THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Kenneth G. Goode, Circuit Court Judge

Appellate Case No. 2011-194189

Frances S. Hudson, Deceased Employee, by Kenneth Hudson and Keith Hudson, Co-Executors of her Estate, and Matthew Deese and/or Andrew Deese,.....Respondents.

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company in liquidation through S.C. Property and Casualty Insurance Guaranty Association, carrier,.....Appellants.

PETITION FOR REHEARING

The South Carolina Property and Casualty Insurance Guaranty Association hereby files its Petition for Rehearing in the above matter pursuant to Rule 221 SCACR. As grounds for granting rehearing in the above captioned case and partially reversing Opinion No. 27348, the Petitioner would respectfully assert that the Court misapprehended the question before it and erred in holding the Petitioner liable for an award of interest and, in the alternative, in selecting April 27, 2004 as the date from which the Petitioner would be liable for the award of interest.

ARGUMENT

I) Did the Court Err in Reinstating the Award of Interest Against the South Carolina Property & Casualty Insurance Guaranty Association?

In its Order filed January 8, 2014, this Court reinstated an award of interest against the South Carolina Property and Casualty Insurance Guaranty Association (the "Guaranty Association"), which had been previously reversed by the South Carolina Court of Appeals. The reinstatement of the interest award was based on the Court's interpretation of the definition of "covered claim" provided in S.C. Code Ann. § 38-31-20(8) of the South Carolina Property and Casualty Insurance Guaranty Association Act (the "Act").

This Court held that the liability protections afforded to the Guaranty Associations by way of limitations in the definition of "covered claim" only apply to claims arising from an insolvent insurance carrier. This Court further held that the obligation of the Guaranty Association to pay claims "brought directly against [it] will not be limited to 'covered claims'". The Court identifies claims arising from policies issued by an insolvent insurance carrier as "derivative claims" and identifies claims brought directly against the Guaranty Association as "direct claims". In support of its reasoning, this Court notes S.C. Code Ann. § 38-31-60(j) provides that the Guaranty Association may be held directly liable for its own actions and there is no "covered claims" limitation for the Guaranty's direct liability. The Court then also notes that there is no "reference to the Guaranty [Associations] direct liability in the definition of "covered claims".

Based upon this analytical framework, this Court held that the award of interest was based upon the Guaranty Association's own conduct in failing to pay the award in a timely fashion and was therefore a direct claim. Accordingly, this Court ruled that the prohibition against, "any awards of interest" on "covered claims" expressly provideded by S.C. Code Ann. §

38-31-20(8)(h) would not apply to this interest award. The Court modified the date for which the Guaranty Association's responsibility for payment of the award of interest would begin to April 27, 2004 and remanded the matter back to the Workers' Compensation Commission for determination of the amount owed as interest after that date. This modification was due to the Court's determination that "interest is only appropriate for [the Guaranty Association] when associated with direct liability.

The Petitioner respectfully submits that this Court has misapprehended the Act and incorrectly reinstated an assessment of interest against the Guaranty Association despite a clear statutory prohibition barring "any awards of interest" against the Guaranty Association on "covered claims." The Court's ruling on the award of interest is improper for three reasons: First, the interest award at issue should not be classified as direct liability given that it arises from the Association's obligation to pay an award of workers' compensation benefits due to the coverage of an insolvent insurer under a 'covered claim.' Second, the Guaranty Association is prohibited by the express language of the Act from paying any claims "which arises out of and is within the coverage" of an insolvent insurer unless the claim is a "covered claim." Lastly, the definition of "covered claim" includes claims arising from both direct and derivative liability and the limitations on covered claims apply to both equally.

