THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

The Honorable Susan S. Barden, Melody L. James and Scott T. Beck

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WCC File No. 0810152

SOUTH CAROLINA SECOND INJURY FUND,..APPELLANT,

v.

GRIFFCO OF WAMPEE, INC., EMPLOYER, AND
COMMERCE & INDUSTRY INSURANCE COMPANY,
CARRIER,..RESPONDENTS.

In re:
Patricia Fore, Employee, Claimant,

v.

Griffco of Wampee, Inc., Employer, and Commerce & Industry Insurance Company,
Carrier, Defendants, Respondents

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION'S ORDER REQUIRING THE SECOND INJURY FUND TO REIMBURSE CARRIER FOR CLAIMANT'S COMPENSATION BENEFITS WAS BARRED UNDER S.C. CODE ANN. § 42-7-320(B)?

II. WHETHER SUBSTANTIAL EVIDENCE SUPPORTED THE COMMISSION'S FINDING THAT CARRIER WAS ENTITLED TO REIMBURSEMENT UNDER S.C. CODE ANN. § 42-9-400?

STATEMENT OF THE CASE

The underlying claim involves alleged injuries to the back and hip from a work-related accident on February 24, 2008. Carrier put the Second Injury Fund ("Fund") on notice of a potential claim on October 2, 2009. (R. p. 168). The Carrier provided treatment, including a lumbar fusion. On March 10, 2011, Carrier submitted a claim to the Fund for reimbursement due to Claimant's pre-existing diabetes. (R. p. 61). On June 20, 2011, the Fund denied the claim. (R. p. 62).

After a slow recovery, Claimant filed a Form 50 seeking permanent disability benefits on June 27, 2011. A hearing was held on September 27, 2011, after which Carrier filed a Form 54 seeking Commission review of the Fund's denial of its claim for reimbursement. (R. p. 63). On November 10, 2011, the Fund filed its answer to Carrier's request, denying the claim on numerous grounds. (R. p. 64). By order dated January 18, 2012, the Single Commissioner awarded her 40% permanent partial disability to her back, pursuant to S.C. Code Ann. § 42-90-30, as well as lifetime replacement of any hardware.[1] (R. pp. 16-31).

Thereafter, on February 21, 2012, Carrier submitted its Form 58 pre-hearing brief in support of its request for reimbursement from the Fund, along with its notice of witnesses and medical reports to be introduced as evidence. (R. pp. 65-67). A hearing was held on April 26, 2012 to determine whether Carrier was entitled to reimbursement from the Fund. By Order dated December 19, 2012, Single Commissioner Andrea C. Roche ordered the Fund to reimburse the Defendants for all compensation benefits payable. (R. pp. 32-41). The Fund filed a Form 30 request for Full Commission review. By Order filed July 15, 2013, the Full Commission

[1] On August 27, 2012, the Full Commission affirmed the Single Commissioner's determination of permanent disability benefits. Decision & Order of the Full Commission (August 27, 2012). Claimant's appeal of this Order is pending before this Court.

affirmed the decision of the Single Commissioner. (R. pp. 42-49). The Fund timely appealed to this Court.

STATEMENT OF THE FACTS

Appellant/Claimant Patricia Fore sustained a work-related injury to her lower back on February 21, 2008, when she bumped into a meat saw while carrying approximately 60 pounds of meat. (R. p. 108). Claimant first sought treatment from Mark A. Wolgin, M.D., on September 16, 2008. (R. pp. 88-89). At that appointment, Dr. Wolgin documented the Claimant's medical history, which was "significant for diabetes mellitus." *Id.* Thad Griffin, the Employer's president, indicated he was aware from general conversation with the Claimant that she suffered from diabetes prior to her injury. (R. p. 167).

