

RECEIVED

APR 18 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2013-002607

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

v.

Sompo Japan Insurance Company,.....Respondent.

INITIAL BRIEF OF APPELLANT

Latonya Dilligard Edwards, Esq.
Dilligard Edwards, LLC
3790 Fernandina Road Suite 103
Columbia, South Carolina 29210
(803) 750-2214 (telephone)
(803) 750-2377 (facsimile)

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities iii

Issues on Appeal 1

Statement of the Case..... 1

Standard of Review 2

Historical Background 2

Argument..... 3

 I. THE COMMISSION COMMITTED AN ERROR OF LAW IN ADMITTING
 CARRIER’S MEDICAL QUESTIONNAIRE INTO EVIDENCE..... 3

 II. CARRIER’S CLAIM IS BARRED BY S.C. CODE ANN. § 42-7-320(B)..... 4

 III. CLAIMANT’S PRIOR CERVICAL PROBLEMS WERE NOT PERMANENT AND
 SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO
 HER EMPLOYMENT 5

 IV. CLAIMANT’S PREEXISTING CONDITION DID NOT CREATE
 SUBSTANTIALLY GREATER LIABILITY 6

Conclusion..... 8

TABLE OF AUTHORITIES

Cases

<u>Bass v. Kenco Grp.</u> , 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005)	2
<u>Corbin v. Kohler Co.</u> , 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).....	2
<u>Crisp v. SouthCo.</u> , 401 S.C. 627, 642, 738 S.E.2d 835, 843 (2013)	5,6
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 133, 276 S.E. 2d 304, 305 (1981).....	2
<u>Liberty Mut. Ins. Co. v. S.C. Second Injury Fund</u> , 363 S.C. 612, 619, 611 S.E.2d 297 (Ct. App. 2005).	2
<u>Stone v. Traylor Bros.</u> , 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004).....	2
<u>Thompson v. Cisson Constr. Co.</u> , 377 S.C. 137, 160, 659 S.E. 2d 171, 183 (Ct. App. 2008).....	5

Statutes and Regulations

S.C. Code Ann. § 42-7-320.....	2,3,5
S.C. Code Ann. § 42-7-320(A).....	3
S.C. Code Ann. § 42-7-320(B).....	1,2,3,5
S.C. Code Ann. § 42-7-320(B) (1)	2
S.C. Code Ann. § 42-7-320(B) (2)	4
S.C. Code Ann. § 42-7-320(B) (3)	5
S.C. Code Ann. § 42-9-400.....	1,3,5
S.C. Code Ann. § 42-9-400(a).....	4,6,7
S.C. Code Ann. § 42-9-400(c).....	4
S.C. Code Ann. § 42-9-400(d)	1,3
S.C. Code Ann. § 42-9-400(f)	4
S.C. Code Ann. § 42-17-90.....	1,2,3,5

S.C. Code Ann. § 42-17-90(A)..... 5

Other Authority

WEBSTER’S DESK DICTIONARY 212 and 312 (2004) 5

5 LARSON’S, WORKERS’ COMPENSATION § 91.02(6)..... 5,6

ISSUES ON APPEAL

1. Under S.C. Code Ann. § 42-7-320(B), did the South Carolina Workers' Compensation Commission err in admitting evidence that was submitted after the statutorily mandated deadline?
2. Under S.C. Code Ann. § 42-9-400(d), did the South Carolina Workers' Compensation Commission err in finding that Claimant's prior cervical problem was permanent and serious enough to constitute a hindrance or obstacle to employment?
3. Under S.C. Code Ann. § 42-9-400, did the South Carolina Workers' Compensation Commission err in finding that Claimant's prior cervical problem created substantially greater liability for medical costs and permanent disability?

STATEMENT OF THE CASE

This is an appeal by the South Carolina Second Injury Fund ("Fund") from an award of partial reimbursement under South Carolina Code Ann. § 42-9-400. Employer, Yanagawa of S.C. and Carrier, Sompo Japan Insurance Company (collectively "Carrier"), alleged that they incurred substantially greater liability for medical costs and disability when their employee, Patricia McFadden ("Claimant"), sustained a work injury on October 9, 2002 that either aggravated or combined with her preexisting arthritis. The Fund denied the claim was reimbursable asserting that Claimant's preexisting cervical problems were not a hindrance or obstacle to employment, and did not create substantially greater liability for medical costs and permanent disability as contemplated by S.C. Code Ann. § 42-9-400. The Fund also asserted that this claim was barred by S.C. Code Ann. § 42-7-320(B) and its subsections.

The South Carolina Workers' Compensation Commission found that this claim met the requirements of reimbursement pursuant to S.C. Code Ann. § 42-9-400. The Circuit Court affirmed. The Fund now appeals to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review in workers' compensation cases. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005). An appellate court may not substitute its judgment for that of the Workers' Compensation Commission as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004). Courts can reverse the decision of an administrative agency where it is affected by an error of law or not supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). A reviewing court may reverse an agency decision if the findings or conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).

