ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

69226

APPEAL FROM CHESTERFIELD COUNTY

Paul M. Burch, Circuit Court Judge
Trial Court Case No.: 2012-CP-13-00362

Appellate Case No.: 2012-213511

South Carolina Second Injury Fund, ...Appellant

v.

John F. Stroud & Sons, Inc. and
American Home Assurance Co.,..... Respondents

FINAL BRIEF OF RESPONDENTS

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1. Under S.C. Code Ann. §§ 1-23-380 (1976) and 42-9-400 (2003), is the Decision and Order of the Appellate Panel of the Workers' Compensation Commission, wherein it grants Respondents full Second Injury Fund reimbursement, supported by reliable, probative and substantial evidence on the whole record?

2. Under S.C. Code Ann. § 1-23-380 (1976), did the Appellate Panel of the South Carolina Workers' Compensation Commission properly apply City of Greenville v. South Carolina Second Injury Fund, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000), in finding that Respondents were entitled to full Second Injury Fund reimbursement?

3. Under S.C. Code Ann. § 42-9-400(c) (2003), did the Appellate Panel of the South Carolina Workers' Commission correctly find that the Appellant conceded employer knowledge for all preexisting impairments?

STATEMENT OF THE CASE

Appellant, the South Carolina Second Injury Fund, appeals from the Order of the Honorable Paul M. Burch, Fourth Judicial Circuit, filed with the Chesterfield Clerk of Court on October 12, 2012, wherein Judge Burch affirmed the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") granting Respondents full Second Injury Fund reimbursement pursuant to S.C. Code Ann. § 42-9-400 (2003) for benefits paid or to be paid to the injured employee, John Stroud ("Mr. Stroud"), stemming from Mr. Stroud's April 10, 2005 work accident.

Mr. Stroud sustained compensable work-related injuries on April 10, 2005 when he injured his left eye, right eye, right leg, left leg, left hip, right arm, torso, ribs, shoulders, and suffered hearing loss and permanent, physical brain damage in an airplane crash during the course and scope of his employment (R. p. 15, ¶¶ 6, 8). Ultimately, the underlying workers' compensation claim was concluded by award and Respondents were ordered to pay Mr. Stroud lifetime medical and indemnity benefits in addition to other awards (R. p. 16, ¶¶ 12–15).

Respondents sought Second Injury Fund reimbursement under S.C. Code Ann. § 42-9-400 (2003) on the basis of multiple theories, including preexisting diabetes, a prior traumatic brain injury (concussion) and/or brain damage,[1] and all of these preexisting conditions combining both individually and collectively with Mr. Stroud's work accident to result in permanent impairment greater than seventy-eight (78) weeks (R. pp. 81–82). Respondents and Appellant appeared before Commissioner G. Bryan Lyndon on September 21, 2011. On October 20, 2011, Commissioner Lyndon issued a Decision and Order finding that Respondents submitted evidence sufficient to show that Mr. Stroud had preexisting diabetes and a prior traumatic brain injury (concussion) and/or brain damage; that Appellant conceded employer knowledge and alternatively that Respondents established employer knowledge because Mr. Stroud served as owner/operator for Employer and was aware of his preexisting impairments and resulting treatment; that the aforementioned preexisting impairments were of such seriousness so as to constitute a hindrance or obstacle to Mr. Stroud's employment; that Mr. Stroud's preexisting impairments combined with or were aggravated by his April 10, 2005 work accident to result in greater overall liability for Respondents; that Mr. Stroud's preexisting impairments combined with or were aggravated by his April 10, 2005 work accident to result in him being deemed permanently and totally disabled; and that Respondents were entitled to reimbursement from the South Carolina Second Injury Fund pursuant to S.C. Code Ann. § 42-9-400 (2003) under multiple theories, including §§ 42-9-400(d)(2), and/or 42-9-400(d)(28), and/or 42-9-400(d)(34)(b), and/or 42-9-400(a), any

[1] Appellant combines preexisting traumatic brain injury (concussion) and brain damage by only referencing brain damage (Appellant Final Br. p. 2 ¶¶ 1–2), but Respondents have consistently argued these as separate and distinct theories of recovery, either of which is sufficient to entitle them to full Second Injury Fund reimbursement.

one of which was sufficient to entitle Respondents to reimbursement for all compensation and medical payments made to or paid on behalf of Mr. Stroud (R. pp. 28–44).

