

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

TRIAL COURT CASE NO. 0809951

APPELLATE CASE NO. 2013-000286

Old Republic, Ins. Co.,..... Respondent,

v.

The South Carolina Second Injury Fund,..... Appellant,

In re: Lester Miller,..... Employee/Claimant,

v.

Archer Daniels-Midland Company,..... Respondent.

INITIAL BRIEF OF APPELLANT

RECEIVED

JUN 24 2013

SC Court of Appeals

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STATEMENT OF THE ISSUES

1. Under S.C. Code Ann. § 42-7-320(B) did the Workers' Compensation Commission err in ordering the Fund to accept a claim for reimbursement after December 31, 2011?
2. Under S.C. Code Ann. § 42-7-320(B)(2) did the Workers' Compensation Commission err in considering evidence that was not submitted to the Fund prior to June 30, 2011?
3. Under S.C. Code Ann. § 42-9-400, must the Claimant be working for the employer on the date of injury to implicate reimbursement?
4. Under S.C. Code Ann. § 42-9-400 did the Workers' Compensation Commission err in finding that Claimant had a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment?

STATEMENT OF THE CASE

This is an appeal by the South Carolina Second Injury Fund ("Fund") from an award of partial reimbursement under South Carolina Code Ann. § 42-9-400. Employer, Archer Daniels Midland Company and Carrier, Old Republic Insurance Company (collectively "Carrier") alleged that they incurred substantially greater liability for medical costs and disability when their employee, Lester Miller ("Claimant"), sustained a work injury on April 11, 2008 that either aggravated or combined with his preexisting pulmonary disease. The Fund asserted that Claimant was not working for the employer on the alleged date of injury. Moreover, the Fund denied the claim arguing that Claimant did not have a preexisting condition before his occupational exposure, and further, if Claimant had a preexisting condition, it was not permanent and serious enough to constitute a hindrance to his employment pursuant to S.C. Code Ann. § 42-9-400.

The Fund also asserted that the claim was barred from reimbursement pursuant to S.C. Code Ann. § 42-7-320(B), which states that the Fund shall not accept a

reimbursement claim after December 31, 2011. The Fund also objected to the testimony of the employer's representative regarding knowledge as a violation S.C. Code Ann. §42-7-320(B)(2), which requires that all evidence to support a reimbursement claim be submitted by June 30, 2011

The Hearing Commissioner granted Carrier's claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 and the Appellate Panel affirmed. The Fund now appeals to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review in workers' compensation cases. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 619, 611 S.E.2d 297 (Ct. App. 2005). An appellate court may not substitute its judgment for that of the Workers' Compensation Commission as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004). Courts can reverse the decision of an administrative agency where it is affected by an error of law or not supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 1333, 276 S.E.2d 304, 305 (1981); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). A reviewing court may reverse an agency decision if the findings or conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION ERRED IN ORDERING THE FUND TO ACCEPT THIS REIMBURSEMENT CLAIM AFTER THE STATUTORY DEADLINE.

In 2007, the South Carolina legislature created § 42-7-320 to wind down and ultimately close the Second Injury Fund effective July 1, 2013. See S.C. Code Ann. § 42-7-320(A). South Carolina Code § 42-7-320(B) states that “[a]fter December 31, 2011, the Second Injury shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier.” Since “shall” is contained in the statute, the action is mandatory. Thompson v. Cisson Constr. Co., 377 S.C. 137, 160 659 S.E.2d 171, 183 (Ct. App. 2008). Courts have held that the statute should be read to ascertain legislative intent. Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct. App. 2006). Thus, any action that would allow the Fund to remain viable in perpetuity is an unreasonable proposition and is inconsistent with clear legislative intent.

