THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No.: 2012-211873
Case No. 2011-CP-08-00396

Robert Russell,.....Employee/Claimant, Respondent,

v.

Department of Health and Environmental Control, Employer, and
The State Accident Fund, Carrier,.....Appellants.

PETITION FOR REHEARING

Appellants DHEC and State Accident Fund, petition the South Carolina Court of Appeals pursuant to Rule 221(a) to rehear and vacate the Courts opinion filed May 8, 2013 on the following grounds:

(1) The Court of Appeal erred in finding that the Appellants are responsible for the medical care related to the Respondent's pre existing psychological condition.

The Order finds that the Appellants are responsible for the Respondent's medical care related to his pre existing psychological condition. Respondent was found to be permanently and totally disabled based on a combination of his work's

compensation injury and his pre existing psychological condition based on Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). Ellison stands for the proposition that a claimant may recover for a greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre - existing condition aggravate the injury or that the injury aggravate the pre existing condition so as long as there is greater disability simply from the combined effects of the injury and pre existing condition. Ellison is based on S.C. Code § 42-9-400 which is the statute that allows recovery under the Second Injury Fund. Respondent's psychological condition was found not to be aggravated by the back injury.

Section 42-9-400 is the statute that pertains to reimbursement from the Second Injury Fund, it does not create a manner for a Claimant to recover for a non related medical condition that was not aggravated by the work accident. Section 42-9-400 is entitled "[m]anner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from pre existing impairment and subsequent injury" . The intent of this statute is how carriers get reimbursement from the Second Injury Fund and not with creating additional ways for claimants to recover benefits. The statute provides a mechanism of recovery for medical expenses and disability benefits paid for the compensable injury. Section 42-9-400(a) states that "the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund ..." The statute is clear that the benefits are worker's compensation benefits paid out under Title 42, there

is no provision for payment for non work related conditions.

Furthermore, section 42-9-400 states that

> If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits in the following manner: ...

This section clearly indicates that the employer/carrier is responsible for medicals related to the compensable injury and payment of a disability award that is greater due to the pre existing condition but it does not create or mandate that the carrier pay for treatment for the preexisting condition. In this case, Respondent had a 5% rating to his back from Dr. Stovall, in all likelihood if Respondent did not have his psychological condition, the award would have been limited to an award under § 42-9-30 and Respondent would not have been found to be permanently and totally disabled. Instead, the Commission found the Respondent was permanently and totally disabled as a result of his psychological condition and the back condition combined and as a result the Appellants will have to pay a substantial greater award and the Appellants then have an opportunity to recoup the increased disability award.

Furthermore, Second Injury Fund only accepted the back. It seems inconsistent that carrier would be held responsible for any psychological treatment but the Second Injury Fund is not required under § 42-9-400 to reimburse the carrier for the psychological treatment. If the Appellants are required to pay for Respondent's

psychological treatment, then the Second Injury Fund should be required to accept the psychological condition and reimburse the carrier.

Section 42-15-60 is the statute that mandates how medical care will be provided. Section 42-15-60 has been modified since 2004 when this claim occurred. In 2004, § 42-15-60 read in part "[m]edical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks form the date of an injury to effect a cure or give relief and for such additional time as in the judgment of Commission will tend to lessen the period of disability." As this case involves a 2004 date of loss, the 2004 version of the statute should be controlling. This version states that medical treatment shall be provided as " reasonably required". There is nothing reasonable about requiring the Appellants to provide treatment for a psychological condition that was found not to be aggravated by the Claimant's comp injury and pre existed the comp injury.

The current version of § 42-15-60 states that an "employer shall provide medical, surgical, hospital and other treatment... as reasonably may be required..". The current version added the word "shall" but still uses the phrase "as reasonably may be required." Clearly, under either version of § 42-15-60, employers are required treatment for compensable injuries not for pre existing conditions. The word "shall" does not create an obligation for the employer to pay for unrelated conditions. If the court accepts the Respondent's arguments then employers and carriers would be suddenly be responsible for all sorts of conditions that are not aggravated by the worker's comp injury, this is clearly not the intent of the statute or Title 42.

Claimant's back treatment ended in 2005 when Dr. Stovall rated and released

him on January 13, 2005. Claimant has had hospitalizations for his psychological treatment and is presumably on medications. Finding of Fact 11 finds that the Respondent's psychological condition was already spiraling downward prior to the accident. The Order also found that during hospitalization 6 days after the accident for psychiatric treatment there was no mention of his worker's comp accident. (R. pp. 3-5). Without a doubt, regardless of the worker's compensation injury, Respondent was going to have get treatment for his psychological treatment if the worker's compensation accident never happened. Requiring the carrier to pay for the Respondent's psychological treatment creates windfall for the Respondent that was not intended by the statute.

