THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COUNTY OF GREENVILLE
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,

FINAL BRIEF OF RESPONDENT

Duke K. McCall, Jr.
Attorneys for Respondent
Smith Moore Leatherwood, LLP
2 West Washington Street, Suite 1100
Greenville, S.C. 29601
(864) 751-7603

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ISSUE PRESENTED ON APPEAL

Whether there is substantial evidence which supports the Order of the Honorable Letitia H. Verdin that the Respondent is entitled to reimbursement pursuant to S.C. Code § 42-9-400.

STATEMENT OF THE CASE

On October 29, 2002, Patricia McFadden ("McFadden") sustained a compensable injury to her back and left leg while employed by Yanagawa of S.C. As a result of that injury, the McFadden did not reach MMI until January 1, 2004. The claim was settled under a Form 16 which awarded the Claimant a 10% permanent disability to her left leg and a 33.76% permanent disability to her spine. McFadden subsequently filed a change of condition for the worse which the Respondent denied. After a hearing was held on the McFadden's change of condition for the worse claim on March 17, 2006, an Order was issued by Commissioner J. Michele Childs on May 5, 2006 which awarded McFadden further medical treatment by Dr. Stephen Poletti. After the Claimant reached MMI the indemnity portion of the case was settled under a Common Law Order & Release Agreement on February 22, 2008.

On January 7, 2003, just 60 days after her accident, a lumbar X-ray of the Claimant's back showed: "view of the lumbar spine shows a small osteophyte formation at L2-3, L3-4, and L5-S1. Osteophytes are most pronounced at L3-4. . . ." (R. p. 56). Dr. Stephen Poletti who performed spinal fusion on the Claimant found that "to a reasonable degree of medical certainty Patricia McFadden aggravated a pre-existing condition in her back and/or left leg as a result . . ." of this accident. (R. p. 88). The pre-existing condition in the Claimant's back is identified in the medical questionnaire of Dr. Poletti **as arthritis**. (R. pp. 88-89)

The Respondents subsequently filed for a Hearing for reimbursement from the South Carolina Second Injury fund on December 30, 2011. The Appellant denied liability. A Hearing was held on May 9, 2012. Based on the evidence in the record, the Hearing

Commissioner found that the 30% permanent disability suffered by McFadden as a result of her original back injury and the 5% permanent disability to each leg were a hindrance or obstacle to employment or re-employment and further that the her back injury and injury to her legs combined with and aggravated her pre-existing arthritis so as to substantially increase the Carrier's liability for both disability and medicals. (R. p. 60; R. pp. 10-12 (*Commissioner Beck's June 28, 2012 Order, at Findings of Fact No. 3, 5 – 11 and 16)*. The Hearing Commissioner then issued this Order requiring the South Carolina Second Injury Find to reimburse the Respondent pursuant to 42-9-400, Code of Laws of South Carolina, as amended. The Appellant appealed. The Appellant Panel affirmed with an Amendment to the Finding of Facts No. 5 of the Hearing Commissioner which was, "That prior to her accident on October 29, 2002, Patricia McFadden had a pre-existing condition of arthritis to her back. The presumption that arthritis was a hindrance or obstacle to employment was not rebutted." This matter was appealed to the lower court which affirmed the Appellate Panel Order. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers' compensation commission." Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005) cert. dismissed as improvidently granted Aug. 2007; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).

1. Substantial Evidence Standard

The judicial review of the Appellate Panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 366 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006); see, also, Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct. App. 2006). However, a

reviewing court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of them are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. Section 1-23-380(A)(5)(e)(Supp. 2006); Bass v Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004) aff'd, 369 S.C. 176, 631 S.E.2d 899 (2006).

It is not within the appellate court's province to reverse the Appellate Panel's factual findings if they are supported by substantial evidence. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002) (citing Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991)); Muir v. C.R. Bard, Inc., 366 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). 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 the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc. 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Brown v. Greenwood Mills, Inc., 366 S.C. 379, 392, 622 S.E.2d 546, 554 (Ct. App. 2005) cert. denied Jan. 2007; Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct. App. 2006); DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. Isochem, 365 S.C. at 468, 617 S.E.2d at 376; Frame, 357 S.C. at 528, 593 S.E.2d 495; Muir, 336 S.C. at 281, 519 S.E.2d at 591. The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Frame, 357 S.C. at 528, 593 S.E.2d 495. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are inconclusive. Brown, 366 S.C. at 393, 622 S.E.2d at 554; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681; see, also, Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. Kenco Group, 366 S.C. at 458, 622 S.E.2d at 581; Frame, 357 S.C. at 528, 593 S.E.2d 495; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. The appellate court is prohibited from overturning findings of fact of the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C.612, 621, 611 S.E.2d 297 (Ct. App. 2005) cert. denied July 2007; Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455-56, 562 S.E.2d at 681. The Appellate Panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d

843, 845 (1999); Muir, 336 S.C. at 282, 519 S.E.2d at 591; Sharpe v. Case Produce Co., 329 S.C.534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997) rev'd on other grounds.

