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SC Court of Appeals

**APPELLATE PANEL
DECISION AND ORDER**

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0800956

OLD REPUBLIC INSURANCE COMPANY,CARRIER/RESPONDENT,

- v -

SC SECOND INJURY FUND,.....DEFENDANT/APPELLANT.

[In Re: Carl Hutchins, Employee v. Pepsi Bottling Group and Old Republic Insurance
Company, Employer and Carrier]

Appellate Panel Review held in Columbia,
South Carolina on January 21, 2014, per notices
timely and properly served on all parties.

Appellate Panel Decision and Order filed
_____, 2014.

APPEARANCES: Defendant/Appellant represented by Latonya Dilligard Edwards,
Esquire, of Dilligard Edwards, LLC, Columbia, South Carolina.

Carrier/Respondent represented by Andrew D. Smith, Esquire, of
Andrew D. Smith, L.L.C., Charleston, South Carolina.

STATEMENT OF CASE

On February 28, 2013, Commissioner Gene McCaskill held a hearing on this matter in Hampton County, South Carolina. By Decision and Order dated September 6, 2013, Commissioner McCaskill granted Carrier's request for reimbursement pursuant to S.C. Code Ann. § 42-9-400 via the following Findings of Fact and Rulings of Law:

FINDINGS OF FACT

1. The first question at bar is whether or not this matter is correctly before the Commission. The Fund argues that this a 2008 case as noted by the WCC File Number attached. As such, a 2007 claim is not correctly before the Commission. The Carrier's position is that even though this case has been assigned a 2008 case number this is actually a 2007 injury. They cite Orders from both Commissioner Barden and Commissioner Williams which identify this as a 2007 injury. While there was an incident in 2008, both Commissioners refer to that event as a temporary aggravation on the 2007 injury. The record is clear, despite the assigned case number; this is clearly a 2007 injury, and a 2007 case which is correctly before the Commission at this hearing.

2. Not only do the Orders from Commissioner Barden and Commissioner Williams identify this as a 2007 injury, but Dr. Strohmeyer, Dr. Zgleszewski and the Claimant statements support this finding.

3. The other questions at bar are all issues pursuant to §42-9-400 and whether or not the Carrier's claim is barred from reimbursement pursuant to §42-7-320(B).

4. Under §42-7-320(B)(2), the Second Injury Fund needs to make a determination whether to accept, deny or accept in part/deny in part any claim submitted to it by December 31, 2011. Their determination is based on process outlined in the statute.

5. If the decision of the Second Injury Fund is adverse to the Employer and/or Carrier, they may seek adjudication by the Commission by filing a Form 54. Contested cases before the Workers' Compensation Commission are governed by the Administrative Procedures Act and the Workers' Compensation Act and Regulations.

6. The Legislature promulgated S.C. Code Ann. §42-7-320 for an orderly dissolution of the Fund. It requires the moving party requesting reimbursement from the Fund to provide all necessary material to the Fund by June 30, 2011, in order for the Fund to make a decision as to whether it was to accept, make a compromised settlement or deny a claim prior to December 31, 2011.

7. The Defendants received their denial letter on July 8, 2010. After that point, the Employer/Carrier no longer had a duty to continue to provide the Fund with additional statements or information, as they had already made a denial of the claim.

8. After the Fund denied the claim with respect to the notice requirement and after having been provided with notice as to both claims and the Order of Commissioner Williams, there was not any additional duty by the Defendants to submit additional information prior to June 30, 2011.

9. The Fund had made its decision as to accept, enter into a compromised settlement, or deny by December 31, 2011.

10. The statute does not place an affirmative burden on the Defendants to continually submit additional evidence after the Fund has made one of its (3) three decisions.

11. The Fund was provided notice prior to the (78) seventy-eight weeks of Temporary Total Disability being paid.

12. The language in §42-7-320(B) cited by the Fund applies to the Fund. It does not and may not prohibit the Commission from considering any and all evidence. In fact, the Commission has a duty to accept any and all relevant and admissible evidence the Employer/Carrier submits in accordance with the Administrative Procedures Act.

13. Section 42-7-320(B) does not serve as a bar as to what evidence may be submitted to the Workers' Compensation Commission.