This Court held that "the 'covered claim' limitation, applies only in the context of claims deriving from insolvent insurance carrier's policies" and that "when a claim is brought directly against [the Guaranty Association], it will not be limited to 'covered claims'". The definition of "covered claim" provided by the legislature extends to include a claim "which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies", except as otherwise expressly excluded. The interest award at issue was

assessed based upon the Guaranty Associations failure to timely pay a workers' compensation award form a "covered claim." That is, the Guaranty Association's *only* obligation to pay this award arises from the insurance coverage extended by the insolvent insurance carrier under a covered claim. There is no logical way to construe the Guaranty Association's obligation to pay this award as anything other than a claim which arose out of and was within the coverage of the insolvent insurer. As a result, the claim is only payable as a *covered claim*, arising solely from the express statutory exclusion for any claims of interest contained in S.C. Code Ann. §38-31-20(8)(h).

By counter example, the Guaranty Association, as an entity could have what may be deemed 'directly liability' on a claim if, for instance, actions of its own employees or agents led to some type of legal liability, through negligence, breach of contract or otherwise. However, as noted above, in the instance case, the only obligation the Guaranty Association has on this case is by and through the operation of this being a "covered claim."

The prohibition of "any award of interest" in §38-31-20(8)(h) is clear and unambiguous. See *New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007). ("We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope"). See also *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning"). The statute's language is considered the best evidence of legislative intent. *Id.*

It should also be noted pursuant to S. C. Code Ann. §38-31-60(a)(iv)(2), a Claimant may still make a claim for awarded interest and penalties against the insolvent insurer in liquidation even though SCPCIGA does not have coverage for such awards.

Notably, extra contractual damages, such as penalties, can be part of "covered claims" under the Guaranty Association Act as long as the award was made directly against the SCPCIGA, and not solely against the insolvent carrier. S.C. Code Ann. §38-31-20(8)(a) provides for such extra contractual damages on "covered claims" when awarded against the Guaranty Association in glaring juxtaposition to §38-31-20(8)(h) which categorically prohibits "any claim of interest," yet provides for no permissible claim of interest on "covered claims" if awarded directly "against the Guaranty Association.":

> (8) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. 'Covered claim' does not include:
>
> (a) any amount awarded as extra-contractual damages **unless awarded against the association;**
>
> [].…[]
>
> (h) any claims for interest.
>
> S.C. Code Ann. §38-31-20 (emphasis added)

Under the reasoning of the this court in the case *sub judice* the aspect of permitted certain items to become part of "covered claims" when awarded directly against the Guaranty Association – such as extra contractual damages as outlined above – would be emasculated and rendered a meaningless distinction, because any prohibition of covered claims, so long as it was

awarded directly against the Guaranty Association (post liquidation of the insolvent carrier) would be considered "direct liability." This is clearly not what the legislature intended by making a categorical prohibition from the Guaranty Association covering "any award of interest," on covered claims.

In response to the Respondents first argument on statutory interpretation, the language of §38-31-20(8)(h) is clear and unambiguous. "If the language in the statute is plain and unambiguous, there is no need to resort to the rules of the statutory interpretation." *City of Columbia v. Am. Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996) cited by *Hopper v. Terry Hunt Construction*, 373 S.C. 475, 481; 646 S.E.2d 162, 165 (S.C. Ct. App. 2007). Not only is the precise language of §38-31-20(8)(h) clear and categorical in stating that the SCPCIGA does not cover, "any claims for interest[,]" but it would be strange indeed to institute a scheme of statutory interpretation that allowed the reading of one part of any article within a chapter of Title 38 to make a provision within another article wholly inoperative.

Moreover, the plain language of §38-31-60(b) actually provides that the SCPCIGA is, "considered the insurer in the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." (emphasis added). Again, §38-31-20(8) lists the definition of 'covered claims' under the Guaranty Act, *as well as the specific exceptions thereto*, such as any claim of interest against the SCPCIGA. Therefore, a 'harmonious' reading of these statutory provisions does not require any strained exercise in statutory interpretation.

Even if the Court did need to resort to a regime of statutory interpretation to differentiate whether claims of interest could be awarded against the SCPCIGA, South Carolina case law

provides the proper remedy for the conflict. S.C. Courts have consistently held that when two statutory provisions appear to be in conflict on the same issue, the more specific statutory provision is the one that prevails. (See *Criterion Ins. Co. v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459 (1972) (special statute controls over a general statute). When one statute "specifically addresses" a certain issue, that statute will, "therefore, control[] over the more general" statutory provision. *Mims v. Alston*, 312 S.C. 311, 313; 440 S.E.2d 357, 359 (S.C. 1994) (cited with approval by *Avant v. Willowglen Academy*, 367 S.C. 315, 319; 626 S.E.2d 797, 799 (S.C. 2006)).