HISTORICAL BACKGROUND

This is a case of first impression. In 2007, the Workers' Compensation Reform Act created various provisions that impacted the Second Injury Fund. See S.C. Code Ann. § 42-7-320 et. seq. The Workers' Compensation Reform Act required the Fund to initiate a winding down process that would ultimately result in its termination. To that end, the Act set out a series of deadlines to insure an efficient winding down process.

The first step in the process prohibits the Fund from accepting claims with dates of injury on or after July 1, 2008. S.C. Code Ann. § 42-7-320(B). Then, employers, carriers and self-insurers must notify the Fund of a potential claim by December 31, 2010. S.C. Code Ann. § 42-7-320(B) (1). In addition, employers, carriers, and self-insurers must submit all required information to the Fund by June 30, 2011. S.C. Code

Ann. §42-7-320(B) (2). The statute further instructs that the Fund shall not accept a claim for reimbursement after December 31, 2011. S.C. Code Ann. § 42-7-320(B). Finally, the programs and appropriations of the Fund are terminated on and after July 1, 2013. S.C. Code Ann. § 42-7-320(A). The dates outlined in the statute are mandatory not discretionary.

ARGUMENT

I. THE COMMISSION COMMITTED AN ERROR OF LAW IN ADMITTING CARRIER'S MEDICAL QUESTIONNAIRE INTO EVIDENCE.

South Carolina Code § 42-7-320(B) (2) states the following:

[a]n 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.

S.C. Code Ann. § 42-7-320(B) (2).

While this provision does not specifically define "required information," the logical conclusion is that "required information" is information necessary to determine if a carrier meets all reimbursement criteria outlined in S.C. Code Ann. § 42-9-400. In order to establish its entitlement to reimbursement, a carrier must prove that Claimant had a permanent preexisting physical impairment that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment, and that the preexisting impairment created substantially greater liability than that which would have resulted from the subsequent injury alone. S.C. Code Ann. § 42-9-400(a) and (d).

Carrier must also prove that it had knowledge of Claimant's preexisting impairment or alternatively, that Claimant concealed the impairment. S.C. Code Ann. §42-9-400(c). As a prerequisite, Carrier must establish that it provided notice of a potential Second Injury Fund claim prior to paying Claimant seventy-eight (78) weeks of benefits. S.C. Code Ann. § 42-9-400(f). Thus, information relative to notice, knowledge, preexisting impairment, hindrance, and substantial increase in liability would constitute required information.

The Fund objected to Carrier's submission dated March 7, 2012, which is the medical questionnaire of the treating physician. In this case, the medical questionnaire upon which Carrier relies to support its reimbursement claim was submitted in March 2012, which is well after the June 30, 2011 statutory deadline. This questionnaire contained required information and should not have been admitted because it did not comply with the mandatory deadlines outlined in S.C. Code Ann. § 42-7-320(B) (2).

The Fund denied this claim via letter dated August 9, 2011 because it had not received all required information by June 30, 2011. The primary deficiency was the lack of medical support on Second Injury Fund elements. R. p. _____. The Commission committed a reversible error when it admitted Carrier's medical questionnaire outside of the statutorily prescribed deadline. Since Carrier's questionnaire contained "required information" pursuant to § 42-7-320(B) (2), it was not timely submitted and the only remedy is reversal.

II. CARRIER'S CLAIM IS BARRED BY S.C. CODE ANN. § 42-7-320(B).

Section 42-7-320(B) 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.” S.C. Code Ann. § 42-7-320(B). Since “shall” is contained in the statute, the action is mandatory. Thompson v. Cisson Constr. Co., 377 S.C. 137, 160 659 S.E.2d 171, 183 (Ct. App. 2008). Thus, the plain meaning of this provision bars the Fund from accepting a claim for reimbursement under any circumstances. Section 42-7-320(B)(3) further states that “[i]nsurance 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.” S.C. Code Ann. § 42-7-320(B) (3). Thus, the statute does not make any provision for paying claims that have not been accepted on or before December 31, 2011, which reinforces the interpretation that this claim is barred by the statute. Carrier is not entitled to reimbursement pursuant to S.C. Code Ann. § 42-9-400.