14. This matter, heard by the Workers' Compensation Commission regarding the issues on Petitioner's Form 54, is a full hearing on the merits of the case at which the Workers' Compensation Commissioner may consider any and all relevant evidence submitted in accordance with the Administrative Procedures Act.

15. The Claimant had a pre-existing condition to his lumbar spine as a result of an on-the-job injury on April 27, 2002. The Claimant sustained a L5-S1 right paracentral disc bulge per the MRI conducted on November 12, 2002.

16. This pre-existing injury caused permanent impairment and was an obstacle and hindrance to his employment or re-employment prior to the November 29, 2007 injury, Dr. Strohmeyer, Dr. Zgleszewski and the Claimant support this finding.

17. The employer had notice of the Claimant's prior injury. (See the Consent or Order entered into by the parties and served on November 28, 2011).

18. One could also presume that they had notice since the Defendants have included a statement from Chuck Williams. [APA 21 page 53].

19. Although, the statement does not reference who Mr. Chuck Williams is, the Defendants presented, during oral argument, he is the Human Resource Representative for PepsiCo.

20. The pre-existing condition which the Employer was aware of was aggravated by the November 29, 2007 injury.

21. Due to the pre-existing condition that was aggravated by the November 29, 2007, injury, the Claimant sustained greater medical expenses and/or disability as a result of the pre-existing condition than he would from the subsequent injury alone.

22. Dr. Scott Strohmeyer states, "As a result of the Claimant's pre-existing condition of April 27, 2002, which was permanently aggravated by the accident on November 29, 2007 and temporarily aggravated by the incident on January 16, 2008, the Claimant sustained substantially greater medical expenses and/or disability as a result of the pre-existing condition of April 27, 2002 than for the November 29, 2007 injury alone. All of my opinions have been provided within a reasonable degree of medical certainty."

23. Dr. Zgleszewski states, "Based upon my treatment and review of the Claimant's prior medical records, it is my opinion the Claimant permanently aggravated his pre-existing condition of April 27, 2002, due to his injury on November 29, 2007...." "All of my opinions have been provided within a reasonable degree of medical certainty."

24. The Defendants have met their burden of proof that the permanent pre-existing condition was aggravated by the subsequent injury causing substantially greater medical expenses and disability than for the subsequent injury alone.

RULINGS OF LAW

1. Under S.C. Code Ann. §42-1-130, the Claimant was a covered Employee at the time in question.
2. Under S.C. Code Ann. §42-1-140, the Employer was a covered Employer at all relevant times.
3. Under S.C. Code Ann. §42-1-40, the Claimant's appropriate average weekly wage is \$780.85 dollars, resulting in an applicable compensation rate of \$520.59 dollars.
4. Under S.C. Code Ann. §42-1-160, the Claimant sustained an on-the-job injury to his spine on November 29, 2007.
5. In accordance with S.C. Code Ann §42-1-160, the Claimant only had a temporary flair-up of the November 29, 2007 injury on January 16, 2008.
6. Under S.C. Code Ann. §42-15-60, the Defendants provided the Claimant with proper and adequate medical care and treatment. The Defendants subsequently entered into a settlement on a Final Lump Sum and Release Agreement to close out the future medical care and treatment in accordance with the Court's interpretation of Dodge that was fair and reasonable to both parties.
7. Under S.C. Code Ann. §42-9-10, S.C. Code Ann. §42-9-20 and S.C. Code Ann. §42-9-30, the Defendants paid the Claimant a fair and equitable amount of compensation for his injuries of November 29, 2007.
8. Under S.C. Code Ann. §42-9-10, S.C. Code Ann. §42-9-20, Reg. 67-502, Reg. 67-503 and Reg. 67-506, the Defendants paid proper and adequate Temporary Total Disability benefits.

9. Under S.C. Code Ann. §42-9-400(a) and S.C. Code Ann. §42-9-400(d) the Claimant had a permanent physical impairment that was serious enough as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment following his injury on April 27, 2002.

10. In accordance with S.C. Code Ann. §42-9-400(a) the Claimant sustained substantially greater medical expenses and disability due to the pre-existing physical condition that was aggravated by the November 29, 2007 than he would have but for the subsequent injury alone.