After a course of conservative treatment, the Claimant elected to undergo surgery. (R. p. 82). The Claimant received a two-level fusion on May 19, 2010. (R. p. 78). She also continued follow up treatment with Dr. Wolgin. (R. p. 77). A CT scan on February 9, 2011, showed no evidence of hardware failure but did show evidence of a non-union in places. (R. p. 25). As of February 14, 2011, the Claimant stated she did not wish to undergo additional surgery. (R. pp. 25-26). Dr. Wolgin released the Claimant from treatment with a 36% impairment. (R. p. 26).

On February 21, 2011, Dr. Wolgin provided his opinion, within a reasonable degree of medical certainty, that Claimant had or most likely had diabetes prior to her work injury of February 24, 2008, and that the diabetes "may have contributed to her fusion not uniting." (R. p. 68). Dr. Wolgin elaborated on his opinion, stating that "diabetes, obesity/overweight, and smoking all contributed to the nonunion." (R. p. 69). He further opined that the Claimant's pre-existing diabetes most probably caused her to lose more time from work that she would have had from the injury alone, and that the Claimant's pre-existing diabetes most probably resulted in

substantially higher percentage of permanent impairment that she would have had from the injury alone. (R. p. 68).

STANDARD OF REVIEW

Judicial review of a Worker's Compensation Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5). *Gray v. Club Group, Ltd.*, 339 S.C. 173, 180, 528 S.E.2d 435, 439 (Ct. App. 2000); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "This Court can reverse or modify the decision of the Commission where the substantial rights of the appellant 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 considering the record as a whole." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 293 (2011).

The Commission is the ultimate fact finder in workers' compensation cases. *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 729 (1989). A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action." *Etheredge v. Monsanto Co.*, 349 S.C. 451, 456, 562 S.E.2d 679, 681-82 (Ct. App. 2002). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 216, 217 (1981). "Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive." *Etheridge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002).

ARGUMENT

I. The Commission's order requiring the Second Injury Fund to reimburse Carrier for Claimant's compensation benefits was not barred under S.C. Code Ann. § 42-7-320.

The Fund argues that the Commission erred as a matter of law in requiring it to reimburse the Carrier for compensation benefits because Carrier's reimbursement claim is barred under S.C. Code Ann. § 42-7-320(B), which states that "[a]fter December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier." The Fund claims that S.C. Code Ann. § 42-7-320(B) "only allows for reimbursement of claims that were accepted by the Fund on or before December 31, 2011 ...." Because Carrier's claim for reimbursement had not been accepted by the Fund before December 31, 2011, the Fund argues that the Commission erred in directing the Fund to reimburse Carrier for compensation benefits. The Commission committed no error.

Section 42-7-320(B) states as follows:

> (B) After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier. The fund shall not consider a claim for reimbursement for an injury that occurs on or after July 1, 2008.
>
> (1) An employer, self-insurer, or insurance carrier must notify the Second Injury Fund of a potential claim by December 31, 2010. Failure to submit notice by December 31, 2010, shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.
>
> (2) An 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.
>
> (3) Insurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund assessments, as determined by the State Budget and Control Board, in order to pay accepted claims. The fund shall continue reimbursing employers and insurance carriers for claims accepted by the fund on or before December 31, 2011.

The Fund does not take issue with any of the requirements of S.C. Code Ann. § 42-7-320(B) other than the directive that "the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier" after December 31, 2011.

At issue here is the meaning of the phrase "accept a claim for reimbursement" within S.C. Code Ann. § 42-7-320(B). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010). "The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will." *Id.* "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." *Id.* "The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Terms must be construed in context with the rest of the Act. *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005).

Because the operative word "accept," is not defined in the Worker's Compensation Act, this Court applies its "usual and customary meaning." *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005). According to the Merriam-Webster Dictionary, "accept" is defined as "to receive willingly," "to agree to undertake," "to give admittance or approval to," "to make a favorable response to," and "to assume an obligation to pay." "Accept," Merriam-Webster Dictionary (http://www.merriam-webster.com/dictionary/accept). The word "accept" connotes consent on the part of the Fund.