III. CLAIMANT’S PRIOR CERVICAL PROBLEMS WERE NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO HER EMPLOYMENT.

While the statutory reimbursement scheme does not define what constitutes a hindrance or obstacle to employment, Webster’s Dictionary defines “hinder” as that which causes delay or difficulty, or to prevent from doing or happening; and “obstacle” as something that obstructs or hinders progress.” WEBSTER’S DESK DICTIONARY 212 and 312 (2004). Additionally, recent case law instructs that “permanent” contemplates that Claimant may require specialized healthcare without the means to earn a living. Crisp v. SouthCo., 401 S.C. 627, 642, 738 S.E.2d 835, 843 (2013). Moreover, Larson’s instructs that whether a condition is a hindrance to employment depends upon whether an employer would hire, employ or promote Claimant knowing all of the facts. 5 LARSON’S

WORKERS' COMPENSATION § 91.02(6). While there were no prior records outlining the extent of the prior cervical problems, the post injury medical records revealed that Claimant complained of neck and shoulder pain two (2) days post injury. R.p. _____. Claimant's history of cervical disc disease was noted but she did not report problems with her neck at that time, but only reported problems with her hip and back. R.p._____.

In January 2003, the treating physician noted that he "operated on her years ago for a cervical disc herniation" but he did not indicate any ongoing problems with Claimant's cervical spine and did not indicate when the surgery was performed. R.p. _____. Furthermore, the treating physician indicated that the lumbar spine, specifically L4-5, was problematic not the cervical spine. R.p. _____. Claimant's prior cervical was not a hindrance to her employment as it did not require any specialized treatment and did not affect her ability to earn a living.

IV. CLAIMANT'S PREEXISTING CONDITION DID NOT CREATE SUBSTANTIALLY GREATER LIABILITY.

Section 42-9-400(a) states as follows:

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 by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title.

S.C. Code Ann. § 42-9-400(a) (Supp. 2005) (emphasis added).


This section requires that the preexisting condition create substantially greater liability to the Carrier with respect to medical costs and permanent disability. Here, Claimant's preexisting arthritis, in the form of cervical disc disease, did not create substantially greater liability for medical costs and permanent disability. Claimant complained of cervical pain two (2) days post injury. R.p. _____. There are no other medical records where Claimant complained of cervical pain. All of Claimant's subsequent complaints related to her lumbar spine. Claimant's post injury treatment all related to her lumbar spine. In January 2003 and March 2003 respectively, Claimant received lumbar injections for pain and a lumbar discectomy. R.pp. _____. In 2004, approximately two (2) years post injury, Claimant received an eight (8%) percent impairment rating to the cervical spine. R.p. _____.

Claimant had lumbar surgery in 2006. R.p. _____. In May 2007, Claimant received a thirty (30%) percent impairment rating to her lumbar spine and a five (5%) percent impairment rating for residual pain and weakness in her legs. R.p. _____. No additional impairment was assigned to the cervical spine at that time. Furthermore, the Settlement Agreement, which was solely based on the indemnity portion of the claim, was specifically allocated to the lumbar spine and residual pain and leg weakness. R.p. _____. There was no allocation for Claimant's cervical spine or any acknowledgement that the cervical spine was a consideration. R.pp. _____. Thus, the prior cervical spine injury did not substantially increase Carrier's liability for medical costs and permanent disability. R.pp. _____. The Commission's decision should be reversed.

CONCLUSION

For the reasons cited herein, the Fund requests that this Honorable Court reverse the decisions below as based on an error of law and not supported by substantial evidence in the record.

Respectfully submitted,

By: 

Latonya Dilligard Edwards, Esquire
Dilligard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, South Carolina 29210
(803) 750-2214 (phone)
(803) 750-2377 (fax)

April 16, 2014
Columbia, South Carolina

RECEIVED

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APR 18 2014

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2013-002607

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

v.

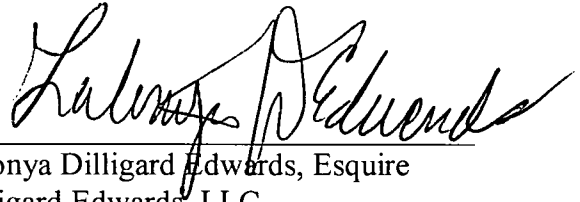
Sompo Japan Insurance Company,.....Respondent.

PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **Initial Brief of Appellant and Designation of Matter To Be Included In Record On Appeal** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondent Yanagawa of S.C., Employer, and Sompo Japan Insurance Company of America, Carrier, and the South Carolina Workers' Compensation Commission, by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope on this 16th day of April, 2014, addressed as follows:

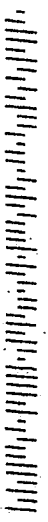
Duke K. McCall, Jr., Esquire
Smith Moore Leatherwood LLP
Post Office Box 87
Greenville, South Carolina 29602

The Honorable Virginia Crocker, Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715



Latonya Dilligard Edwards, Esquire
Dilligard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, South Carolina 29210
S.C. Bar #: 14593
(803) 750-2214 (telephone)
(803) 750-2377 (facsimile)

ATTORNEY FOR APPELLANT



Dilligard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, SC 29203

RECEIVED

APR 18 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