The categorical prohibition under 'covered claims' by the SCPCIGA in §38-31-20(8)(h) for "any claims of interest," is the more specific statutory provision on this point. Not only can §38-31-20(8)(h) be read in harmonious conjunction with the other provisions of the Guaranty Association Act, *but even if it could not be*, this statute is controlling for covered liabilities allowed by the legislature for the SCPCIGA, as it is the most specific statutory provision on this issue. But for the aspect of this being a "covered claim" the SCPCIGA would not be involved in this claim for benefits, and therefore, a consideration of whether or not this a 'covered claim' and the obligation of the Guaranty Association for 'covered claims' is the only logical framework from which to consider the statutory obligations of the SCPCIGA would have.

There is simply no basis in the Act for payment of any claims "which arise[] out of and [are] within the coverage" of an insolvent insurer if the claim *does not meet the definition of a covered claim*. The legislature has expressly directed that the Guaranty Association "shall investigate claims brought against the Association and adjust, compromise, settle, and pay ***covered claims*** to the extent of the Associations obligations ***and deny all other claims***". S.C. Code Ann. § 38-31-60(d)(emphasis added). Accordingly, in the event the nature of the liability that gave rise to the interest award could preclude this claim from meeting the definition of a

covered claim, as found by this Court, the claim would be outside of the Association's statutory authority to adjust, compromise, settle, or pay.

In the case of *Builders Transport, Inc. v. The South Carolina Property and Casualty Insurance Guaranty Association*, 307 S.C. 398, 415 S.E.2d 419 (1992), this court upheld a pre-judgment interest award entered against the Guaranty Association. The *Builders'* Court concluded its opinion with the following language "absent an indication legislature intended to exempt SCIGA from the general rule, we agree with the trial court that SCIGA is liable for pre-judgment interest in this case." *Id.* The *Builders* case was determined based upon an earlier version of the Guaranty Association Act, which did not contain the subsequently enacted legislative limitations to the definition of covered claim. In the years following the *Builders'* opinion, the definition of covered claims in the Act has been substantially modified by the Legislature to include the prohibition of any award of interest.

Despite the Court's stated inability to find "reference to the Guaranty [Associations] direct liability in the definition of "covered claims", the currently enacted definition of "covered claim" does include reference to claims arising from both direct and derivative liability. S.C. Code Ann. § 38-31-20(8)(a) expressly excludes from the definition of Covered Claims "any amount awarded as extra contractual damages **unless awarded against the Association**". (Emphasis added.) This operates as a savings clause to preserve within the definition of "covered claims" awards of extra-contractual damages when they are awarded directly against the Association. There is no similar savings clause attached to subsection (h) that excludes claims of interest from the definition of covered claims.

The sole basis for the Court's differentiation between direct and derivative liability is the language of S.C. Code Ann. § 38-31-60(j) that allows the Guaranty Association "to be sued".

Extra-contractual damages awarded against the Association can only arise from an action against the Guaranty Association relating to its own conduct. Accordingly, the sole saving feature that the legislature provided whereby extra-contractual damages can be a "covered claim" (i.e. awarded against the Guaranty Association) is precisely the scenario the Court has termed direct liability and set forth as the basis for disregarding the prohibition against awards of interest ("when a claim is brought directly against [the Guaranty Association], it will not be limited to "covered claims.")