On October 31, 2011, Appellant filed an Application for Full Commission Review of Commissioner Lyndon's Decision and Order (Form 30). The application contained seven (7) Grounds for Review and Exceptions (R. p. 145, ¶¶ 1–7). Appellant and Respondents submitted briefs in support of their respective positions and appeared before the Appellate Panel on March 19, 2012 for oral argument. On May 22, 2012, the Appellate Panel issued its Decision and Order wherein it fully affirmed each and every Finding of Fact and Conclusion of Law of the Hearing Commissioner (R. pp. 49–66).

On June 20, 2012, Appellant appealed the Decision and Order of the Appellate Panel to the Chesterfield County Court of Common Pleas (R. pp. 67–71). Appellant and Respondents again submitted briefs in support of their respective positions and appeared before the Honorable Paul M. Burch on September 17, 2012. On October 12, 2012, Judge Burch filed an Order with the Chesterfield Clerk of Court affirming the Decision and Order of the Appellate Panel on the ground that its decision was supported by the reliable, probative and substantial evidence of the whole record (R. pp. 72–76).

On November 30, 2012, Appellant filed a Notice of Appeal and Proof of Service regarding the same with the Court. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 15–16, 682 S.E.2d 516, 519 (Ct. App. 2009); see Lark v. Bi-Lo, Inc., 276 S.C. 130, 134–35, 276 S.E.2d 304,

306 (1981). Under the scope of review established by the APA, the Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012); see S.C. Code Ann. § 1-23-380 (1976). Substantial evidence is defined as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion as the Appellate Panel. Carolinas Recycling Group, 398 S.C. at 483, 730 S.E.2d at 326 (citing Lark, 276 S.C. at 135, 276 S.E.2d at 306).

ARGUMENT

I. THE DECISION AND ORDER OF THE APPELLATE PANEL WHEREIN IT GRANTED RESPONDENTS FULL SECOND INJURY FUND REIMBURSEMENT IS SUPPORTED BY THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE OF THE WHOLE RECORD.

a. Respondents Submitted Reliable, Probative and Substantial Evidence Satisfying all Elements of Reimbursement.

Respondents have submitted substantial evidence proving each and every requirement for reimbursement as set forth in S.C. Code Ann. § 42-9-400 (2003). Accordingly, the Decision and Order of the Appellate Panel wherein it granted Respondents full Second Injury Fund reimbursement should be affirmed.

The substantial evidence in the record supports that Mr. Stroud had diabetes and a traumatic brain injury (concussion) and/or brain damage prior to his April 2005 work accident. Medical records from Dr. John McLeod document that Mr. Stroud developed

Type II diabetes around 1998 and received treatment including Glucophage and diet control in the years leading up to his April 2005 work accident (R. pp. 156–161). The same records document that Mr. Stroud was diagnosed with a concussion in July 2004 after an accident involving a tractor; this incident occurred less than one year before the work accident at issue in this action (R. p. 160). Further records from Palmetto Health Richland Memorial Hospital reveal the tractor accident involved a backhoe rolling over Mr. Stroud, resulting in a loss of consciousness and diagnosis of traumatic brain injury (concussion) and coma (R. pp. 180–84, 188, 191). Respondents submitted reports from the Centers for Disease Control and Prevention (hereinafter "CDC Reports") stating that a concussion is considered to be a "traumatic brain injury" that can affect brain function; accordingly, "all [concussions] are serious" (R. p. 348–66). Consistent with the medical evidence in the record, Dr. Scott and Dr. Waid prepared medical narratives and completed medical certificates indicating that Mr. Stroud suffered from diabetes and sustained a concussive head injury prior to the April 10, 2005 work accident (R. pp. 343–47). As such, substantial evidence in the record demonstrates that Mr. Stroud suffered from preexisting diabetes and sustained a traumatic brain injury (concussion) and/or brain damage prior to his April 10, 2005 work accident; thus, the Appellate Panel reached the proper decision on this issue (R. pp. 53–54, ¶¶ 10, 11).