Taking the usual and customary meanings of "accept" and construing the word in context with the Act, it is clear that the intent of S.C. Code Ann. § 42-7-320(B) is to prohibit the Fund

from voluntarily agreeing to pay a claim made by the Carrier to the Fund for reimbursement after December 30, 2011. This section does not apply when a claim is submitted to the Fund prior to December 30, 2011, the Fund denies the claim, which is then contested by the Carrier and adjudicated by the Commission in favor of the Carrier. To construe S.C. Code Ann. § 42-9-320(B) in the manner the Fund asserts contravenes the well-settled rule that words in a statute must be construed in light of the Act as a whole rather than focusing on isolated words. *Hembree v. One Thousand Eight Hundred Forty-Seven Dollars 1,847.00*, 404 S.C. 241, 246, 743 S.E.2d 864, 866 (Ct. App. 2013); *see also Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) ("The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose."). The Fund's interpretation would yield a result that ignores the Commission's statutory authority to award reimbursement from the Fund. S.C. Code Ann. § 42-7-310(b); S.C. Code Ann. § 42-9-400; *see also* S.C. Code Ann. § 42-3-20 ("The commissioners shall hear and determine all contested cases, conduct informal conferences when necessary, approve settlements, hear applications for full commission reviews, and handle such other matters as may come before the department for judicial disposition."). Construed in light of the Act as a whole, S.C. Code Ann. § 42-9-320(B) simply bars the Fund from voluntarily accepting claims after December 31, 2011; it does not bar the Commission from ordering the Fund to reimburse a carrier.

Additionally, the Fund's interpretation would allow the Fund to impermissibly avoid its duty to reimburse simply by showing it denied a claim made before December 31, 2011. *C.f. Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 63, 744 S.E.2d 547, 550-551 (2013) (rejecting construction of statute requiring mediation within certain time period as affecting subject matter jurisdiction because such an interpretation was "ripe for mischief, as defendants could easily

thwart timely completion of the mediation conference."). What is more, the Fund's interpretation would effectively deny Carrier's due process right to a hearing before the Commission to dispute the Fund's denial. *Adams v. H.R. Allen, Inc*, 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012). Therefore, the Fund's interpretation should be flatly rejected. *See Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) ("The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.").

II. Substantial evidence supports the Commission's finding that Carrier was entitled to reimbursement under S.C. Code Ann. § 42-9-400.

Pursuant to S.C. Code Ann. § 42-9-400(a):

> If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits ....

A "permanent physical impairment" is defined as "any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed." S.C. Code Ann. § 42-9-400(d). "When an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists when the condition is ... diabetes." *Id.* at (d)(2). Here, evidence unquestionably shows that Claimant had preexisting diabetes. (R. pp. 70, 71, 72, 73, 74, 76, 77, 83, 85, 88, 91). The Employer established

his prior knowledge of Claimant's pre-existing diabetes. (R. p. 167). Therefore, Claimant's diabetes is presumed to constitute a "permanent physical impairment."

The Fund argues that "the medical evidence establishes that Claimant's pre-existing diabetes was not aggravated by the February 24, 2008 injury." Appellant's Brief, pp. 4-5. The Fund misstates the law. Carrier is not required to show that Claimant's work injury aggravated her diabetes. S.C. Code Ann. § 42-9-400 requires a showing that the Claimant's diabetes aggravated Claimant's back injury, and caused substantially greater disability, than Claimant's back injury alone. Appellant's arguments on pages four and five of its Brief, which make arguments based upon an incorrect statement of the law, should be disregarded.