The lack of a savings clause in the probation against claims of interest and the inclusion of saving language in the extra-contractual damages clause clearly evidences the legislature's ability to differentiate between claims arising based on direct and derivative liability. Had the legislature intended to allow claims of interest in instances where the basis for such award was a matter of direct liability, a saving clause such the one utilized for awards of extra contractual damages could have been used. The fact that no such clause was utilized clearly shows that the legislature intended to prohibit claims for interest from the definition of covered claim regardless of whether they arose from direct or derivative liability. Further the inclusion of a saving clause in the extra contractual damage section which permits an award of extra contractual damages when awarded against the Association clearly shows that covered claims include both derivative and direct liability. Therefore, the Legislature intended the limitations on covered claims to apply equally to claims arising from both direct and derivative liability.

The differentiation in S.C. Code Ann. § 38-31-20(8)(a) between awards that are directly against the Association and those that are not is the only place in the Act where the derivative or direct nature of liability is relevant. There is no evidence in the Act that the Legislature intended to extend liability for a claim "which arises out of and is within the coverage" of an insolvent

insurer beyond the limits of a "covered claim" based upon a determination of direct or derivative nature of the liability. Therefore, the limitations contained in the definition of "covered claim" must apply regardless of the derivative or direct nature of the liability except where the legislature has provided otherwise as in the limitation on extra-contractual damages.

II. Did the Court Err in Selecting April 27, 2004 as the Date on Which to Begin the Guaranty Association's Responsibly for the Interest Award?

Assuming *arguendo* that the express prohibition of an award of interest provided by S.C. Code Ann. § 38-31-20(8)(h) did not exist and does not apply, the Guaranty Association further contends that the date from which interest would run was overlooked or misapprehended in this matter. In its January 8, 2014 Opinion, this Court determined that interest should run from April 27, 2004 to present, on the lump sum proceeds which were originally awarded to Frances Hudson, who died before the first appellate panel hearing ever took place before the SCWCC. This date was chosen in relation to the date of the first circuit court Order in this matter. Notably, the proper beneficiaries had not been identified and adjudicated by the Commission or any other court as of April 27, 2004 under S.C. Code Ann. §42-9-280. The Guaranty Association's responsibility for post judgment interest should not begin to have run at a time period in which there was no determination of the proper payee, if any at that time.

This Court held that "the Guaranty [Association] will only be responsible for interest from the date that this lump sum award became finial, which under the statute is April 27, 2004, seven days from the date of the Order of Remittitur from the Court of Appeals." This date was chosen based on the withdraw of the appeal that originated from the lump sum award.

During oral arguments before this Court, in response to direct questioning from Justice Pleicones, opposing counsel addressed the issue of the time at which he felt the Guaranty Association's responsibility for direct interest should begin. During this exchange, opposing

counsel conceded that the Guaranty Association should not be liable for direct interest until after the Dependency Hearing which was conducted by Commissioner Bass on January 25, 2005. Opposing counsel noted that this time frame was being proposed out of fairness and recognition of the Carrier's concern for uncertainties relating to proper distribution of proceeds which could result in the Carrier having to pay the award twice in the event that the payment was made to the wrong payee.

This Court addressed the issue of uncertainties relating to proper distribution of proceeds in its opinion. The Court determined that no legitimate dispute existed as to who the proper payee was due to what it found to be a valid settlement agreement between all potential beneficiaries. The purported settlement agreement – reached between opposing potential beneficiaries – was *first* made known to the Defendants and the Commission during the hearing before Commissioner Bass on January 25, 2005. Prior this date, there is no basis to support a conclusion that any degree of certainty existed as to who the proper payee(s) were for benefits.

The attorney for the Employer who participated in the Hearing before Commissioner Bass had at all times thereafter insisted that he did not consent to the settlement agreement purportedly reached between all potential beneficiaries, and did not believe it to be a valid agreement as the Workers' Compensation Act provides for no mechanism to award payments – under any circumstance, to the estate of a decedent. The first notice that the Employer and the Guaranty Association had that Commissioner Bass was relying upon the settlement agreement as a mechanism by which to determine distribution was Commissioner Bass' June 3, 2005 Order. This is the point at which opposing counsel has set forth as being the time for direct interest to start running against the Guaranty Association. The basis for this is his claim from this point

forward there was no dispute as to proper payee. However, this reasoning fails to recognize that the Dependency Order was not final on June 3, 2005.