There is also substantial evidence in the record to support the Appellate Panel's finding that Respondents satisfied employer knowledge under S.C. Code Ann. § 42-9-400(c) (2003) (R. pp. 54–55, ¶¶ 12, 13). Although Appellant now attempts to do so, it did not contest employer knowledge with regard to <u>any</u> of Mr. Stroud's preexisting impairments; specifically, Appellant stated on the record at the hearing before

Commissioner Lyndon "we're not contesting employer knowledge" (R. p. 92, lines 16–17). Accordingly, the Appellate Panel correctly found that Appellant conceded knowledge of all of Mr. Stroud's preexisting impairments. Despite Appellant not challenging employer knowledge, Respondents provided independent support showing that employer knowledge was satisfied in this instance. Mr. Stroud's position as owner/operator of Employer, along with his knowledge of his diagnoses and treatment for diabetes and a prior concussion, fulfilled the requirements of the statute. Therefore, the Appellate Panel correctly found that employer knowledge was satisfied through Appellant's concession and evidence presented by Respondents.

The findings of the Appellate Panel that Mr. Stroud's preexisting impairments were permanent and serious enough to constitute a hindrance or obstacle to his employment or reemployment are supported by substantial evidence (R. pp. 55–59, ¶¶ 14–23). In a medical narrative, Dr. Waid explained that Mr. Stroud's July 2004 traumatic brain injury (concussion) and/or brain damage served as a risk factor for greater impairment should Mr. Stroud sustain a subsequent head injury (R. pp. 344–45). The CDC reports provide additional support; specifically, "[t]hose who have had a concussion in the past are also at risk of having another one and may find that it takes longer to recover if they have another concussion" (R. p. 352). Repeated traumatic brain injuries (concussions) over an extended period of time can result in cumulative neurological and cognitive deficits (R. p. 363). Hence, Mr. Stroud's prior traumatic brain injury (concussion) and/or brain damage served as a hindrance to his employment insofar as it made him more susceptible to serious cognitive injury or prolonged recovery time should he suffer another such incident. Further, both Dr. Waid and Dr. Scott completed medical

certificates and provided medical narratives explaining how Mr. Stroud's preexisting diabetes, which required the use of Glucophage and other treatment for years, was permanent and serious enough to constitute a hindrance to his employment (R. p. 343–47). In addition to the foregoing evidence supporting hindrance, the Appellate Panel correctly determined that Respondents are entitled to a presumption of permanency and hindrance under S.C. Code Ann. §§ 42-9-400(d)(2) (diabetes), 42-9-400(d)(28) (brain damage), and 42-9-400(d)(34)(b) (all of Mr. Stroud's preexisting impairments both individually and collectively (R. pp. 55–57, ¶¶ 14–16). Under subsection (d)(34)(b), if the preexisting impairment(s) combine with the subsequent accident to result in overall impairment in excess of seventy-eight (78) weeks, there is a presumption that the preexisting impairment(s) were a hindrance. Therefore, the substantial evidence in the record demonstrates that Mr. Stroud's preexisting impairments were permanent and serious enough to constitute a hindrance to his employment.

Lastly, Respondents submitted evidence substantiating that Mr. Stroud's preexisting impairments combined with or were aggravated by his April 10, 2005 work injuries to result in greater overall liability related to his workers' compensation claim. The medical narrative from Dr. Waid, as well as the reports from the CDC, note that Mr. Stroud's prior traumatic brain injury (concussion) and/or brain damage rendered him at greater risk for increased impairment or a longer period of disability should he sustain another brain injury, and specifically another injury within one year (R. pp. 344–45; 352, 363). That is precisely what happened in this instance and Dr. Waid concluded "it is my opinion that . . . the manner in which [Mr. Stroud] sustained a concussion within a year prior to the accident of April 10th, 2005, served to render him with a greater disability;

