at 89, 352 S.E.2d at 299.

but modified *Laboureur v. Harleysville Mutual Insurance Co.*⁶⁶ to clarify the court of appeals' decision and to provide jurisdictional guidelines in this area.⁶⁷ The court acknowledged the difficulty in determining the proper forum for a bad faith or wrongful cancellation action when the basic question is whether the cancellation was proper, which is a question within the jurisdiction of the Commission when it arises in connection with an employee's compensation claim.⁶⁷

Therefore, in a clarifying opinion, the supreme court adopted the approach of other jurisdictions as outlined in the Larson treatise on workers' compensation law:⁶⁸

[W]hen there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is in the Workers' Compensation Commission. On the other hand, when no pending employee claim for compensation exists, the Commission lacks the jurisdiction to decide such questions.⁶⁹

Furthermore, the court explained that "the Commission is never the proper forum for a bad/faith wrongful cancellation action."⁷⁰ Therefore, the circuit court was the proper forum for *Laboureur's* wrongful termination action; however, he had to await the Commission's determination of the employee's compensation claim before he could bring the wrongful termination action in circuit court. In adopting these guidelines, the supreme court has provided a straightforward, jurisdictional framework for the courts and the bar.

Christie Newman Barrett

III. WORKERS' COMPENSATION CARRIER MAY BE HELD LIABLE FOR NEGLIGENT SAFETY INSPECTION

In *Ancrum v. United States Fidelity and Guaranty Co.*⁷¹ the South Carolina Supreme Court held that the South Carolina Workers' Compensation Act's exclusive remedy provision bars an injured employee's action against a workers' compensation carrier "except when the carrier stands in the position of a third party unrelated to its func-

65. No. 23289, Davis Adv. Sh. No. 21 (S.C. Oct. 29, 1990).

66. *Id.*, slip op. at 4.

67. *Id.*, slip op. at 5.

68. See *supra* notes 48-52 and accompanying text.

69. *Laboureur*, No. 23289, Davis Adv. Sh. No. 21, slip op. at 5-6 (S.C. Oct. 29, 1990).

70. *Id.*, slip op. at 6.

71. — S.C. —, 389 S.E.2d 645 (1989).

tion as a carrier.”⁷²

Edgar Ancrum, the plaintiff, was injured severely when his clothing was caught in an unshielded gear at Stoller Chemical Corporation’s plant. As a result, Ancrum’s arms were severed. He sued his employer’s workers’ compensation carrier, United States Fidelity and Guaranty Company (Fidelity), in the United States District Court. Ancrum claimed that Fidelity negligently conducted safety inspections at Stoller’s plant.⁷³ District Court Judge Sol Blatt, Jr. certified the following question to the South Carolina Supreme Court:

Does the South Carolina Workers’ Compensation Act, and its exclusive remedy provisions, bar an action by an employee, injured while acting in the course and scope of his employment, against the employer’s workers’ compensation carrier based upon that carrier’s negligence in performing safety inspections when the carrier voluntarily performs these inspections?⁷⁴

Because the record did not include the insurance contract, the supreme court stated that the district court must apply the new rule and suggested that the district court follow certain guidelines.⁷⁵

The Act’s third party provision expressly limits immunity to the employer.⁷⁶ Section 42-1-560 of the Act, however, seems to indicate that persons other than the employer may be exempt from liability under section 42-1-540:

The right to compensation and other benefits under this Title shall not be affected by the fact that the injury or death is caused under circumstances creating a legal liability in some person, other than the employer or another person exempt from liability under section 42-1-540 to pay damages therefor, the person so liable being hereinafter referred to as the third party.⁷⁷

72. *Id.* at —, 389 S.E.2d at 646.

73. *See id.* at —, 389 S.E.2d at 645.

74. *Id.*

75. *Id.* at —, 389 S.E.2d at 646.

76. S.C. CODE ANN. § 42-1-550 (Law. Co-op. 1976). The provision reads as follows: When an employee, his personal representative or other person may have a right to recover damages for injury, loss of service or death from *any person other than the employer*, he may institute an action at law against such third person before an award is made under this Title and prosecute it to its final determination.

Id. (emphasis added).

