THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083
WCC Number: 0800956

SC Second Injury Fund, Respondent,

v.

Pepsi Bottling Group and Old Republic Insurance Company, Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Full Commission is correct in finding, as the Hearing Commissioner found, the Claimant's date of accident is November 29, 2007, and he merely sustained a temporary flare-up on January 16, 2008?

    a. Whether the Full Commission is correct finding, as the Hearing Commissioner found, that the medical treatment clearly shows the Claimant injured himself on November 29, 2007, and he merely sustained a temporary flare-up on January 16, 2008?

    b. Whether the Full Commission is correct in finding, as the Hearing Commissioner found, the medical experts' opinions clearly show the Claimant injured himself on November 29, 2007, and he merely sustained a temporary flare-up on January 16, 2008?

    c. Whether the Full Commission is correct in finding, as the Hearing Commissioner found, that the Orders from the Commissioners clearly reference WCC #0800956 as a November 29, 2007 injury?

2. Whether the Full Commission is correct in finding, as the Hearing Commissioner found, the Appellants properly provided notice to the Fund of the November 29, 2007 accident on December 31, 2007?

3. Whether the majority of the Full Commission erred in holding the Employer had a continued duty to establish a *prima facie* case for reimbursement, establishing all the elements of reimbursement under S.C.Code Ann. § 42-9-400(2010), to the Fund under S.C.Code Ann. § 42-7-320(B)(2)(2010), after the Fund denied the claim on two (2) prior occasions based on notice.

    a. Whether the majority of the Full Commission erred as a matter of law in failing to find, as the Hearing Commissioner found, the Appellant did not have any further duty to submit additional information, under S.C.Code Ann. § 42-7-320(B)(2)(2010), after the Fund choose to deny the Appellants' claim based on notice, since a denial on notice is a complete bar to recover under S.C.Code Ann. § 42-9-400(2010)?

    b. Whether the majority of the Full Commission erred in failing to find, as the Hearing Commissioner found, additional evidence after June 30, 2011, can be submitted to the Commission after a claim has been denied, as S.C.Code Ann. § 42-7-320(B)(2)(2010) does not mandate, nor does it mention exclusion of evidence?

4. Whether the Hearing Commissioner is correct in finding the Claimant had a pre-existing permanent condition to his lumbar spine as a result of an on-the-job injury on April 27, 2002 that substantially increased the Claimant's disability and/or medical expenses and was an obstacle or hindrance to his employment or reemployment under S.C.Code Ann. § 42-9-400(2010)?

STATEMENT OF THE CASE

This matter originally came before Commissioner Gene McCaskill, on February 28, 2013, in Hampton County. (Item No. 29) The hearing was scheduled to determine the issues as set forth on the Employer's Form 54, claim for reimbursement from the South Carolina Second Injury Fund (hereinafter, Fund). The Employer had paid Two Hundred Twenty Two Thousand Two Hundred Ninety Dollars and 88/100 ($222,290.88) in indemnity and Eighty Seven Thousand Four Hundred Sixteen Dollars and 22/100 ($87,416.22) in medical benefits and sought reimbursement under S.C.Code Ann. § 42-9-400(2010). (Item No. 25)

It was argued by the Employer that the Claimant had a preexisting condition, as a result of a work-related injury that occurred on April 27, 2002, at Industrial Grounds Maintenance. The Claimant sustained an on-the-job injury resulting in an annular tear at the L5-S1 disc space. He was treated and released with permanent impairment and could only perform fifty percent (50%) of the ground keeping maintenance he was able to perform prior to the accident, and he had to change jobs due to his disability. (Item No. 23)

On November 29, 2007, the Claimant sustained a compensable injury to his lumbar spine at Pepsi Bottling Group. (Item No. 6) On that date, the Claimant bent down to pick up a twelve (12) pack of product, injuring his lower back. (Item No. 6) The Claimant reinjured his L5-S1 disc space. The Claimant did sustain a temporary aggravation of the November 29, 2007 injury, when he attempted to return to work on January 16, 2008. (Item No. 16)

The Employer provided notice to the Fund of the November 29, 2007 accident on December 27, 2007. (Item No. 7) The Fund acknowledged acceptance of the notice and assigned an SIF claim number (138841) on January 2, 2008. (Item No. 11) Prior to the hearing, the Fund argued the Claimant's actual injury occurred on January 16, 2008, rather than

November 28, 2007. Therefore, it refused to acknowledge that notice was provide within seventy-eight (78) weeks. The Fund then issued a denial.

After receiving the denial letter, the Employer provided the Fund with Commissioner Williams and Commissioner Barden's Orders indicating the Claimant injured himself on November 29, 2007 and merely sustained a temporary aggravation of the November 29, 2007 injury on January 16, 2008. (Item No. 18) The Orders stated unequivocally that the actual date of injury is November 29, 2007. (Item No. 17, 21) Nonetheless, the Fund refused to accept the claim as a November 29, 2007 injury.

Marla Rehborn, the Claims Analyst for the Fund, per letter dated July 8, 2010, stated, "Thank you for the submissions in regards to the above claim. [0800956]. After a careful review of this claim, I find that it does not meet the requirements for Second Injury Fund Reimbursement. It appears that this claim was not put on notice in a timely manner... As notice is not proper, we have no choice but to deny this claim for benefits...." (Item No. 19) The Fund refused to except the medical records, the Order of Commissioner Williams and Commissioner Barden's Order indicating WCC file number 0800956 date of accident is November 29, 2007. It maintained the claim was a 2008 claim to allege that notice was not proper. (Item No. 19) After receiving the second (2^{nd}) denial letter, and being unable to submit any additional evidence to support the fact that WCC file number 0800956 date of accident is November 29, 2007, the Employer began preparing their case for a hearing. Subsequently, the Employer filed a Form 54, an employer's request for a hearing. (Item No. 26)

Since the Fund refused to acknowledge that notice was proper, the Employer could not have provided any additional evidence for acceptance, as notice is the first (1^{st}) essential element

of reimbursement from the Fund under S.C.Code Ann. § 42-9-400(2010). The Employer then prepared its case for hearing.

