

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
The Workers' Compensation Commission

Case No. 0712583

Joann Brockington,

v.

NHC Lexington, and Premier Group Insurance Co., Inc.,
Carrier, Defendants, Respondents,

v.

The South Carolina Second Injury Fund, Appellant

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

Pursuant to Rule 208(b)(2), SCACR, the Respondents respectfully submit that the following issue is presented in this matter:

1. Is the Decision and Order of the Commission granting reimbursement to the Respondents from the Second Injury Fund supported by substantial evidence?

STATEMENT OF THE CASE

This matter is before the Court to review the Decision and Order of the South Carolina Workers' Compensation Commission dated June 4, 2012.

Joann Brockington injured her lower back on August 8, 2007 while working as a dietary aide for NHC Lexington at its nursing home in West Columbia, South Carolina. (Decision and Order of Commissioner McCaskill dated 8/2/12). The Respondents accepted this injury as compensable under the South Carolina Workers Compensation Law ("the Act"). (Decision and Order of Commissioner McCaskill dated 8/2/12). The Claimant also alleged that she sustained a physical brain injury as a result of the accident involved here. (Decision and Order of Commissioner McCaskill dated 8/2/12). The Defendants deny that the Claimant sustained such an injury. (Decision and Order of Commissioner McCaskill dated 8/2/12).

After accepting the injury to the Claimant's lower back the Defendants paid for certain medical treatment provided to her. (Decision and Order of Commissioner McCaskill dated 8/2/12). The Claimant also received temporary total compensation from the date of accident until January 6, 2009, at which time she returned to work with the Employer on a modified basis. (Decision and Order of Commissioner McCaskill dated 8/2/12). Of note, the Claimant left work with

the Employer in September 2011 and contended that she was entitled to payment of additional temporary compensation. (Decision and Order of Commissioner McCaskill dated 8/2/12). The Defendants denied that she was entitled to payment of such additional compensation. (Decision and Order of Commissioner McCaskill dated 8/2/12).

In May 2009 the Respondents notified the Appellant Second Injury Fund of their intention to submit a claim for reimbursement pursuant to the provisions of the Act. (Decision and Order of Commissioner McCaskill dated 8/2/12). The Respondents and Ms. Brockington subsequently resolved her claim for compensation and benefits by way of a "clincher agreement". (Decision and Order of Commissioner McCaskill dated 8/2/12).

The Second Injury Fund subsequently denied the Defendants' claim for reimbursement. (Decision and Order of Commissioner McCaskill dated 8/2/12). The Defendants then filed a Form 54 as part of this matter requesting a hearing before the Commission. (Decision and Order of Commissioner McCaskill dated 8/2/12).

A hearing to consider the Respondent's Form 54 was scheduled before Commissioner Gene McCaskill. The Parties agreed to submit briefs to Commissioner McCaskill for purposes of his consideration of the issues presented by them. (Decision and Order of Commissioner McCaskill dated 8/2/12). After consideration of the evidence contained in the record for this matter, and the briefs submitted by the Parties, Commissioner McCaskill granted the Respondents' request for reimbursement from the Second Injury Fund. (Decision and Order of Commissioner McCaskill dated 8/2/12).

The Second Injury Fund then requested that the Full Commission review Commissioner McCaskill's decision. (Second Injury Fund's Form 30 dated 8/16/12). An Appellate Panel of the Commission subsequently affirmed Commissioner McCaskill's decision. (Appellate Panel Decision and Order dated 6/4/13). The Second Injury Fund then filed a Notice of Appeal of the Commission's Decision and Order.

ARGUMENT

1. The Decision of the Commission granting the Respondents reimbursement from the Second Injury Fund is supported by substantial evidence and should be affirmed.

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by 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, 134-45, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, a Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission'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." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2010); Stone v. Traylor Bros, Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). The South Carolina Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Commission reached. Lark, 276 S.C. at 135, 276 S.E.2d at 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. South

Carolina Public Service Commission, 282 S.C. 430, 319 S.E.2d 695, 696 (1984).