11. In accordance with S.C. Code Ann. §42-9-400(c) the Employer acquired knowledge of the pre-existing physical impairment after the Claimant was hired but prior to the November 29, 2007, date of accident.

12. In accordance with S.C. Code Ann. §42-9-400(f) the South Carolina Second Injury Fund as well as the South Carolina Workers' Compensation Commission was provided appropriate notice of the potential claim prior to the payment of the first (78) seventy-eight weeks of compensation.

13. In accordance with S.C. Code Ann. §42-9-400(a)(1) the Defendants are entitled to reimbursement of all compensation benefits subsequent to payment of the first (78) seventy-eight weeks of compensation benefits to the Claimant.

14. In accordance with S.C. Code Ann §42-9-400(a)(2) the Defendants are entitled to reimbursement of (50%) fifty percent of the medical expenses, less the initial payment of \$3,000.00 dollars, during the first (78) seventy-eight weeks following the date of injury, and is entitled to full reimbursement of the medical expenses thereafter.

15. In accordance with S.C. Code Ann. §42-9-400(a)(2) the Defendants have established the Claimant's disability for the medical payments are substantially greater by reason of the aggravation of the pre-existing impairment than would have resulted from the subsequent injury alone.

16. In accordance with S.C. Code Ann. §42-7-320(B)(2) the Defendants submitted all required information for consideration of acceptance of the claim by the South Carolina Second Injury Fund by June 30, 2011.

17. In accordance with S.C. Code Ann. §42-7-320(B) (2) the South Carolina Second Injury Fund chose to deny the claim based on notice.

18. In accordance with the Administrative Procedure Act, the Commission has a duty to accept any and all relevant and admissible evidence the Employer/Carrier submits. The language in S.C. Code Ann. §42-7-320(B) does not and may not prohibit the Commission from considering any and all of the relevant and admissible evidence.

ORDER

IT IS THEREFORE, HEREBY ORDERED, that the Defendants shall be entitled to full reimbursement from the South Carolina Second Injury Fund.

IT IS SO ORDERED!

Within the statutory period, counsel for the South Carolina Second Injury Fund filed a Request for Commission Review setting forth the grounds for appeal with copies furnished to all interested parties prior to being presented to the Appellate Panel on January 21, 2014. All proffered testimony has been taken and together with all documentary

evidence has been delivered to the individual members of the Full Commission and has since been under advisement and consideration.

By appeal, the South Carolina Second Injury Fund respectfully submitted the following:

1. The Hearing Commissioner erred in finding as a fact that there was not any additional duty by Defendants to submit additional information prior to June 30, 2011.
2. The Hearing Commissioner erred in finding as a fact that the Fund was provided notice prior to the seventy-eight (78) weeks of Temporary Total Disability being paid.
3. The Hearing Commissioner erred in finding as a fact that § 42-7-320(B) does not serve as a bar to what evidence may be submitted to the Workers' Compensation Commission.
4. The Hearing Commissioner erred in finding as a fact that Claimant's preexisting injury caused permanent impairment and was an obstacle and hindrance to his employment or re-employment prior to the November 29, 2007 injury.
5. The Hearing Commissioner erred in finding as a fact that Defendants have met their burden of proof that the permanent preexisting condition was aggravated by the subsequent injury causing substantially greater medical expense and disability than that which would have resulted from the subsequent injury alone.
6. The Hearing Commissioner erred in ruling as law that Defendants submitted all requirement information for consideration of acceptance of the claim by the South Carolina Second Injury Fund by June 30, 2011.

7. The Hearing Commissioner erred in failing to find that the date of Claimant's injury was January 16, 2008, and not November 29, 2007, as alleged.

In accordance with S.C. Code Ann. § 42-17-50, the Appellate Panel shall review the award, and if good and proper grounds are shown, may reconsider evidence, receive further evidence, rehear the parties and amend the award. Furthermore, the Appellate Panel may make its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (S.C.App. 1984). After careful review in the instant case, the Commission by a Majority, REVERSES the Hearing Commissioner's Findings of Fact and Rulings of Law.