The Employer had notice of the prior accident of April 27, 2002, prior to the November 29, 2007 accident, as evidenced by the Claimant's statement and the Employer's affidavit. (Item No. 22) The Employer acquired opinions from the Claimant, Dr. Strohmeyer and Dr. Zgleszewski that the preexisting condition was a hindrance to his employment and/or reemployment. (Item No. 27, 28) Also, both physicians opined that he sustained substantially greater medical expenses and disability due to his preexisting physical condition, which was aggravated by the November 29, 2007, injury, than he would have sustained but for the subsequent injury alone. (Item No. 27, 28)

Therefore, in accordance with S.C.Code Ann. § 42-9-400(2010), the Employer argued it was entitle to reimbursement of fifty percent (50%) of the medical payments, during the first seventy-eight (78) weeks of payment of temporary disability, less the initial Three Thousand Dollar and No./100 ($3,000.00) payment, and reimbursement of all medical benefits after the payment of the first seventy-eight (78) weeks of disability benefits. The Employer also sought reimbursement of all indemnity payments made subsequent to the first seventy-eight (78) weeks of temporary total disability benefits. (Item No. 29)

At the hearing, not only did the Fund argue that notice was not proper, which was the thrust of its argument, it also argued the Claimant did not have a prior lumbar injury that was permanent and serious enough to constitute a hindrance to employment or that it substantially increased medical expenses. (Item No. 29) The Fund further argued the Defendants could not submit into evidence anything that was not submitted to the Fund by June 30, 2011, and referenced S.C.Code Ann. § 42-7-320(B)(2010), alleging it somehow prevents submission.

The Hearing Commissioner found in favor of the Employer. (Item No. 29) The Findings of Fact are as Follows:

> 1. The first question at bar is whether or not this matter is correctly before the Commission. The Fund argues that this is 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 three (3) decisions.

11. The Fund was provided notice prior to the seventy (78) 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 substantially 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.

From the Hearing Commissioner's Decision and Order dated September 20, 2013, the Fund appealed. (Item No. 29) This matter came before the Full Commission pursuant to the Fund's Form 30, Request for Commission Review, dated September 20, 2013. (Item No. 30)

According to the Fund's Form 30, Appellant Brief and oral argument, the Fund alleged the Hearing Commissioner erred in failing to find that notice was provided to the Fund within the first seventy-eight (78) weeks of payment of temporary total disability benefits, since the Fund is of the opinion that the actual date of accident is January 16, 2008. (Item No. 30) It further argued as follows: the November 29, 2007 injury was not properly before the Commission, since the Fund alleged it was actually a January 16, 2008 injury; the Claimant's preexisting injury did not cause permanent impairment, and it was not an obstacle and hindrance to his employment or re-employment prior to the November 29, 2007 injury (it alleges is a January 16, 2008 injury); the preexisting condition was not aggravated by the November 29, 2007 injury(it alleges is a January 16, 2008 injury), and it did not cause substantially greater medical expenses and disability than for the subsequent injury alone; the Employer failed to submit all required information for consideration of acceptance of the claim to the Fund prior to June 30, 2011; the Hearing Commission erred in allowing evidence submitted by the Employer into the record dated after June 30, 2011, and the Fund relies on S.C.Code Ann. § 42-7-320(B)(2010), as a somehow exclusion provision for evidence submission; and the Employer did have a duty to continue to submit information to the Fund with required information, after the Fund had denied the Employer's request for acceptance on two (2) separate occasions based on notice. (Item No. 30)

The matter was heard before Commissioner Wilkerson, Commissioner Barden, and Commissioner James on January 21, 2014, at 2:00 p.m. in Columbia, SC. (Item No. 34) On

February 11, 2014, The Full Commission issued its Directive, indicating Commissioner James and Commissioner Barden reversed the Hearing Commissioner's Decision and Order, and Commissioner Wilkerson voted to affirm the Hearing Commissioner's Order. It did not state any specific Findings of Fact or Conclusions of Law. The Fund was requested to prepare a proposed order and submit it to the Judicial Department within thirty (30) days. On March 28, 2014, the proposed Decision and Order was submitted. The Fund provided the following Findings of Fact and Conclusions of Law in its proposed Order:

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 not properly before the Commission. According to the Commission's file, the date of injury is January 16, 2008, not November 29, 2007. This finding is based upon the totality of the records in evidence including the Commission's file number and Fund APA pp.1-2 and 38-42.
>
> 2. Carrier's documents dated after June 30, 2011 should have been excluded from the record based on the mandate of S.C. Code Ann. § 42-7-320(B)(2), which states that all required information must be submitted to the Fund by June 30, 2011 so that the claim can be accepted, compromised, or denied.
>
> 3. We find that documents addressing elements of reimbursement are "required information" for purposes of S.C. Code Ann. § 42-7-320(B)(2) and was required to be submitted to the Fund by June 30, 2011. This "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).

4. Carrier submitted several documents after June 30, 2011 that address the elements of reimbursement, including knowledge statements dated December 5 and 6, 2011, a medical questionnaire dated January 11, 2012, and a medical narrative dated January 26, 2012. These statements were admitted over the Fund's objection and should have been excluded. This finding is based upon the express language of S.C. Code Ann. § 42-7-320(B)(2) and Carrier APA pp.53-54 and 65-68.