greater medical costs; as well as more significant disability with loss of time from employment capacities" (R. p. 345). As for the involvement of his preexisting diabetes, Mr. Stroud required an Insulin infusion following his work accident—a treatment he had never had to resort to previously (R. pp. 196, 343). Several months after the work accident, Mr. Stroud was still Insulin-dependent (R. pp. 235, 343). Perhaps more importantly, Mr. Stroud's preexisting diabetes contributed to the amputation of his right lower extremity. In the surgical report, Dr. Bosse noted that Mr. Stroud exhibited a deep infection in his right ankle/leg and that he was diabetic and completely devascularized, therefore "there was no salvage option other than below-knee amputation" (R. p. 240). Thus, the medical narratives and medical certificates from Dr. Scott and Dr. Waid wherein each physician states that Mr. Stroud's diabetes combined with or was aggravated by his April 10, 2005 work injuries to result in greater overall liability for Carrier (R. pp. 343–47), are supported by evidence in the record. Accordingly, substantial evidence in the record supports the findings of the Appellate Panel that Mr. Stroud's preexisting impairments combined with his work accident to result in greater overall liability in relation to his workers' compensation claim (R. p. 60, ¶¶ 24–26).

As demonstrated above, Respondents submitted reliable, probative and substantial evidence satisfying all of the elements entitling them to reimbursement pursuant to S.C. Code Ann. § 42-9-400 (2003). Thus, the Appellate Panel properly granted full reimbursement in favor of Respondents.

b. Appellant Failed to Rebut the Reliable, Probative and Substantial Evidence Submitted by Respondents.

Once Respondents presented substantial evidence supporting their claim for reimbursement, the burden then shifted to Appellant to present reliable, probative and

substantial evidence sufficient to rebut that presented by Respondents. See Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012). The Appellate Panel correctly determined that Appellant failed to satisfy its burden (R. p. 59, ¶¶ 22–23). Accordingly, it cannot be said that the findings of the Appellate Panel are not supported by substantial evidence.

Appellant failed to present any expert medical evidence or expert testimony supporting its position. The issues involved in this action call for a level of expertise beyond laymen's knowledge. The only expert medical evidence and testimony in the record favors reimbursement. When the specific issues relevant to reimbursement were presented to the experts possessing the skills to offer an opinion, each determined that Mr. Stroud suffered from preexisting impairments that combined with or were aggravated by his work accident to result in greater liability than would have resulted from the work accident alone. For the Appellate Panel to have accepted Appellant's contentions it would have had to render medical opinions based upon its own interpretation of isolated medical records; such an approach seemingly has been prohibited as outside the scope of the Commission's authority. See Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) (rejecting a finding of the Commission containing a medical opinion that did not originate from a medical provider and remanding the claim to the Commission to enter findings consistent with the substantial evidence in the record). Accordingly, Appellant failed to sufficiently rebut the evidence presented by Respondents and therefore the Appellate Panel correctly granted reimbursement in this instance.

Assuming *arguendo* that Appellant was not required to present expert medical evidence supporting its position, it has failed to present any evidence sufficient to rebut the evidence submitted by Respondents. Appellant argues that Mr. Stroud's preexisting traumatic brain injury (concussion) and/or brain damage was not a hindrance to his employment and did not combine with his subsequent accident to result in greater liability for Respondents (Appellant Final Br. pp. 5–7). In so arguing, Appellant relies heavily upon the testimony of Mr. Stroud's wife. However, Mrs. Stroud is incapable of speaking to the issue of whether a preexisting traumatic brain injury (concussion) and/or brain damage constitutes a latent risk-factor for greater disability if a person suffers a subsequent similar injury. Mrs. Stroud testified that prior to the April 2005 work accident, Mr. Stroud did not exhibit any symptoms like those he suffered from following the work accident (R. p. 4); however, her testimony in no way negates the fact that Mr. Stroud's resulting condition was from the combination or aggravation of his preexisting traumatic brain injury (concussion) and/or brain damage and the subsequent 2005 accident. While Mrs. Stroud may not have observed any outward signs, this does not negate the fact that Mr. Stroud suffered from a latent condition as described by Dr. Waid and the CDC Reports. Additionally, Appellant argues that CT scans reflect that Mr. Stroud's injuries got worse over time; this argument also fails to negate that the worsening was the result of the preexisting traumatic brain injury (concussion) and/or brain damage combining with the subsequent accident. Dr. Barkenbus likewise fails to address what role, if any, Mr. Stroud's preexisting traumatic brain injury (concussion) and/or brain damage had on his resulting condition. In fact, Dr. Barkenbus admits that he did not have definitive evidence showing Mr. Stroud's pre-2005 level of cognitive