FINDINGS OF FACT

After hearing argument of the parties and reviewing the evidence, we reverse the Single Commissioner's Findings of Fact and issue the following:

1. Carrier's November 29, 2007 claim was properly before the Commission. The Consent Order amended the prior date of injury to reflect the appropriate date of injury. This finding is based upon the totality of the record and Carrier APA pp.38-42. The 78 week notice was met by the carrier.

2. We find that documents addressing the essential elements of reimbursement are "required information" for purposes of S.C. Code Ann. § 42-7-320(B) (2), and were required to be submitted to the Fund by June 30, 2011. The "required information" includes elements addressing whether there is a preexisting condition and subsequent injury; whether the preexisting condition was permanent and serious enough to constitute a hindrance or obstacle to employment; whether Carrier has established knowledge and notice; and, whether the preexisting condition created substantially

greater liability for the Carrier. This finding is based upon the plain meaning of S.C. Code Ann. § 42-9-400 and § 42-7-320(B) (2).

3. Carrier submitted several documents after June 30, 2011 that address the elements of reimbursement, including knowledge statements dated December 5 and 6, 2011.

4. Pursuant to S.C. Code Ann. § 42-9-400(c), knowledge is a required element of reimbursement. Carrier is required to either establish actual knowledge or concealment of the preexisting condition. S.C. Code Ann. § 42-9-400 (c). This finding is based upon the statutory language of S.C. Code Ann. § 42-9-400 (c).

5. Carrier asserts that it had knowledge of Claimant's preexisting condition; however, the December 6, 2011 knowledge statement was not timely submitted pursuant to S.C. Code Ann. § 42-7-320(B) (2).

6. Prior to June 30, 2011, the carrier had not submitted any documents relevant to the issue of knowledge or concealment.

7. The statute indicates that failure to submit required information to the Fund shall bar recovery. Carrier's failure to submit any knowledge statement by June 30, 2011 bars its reimbursement recovery. This finding is based on the express statutory language of S.C. Code Ann. § 42-7-320(B) (2).

8. Carrier did not establish a *prima facie* case prior to the June 30, 2011 statutory deadline, as there were no submissions made as to the element of knowledge.

9. Since Carrier's claim for reimbursement is barred for its failure to provide knowledge of Claimant's preexisting condition by June 30, 2011, we do not find it necessary to address the other substantive elements of reimbursement.

10. Carrier is not entitled to reimbursement and its claim is denied.

CONCLUSIONS OF LAW

Based upon the foregoing and applicable statutory and case law, we conclude as a matter of law:

1. Reimbursement from the South Carolina Second Injury Fund is governed by S.C. Code Ann. § 42-9-400.
2. The right of Carrier to receive reimbursement from the South Carolina Second Injury Fund depends upon complete compliance with the requirements for recovery. S. C. Second Injury Fund v. Amer. Yard Prod., 330 S.C. 20 496 S.E.2d 862 (1998).
3. To qualify for reimbursement Carrier had the burden to prove that it provided all required information to the Fund for consideration by June 30, 2011. Carrier did not meet this requirement as outlined in S.C. Code Ann. § 42-7-320(B) (2); and as such, Carrier is not entitled to reimbursement pursuant to S.C. Code Ann. § 42-9-400.
4. Since Carrier did not meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-7-320(B) (2) and § 42-9-400, it is not entitled to reimbursement from the South Carolina Second Injury Fund, and its claim is denied.

ORDER


IT IS THEREFORE, ORDERED that the Order of the Single Commissioner filed on September 6, 2013, is hereby REVERSED by a Majority of the Appellate Panel, and this Order shall constitute the Decision of the Full Commission.

S.C. WORKERS' COMPENSATION COMMISSION



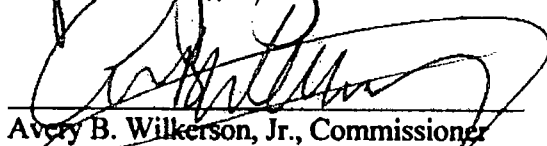
Melody L. James, Commissioner

REVERSE:



Susan S. Barden, Commissioner

DISSENT:



Avery B. Wilkerson, Jr., Commissioner
(I would affirm the Single Commissioner's Order)

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on May 12, 2014