5. Carrier's assertion that it had no duty to provide additional documents to the Fund after its claim was denied in 2010 is without merit and is inconsistent with the express statutory language of § 42-7-320(B)(2).

6. Carrier failed to provide notice of the January 16, 2008 to the Second Injury Fund pursuant to S.C. Code Ann. § 42-9-400(f), which requires that the Fund be provided notice prior to the payment of seventy-eight (78) weeks of compensation.

a. Carrier did not provide notice prior to the payment of seventy-eight (78) weeks of compensation. According to the Form 18, temporary total benefits were paid from January 28, 2008 to January 17, 2010. On the Form 18, the time period from January 28, 2008 to January 17, 2010 is incorrectly calculated to be approximately fifty (50) weeks, when in fact it is approximately one hundred fourteen (114) weeks. This finding is based upon Carrier APA p.36.

b. Carrier provided the Fund with notice of the January 2008 claim in approximately March or April 2010, after it had already paid at least one hundred fourteen (114) weeks of compensation. This violates the express mandate of S.C. Code Ann. § 42-9-400(f). This finding is based upon Carrier APA pp.36-37 and S.C. Code Ann. §42-9-400(f).

7. Carrier's failure to provide notice of a potential Second Injury Fund claim prior to the payment of seventy-eight (78) weeks of compensation bars its receipt of reimbursement. This finding is based upon S.C. Code Ann. § 42-9-400(f).

8. Since Carrier's claim for reimbursement is barred for its failure to provide notice within the statutory time period outlined in S.C. Code Ann. § 42-9-400(f), we do not find it necessary to address the other substantive elements of reimbursement.

9. Carrier's 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 of its claim 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. To qualify for reimbursement Carrier had the burden to prove that it provided notice to the Fund prior to the payment of seventy-eight (78) weeks of compensation. Carrier did not comply with this requirement as outlined in § 42-9-400(f); and, as such, Carrier is not entitled to reimbursement pursuant to S.C. Code Ann. § 42-9-400.

5. 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.

(Item No. 31) The majority of the Full Commission then wrote the Fund indicating numerous errors in the proposed Decision and Order. The majority requested the proposed Decision and Order find the Fund was provided with proper notice within seventy-eight (78) weeks of payment of compensation in regard to the November 29, 2007 accident. Also, the majority of the Full Commission requested a finding that the accident occurred November 29, 2007, not on January 16, 2008, as the Fund maintained.

The majority of the Full Commission based the reversal on the Employer not providing the Fund with a knowledge statement, before June 30, 2011, by the Employer that it was aware of the Claimant's preexisting impairment. (Item No. 34) The majority of the Full Commission is of the position that the Employer had a continued duty to establish a *prima facie* case for reimbursement, establishing all the elements of reimbursement under S.C.Code Ann. § 42-9-400(2010), to the Fund under S.C.Code Ann. § 42-7-320(B)(2)(2010), despite the fact the Fund had issued two (2) denial letters, and it would have been impossible for the Fund to accept the claim or enter into a compromised settlement, as it maintained it was not a 2007 claim.

The Fund then submitted another proposed Decision and Order on April 24, 2014. (Item No. 32) The Fund revised the Findings of Fact and Conclusions of Law as Follows:

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.
>
> 2. Carrier's documents dated after June 30, 2011 should have been excluded from the record based on the mandate of S.C. Code Ann. § 42-7-320(B) (2), which states that all required

information must be submitted to the Fund by June 30, 2011 so that the claim can be accepted, compromised, or denied.

3. We find that documents addressing elements of reimbursement are "required information" for purposes of S.C. Code Ann. § 42-7-320(B) (2) and was 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).

4. Carrier submitted several documents after June 30, 2011 that address the elements of reimbursement, including knowledge statements dated December 5 and 6, 2011, a medical questionnaire dated January 11, 2012, and a medical narrative dated January 26, 2012. These statements were admitted over the Fund's objection and should have been excluded. This finding is based upon the express language of S.C. Code Ann. § 42-7-320(B) (2) and Carrier APA pp.53-54 and 65-68.

5. 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).

6. 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).

7. The statute indicates that failure to submit required information to the Fund shall bar recovery. Carrier's failure to submit the 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's assertion that it had no duty to provide additional documents to the Fund after its claim was denied in

2010 is without merit and is inconsistent with the express statutory language of § 42-7-320(B)(2).

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's 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.

(Item No. 32) Following this submission of the proposed Decision and Order by the Fund, the Employer objected. The Employer forwarded an email to the Full Commission asserting as follows:

> Hello,
>
> I would object to Finding of Fact #2. Based on my understanding of the majority decision, a prima facie case was to be established by 42-7-320(B)(2), despite the fact the Fund denied the claim based on notice, which acts as a complete bar to recovery under 42-9-400. It seems it is the majority's decision that knowledge by the employer was not established until 12/11; therefore, a prima facie case was not established. Finding of fact #2 goes so far as to bar medical submissions, which the majority did not find inadmissible. The Fund had the medical records prior to the denial based on notice. The additional submissions from the physicians were in furtherance of the employer/carrier's recovery against the Fund.
>
> I would object to Finding of Fact #4. It seems to go further than the majority decision in excluding medical questionnaires. The denial by the Fund was based on notice to the Fund of a claim within 78 weeks. Despite the fact that it was clearly placed on notice within 78 weeks. Medical records had been submitted to the Fund prior to 6/30/11. Their denial was based solely on Notice.
>
> I would object to Finding of Fact #8. By the majority's decision a prima facie case needed to be established under 42-7-320(B)(2). This language in Finding of Fact #8 seems to go farther in requiring continual submissions of evidence even if a prima facie case has been established.
>
> I would object to Finding of Fact #3. "All required" information is not defined in 42-7-320(B)(2). I would object to Finding of Fact #7 for the same reason.
>
> Thanks,
> Andy

(Item No. 33) The Full Commission then prepared its own Findings of Fact and Conclusions of Law it states as follows:

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 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.