77. *Id.* § 42-1-560 (emphasis added). Employer is defined as “the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person.” *Id.* § 42-1-140. A carrier, or insurer, is defined as “any person or fund authorized under § 42-5-20 to insure under this Title and includes self-insurers.” *Id.* § 42-1-60.

In addition, the Act defines "employer" and "carrier" separately and these definitions do not include common elements.⁷⁸

Prior South Carolina cases have favored extending the employer's immunity to the carrier. In *Hill v. Skinner*⁷⁹ the court stated that the insurer "stands in the shoes of its insured employer, having his rights and being subject to his obligations."⁸⁰ In *Whitten v. American Mutual Liability Insurance Co.*⁸¹ a federal district court recognized a workers' compensation carrier as "the 'alter ego' of the employer" and found the carrier immune from suit by an employee for failure to make compensation payments.⁸² Though factually distinguishable from *Ancrum*, *Whitten* reflects the South Carolina courts' willingness to extend immunity to the carrier.

South Carolina patterned its Act after the North Carolina Act and, thus, the courts often cite decisions that construe the North Carolina Workers' Compensation Act.⁸³ In *Smith v. Liberty Mutual Insurance Co.*⁸⁴ a federal district court, construing North Carolina law, held that the carrier was immune from suit by an injured employee who alleged negligent safety inspection by the carrier.⁸⁵ Accordingly, a comparison of *Smith* and *Ancrum* indicates that the North Carolina and South Carolina courts are in accord in extending the employer's immunity from suit to the carrier.

In *Kifer v. Liberty Mutual Insurance Co.*⁸⁶ the Eighth Circuit, noting "that the rule of law adopted in most of the decisions permitting this type of action against the workers' compensation carrier has been overturned by statutory amendment,"⁸⁷ expressly recognized a legislative trend toward granting immunity to carriers.⁸⁸ In addition, the *Kifer* court stated that the failure to extend immunity to the carrier could cause,

the potential for unlimited liability of workers' compensation carriers,
a substantial increase in workers' compensation insurance premiums

78. *Id.* § 42-1-560(a).

79. 195 S.C. 330, 11 S.E.2d 386 (1940).

80. *Id.* at 335, 11 S.E.2d at 388.

81. 468 F. Supp. 470 (D.S.C. 1977), *aff'd*, 594 F.2d 860 (4th Cir. 1979).

82. *Id.* at 474-75.

83. See, e.g., *Carter v. Penney Tire and Recapping Co.*, 261 S.C. 341, 348, 200 S.E.2d 64, 67 (1973) ("particularly persuasive is the decision of the North Carolina Court, because, as previously held, our Workmen's Compensation Act was fashioned after the North Carolina Act and the opinions of the North Carolina Court construing such Act are entitled to great weight with this Court" *Id.*).

84. 449 F. Supp. 928 (M.D.N.C. 1978), *aff'd*, 598 F.2d 616 (4th Cir. 1979).

85. *Id.* at 929, 934.

86. 777 F.2d 1325 (8th Cir. 1985).

87. *Id.* at 1338 (citations omitted).

88. *Id.*

for all employers, the abandonment of many safety programs currently undertaken by workers' compensation carriers, and a breakdown in the expeditious and informal administration of workers' compensation claims, all to the detriment of employees and employers alike.⁸⁹

The Third Circuit responded to this argument in *Mays v. Liberty Mutual Insurance Co.*⁹⁰ The *Mays* court stated that a safety inspection program has many practical advantages and carriers will continue the practice even under the threat of potential liability.⁹¹ Furthermore, even if carriers discontinue the practice, no inspection is preferable to a negligent inspection.⁹²

Some jurisdictions have found a middle ground between carrier liability and immunity for negligent inspections. The Alabama courts have denied immunity to the carrier for negligent safety inspection in some instances.⁹³ In *Fireman's Fund American Insurance Co. v. Coleman*⁹⁴ the Alabama Supreme Court found that the workers' compensation carrier was also the employer's liability insurer and held the carrier liable because it was not acting strictly within its role as a workers' compensation carrier when it inspected the premises.⁹⁵ In *United States Fidelity & Guaranty Co. v. Jones*⁹⁶ the supreme court found the carrier liable because the carrier was authorized but not required to inspect job sites for safety.⁹⁷ Both cases indicate that a carrier may be held liable when its negligent safety inspection is performed in some role other than as a workers' compensation carrier.