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE WHICH SUPPORTS THE ORDER OF THE HONORABLE LETITIA H. VERDIN THAT THE RESPONDENT IS ENTITLED TO REIMBURSEMENT PURSUANT TO S.C. CODE 42-9-400.

The Second Injury Fund denies that the carrier's claim is reimbursable pursuant to S.C. Code § 42-9-400 on the basis of five (5) exceptions, four (4) of which are discussed in the Appellant's Brief and also herein.

The initial objection is that the lower Court should have struck the Respondent's APA No. 11, which is a Second Injury Fund Questionnaire completed by Dr. Stephen Poletti, the employee's attending orthopedic physician. This objection is without merit. The Appellant had denied this claim of the Respondent for reimbursement and the APA No. 11 of the Respondent is submitted in light of that denial, to refute Appellant's denial. The Respondent's APA No. 11 is evidence from the attending physician on the issue of whether the back injury aggravated the Claimant's pre-existing condition of arthritis. The Fund did not introduce any evidence to the contrary, but objects to the Respondent's evidence as against substantial evidence. There is no evidence of the Appellant which disputes the Respondent's evidence on this issue. Further, there is no evidence that this information wasn't readily available to the Appellant or that the Appellant did not already have this information since it had medical reports from the attending physician(s). The Appellant did not introduce any evidence or testimony that the Respondent did not fully comply with Section 42-7-320(B)(2) Code of Laws of S.C., as amended. It simply argued that Respondent did not comply with this S.C. Statute.

Second, the Second Injury Fund denied this claim on the ground that the fact that the Claimant's back injury combined and aggravated her preexisting arthritis condition was not an obstacle or hindrance to her employment. To the contrary, under Section 42-9-400 the pre-existing condition of arthritis is presumed to constitute an obstacle or hindrance to employment or re-employment.

"When an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists when the condition is one of the following impairments: (4) Arthritis . . ." Section 42-9-400 (d), Code of Laws of S.C. as amended

The Second Injury Fund's arguments are belied by applicable statutory and case law as well as the evidence in the record.

Of primary importance to the issues raised by Appellant in its brief is S.C. Code § 42-9-400, which provides, in pertinent part, 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 impairment alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer of his insurance carrier shall be reimbursed from the Second Injury Fund as created by § 42-7-310 for compensation and medical benefits.

S.C. Code § 42-9-400(a).

S.C. Code Section § 42-9-400 specifically requires that a Claimant's original injury to have resulted in permanent physical impairment. "Permanent physical impairment" is defined as "any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed." S.C. Code § 42-9-400(d). There is no question that the Claimant's October 29, 2002 injury resulted in permanent physical impairment. The Claimant had a herniated disc at L4-L5 in January 2003. (R. p. 82) Then she developed a partial foot drop. (R. p. 81). In September 2006, the Claimant had screws and a rod inserted for an interbody fusion. (R. p. 67) In addition to the physician's ratings are the permanent restrictions prescribed by Dr. Poletti which he gave the Claimant on May 2, 2007. (R. p. 60).

It must be remembered that the Second Injury Fund's purpose is to "encourage the employment of disabled person without penalizing an employer with greater liability if he employee is injured because of his preexisting condition." Liberty Mutual Ins. Co. v. S.C. Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995).

Third, the Second Injury Fund objects to the Conclusion of Law. No. 3 and apparently Finding of Facts Nos. 6, 7, 8, 9 and 10. Yet again this objection is without merit since there is no evidence to the contrary offered by the Appellant. Both the narrative medical reports of Dr. William Aldrich, and Dr. Stephen Poletti, together with Dr. Poletti SIF Questionnaire clearly establish substantial evidence in support of the Hearing Commissioner's findings as affirmed by the Commission and the lower Court. Dr. Aldrich in his initial medical exam notes ridiculer left

leg pain with a plan to see Dr. Poletti. On the second visit the Claimant was told she needed surgery on her back by Dr. Aldrich. (R. p. 50) On January 9, 2003, Dr. Aldridge diagnosed the Claimant as having **"lumbar back pain – osteophyte arthritis, ridiculer pain."** (R. p. 55) (Emphasis added)

Fourth, the Appellant objects to the ruling of the Hearing Commissioner as affirmed by the Appellate Panel and the lower Court that her interpretation of Section 42-7-320 and 42-7-320(B) is without merit. The Respondents filed their formal hearing Request on December 30, 2011, but the Second Injury Fund did not receive the Respondent's Form 54 until January 2, 2012. The Hearing Commissioner ruled as affirmed by the Appellate Panel and the Lower Court that the Second Injury's Fund's objection is without merit because the Fund had denied the claim. In addition, Rule 3 of the South Carolina Rules of Civil Procedure state:

> "A civil action is commenced . . . (when the pleadings) are served within the statute of limitations in the manner prescribed by law; . . ."