(Item No. 34) From that Order, the Employer/Carrier filed an appeal to this honorable Court on May 16, 2014. (Item No. 35) The Appellants assert the majority of the Full Commission is correct in finding the Appellants' November 29, 2007 claim was properly before the Commission. However, the majority of the Commission erred in finding all essential elements of reimbursement under S.C.Code Ann. § 42-9-400(2010) are "required information" for the purposes of S.C.Code Ann. § 42-7-320(B)(2)(2010), and were required to be submitted to the Fund by June 30, 2011.

STANDARD OF REVIEW

The standard of review in workers' compensation cases is clear, in that a court may overturn a conclusion of the South Carolina Workers' Compensation Commission if that conclusion is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C.Code Ann. § 1-23-380(2009).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 conclusion that the administrative agency reached in order to justify the action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct App. 1995). The Appellate Court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534 S.E.2d 87 (Ct. App. 1984). The Appellate Court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999). In an appeal from the Commission, the Court of Appeals is free to reverse where the decision is affected by an error of law. Pratt v. Morris Roofing, Inc.,

577 S.E.2d 475 (S.C. App. 2003) The agency charged with administration of an Act will be accorded the most respectful consideration and the Appellant must present compelling reasn for reversal. Dunton v. S.C. Bd of Exam. in Optometry, 291 S.C 221, 223, 353 S.E.2d 132, 133 (1987). The Court can modify the Commission's decision in this case if the substantia rights of the Appellants have been prejudiced because the decision is affected by an error of law. Shealy v. Aiken County, 341 S.C. 448, 454-55, 535 S.E.2d 438, 442 (2000).

ARGUMENT

1. THE MAJORITY OF THE FULL COMMISSION IS CORRECT IN FINDING, AS THE HEARING COMMISSIONER FOUND, THE CLAIMANT'S DATE OF ACCIDENT IS NOVEMBER 29, 2007, AND HE MERELY SUSTAINED A TEMPORARY FLARE-UP ON JANUARY 16, 2008.

I. Medical history regarding the November 29, 2007 claim.

The November 29, 2007 claim was properly before the Commission. On November 29, 2007, the Claimant sustained a compensable injury to his lumbar spine at Pepsi Bottling Group. (Item No. 6) On that date, the Claimant bent down to pick up a twelve (12) pack of product, injuring his lower back. (Item No. 6) He reported the incident to his supervisor, and he was subsequently referred for medical treatment. The Claimant was initially seen by Dr. Grossman at Doctor's Care. (Item No. 8) The Claimant returned to work and underwent a conservative course of treatment, although he still continued to complain of lower back pain and numbness in his lower extremities. (Item No. 8)

The Claimant began receiving temporary total disability benefits on January 28, 2008. (Item No. 15) An MRI was requested by Doctor's Care. (Item No. 8) The MRI was performed on January 30, 2008. (Item No. 10) It revealed the Claimant had a broad-based disc bulge at L5-S1, pressing on the right S1 nerve root. (Item No. 10) This is the same disc level that was injured due to the Claimant's prior work-related injury on April 27, 2002. (Item No. 3) The Claimant was then referred to an orthopedic physician, Dr. Reuben. (Item No. 12)

Dr. Reuben recommended lumbar epidural steroid injections. (Item No. 12) The Claimant requested a second (2^{nd}) opinion. He was then referred to Dr. Aymond in Charleston, South Carolina. (Item No. 13) Dr. Aymond diagnosed the Claimant as having a L5-S1 right paracentral disc herniation with lower back pain. (Item No. 13) He recommended the

Claimant undergo physical therapy and provided two (2) lumbar steroid injections. (Item No. 13) By the Claimant's own report, they were not helpful.

Per Dr. Aymond's office note of March 28, 2008, the Claimant was to remain out-of-work until he was seen again in five (5) weeks. (Item No. 13) The Claimant was last seen by Dr. Aymond on May 20, 2008. It was Dr. Aymond's opinion the Claimant was a surgical candidate for a lumbar discectomy and fusion at L5-S1. (Item No. 21) However, the Claimant elected not to go forward with the surgery. (Item No. 27)

The Claimant was still in pain. The Appellants referred the Claimant to Dr. Strohmeyer, for a third (3rd) opinion, since he had previously treated the Claimant in regard to the April 27, 2002 injury. Dr. Strohmeyer indicated the Claimant needed an updated MRI scan, which was conducted on January 29, 2009. (Item No. 14) Dr. Strohmeyer indicated, on February 11, 2009, that the MRI revealed a small disc herniation at L5-S1 on the right side and severe disc disease at L5-S1. (Item No. 27) Dr. Strohmeyer then recommended an arthrogram. Dr. Eller conducted the arthrogram on March 26, 2009. (Item No. 21) Dr. Eller also performed an L5-S1 facet block, due to his degenerative disc disease. (Item No. 21) The Claimant returned to Dr. Strohmeyer's office on May 18, 2009. The Claimant reported the injection was helpful for approximately one (1) week and then the symptoms returned. Dr. Strohmeyer again referred the Claimant back to Dr. Eller for additional facet blocks. (Item No. 21) Dr. Strohmeyer indicated if the facet blocks were not of any benefit the Claimant was a possible candidate for a L5-S1 ALIF. (Item No. 21)

On August 17, 2009, Dr. Strohmeyer conducted the interior lumbar interbody fusion at L5-S1. (Item No. 21) Following the surgery, Dr. Strohmeyer recommended the Claimant undergo physical therapy. (Item No. 21) The Claimant began physical therapy on October 5,