The Fund argues that the medical and other evidence presented in this matter does not support the Respondents' claim for reimbursement. First, it is undisputed that the Claimant in this case suffered from pain and discomfort in her lower back before the accident in August 2007. This fact is documented as early as 1999 by medical records submitted by the Respondents. (Defendants' APA, Pages 39, 41, 79, 80 and 81). It is further supported by the statement of Iris Crum, Ms. Brockington's supervisor at NHC Lexington. (Statement of Iris Crum).

Frank K. Noojin, M.D., who treated Ms. Brockington following her work-related accident in 2007, also sets forth affirmatively in his statement that Ms. Brockington suffered from arthritis in her lower back prior to the date of accident involved here. (Statement of Dr. Noojin dated 6/27/11). Dr. Noojin further states that this condition was permanent, was aggravated by the work-related accident and serves as a hindrance or obstacle to Ms. Brockington's employment opportunities. (Statement of Dr. Noojin dated 6/27/11). His statement also supports the "substantial increase" requirements established by statute and applicable law. *See Carolina Recycling Group, et al. v. South Carolina Second Injury Fund*, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012).

Finally, Ms. Crum set forth in her statement that Ms. Brockington complained of lower back pain after experiencing non work-related falls in 2004 and 2006 (Statement of Ms. Crum). Ms. Crum states affirmatively that NHC Lexington made a decision to retain Ms. Brockington in employment despite her back problems. (Statement of Ms. Crum).

There is no evidence in the record for this matter which contradicts the medical and lay evidence set forth above. This evidence clearly establishes the requirements for reimbursement

from the Second Injury Fund.

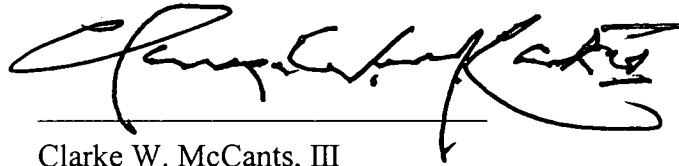
The purpose of the Fund is to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." South Carolina Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 122, 576 S.E.2d 199, 202 (Ct.App.2003) (quoting Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995)).

The Second Injury Fund accomplishes this goal by absorbing some of the risk that such a worker will become reinjured in the workplace. Its creation allows the employer, or his insurance carrier, to seek compensation from the Fund when an employee with a prior permanent physical impairment incurs a subsequent disability in the workplace. *See* S.C.Code Ann. § 42-9-400(a) (1985).

The facts of this case are a perfect example of why reimbursement should be allowed. Despite Ms. Brockington's back problems, NHC Lexington retained her in employment. It accepted responsibility for her work-related injury and provided compensation and other benefits. The Commission correctly found that under such circumstances that the Respondents are entitled to relief from the Second Injury Fund.

CONCLUSION

For the above-stated reasons the Respondents respectfully submit that the Decision and Order of the Workers' Compensation Commission dated June 4, 2013 should be affirmed.



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December 16, 2013

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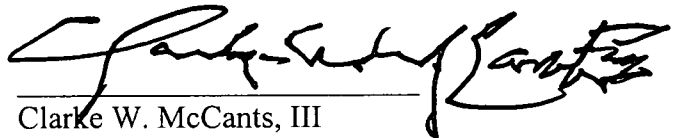
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PROOF OF SERVICE

I certify that I have served a copy of the Respondents' Initial Brief to be included in the Record on Appeal on counsel for the Appellant, Joann Brockington, by depositing a copy of it in the United States Mail, postage prepaid, on December 16, 2013, addressed to Latonya Dilligard Edwards, Esquire, Dilligard Edwards, LLC, 3790 Fernandina Road, Suite 103, Columbia, SC, 29210.



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