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SC Court of Appeals

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0712583  
SCSIF NO. 145701

JOANN BROCKINGTON,

-v-

NHC LEXINGTON,

AND

PREMIER GROUP INSURANCE CO., INC., CARRIER,

DEFENDANTS/RESPONDENTS,

-v-

THE SOUTH CAROLINA SECOND  
INJURY FUND,

APPELLANT.

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Appellate Panel Decision and Order filed

6/7, 2013

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APPEARANCES:

Defendants/Respondents represented by  
Clarke W. McCants, III, Esquire  
of Aiken, South Carolina.

Appellant represented by  
Latonya Dilligard Edwards, Esquire  
of Columbia, South Carolina.

STATEMENT OF THE CASE

The Parties were heard by Commissioner Gene McCaskill on March 6, 2012 in Columbia, South Carolina. On August 2, 2012 he issued the following Order:

IT IS THEREFORE ORDERED that the S.C. Second Injury Fund shall be required to provide reimbursement to the Defendants as part of this matter and pursuant to the provisions of the Act.

Within the statutory period, Counsel for the Appellant filed an Application for Review in this case setting forth its reasons, a copy of which was furnished to all interested Parties prior to oral argument presented before an Appellate Panel on November 14, 2012, and comprised of Commissioner T. Scott Beck, Commissioner Avery B. Wilkerson, Jr. and Commissioner Susan S. Barden. All proffered testimony had been taken. Such, together with all documentary evidence, was delivered by oral argument to the individual members of the Appellate Panel convened on the aforesaid date.

By appeal, the Appellant respectfully submitted the following issues:

1. Did the Hearing Commissioner err in finding as a fact (Finding of Fact No. 8) that Claimant's preexisting arthritis was serious and permanent enough to constitute a hindrance or obstacle to employment, and substantially increased Carrier's liability, when such a finding is against the greater weight of the reliable, probative, and substantial evidence in the record?
2. Did the Hearing Commissioner err in concluding (Conclusion of Law No. 1) that pursuant to S.C. Code Ann. § 42-9400 and other applicable law and regulation, that Carrier provided timely notice of its claim for reimbursement to the Second Injury Fund, when such a conclusion is against the greater weight of the reliable, probative and substantial evidence in the record?
3. Did the Hearing Commissioner err in concluding (Conclusion of Law No. 2) that pursuant to S.C. Code Ann. § 42-7-320 and other applicable law and regulation, all required information necessary for consideration, acceptance, compromise or denial of Carrier's claim for reimbursement was timely provided to the Second Injury Fund, when such a conclusion is against the greater weight of the reliable, probative, and substantial evidence in the record?

4. Did the Hearing Commissioner err in concluding (Conclusion of Law No. 3) that pursuant to S.C. Code Ann. § 42-9400 and other applicable law and regulation, that the Second Injury Fund is required to provide reimbursement to the Carrier for compensation and benefits paid to the Claimant in this matter, when such a conclusion is against the preponderance of the reliable, probative, and substantial evidence in the record and is contrary to prevailing case and statutory law?

In an Appellate Review, the Appellate Panel shall, pursuant to S. C. Code Ann. § 42-17-50 (1976), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the record for this matter, and listening to and considering the statements and arguments of Counsel, a majority of the Appellate Panel hereby makes the following Findings of Fact and Conclusions of Law:

#### **FINDINGS OF FACT**

1. The Claimant sustained an injury to her lower back on August 8, 2007 as a result of an accident arising out of and in the course of her employment with the Employer.
2. Payment of temporary total compensation to the Claimant commenced on August 8, 2007 and ended on January 6, 2009, resulting in payment of 74 weeks of temporary compensation to the Claimant.
3. Notice of the Defendants' claim for reimbursement in this matter was provided to the Second Injury Fund on May 13, 2009 by certified mail - return receipt requested.
4. All required information necessary for the Second Injury Fund's consideration, acceptance, compromise or denial of the Defendants' claim for reimbursement was provided to the Fund by June 28, 2011.
5. The Second Injury Fund denied the Defendants' claim for reimbursement on August 26, 2011.
6. This matter was settled by and between the Claimant and the Defendants on November 2, 2011, and by the terms of an Agreement and Final Release; further,

a Form 19 for this matter was filed with the Commission on December 19, 2011.

7. The uncontradicted medical evidence in this matter establishes the Defendants' claim for reimbursement in this matter. Specifically, the Claimant suffered from pain and discomfort in her lower back before the accident in August 2007, and as early as 1999. (Defendants' APA Submissions, Pages 39 and 41; Defendants APA Submissions, Pages 80 and 81).