2009, and continued every two (2) days until November 6, 2009. (Item No. 21) The Claimant was then seen by Dr. Strohmeyer on November 11, 2009, and he was of the opinion the Claimant "pushed too hard in physical therapy," and he had another flair-up of his lower back symptoms. (Item No. 21)

Dr. Strohmeyer then started the Claimant on a Medrol Dose pack. (Item No. 21) When the Claimant returned to Dr. Strohmeyer's office on November 24, 2009, he again did not want the Claimant to return to physical therapy and scheduled a return appointment for February 17, 2010, after a CT scan had been conducted. (Item No. 21) At that time, he determined the CT scan did not demonstrate any abnormalities, so he recommended EMG/nerve conduction studies. (Item No. 21) On April 13, 2010, the Claimant underwent an EMG/nerve conduction study that was essentially normal. (Item No. 21) The Claimant was last seen by Dr. Strohmeyer on April 21, 2010. (Item No. 21) Dr. Strohmeyer recommended the Claimant return in a three to six (3 to 6) month period to review the hardware, and he referred the Claimant to Dr. Zgleszewski for pain management. (Item No. 21)

The Claimant was then seen by Dr. Zgleszewski on May 12, 2010. His plan, given the Claimant's subjective complaints, was to perform diagnostic bi-lateral SI joint injections and in the event his pain decreased one hundred percent (100%), he would forego the diagnostic facet nerve block injections. The Claimant underwent a right sided SI joint diagnostic injection on May 21, 2010, a left sided SI joint diagnostic injection on May 28, 2010, a right lumbar diagnostic facet injection on June 4, 2010, and a left-sided lumbar diagnostic facet injection on June 11, 2010. Dr. Zgleszewski also recommended that another MRI be conducted to rule out L5-S1 adjacent segment disease based upon his review of the CT scan Dr. Strohmeyer had conducted.

On June 14, 2010, due to the Claimant's radiculopathy, Dr. Zgleszewski recommended a spinal cord stimulator. The Claimant was seen by Dr. Rich on July 30, 2010, for a psychological evaluation. Dr. Rich determined the Claimant fully understood the risk and benefits and was able to move forward with the procedure. On August 20, 2010, the Claimant underwent a trial of the spinal cord stimulator. The Claimant returned to Dr. Zgleszewski and indicated he could not tolerate the "tingling sensation" of the spinal cord stimulator.

Since the Claimant had failed to respond to the spinal cord stimulator, rehabilitation, physical therapy, interventional spine treatment, Dr. Zgleszewski determined the Claimant should undergo deep wave treatments. The Claimant underwent a schedule of sixteen (16) deep wave treatments. Unfortunately, the additional treatment was not of benefit. Dr. Zgleszewski then recommended the Claimant undergo platelet rich plasma injections. The Claimant underwent three (3) injections as of March 4, 2011. The Claimant indicated the platelet rich plasma injections actually caused additional back pain and were not of benefit.

As of August 15, 2011, Dr. Zgleszewski released the Claimant to maximum medical improvement with a twenty percent (20%) impairment to the spine as a result of the November 29, 2007 injury. (Item No. 21) Dr. Zgleszewski further indicated the Claimant was only capable of sedentary/light-work duty restrictions with a fifteen (15) pound lifting restriction that also consisted of no repetitive bending, twisting, lifting and no stooping, crawling or squatting, as well as no prolonged sitting. (Item No. 21) He also indicated the Claimant would need ongoing medication management. (Item No. 21)

II. Expert Medical Opinions that it was a November 28, 2007, injury.

The expert medical testimony clearly supports the November 29, 2007 claim was properly before the Commission. Based on the Dr. Strohmeyer's and Dr. Zglezewski's extensive treatment and personal knowledge of the claim, both physicians opined the Claimant injured himself on November 29, 2007 and only sustained a temporary flair-up of his pre-existing condition on January 16, 2008. (Item No. 27, 28) This is evidenced by Dr. Strohmeyer's opinion indicating,

> On November 29, 2007, the Claimant injured his lumbar spine after bending down to pick up a 12-pack of cans. I have reviewed the medical records of Dr. Grossman, Dr. Reuben and Dr. Aymond. It appears as though the Claimant had a broad-based disc bulge at L5-S1, pressing on the right S1 nerve root. According to Dr. Aymond's report, he was of the opinion the Claimant was a candidate for a lumbar discectomy and fusion at L5-S1. The Claimant elected not to go forward with the surgery, due to his young age. He returned to work, although according to the Claimant he continued to experience pain in his lumbar spine and had a temporary flair-up on January 16, 2008.
>
> It is my opinion the Claimant sustained a temporary aggravation of his November 29, 2007 injury on January 16, 2008. . . .

(Item No. 27) This is further evidenced by Dr. Zgleszewski's opinion, within a reasonable degree of medical certainty, (more likely than not) that the Claimant merely temporarily aggravated the November 29, 2007, injury on January 16, 2008. (Item No. 28) He states:

> By the Claimant's own report, following the November 29, 2007 injury, he returned to work and continued to have pain in his lumbar spine, which did not alleviate. On January 16, 2008 the Claimant sustained a temporary aggravation of his pre-existing condition. . . .