Rule 5(b)(1) says:

> "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney **the service shall be made** upon the attorney . . . .. **Service by mail is complete upon mailing** of all pleadings and papers . . . ." (Emphasis added)

Therefore, the Form 54 was served upon the Appellant on December 30, 2011 when it was mailed to the Appellant's attorney on that date.

Further, the Appellants objections are without merit because Section 42-7-320(B) addresses the last date the Second Injury Fund can accept a claim, i.e., Dec. 31, 2011. However, the Appellant had denied this claim, and therefore, acceptance was not an issue before the Hearing Commissioner, the Appellate Panel or the lower Court. The Appellant had notice of this

claim. In addition it is submitted that Section 42-7-320 and Section 42-7-320(B)(1) and (2) are inconsistent and therefore unconstitutional. Section 42-7-320 requires acceptance before Dec. 31, 2011, and Section 42-7-320(B)(2) requires all information submitted to the Appellant by June 30, 2011, but Section 42-7-320(B)(1) requires Notice to be submitted by Dec. 31, 2010. However, none of the code sections address the issue when liability is contested. This statute is not designed to divest the South Carolina Workers' Compensation Commission of its authority to hear contested cases, and to the extend it does, it is unconstitutional. Under the Appellant's argument there would be no need for any hearings or appeals because all "information"/evidence would be introduced prior to June 30, 2011. However, this is a contested case as evidenced by the Appellant's position in this matter, and this Code Sections does not apply in this case under these circumstances, and to the extend it may, it is inconsistent and unconstitutional.

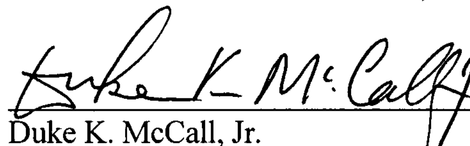
Therefore, the appeal of the Appellant is without merit.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent asserts that this Court should **AFFIRM** the lower Court's finding that Appellant is entitled to reimbursement from the Second Injury Fund for both indemnity and medical expenses paid to or for the injured employee.

Respectfully submitted,

SMITH MOORE LEATHERWOOD, LLP



Duke K. McCall, Jr.
2 West Washington Street, Suite 1100
Greenville, S.C. 29601
(864) 751-7603; (864) 751-7800 (Fax)

Attorneys for Respondent Sompo Japan Insurance Company of America

June 19, 2014

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Letitia H. Verdin, Circuit Court Judge

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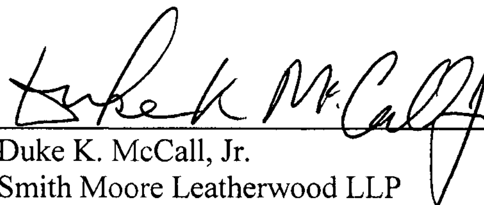
CERTIFICATION OF RESPONDENT

This is to certify that the Final Brief of Respondent, Sompo Japan Insurance Company, complies with Rule 211(b) of the South Carolina Rules of Court.



Duke K. McCall, Jr.
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100
Greenville, S.C. 29601
(864) 751-7603; (864) 751-7800 (Fax)

Attorneys for Respondent Sompo Japan Insurance Company of America

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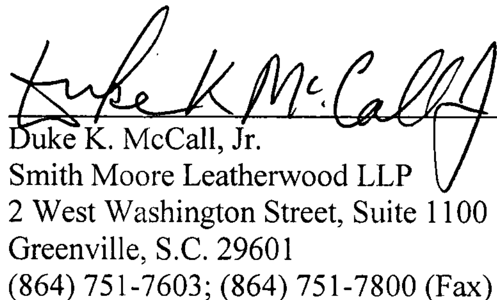
PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the **Final Brief of Respondent** was served upon the Appellant by placing a copy of the same in the United States Mail, postage prepaid, on the 23rd day of June, 2014, addressed as follows:

Latonya Dilligard Edwards
Dilligard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, SC 29210



Duke K. McCall, Jr.
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100
Greenville, S.C. 29601
(864) 751-7603; (864) 751-7800 (Fax)

Attorneys for Respondent Sompo Japan Insurance Company of America

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