functioning (R. p. 319). Further, Appellant points to the underlying claim to argue that Mr. Stroud's condition was the result of the subsequent accident alone. However, Appellant fails to appreciate that its position was not addressed by Commissioner Lyndon in the underlying workers' compensation claim—the underlying claim would have been compensable either as an aggravation of the preexisting traumatic brain injury (concussion) and/or brain damage or solely as a result of the April 2005 accident. See, e.g., Anderson v. Baptist Medical Center, 343 S.C. 487, 541 S.E.2d 526 (2001) (establishing compensability based upon aggravation of a preexisting condition). It also bears mentioning that Commissioner Lyndon served as the Hearing Commissioner in both the underlying workers' compensation claim and the Second Injury Fund claim; therefore, his decision granting reimbursement to Respondents can only be construed to mean that he felt there was evidence supporting an aggravation of Mr. Stroud's preexisting impairments.

While it is possible that the plane crash alone could have caused Mr. Stroud permanent brain damage and rendered him permanently and totally disabled, the only reliable, probative and substantial evidence in the record supports Respondents' position that Mr. Stroud's resulting condition stemmed from the combination of his work accident with his preexisting impairments. Appellant has failed to submit evidence of any sort demonstrating that the work accident alone caused Mr. Stroud's ultimate condition. Accordingly, to reverse the decision of the Appellate Panel on these issues and accept Appellant's contentions would amount to surmise, conjecture or speculation, which is clearly prohibited under prevailing authorities. See Edwards v. Pettit Constr. Co., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979). More importantly, the Appellate Panel

considered the foregoing evidence and weighed it against the other evidence in the record, ultimately finding that the evidence on the whole record favored reimbursement. For the reasons discussed herein the preceding sections, it cannot be said that the findings of the Appellate Panel are not supported by substantial evidence. Therefore, the Decision and Order of the Appellate Panel should be affirmed insofar as it grants Respondents full Second Injury Fund reimbursement.

II. IF THE COURT FINDS THAT MR. STROUD DID NOT HAVE PREEXISTING BRAIN DAMAGE, THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS GRANTING RESPONDENTS FULL SECOND INJURY FUND REIMBURSMENT UNDER ALTERNATE THEORIES.

The Appellate Panel found that Mr. Stroud suffered a traumatic brain injury (concussion) rising to the level of brain damage prior to his April 10, 2005 work-related accident (R. p. 54, ¶ 11). Specifically, the Appellate Panel relied upon the narrative of Dr. Waid noting that Mr. Stroud suffered a loss of consciousness and a right temporal hemotoma as a result of the 2004 rollover accident in finding that Mr. Stroud had preexisting brain damage (R. p. 54, ¶ 11, 344–45). Also factoring into the Appellate Panel's decision on preexisting brain damage were the CDC Reports, which establish that a concussion with associated loss of consciousness, such as that suffered by Mr. Stroud, can have a serious and long-term impact on a person's cognitive, physical and psychological function (R. p. 356). Accordingly, the Appellate Panel felt that the reliable, probative and substantial evidence in the record supports that Mr. Stroud had preexisting brain damage under the prevailing authorities. As such, Respondents were granted a presumption of permanency and hindrance pursuant to S.C. Code § 42-9-400(d)(28) (R. p. 56, ¶ 15).

With the foregoing said, Respondents have consistently argued preexisting brain damage, preexisting traumatic brain injury (concussion), and preexisting diabetes as separate and distinct theories of recovery, any one of which is sufficient to entitle them to full Second Injury Fund reimbursement (R. pp. 81–82). The Appellate Panel found that Respondents were entitled to reimbursement from the South Carolina Second Injury Fund pursuant to S.C. Code § 42-9-400 under multiple theories, including S.C. Code §§ 42-9-400(d)(2), and/or 42-9-400(d)(28), and/or 42-9-400(d)(34)(b), and/or 42-9-400(a), any one of which was sufficient to entitle Respondents to reimbursement for all compensation and medical payments made to or paid on behalf of Mr. Stroud (R. p. 61, ¶ 31, 32). Therefore, even if the Court finds that Mr. Stroud did not have preexisting brain damage as discussed in Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) and Sparks v. Palmetto Hardwood, Inc., 401 S.C. 619, 738 S.E.2d 831 (2013), Respondents are still entitled to full reimbursement under the alternative theories based upon the substantial evidence in the record.