In addition, § 42-7-320(B)(3) requires that the Fund “continue reimbursing employers and insurance carriers for claims accepted by the [F]und on or before December 31, 2011.” This provision makes it crystal clear that the legislature intended for the Fund to continue reimbursing only those claims that were accepted prior to December 31, 2011, and not claims such as the one at bar. The plain and ordinary meaning of the statute bars this claim from reimbursement recovery and a reversal is appropriate.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN CONSIDERING WITNESS TESTIMONY AFTER JUNE 30, 2011.

South Carolina Code § 42-7-320(B)(2) states the following:

[a]n employer, self-insurer, or insurance carrier must submit all required information for consideration of accepting a claim to the Second Injury Fund by June 30, 2011. Failure to submit all required information to the fund by June 30, 2011, so that the claim can be accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

S.C. Code Ann. § 42-7-320(B)(2).

While this provision does not specifically define "required information," the logical conclusion is that "required information" is the information necessary to determine if a carrier meets all reimbursement criteria outlined in S.C. Code Ann. § 42-9-400. In order to establish its entitlement to reimbursement, a carrier must prove that Claimant had a permanent preexisting physical impairment that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment, and that the preexisting impairment created substantially greater liability than that which would have resulted from the subsequent injury alone. S.C. Code Ann. § 42-9-400(a) and (d). Carrier must also prove that it had knowledge of Claimant's preexisting impairment or alternatively, that Claimant concealed the impairment. S.C. Code Ann. § 42-9-400(c). As a prerequisite, Carrier must establish that it provided notice of a potential Second Injury Fund claim prior to paying Claimant seventy-eight (78) weeks of benefits. S.C. Code Ann. § 42-9-400(f). Thus, information relative to notice, knowledge, preexisting impairment, hindrance, and substantial increase in liability would be considered "required information." In this case, the Commission allowed witness testimony on the knowledge

element in violation of the statutory mandate and a reversal is the only appropriate remedy.

III. CLAIMANT WAS NOT WORKING ON THE DATE OF INJURY.

Claimant's last day of work was October 19, 2007. In April 2008, Claimant had triple heart bypass surgery and began receiving social security disability, which was converted to social security retirement benefits. R.p. _____. On April 11, 2008, Claimant underwent a pulmonary function test, which showed significant reduction in capacity but peak flows were normal. R.p. _____. Claimant's pulmonary function test showed improvement in vital capacity as compared to his August 2007 pulmonary function test. R.p. _____. Carrier alleges that Claimant's pulmonary function test date, April 11, 2008, is the date of the alleged injury based on the "last injurious exposure rule." In Geathers v. 3V, Inc., the South Carolina Supreme Court adopted "the last injurious exposure rule." 641 S.E.2d 29, 371 S.C. 573 (2007). The "last injurious exposure rule"

places full liability upon the carrier covering the current risk at the time of the most recent injury that bears a causal relation to the disability [and] makes the insurer at risk at the time of the second injury liable even if the second injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition.

Id., at 576, Id. at 32 (quoting 9 Larson's Workers' Compensation Law § 153.02 [1] and [2]).

The last injurious exposure rule addresses carrier exposure and does not address the determination of Claimant's date of injury. Here, Claimant's last day of work was

October 19, 2007. Claimant did not return to work with this employer or any other employer after October 19, 2007. Since Claimant was not working on the date of this alleged injury, Second Injury Fund reimbursement is not implicated and Carrier's claim should have been denied.

IV. CLAIMANT DID NOT HAVE A PREEXISTING CONDITION BEFORE HIS OCCUPATIONAL EXPOSURE, AND IF HE DID, IT WAS NOT A HINDRANCE OR OBSTACLE TO HIS EMPLOYMENT.

South Carolina Code § 42-11-40 specifically addresses occupational diseases and indicates that occupational diseases shall be treated as injuries by accident. Carrier asserts that Claimant's pulmonary disease is an occupational disease. Claimant was hired on August 22, 2005. In July 2004, approximately one (1) year prior to the occupational exposure, Claimant's respiratory function was deemed normal, his breathing was not labored and his lungs were clear. R.p. _____. There was no evidence of nerve deficits or motor weakness. R.p. _____. Claimant's respiratory system was clear with normal respiratory effect. R.p. _____.