III. Prior Orders of the Commission Clearly Indicate WCC #0800956 is a November 29, 2007 Injury.

It is further evidenced by the Orders of Commissioner Williams and Commissioner Barden that the November 29, 2007 claim was properly before the Commission. (Item No. 17,

21) The Appellants submitted an Order to the Fund from Commissioner Williams, dated April 22, 2010, stating in pertinent part, "Nothing in the . . . Order is to change any other prior Order of the Commission other than to reflect the appropriate date of accident as being November 29, 2007, as reported on the Form 12A, rather than January 16, 2008." (Item No. 17) Also, a Consent Order was submitted to the Fund, which was signed by the Honorable Commissioner Barden, on November 28, 2011, indicating the injury occurred on November 29, 2007. (Item No. 21)

2. THE APPELLANTS PROVIDED PROPER NOTICE TO THE FUND OF THE NOVEMBER 29, 2007 ACCIDENT ON DECEMBER 31, 2007.

The Appellants provided notice to the Fund of the November 29, 2007 accident on December 27, 2007. (Item No. 7) The Fund acknowledged acceptance of the notice and assigned an SIF claim number 138841 on January 2, 2008. (Item No. 11) Despite the fact the Fund admits it was placed on notice of the November 29, 2007 claim, they asserted the 2007 claim was closed and denied reimbursement to the Appellants. Prior to June 30, 2011, the Appellants then provided the Fund with the Order from Commissioner Williams, dated April 22, 2010, indicating the January 16, 2008 incident was merely a flare-up of the November 29, 2007 accident. (Item No. 18) It states the WCC file number 0800956 date of accident was November 29, 2007, not January 16, 2008. (Item No. 17) The Appellants also provided the Fund with Commissioner Barden's Order that clearly maintained that WCC File number 0800956 was a November 29, 2007. Further, the Appellants provided the Fund with the medical records indicating the accident occurred on November 29, 2007.

Nonetheless, Marla Rehborn, the Claims Analyst for the Fund, per letter dated July 8, 2010, stated, "Thank you for the ***submissions*** in regards to the above claim. [0800956]. After a careful review of this claim, I find that it does not meet the requirements for Second Injury Fund Reimbursement. It appears that this claim was not put on notice in a timely manner... As notice is not proper, we have no choice but to deny this claim for benefits...." (*Emphases added*) (Item No. 19) The Fund refused to accept the medical records, the Order of Commissioner Williams and Commissioner Barden's Order indicating WCC file number 0800956 date of accident is November 29, 2007. (Item No. 17) It maintained the claim was a 2008 claim to allege that notice was not proper. After receiving the second (2^{nd}) denial letter, and being unable to submit any additional evidence to support the fact that WCC file number 0800956 date of accident is November 29, 2007, the Appellants began preparing their case for a hearing. Subsequently, the Appellants' filed a Form 54, an Employer's request for a hearing. (Item No. 26)

3. AS A MATTER OF LAW, THE MAJORITY OF THE FULL COMMISSION ERRED IN HOLDING THE EMPLOYER HAD A CONTINUED DUTY TO ESTABLISH A *PRIMA FACIE* CASE FOR REIMBURSEMENT, ESTABLISHING ALL ELEMENTS OF REIMBURSEMENT UNDER S.C.CODE ANN. § 42-9-400(2010), PRIOR TO JUNE 30, 2011, UNDER S.C.CODE ANN. § 42-7-320(B)(2)(2010), AFTER THE FUND HAD ALREADY DENIED THE CLAIM ON TWO (2) OCCASIONS BASED ON NOTICE.

The majority of the Full Commission erred as a matter of law. The majority of the Full Commission held that an employer must submit a *prima facie* case to the Fund prior to June 30, 2011, or it bars an employer from recovery. (Item No. 34) The majority held this to be true even in instances where the Employer provide "all required information" in order for the Fund to issue two (2) formal denials on an essential element of reimbursement, and it would have been impossible for the Employer to prevail on reimbursement without a hearing. It further held that

an employer may not submit anything into evidence at a hearing that was not already submitted to the Fund prior to June 30, 2011, if a *prima facie* case was not established and provided to the Fund prior to June 30, 2011, despite the fact the Fund clearly chose to deny the claim prior to June 30, 2011. (Item No. 34)

SECTION 5. Article 3, Chapter 7, Title 42 of the 1976 Code was amended by adding: S.C.Code Ann. § 42-7-320(2010):

> (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."

(*Emphasis Added*) The Legislature promulgated S.C.Code Ann. § 42-7-320(2010) simultaneously with its decision to dissolve the South Carolina Second Injury Fund. On June 20, 2007, the South Carolina General Assembly passed the Workers' Compensation Reform Act, which provided for the winding down of the Fund by June 30, 2013. By this Statute, the Fund cannot accept any claims with dates of accident after July 1, 2008. Also, the Fund cannot accept <u>any</u> claim after December 31, 2011. The

Legislature promulgated S.C.Code Ann. § 42-7-320(2010) for an orderly dissolution of the Fund. It requires the moving party requesting reimbursement from the Fund to provide "all required information" to the Fund by June 30, 2011, so the Fund can make an informed decision as to whether it was to accept, make a compromised settlement or deny a claim prior to December 31, 2011. This Statute allowed for an orderly dissolution of the Fund, and it imposed time requirements, so the Fund had at least six (6) months to make one of its three (3) decisions.

It is true that the Statute does indicate an employer "shall" be barred from recovery if the employer does not submit "all required information" to the Fund, so it may make one of its three (3) decisions, as to accept, make a compromised settlement, or deny. The Statute does not define "all required information," nor does the Statute reference the elements required for reimbursement in S.C.Code Ann. § 42-9-400(2010). It also does not make any reference to exclusion of evidence at a hearing.

By the literal reading of the Statute, "all required information" is information submitted to the Fund by July 30, 2011, so the Fund could make an informed decision as to accept, enter into a compromised settlement or deny. If an employer does not provide "all required information" to the Fund, so it may make one (1) of its three (3) decisions it shall bar recovery. Here, it is undisputed that the Employer provide "all required information" for the Fund to issue a denial based on an essential element of reimbursement, after two (2) attempts by the Employer to have the claim accepted or settled by June 30, 2011.