8. Dr. Noojin states affirmatively that the Claimant suffered from arthritis in her lower back prior to the date of accident involved here. (Defendants' APA Submissions, Page 516). He further notes that this condition was serious and permanent, was aggravated by the work-related accident and serves as a hindrance or obstacle to the Claimant employment opportunities. His statement also supports the "substantial increase" requirements established by statute.

9. The Statement of Iris Crum satisfies the notice requirements in this matter. Specifically Ms. Crum states that the Claimant complained of lower back pain after experiencing non- work related falls in 2004 and 2006, and a decision was made by the Employer to retain the Claimant in employment despite her lower back problems. (Defendants' APA Submissions, Page 518).

#### **CONCLUSIONS OF LAW**

1. Pursuant to S.C. Code Ann. § 42-9-400 (1976), and other applicable law and regulation, the Defendants provided timely notice of their claim for reimbursement to the Second Injury Fund.

2. Pursuant to S.C. Code Ann. § 42-7-320 (1976), and other applicable law and regulation, all required information necessary for consideration, acceptance, compromise or denial of the Defendants' claim for reimbursement was timely provided to the Second Injury Fund.

3. Pursuant to S.C. Code Ann. § 42-9-400 (1976), and other applicable law and regulation, the Second Injury Fund is required to provide reimbursement to the Defendants for compensation and benefits paid to the Claimant in this matter.

#### **ORDER**

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner filed in this matter on August 2, 2012 is hereby affirmed by a majority of the Appellate Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

IT IS FURTHER ORDERED THAT the South Carolina Second Injury Fund shall be required to provide reimbursement to the Defendants as part of this matter and pursuant to the provisions of the Act.

SO ORDERED.

  
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Andrea C. Roche

  
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T. Scott Beck, Commissioner

Dated : 6-4-13  
Columbia, South Carolina

**DISSENTING OPINION**

I respectfully dissent. Although I would affirm the Single Commissioner's finding that Carrier has established notice pursuant to S.C. Ann. §42-9-400(f), I would reverse the Single Commissioner's decision on the issue of hindrance. Section 42-9-400(d) allows a presumption that certain permanent physical impairments specifically enumerated in that statute are a hindrance or obstacle to employment or reemployment "[w]hen an employer establishes his prior knowledge of the permanent impairment." S.C. Code Ann. §42-9-400 (d). It is noteworthy that effective July 1, 2007, the legislature eliminated arthritis from the list of permanent physical impairments presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. S.C. Code Ann. §42-9-400 (d) 2007 supplement. Thus, the Carrier in this case no longer enjoys a presumption, but rather is required to prove the issue of hindrance. Here, Carrier presented a questionnaire supporting arthritis as permanent and serious

enough to constitute a hindrance or obstacle to employment. There is other compelling evidence on this issue than the questionnaire submitted by Carrier. The medical evidence indicates that Claimant was diagnosed with a sprained knee in 2004. Carrier APA pp.13 and 15. Claimant's follow up visit regarding the sprained knee revealed normal gait, range of motion, and strength in the right leg with intermittent pain. Carrier APA pp.102-103. When Claimant presented for treatment in March 2005 for a routine follow up examination, she was experiencing head pain and intermittent aching but did not complain of arthritis. Carrier APA pp.341-343. When Claimant presented for treatment in June 2005 for a follow up of her hypertension and diabetes, she denied arthritis; an examination of her eyes, respiratory system, cardiovascular system, gastrointestinal system, and feet were normal. Carrier APA p.347. When Claimant presented for treatment in November 2005, she complained about her arthritis, but she was in no acute distress and her musculoskeletal examination was normal. Carrier APA pp.351-352. When Claimant presented for treatment in May 2007, approximately two (2) months prior to the work injury, she complained of nagging and intermittent headaches, **but no chronic pain or arthritis.** Carrier APA pp.354-355.

Furthermore, the last reference to arthritis in Claimant's back is in 1999--**eight (8) years prior to the date of accident in issue.** While there is indeed a questionnaire supporting reimbursement, we need not give it conclusive effect to the exclusion of other more compelling medical evidence. Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (S.C. 1946). Therefore, the questionnaire as to the back is not supported by the medical records, which speak more loudly than the questionnaire. Accordingly, I would reverse the decision of the Hearing Commissioner and deny reimbursement.



Susan S. Barden, Commissioner

Dated: 6-4-13  
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

**By Valerie Deller on June 4, 2013**