As discussed in Part I, Respondents submitted substantial evidence demonstrating that Mr. Stroud had preexisting diabetes. Therefore, Respondents are entitled to a presumption of permanency and hindrance for that impairment under S.C. Code Ann. § 42-9-400(d)(2) (2003). Additionally, Part I outlines that Respondents fulfilled all of the requirements for reimbursement based upon preexisting diabetes through substantial evidence. Accordingly, the substantial evidence in the record supports the Decision and Order of the Appellate Panel granting reimbursement based upon Mr. Stroud's preexisting diabetes under S.C. Code Ann. §§ 42-9-400(d)(2) and 42-9-400(a) (2003). In addition, Mr. Stroud's preexisting traumatic brain injury (concussion), even if it does not

rise to the level of brain damage, constitutes a preexisting impairment upon which reimbursement can be based. As outlined in Part I, Respondents have submitted substantial evidence establishing all of the requirements for reimbursement based upon Mr. Stroud's preexisting traumatic brain injury (concussion). Accordingly, the Appellate Panel properly awarded Respondents full reimbursement based upon this impairment under S.C. Code § 42-9-400(a). Lastly, because Respondents have proven through substantial evidence that Mr. Stroud had preexisting diabetes and a prior traumatic brain injury (concussion) that combined with his April 2005 work accident to result in impairment rated at greater than seventy-eight weeks, the Appellate Panel properly granted Respondents a presumption of permanency and hindrance for each of these preexisting impairments both individually and collectively under S.C. Code Ann. § 42-9-400(d)(34)(b) (2003). As such, the Appellate Panel properly considered these presumptions in finding that Respondents were entitled to full reimbursement based upon Mr. Stroud's preexisting diabetes and/or prior traumatic brain injury (concussion) under S.C. Code Ann. § 42-9-400(d)(34)(b) and 42-9-400(a) (2003). For these reasons, even if Respondents have failed to show preexisting brain damage, substantial evidence supports the Appellate Panel's decision granting Respondents full Second Injury Fund reimbursement under the alternate theories of S.C. Code Ann. §§ 42-9-400(d)(2) and/or 42-9-400(d)(34)(b), and/or 42-9-400(a).

Additionally, once Respondents established their right to reimbursement for any one condition, they thereby became entitled to reimbursement for <u>all</u> compensation and medical benefit payments, subject to statutory deductions. Workers' compensation statutes are to be read in a way that gives words their plain and ordinary meaning. *See*

Transp. Ins. Co. & Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010). If a statute's meaning is plain and unambiguous, resort to a forced construction is not warranted. See id. S.C. Code §§ 42-9-400(a)(1) and 42-9-400(a)(2) (2003) provide that a carrier shall pay all awards of compensation and medical benefit payments, but the carrier shall be reimbursed for all compensation benefit payments made after the first seventy-eight weeks following the work injury, fifty percent of medical payments in excess of three thousand dollars during the first seventy-eight weeks, and then reimbursement of all medical benefit payments payable subsequent to the first seventy-eight weeks following the injury. Thus, a plain and ordinary reading of S.C. Code Ann. §§ 42-9-400(a), 42-9-400(a)(1), and 42-9-400(a)(2) (2003) means that if Respondents prove through substantial evidence that Mr. Stroud suffered greater disability on account of the combined effects of any one of his preexisting impairments with his April 2005 work injury, then Respondents shall be entitled to full reimbursement for all compensation and medical payments, subject to the statutory deductions. While Respondents contend that they have presented reliable, probative and substantial evidence supporting each theory of recovery, if the Court finds that they have satisfied the requirements for reimbursement for any one theory, then they should be entitled to full reimbursement from the South Carolina Second Injury Fund.

III. THE APPELLATE PANEL PROPERLY APPLIED CITY OF GREENVILLE V. SOUTH CAROLINA SECOND INJURY FUND IN FINDING THAT RESPONDENTS ARE ENTITLED TO FULL SECOND INJURY FUND REIMBURSMENT.