Again, the majority of the Full Commission held that the Employer was required to establish a *prima facie* case pursuant to S.C.Code Ann. § 42-7-320(B)(2)(2010), based on the elements required for reimbursement under S.C.Code Ann. § 42-9-400(2010), which are as follows: providing notice to the Fund in writing of a possible claim against the Fund including

the date of the accident, employee's name, employer's name and address, insurance carrier's name, address, and National Council on Compensation Insurance Code, and the insurance carrier's claim number, policy number, and policy effective date; proof the employee has a prior "permanent physical impairment," as defined in S.C.Code Ann. § 42-9-400(2010); proof the employee sustained an injury by accident causing substantially greater disability and or medical benefits that for the subsequent injury alone; proof the employer had knowledge of the permanent physical impairment prior to the subsequent injury or the employee concealed the information after the employer inquired; and the insurer is also required to certify that the medical and indemnity reserves have been reduced to the threshold limits of reimbursement and report in accordance with the National Council on Compensation Insurance Workers' Compensation Statistical Plan. (Item No. 34)

The Appellants provided notice to the Fund of the November 29, 2007 accident on December 31, 2007. (Item No. 7) The Fund acknowledged acceptance of the notice and assigned an SIF claim number 138841 on January 2, 2008. (Item No. 11) Prior to the initial hearing, the Fund argued the Claimant's actual injury occurred on January 16, 2008, rather than November 28, 2007. It then issued a formal denial.

As stated previously, on November 29, 2007, the Claimant sustained a compensable injury to his lumbar spine at Pepsi Bottling Group. (Item No. 6) On that date, the Claimant bent down to pick up a twelve (12) pack of product, injuring his lower back. (Item No. 6) The Claimant reinjured his L5-S1 disc space. The Claimant did sustain a temporary aggravation of the November 29, 2007 injury, when he attempted to return to work on January 16, 2008, but it was not a new injury according to the medical evidence, physicians' opinions and the Orders of the Commission. (Item No. 17, 21, 27, 28)

After receiving the denial letter, and after already providing the Fund with the medical records, the Appellants provided the Fund with the Orders of Commissioner Williams and Commissioner Barden indicating the Claimant injured himself on November 29, 2007, not January 16, 2008. The Orders stated unequivocally that the actual date of injury is November 29, 2007. (Item No. 17, 21)

Nonetheless, the Fund refused to accept the claim as a November 29, 2007 injury. It still maintained that notice was not proper, because the Fund did not receive notice for the incident on January 16, 2008, which was not the injury in question. The Fund issued another Formal denial on the essential element for reimbursement. Marla Rehborn, the Claims Analyst for the Fund, per letter dated July 8, 2010, stated, "Thank you for the ***submissions*** in regards to the above claim. [0800956]. After a careful review of this claim, I find that it does not meet the requirements for Second Injury Fund Reimbursement. It appears that this claim was not put on notice in a timely manner... As notice is not proper, we have no choice but to deny this claim for benefits...." (*Emphases added*) (Item No. 19)

Again, the Fund refused to except the medical records, the Orders Commissioner Williams and Commissioner Barden indicating WCC file number 0800956 date of accident is November 29, 2007. (Item No. 17, 21) It maintained the claim was a 2008 claim to allege that notice was not proper. After receiving the second (2^{nd}) denial letter, and being unable to submit any additional evidence to support the fact that WCC file number 0800956 date of accident is November 29, 2007, the Appellants began preparing their case for a hearing.

S.C.Code Ann. § 42-7-320(2010) was not promulgated for the Fund to use as an affirmative defense to reimbursement after it steadfastly made an illegitimate denial of a claim, based on an essential element of reimbursement. Had the Appellant submitted all the evidence it

submitted at the hearing to the Fund prior to the June 30, 2011, establishing a *prima facie* case, the Fund still would have chosen to deny the claim for reimbursement. This is "all required information" the Legislature intended when it promulgated S.C.Code Ann. § 42-7-320(B)(2)(2010). The fact the Fund would have still chosen to deny the claim even if it had received all the evidence the Employer provided at the hearing, prior to June 30, 2011, is evidenced by the Fund's original proposed order to the Full Commission. It stated as Finding of Fact #8 as Follows:

> 8. Since Carrier's claim for reimbursement is barred for its failure to provide notice within the statutory time period outlined in S.C. Code Ann. § 42-9-400(f), we do not find it necessary to address the other substantive elements of reimbursement.

(Item No. 31) The Appellants agree with the Fund's statement. Any additional evidence addressing any other substantive element for reimbursement would have been to no avail. The majority's interpretation of "all required information" does not meet statutory intent. Again, all "required information" is not defined by the Legislature in S.C.Code Ann. § 42-7-320(B)(2)(2010). It states that an employer,

> "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)(2010). (*Emphasis Added*) It is the Appellants' position that "all required information," is information so that the Fund could make one of its three (3) decision as to accept, enter into compromised settlement, or deny a claim before June 30, 2011. In this instance, the Fund denied the Employers request for reimbursement despite the fact that

notice of the claim was provided within the first seventy-eight (78) weeks of payment of compensation. The Appellants provided the Fund with information, so the claim could be accepted, compromised or denied. The Appellants could not have provided any additional evidence for the Fund to accept the claim or enter into a compromised settlement, since it choose to deny the claim based on notice, alleging it was a January 16, 2008 claim.

After the Fund denied the claim on two (2) occasions with respect to the notice requirement, there was not any additional duty by the Appellants to submit additional information, prior to June 30, 2011, as the Fund had made its decision as to accept, enter into a compromised settlement, or deny by December 31, 2011. Any additional information the Appellants collected after June 30, 2011 was going to be used in anticipation of litigation. It was not the Legislatures intent that an employer have an affirmative duty to continually submit evidence/material to the Fund after the Fund already issued a formal denial. A hearing in this matter was unavoidable. The majority's decision would be the tantamount of requiring an employer to continually handover work-product evidence to the Fund.