To the extent that the Fund intended to argue that the Commission erred in finding that Claimant's diabetes aggravated her back injury, the Commission committed no error. Claimant suffered a compensable injury to her back on February 24, 2008. (R. p. 88). Because treatment consisting of physical therapy and injections were not reducing Claimant's pain and discomfort, she opted to undergo fusion surgery on May 19, 2010. (R. pp. 82-83, 85-86). The medical evidence shows that Claimant's surgical fusion of her back did not heal properly. (R. pp. 68-72). This non-fusion caused her to experience continued pain and loss in mobility. (R. p. 70-80). She decided not to pursue an additional surgical intervention, and thereafter reached maximum medical improvement on February 14, 2011. (R. p. 26-27). Claimant's attending physician, Dr. Wolgin, opined, within a reasonable degree of medical certainty, that Claimant's diabetes contributed to the failure of Claimant's surgical fusion to heal, along with obesity and smoking.[2] (R. pp. 68-69). In other words, Claimant's diabetes aggravated her back injury because the disease reduced the efficacy of her surgical fusion of vertebrae. "Substantial evidence is evidence

[2] There is no requirement under S.C. Code Ann. § 42-9-400(a) that the pre-existing permanent physical impairment be the only cause of substantially greater disability.

which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *City of Greenville v. South Carolina Second Injury Fund*, 339 S.C. 141, 146, 528 S.E.2d 91, 93 (Ct. App. 2000). Here, the Commission reviewed this evidence and found that Claimant's diabetes aggravated her back injury. Reasonable minds would reach the same result.

The Fund then argues that the "evidence establishes that there was no substantially greater permanent disability as a result of Claimant's preexisting diabetes." Appellant's Brief, p. 5. To the contrary, substantial evidence supports the Commission's finding that the Claimant's diabetes resulted in compensation benefits substantially greater than the back injury alone would have caused. Dr. Wolgin stated his opinion, within a reasonable degree of certainty, that diabetes "most probably" caused Claimant to "lose more time from work than ... she would have had from the injury alone" and "most probably" resulted in "a substantially higher percentage of permanent impairment than ... she would have had from the injury alone." (R. p. 68). The Commission found this evidence credible and thus, found that "the Claimant's prior permanent physical impairment resulted in compensation that is substantially greater and is caused by aggravation of the pre-existing impairment [than] that which would have resulted from the subsequent injury alone." (R. p. 37). Dr. Wolgin's opinion constitutes substantial evidence in support of the Commission's decision. *See City of Greenville v. South Carolina Second Injury Fund*, 339 S.C. 141, 146, 528 S.E.2d 91, 93 (Ct. App. 2000) ("Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.").

The Fund did not enter evidence to rebut Carrier's evidence in support of reimbursement. With the Carrier's evidence as the only evidence for the Commission to consider, the

Commission properly awarded reimbursement to the Carrier. *See Johnson v. Beauty Unlimited Landscape Co.,* 379 S.C. 403, 408-409, 665 S.E.2d 656, 659 (Ct. App. 2008) (holding that circuit court did not err in affirming award when the only medical testimony offered supported the award); *Bass v. Kenco Group*, 366 S.C. 450, 467, 622 S.E.2d 577, 586 (Ct. App. 2005) (affirming award because no evidence was entered to rebut or contradict medical opinion; therefore, the only evidence in the record indicated permanent disability). To the extent that the Fund attempts to draw a different conclusion from the Carrier's evidence, the possibility of drawing a conclusion different from that of the Commission does not prevent the Commission's finding from being supported by substantial evidence." *Burnette v. City of Greenville*, 401 S.C. 417, 427, 737 S.E.2d 200, 205 (Ct. App. 2012).

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's Order.

Respectfully submitted,

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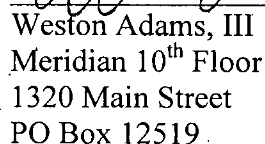
PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents Griffco of Wampee, Inc., and Commerce & Industry Insurance Company comply with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief of Respondents comply with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Brief of Respondents by placing in the United States Mail, postage prepaid, on the 21st day of February, 2014, addressed to counsel of record, as follows:

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