In 2007, Claimant received medical clearance to work using protective equipment. R.p. _____. Also in 2007, Claimant underwent a pulmonary function test revealing a reduction in lung volumes, which the doctor attributed to his morbid obesity. R.p. _____. Claimant was diagnosed with bronchial asthma due to morbid obesity. R.p. _____. In July 2008, approximately two (2) months after the alleged work injury, and approximately nine (9) months after Claimant's last day of work, Claimant was diagnosed with occupational asthma and sleep apnea. R.p. _____. The treating

physician indicated that Claimant did not suffer any permanent impairment to his lungs and Claimant was instructed to avoid exposure to inhaled toxins. R.p._____.

The decision below included various preexisting conditions that do not enjoy medical support for Second Injury Fund reimbursement. R.p._____. These conditions include hypertension, diabetes, sleep apnea and morbid obesity. R.p._____. Carrier did not present evidence regarding Second Injury Fund criteria on any of these additional preexisting conditions; and therefore, it was error for those conditions to be considered for reimbursement. In fact, the South Carolina Supreme Court has upheld a case finding that morbid obesity was neither permanent nor serious enough to constitute a hindrance or obstacle to employment; and as such, morbid obesity should not have received reimbursement consideration. State Accident Fund v. S.C. Second Injury Fund, 388 S.C. 67, 693 S.E.2d 441 (Ct. App. 2010).

The Fund denies that Claimant had a preexisting condition before his occupational exposure, and if so, it was not a hindrance to his employment and Carrier's reimbursement request should have been denied.

CONCLUSION

For the reasons cited herein, the Fund seeks that this Honorable Court reverse the Commission's Order and deny Carrier's reimbursement request because it is not supported by the substantial evidence in the record.

Respectfully submitted,

By: 

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June 21, 2013
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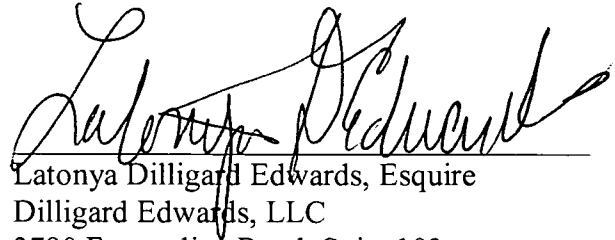
Archer Daniels-Midland Company, Respondent.

**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes that the following be included in the Record on Appeal:

1. Single Commissioner's Hearing Transcript, January 4, 2012;
2. Single Commissioner's Decision and Order, April 16, 2012;
3. Appellate Panel's Hearing Transcript, October 22, 2012;
4. Appellate Panel's Decision and Order, January 8, 2013;
5. Carrier's APA Submissions pp. 1-121, December 3, 2011;
6. Carrier's APA Submissions pp. 122-156, December 5, 2011.

I certify that this Designation contains no matter which is irrelevant to this appeal.

A handwritten signature in black ink, appearing to read "Latonya Dilligard Edwards", written over a horizontal line.

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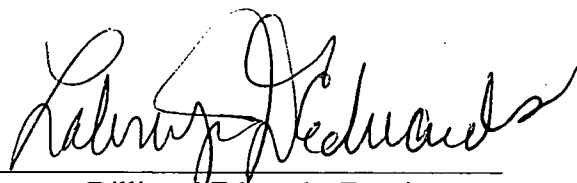
Archer Daniels-Midland Company,Respondent.

PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **INITIAL BRIEF OF APPELLANT**, along with the **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondents Archer Daniels-Midland Company, Employer and Old Republic Insurance Company, Carrier, and the South Carolina Workers' Compensation Commission, by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope on this 21st day of June, 2013, addressed as follows:

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The Honorable Virginia Crocker, Judicial Director
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