4. THE HEARING COMMISSIONER IS CORRECT IN FINDING THE CLAIMANT HAD A PRE-EXISTING CONDITION TO HIS LUMBAR SPINE, AS A RESULT OF AN ON-THE-JOB INJURY ON APRIL 27, 2002, WHICH SUBSTANTIALLY INCREASED HIS MEDICAL EXPENSES AND DISABILITY, AND IT WAS AN OBSTACLE OR HINDRANCE TO HIS EMPLOYMENT OR REEMPLOYMENT UNDER S.C.CODE ANN. § 42-9-400(2010).

The Claimant had a pre-existing permanent condition to his lumbar spine as a result of an on-the-job injury on April 27, 2002. (Item No. 1) The Claimant sustained a L5-S1 right paracentral disc bulge per the MRI conducted on November 12, 2002. (Item No. 3) The Claimant initially treated with Dr. Gray. His symptoms became progressively worse, so he was referred to Dr. Strohmeyer in August of 2002. (Item No. 3) The Claimant was complaining of

lower back pain and left lower extremity radiculopathy. As of January 29, 2003, the physical therapist at Carolina Sportscare indicated on the discharge summary "Return to work. NOT MET" and "Return to prior level of function. NOT MET." (Item No. 2)

Dr. Strohmeyer, as stated previously, also treated the Claimant for the November 29, 2007 injury. (Item No. 21) Per his statement dated January 11, 2012, "the injury [April 27, 2002] was an obstacle and hindrance to his employment or re-employment prior to the November 29, 2007 injury." (Item No. 27) Per Dr. Zgleszewski's statement dated January 26, 2012, he reaffirmed Dr. Strohmeyer's opinion. (Item No. 28) Also, the Claimant has signed a statement also indicating the prior injury was an obstacle or hindrance to his employment. (Item No. 22)

Furthermore, not only did Dr. Strohmeyer and Dr. Zgleszewski provided statements that the Claimant's pre-existing physical condition was a hindrance to his employment and/or reemployment, they both provided statements that due to the pre-existing physical condition that he sustained substantially greater medical expenses and disability than he would have but for the subsequent injury alone. Dr. Strohmeyer stated,

> It is my opinion the Claimant aggravated his permanent pre-existing condition as a result of his on-the-job injury of April 27, 2002 on November 29, 2007. Following the April 27, 2002 injury, I released the Claimant on December 12, 2002 with a permanent impairment that constituted an obstacle or hindrance to his employment and/or re-employment. 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.

(Item No. 27) Dr. Zgleszewski further stated,

> I am aware the Claimant previously injured his lumbar spine in regard to a work-related injury that occurred on April 27, 2002 at Industrial Grounds Maintenance. I have been provided with the medical records from Doctor's Care as well as the medical records from Dr. Strohmeyer. The Claimant clearly had an annular tear at L5-S1 disc space. The Claimant was treated by Dr. Strohmeyer and eventually released with permanent impairment on December 12, 2002.
>
> 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. The pre-existing permanent condition was an obstacle or hindrance to his employment, prior to obtaining employment at Pepsi Bottling Group. As a result of the Claimant's pre-existing condition, which was permanently aggravated by the November 29, 2007 injury, the Claimant has sustained substantially greater medical expenses and/or disability as a result of the pre-existing injury than for the November 29, 2007 injury alone. All of my opinions have been provided within a reasonable degree of medical certainty.

(Item No. 28) The Claimant did have a preexisting permanent impairment, as defined by S.C.Code Ann. § 42-9-400(2010) that when combined with the subsequent injury cause substantially more disability and medical expenses, than for the subsequent injury alone.

CONCLUSION

The Claimant's date of accident affiliated with WCC file number 0800956 is November 29, 2007, this is clear by the overwhelming evidence. The Fund chose to maintain its denial, based on notice, alleging WCC file number 0800956 date of accident was January 16, 2008. The Appellants provide "all required information," so the Fund could deny the claim prior to June 30, 2011. The Fund did deny the claim on two (2) separate occasions prior to June 30, 2011, in accordance with S.C.Code Ann. § 42-7-320(2010). The Appellants would respectfully request that the majority of the Full Commission's opinion in pertinent part, be reversed, and the Hearing Commissioner's Decision and Order be reinstated.

Respectfully submitted,

BY: _____

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083
WCC Number: 0800956

SC Second Injury Fund, Respondent,

v.

Pepsi Bottling Group and Old Republic Insurance Company, Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this initial Brief of Appellants complies with Rule 209(c) and does not contain matter which is irrelevant to the appeal.

This 3rd day of June, 2014

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PROOF OF SERVICE

I certify that I have served the initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal to Respondent by depositing a copy of the documents in the United States mail, first class postage prepaid, on June 3rd, 2014 to Ms. Latonya D. Edwards, Esq., Dilligard Edwards, LLC, 3790 Fernandina Road, Suite 103, Columbia, SC 29210.

This 3rd day of June, 2014

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June 3, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RE: Appellate Case No.: 2014-001083
WCC Number: 0800956

SC Second Injury Fund, Respondent,

v.

Pepsi Bottling Group and Old Republic Insurance Company, Appellants.

Dear Ms. Kitchings:

Enclosed for filing is an initial Brief of Appellants in regard to the above-referenced matter. Also, I have enclosed the following, the Designation of Matter to Be Included In The Record On Appeal, and Proof of Service.

Should you have any questions, please feel free to contact me.

Very truly yours,

Andrew D. Smith

ADS/lmj
Enclosures
Cc: Ms. Latonya Edwards, Esquire

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