To hold the Appellants responsible for medical treatment for Respondent's psychological condition is inherently unfair as Respondent's psychological condition is extreme and not aggravated by the job injury. The law of the case is that the psychological condition was not aggravated so logically no future psychological treatment would be considered related to the work injury. Finding of Fact # 7 finds that:

> Six days after the accident, Respondent was hospitalized for psychiatric care including suicidal ideation and "extreme depression". This was Claimant's 2nd hospitalization, the first having occurred about 20 years ago before. There is no mention in any of these records (i.e., the second hospitalization) about Claimant's accident/injury/pain. Rather, these records focus on issues of sexual orientation, sexual harassment at work, and the death of a close male friend. Claimant's mother and sister also suffered from depression. Claimant admitted at the hearing that he missed days from work for depression immediately prior to the work

accident.[1]

There is no reason for the Appellants to be responsible for medical treatment that would have occurred regardless of the on the job car accident. This finding that was unappealed and is now the law of the case. Furthermore, Finding of Fact # 8 details Respondent's extensive psychological history:

> Claimant has a significant psychological history as documented in the evidence. When Claimant was a child, he watched his father shoot his mother in the eye, and he was molested by an older brother. When he was in his 20's, he jumped off a bridge while intoxicated. Claimant's limb shaking and tremors observed by the undersigned at the hearing are also documented in the evidence by various providers. A video of the hearing (obviously, hearings are not recorded) would have shown that Claimant's demeanor/psychological condition would be next to impossible to fake or feign.(R.p. 3).

Nothing in Ellison or § 42-9-400 requires or even suggests that a worker's compensation carrier pick up lifetime benefits for a non work related condition. Section 42-9-400 deals with reimbursement from the Second Injury Fund for the medical benefits and compensation related to the compensable injury, this statute does not create a windfall the Claimant that a non work related condition will suddenly be covered. Section 42-9-400 requires that the disability results from a pre existing condition and that as a result of an aggravation or combination of the pre existing condition and work related injury. The order of the lower court repeatedly finds that the psychological condition was not aggravated by the work accident. Furthermore, it is

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[1]Neither side appeal this Finding of Fact, the medical record referred to in this finding is actually dated June 18, 2001, three years before the Respondent's work comp accident occurred. (R. p. 248).

extensively documented throughout the medical records that the Respondent's psychological condition long pre-existed this work accident. Moreover, Respondent admits that he missed days from work due to his depression, immediately prior to his work accident. (R. p. 409). In Finding of Fact number 8, the lower court order chronicles how the Respondent had witnessed his father shooting his mother as a child in the eye and was molested by an older brother. (R.p.3). Additionally, while he was in his twenties, he jumped off a bridge while intoxicated. Again, in Finding of Fact number 11, the lower court order notes that there is no aggravation of a psychological condition as it was already spiraling downward at the time of this accident. Regardless of this accident, there is such a long history of psychological problems with the Respondent that clearly he is going to need additional treatment for his psychological condition for the rest of his life. (R.p.4). As there is no finding of aggravation of his psychological condition, the Appellants should not be responsible for such.

(2) The Court of Appeals erred in finding there was substantial evidence to support the finding that the Respondent was permanently and totally disabled. The Respondent suffered a single member injury to his back and was ultimately assigned a five (5%) percent impairment rating by Dr. Stovall back in 2004. Therefore, only a single body part was injured and any recovery should be limited by Singleton v. Young Lumber Company 236 S.C. 454, 114 S.E. 2d 837 (1960). The Order specifically noted that the Respondent's lower extremity complaints were not supported by the medical evidence and that the Claimant's own IME records are devoid of any mention of leg pain or problem (Decision and Order Finding of Fact number 10). Therefore, as the Commission as affirmed by the circuit court only found that the Claimant suffered an

injury to one scheduled member, this case should be limited under Section 42-9-30. Respondent has a four year college degree and in the past has worked sedentary type positions. Dr. Stovall, the authorized treating physician, assigned a twenty pound frequent lifting restriction. Respondent was not a surgical candidate and underwent physical therapy in a work hardening program. Dr. Stovall noted that the Respondent should be able to maintain a reasonable level of activity through working. (R. pp. 48-185) Respondent has not returned to Dr. Stovall since 2004. Respondent had additional treatment through a chiropractor that was not authorized and it was never requested to be authorized by the Respondent. No authorized doctor has ever recommended surgery or additional treatment.

Respondent underwent a psychiatric exam when he applied for disability this report details the Respondent's extensive psychiatric problems that prevent him for working and does not find that the back injury prevents him from working. If Respondent is disabled from his psychiatric condition alone, it appears that he would become disabled regardless of this accident. (R. pp. 259-266).

(3). The Court of Appeals erred in finding that physical injury was aggravated by the psychological injury. The order specifically discounts the affidavits of Dr. Burke who opined that the psychological condition was aggravated. If the psychological condition was not aggravated how could the order then stated the physical injury aggravated the psychological condition which in turn aggravated the physical condition. (Finding of Fact #11)(R.p. 4).

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition of Rehearing of Appellant on Robert Russell by faxing and depositing a copy of it in the United States Mail, postage prepaid, on May 22, 2013, addressed to his attorney of record, J. David Murrell, 1517 Sam Rittenberg Boulevard, Charleston, SC 29407.

May 22, 2013

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May 22, 2013

File No.: 2008-0548 mmu

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Robert Russell, Respondent v. Department of Health and Environmental Control and The State Accident Fund, Appellants, Case No. 2011-CP-08-00396

Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of the Appellants' Petition for Rehearing in the above case. Also enclosed are the following:

(1) The Original and one (1) copy of the Proof of Service of the Notice of Appeal on the Respondent.

If you would please file the original and return a clocked copy in the enclosed self-addressed, postage paid envelope. Pursuant to Rule 203(d)(2) as this is an appeal by a state agency no filing fee is required.

With kindest regards, I remain

Very truly yours,

CLAWSON AND STAUBES, LLC

Margaret M. Urbanic

MMU/acc
Enclosures

cc: J. David Murrell, Esquire
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