As a point of public policy, in the rare instances, such as this one, where a Claimant dies form non-work related causes, while there is an ongoing appeal, and the award does not abate under S.C. Code Ann. §42-9-280, the current ruling by this Court, if unmodified, would put the carriers in an impossible situation. Namely by the fact that, as of April 27, 2004, and on any date since Frances Hudson's death, up until the time of the June 3, 2005 Order issued by Commissioner Bass, even if the SCPCIGA decided not to pursue any further appeals of any issue of any nature, of any kind on any point or law or fact – there still would not have been a proper payee to whom a check could have been remitted, which would have extinguished the liabilities of the Guaranty Association. Clearly, in the instant case, the two opposing factions ultimately determined before Commission Bass, in a consent agreement that was placed on the record – though never reduced to writing – that they would split the proceeds fifty-fifty. However, any prior payment to any prior party would not have relieved the Guaranty Association of any liability to another party which may have arisen with a colorable claim. Only an adjudication of the Commission through a dependency hearing will provide such protection to the Defendants. Requiring post judgment interest be paid on an award that is unpayable to any party at the time interest begins to run, works a patent unfairness, and creates uncertainty for carriers in similar situations in the future.

Furthermore, South Carolina Code Ann. § 42-17-60 provides that an Order of a Single Workers' Compensation Commissioner is not a final judgment until the time for filing for review by the Full Commission passes without such review being sought or, in the event such review is sought, the issuance of an Order of the Full Commission following review of the Single

Commissioner's Order. This section then provides for effect of filing an appeal following review by the Full Commission and expressly provides: "interest accrues on an unpaid portion of the award at the legal rate of interest as established in Section 34-31-20 (B) during the pendency of an appeal." *Id.* Accordingly, interest on the Bass Order of June 2005, would only begin to run on or after it becomes final.

In the present case, Commissioner's Bass Order from the dependency hearing was the first Order to recognize the purported disbursement agreement between all potential beneficiaries, and was the first point that an argument can be made to show that there no longer existed a dispute regarding determination of proper payees for disbursement. Following issuance of the Dependency Order, the Defendants sought full commission review of the Dependency Order. Accordingly, the Dependency Order was not a final order until the Full Commission issued its Order on June 29, 2006. Therefore, in the event that the award of interest against the Guaranty Association stands, the earliest date at which such direct interest should run is June 29, 2006. This is the earliest date for which an argument can logically be made showing that no uncertainty remained regarding the distribution of proceeds.

CONCLUSION

For the reasons set forth above, the Guaranty Association respectfully asserts that this Court has incorrectly applied the above referenced provisions of the Guaranty Association Act and the Workers' Compensation Act under the circumstances of this claim, and that an assessment of interest against the Guaranty Association was not proper. Accordingly, the Guaranty Association requests this Court grant rehearing on this issue and affirm the ruling of the South Carolina Court of Appeals whereby the award of interest was vacated, or alternatively utilized the date June 29, 2006 as the date on which such interest would begin to accrue.

Respectfully Submitted

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Columbia, SC
January 23, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Kenneth G. Goode, Circuit Court Judge

Case No.: 2006-CP-29-941 &
2006-CP-29-955

Frances S. Hudson, Deceased Employee, by Kenneth Hudson and Keith Hudson, Co-Executors of her Estate, and Matthew Deese and/or Andrew Deese,.....Respondents.

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company in liquidation through S.C. Property and Casualty Insurance Guaranty Association, carrier,.....Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing of the SC Property & Casualty Ins. Guaranty Association upon all counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on January 23, 2014 addressed to them as follows:

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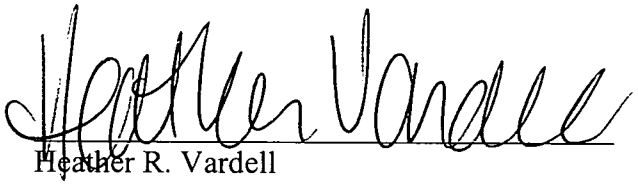

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January 23, 2014