In *Latour v. Commercial Union Insurance Co.*⁹⁸ a Rhode Island District Court held that a workers' compensation carrier, which was also the employer's general liability insurer and risk management consultant, was not immune for negligent inspections performed in its capacity as liability insurer and consultant.⁹⁹ The court stated that "immunity is essentially a functional concept which attaches to activities, not entities" and that "workers' compensation carriers should enjoy

89. *Id.* at 1334.

90. 323 F.2d 174 (3d Cir. 1963).

91. *Id.* at 178.

92. See *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 1327, 121 N.W.2d 361, 366 (1963).

93. See, e.g., *Fireman's Fund Ins. Co. v. Coleman*, 394 So. 2d 334 (Ala. 1980); *United States Fidelity & Guar. Co. v. Jones*, 356 So. 2d 596 (Ala. 1977).

94. 394 So. 2d 334 (Ala. 1980).

95. *Id.* at 335, 338-39.

96. 356 So. 2d 596 (Ala. 1977).

97. *Id.* at 597-98.

98. 528 F. Supp. 231 (D.R.I. 1981).

99. *Id.* at 233, 236.

immunity from liability *only* for activities undertaken in their capacity as compensation insurers."¹⁰⁰ Likewise, courts in Georgia and Vermont have held that their respective workers' compensation statutes do not confer absolute immunity on a compensation carrier that conducts a negligent safety inspection.¹⁰¹

Professor Arthur Larson proposes a solution to the third party liability problem which utilizes a functional approach distinguishing between "the carrier's function of *payment* for benefits and services, on the one hand, and, on the other, any function it assumes in the way of direct or physical performance of services related to the act."¹⁰² The *Ancrum* court seems to have adopted a functional approach to the issue of carrier immunity, but not the distinction suggested by Professor Larson. Instead, the court held that liability depends on whether the safety inspections were carried out by the carrier as part of its role as a workers' compensation carrier or as "an independent provider of safety inspections."¹⁰³ If inspections are performed in a role as carrier, the carrier is immune from suit. If inspections are performed "in the position of a third party unrelated to its function as compensation carrier," negligent inspection could subject the carrier to liability.¹⁰⁴ The *Ancrum* court stated that "[e]vidence of such an arrangement could include specific contractual language or payment of additional fees for these services."¹⁰⁵

The *Ancrum* decision is consistent with both prior South Carolina court decisions and the majority rule. While generally preserving carrier immunity, *Ancrum* provides the employee with a new avenue for bringing a third party suit against the carrier when the carrier performs inspections as an "independent provider of safety inspection."

100. *Id.* at 234.

101. *Newton v. Liberty Mut. Ins. Co.*, 148 Ga. App. 694, 252 S.E.2d 199 (1979) (when insurer issues both workers' compensation and liability policy, it is entitled to immunity only if it performs the inspection solely in its workers' compensation role); *United States Fire Ins. Co. v. Day*, 136 Ga. App. 359, 221 S.E.2d 467 (1975) (when insurer provides coverage under two policies it is immune from liability for negligent inspections only if performed in its role as workers' compensation carrier); *Sims v. American Casualty Co.*, 131 Ga. App. 461, 206 S.E.2d 121, *aff'd sub nom.* *Providence Washington Ins. Co. v. Sims*, 232 Ga. 787, 209 S.E.2d 61 (1974) (workers' compensation carrier is not immune when it performs negligent safety inspection in connection with duties other than as compensation carrier). *Derosia v. Duro Metal Prods. Co.*, 147 Vt. 410, 519 A.2d 601 (1986) (in answer to certified questions supreme court held that a carrier's immunity is not absolute).

102. 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 72.97, at 14-328 (1989).

103. *Ancrum*, — S.C. at —, 389 S.E.2d at 646.

104. *Id.*

105. *Id.*

tions.”¹⁰⁶ Therefore, any facts which indicate that a carrier performed negligent inspections separate and apart from its role as compensation carrier may be enough to establish the liability of the carrier.

Stephen P. Stewart

106. *Id.*