City of Greenville v. South Carolina Second Injury Fund, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000), establishes that when an employee has been found to be totally disabled solely as a result of a work accident, the employer cannot incur greater

liability for compensation benefits on account of a preexisting condition. Id. at 93–94, 528 S.E.2d at 147. However, an employer may incur greater liability for a totally disabled employee's medical payments due to a preexisting condition. Id. at 94, 528 S.E.2d at 147.

In City of Greenville, the South Carolina Court of Appeals applied the foregoing analysis to the facts and found that the evidence in the record supported that the claimant was rendered totally disabled and a paraplegic solely as a result of his work fall, and thus the decision to deny the employer reimbursement for compensation benefits was proper. Id. With regard to the claim for increased medical expenses, the court relied upon the testimony of the claimant's treating physician, who established that the claimant's preexisting conditions did not affect the length of time necessary for the claimant to reach maximum medical improvement. Id. The physician's testimony also established that the only increased expenses attributable to the preexisting conditions totaled $500.00 or $600.00, whereas the total medical expenses on the claim were $153,989.79. Id. The court held that this expert medical testimony constituted substantial evidence supporting denial of reimbursement for medical benefits. Additionally, the court found that the employer did not submit evidence sufficient to establish employer knowledge, as required by S.C. Code Ann. § 42-9-400(c). Id. Thus the Employer/Carrier was unable to prove all elements of reimbursement under S.C. Code Ann. § 42-9-400; specifically, it failed to show (1) combination with and/or aggravation of the preexisting condition by the work accident, (2) substantially greater lost time from work, (3) substantially greater medical costs, and (4) employer knowledge. Accordingly, the South Carolina Court of Appeals affirmed the denial of reimbursement.

The instant action is distinguishable from City of Greenville on numerous grounds. In City of Greenville, the Employer/Carrier failed to present evidence sufficient to satisfy all elements for reimbursement. However, as discussed in Part I, Respondents have submitted substantial evidence in the form of expert medical opinions with supporting medical records fulfilling each and every element for reimbursement under S.C. Code Ann. § 42-9-400 (2003). Unlike City of Greenville, in this instance employer knowledge was satisfied through Appellant's concession and Respondents submitting substantial evidence proving the same. In City of Greenville the record is absent of evidence indicating that the accident combined with or aggravated the claimant's preexisting conditions. However, as discussed in Part I at length, the Respondents submitted reliable, probative and substantial evidence, including the narrative from Dr. Waid, medical records and surgical report from Dr. Bosse, post-accident reports reflecting Mr. Stroud's Insulin dependency, medical certificates from Dr. Scott and Dr. Waid, and CDC Reports, establishing that Mr. Stroud's preexisting impairments combined with or were aggravated by his April 2005 work accident to result in substantially greater lost time and permanent disability. The aforementioned evidence submitted by Respondents likewise supports increased medical costs, including but not limited to Insulin-infusions and subsequent Insulin treatment, amputation of Mr. Stroud's right lower extremity on account of his diabetes, home modifications and treatment for cognitive issues resulting from the preexisting traumatic brain injury (concussion) and/or brain damage combining with Mr. Stroud's subsequent work accident. Appellant has failed to present any evidence, expert or otherwise, that rebuts the evidence presented by Respondents. In City of Greenville, the South Carolina Second Injury Fund presented

expert evidence in the form of testimony by the claimant's treating physician. However, such evidence was not presented by Appellant in this instance. For these reasons, the Appellate Panel properly granted reimbursement for both compensation and medical payments.

For the foregoing reasons, City of Greenville, when applied to the facts of the instant action, does not preclude Respondents from obtaining full Second Injury Fund reimbursement. Accordingly, the Appellate Panel properly distinguished that case and its decision granting Respondents full reimbursement should be affirmed.

IV. APPELLANT CONCEDED EMPLOYER KNOWLEDGE AND BY VIRTUE OF THE CONCESSION, HAS CONCEDED ALL OF MR. STROUD'S IMPAIRMENTS PREEXISTED, WERE PERMANENT AND CONSTITUTED HINDRANCES TO HIS EMPLOYMENT OR REEMPLOYMENT.

As discussed in the preceding sections, Respondents have consistently based their claim for reimbursement on multiple theories, including preexisting traumatic brain injury (concussion) and/or brain damage and/or diabetes. Respondents presented these same arguments and theories of recovery before the Hearing Commissioner (R. pp. 81–82). Before the Hearing Commissioner, Appellant conceded employer knowledge, specifically stating "we're not contesting employer knowledge" (R. p. 92, lines 16–17). Therefore, this concession constituted an admission by Appellant that it did not contest employer knowledge for any of the preexisting impairments/theories of reimbursement raised by Respondents. As such, Appellant conceded knowledge of Mr. Stroud's preexisting traumatic brain injury (concussion), brain damage and diabetes.

Under S.C. Code Ann. § 42-9-400(c) (2003), "the employer must establish . . . that employer had knowledge of the permanent physical impairment . . . ." Permanent physical impairment is defined by statute as "a permanent condition . . . of such

seriousness as to constitute a hindrance or obstacle to obtaining employment . . . or reemployment . . . ." S.C. Code Ann. § 42-9-400(d) (2003). Therefore, a concession of employer knowledge under S.C. Code Ann. § 42-9-400(c) (2003) would constitute a concession that the preexisting conditions were permanent physical impairments under S.C. Code Ann. § 42-9-400(d) (2003). Appellant must recognize the impact of its concession or else it would not continue to appeal the issue of employer knowledge which is clearly conceded in the record.

"If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory construction are not needed and a court has no right to impose another meaning." Transp. Ins. Co. & Flagstar Corp., at 429, 699 S.E.2d at 690. Under the plain and unambiguous statutory language, by conceding employer knowledge of Mr. Stroud's preexisting traumatic brain injury (concussion), brain damage and diabetes, Appellant also conceded that each of these impairments were permanent and of such seriousness so as to constitute a hindrance to Mr. Stroud's employment. By virtue of Appellant's admission, the issues of permanency and hindrance should not properly be considered on appeal.

CONCLUSION

For the reasons set forth herein, the Decision and Order of the Appellate Panel wherein it granted Respondents full Second Injury Fund reimbursement for compensation and medical benefits paid or to be paid to Mr. Stroud in relation to his April 10, 2005 work accident, is supported by the reliable, probative and substantial evidence of the whole record. Accordingly, Respondents requests that the Court affirm the Decision and

Order of the Appellate Panel and award Respondents full Second Injury Fund reimbursement.

Respectfully submitted,

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Attorneys for Respondents

Date: July 24, 2013
Greenville, SC

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY

Paul M. Burch, Circuit Court Judge
Trial Court Case No.: 2012-CP-13-00362

Appellate Case No.: 2012-213511

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

v.

John F. Stroud & Sons, Inc. and
American Home Assurance Co.,.....Respondents

CERTIFICATE OF COMPLIANCE

As attorneys of record for the Respondents, the undersigned do hereby certify that the **RESPONDENTS' FINAL BRIEF** is compliant with SCACR 211 (b).

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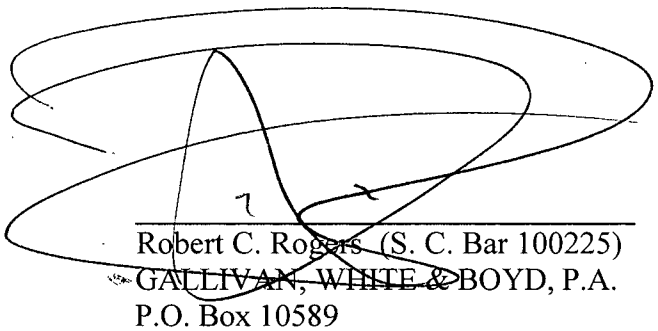

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PROOF OF SERVICE

As attorneys of record for the Respondents, the undersigned do hereby certify that on the 24th day of July, 2013, a copy of the **RESPONDENTS' FINAL BRIEF and CERTIFICATE OF COMPLIANCE** was served upon the Clerk of Court for the South Carolina Court of Appeals, the attorney for the Appellant, and others as specified below, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, as follows:

The Honorable Faye Sellers
Clerk of the Circuit Court
Chesterfield County
200 W. Main Street
Chesterfield, SC 29709

Latonya D. Edwards, Esq.
Dilligard Edwards, LLC
3790 Fernandina Road, Ste. 103
Columbia, SC 29210

Ms. Virginia L. Crocker
Judicial Director
S. C. Workers' Compensation Commission
P O Box 1715
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July 24, 2013