

STATE OF SOUTH CAROLINA  
 COUNTY OF RICHLAND  
 IN THE COURT OF COMMON PLEAS  
 Sedgwick CMS

FORM 4

JUDGMENT IN A CIVIL CASE  
 CASE NO. 2013 CP 40-01592  
 South Carolina Second Injury Fund

**RECEIVED**  
 JUL 14 2014  
**SC Court of Appeals**

Plaintiff/Respondent

Defendant/Appellant

Submitted by: Defendant

Attorney for : Plaintiff X Defendant  
 or  
 Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRCP;  Rule 41(a), SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRCP;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TREASURY, ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.  
 Additional Information for the Clerk :

2014 JUN 16 AM 12:10  
 RICHLAND COUNTY  
 FILED  
 JANNETTE W. MCBRIDE  
 CLERK, C.P. & G.S.

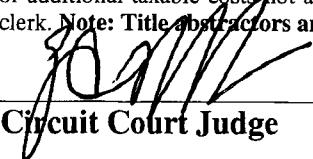
**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
 Circuit Court Judge

2154  
 Judge Code

06/4/2014  
 Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Latonya Edwards

Daniel Addison

\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

Jeanette McBride

**CLERK OF COURT**

**Court Reporter:**

*Jeanette W McBride*

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 South Carolina Second Injury Fund, )  
 )  
 Defendant/Appellant, )  
 )  
 v. )  
 )  
 Sedgwick CMS, )  
 )  
 Plaintiff/Respondent, )  
 )  
 [In Re: Cheryl Petway v. Verizon Wireless] )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No.: 2013-CP-40-01592

RICHLAND COUNTY  
 FILED  
 2014 JUN -6 AM 12:10  
 JEANNETTE W. MCBRIDE  
 C.C.P. & G.S.

**ORDER**

This matter is before the Court upon the appeal of the South Carolina Second Injury Fund (“Appellant”) from an order of the South Carolina Workers’ Compensation Commission (“Commission”). A hearing on this matter was held before the undersigned on March, 7, 2014. Appellant was represented by Latonya Dilligard Edwards of Columbia, South Carolina. The respondent, Sedgwick CMS (“Respondent”) was represented by R. Daniel Addison of Columbia, South Carolina. After carefully reviewing the record in this matter as well as considering the arguments of counsel at the hearing, this Court finds that underlying order of the Commission is supported by substantial evidence and is, therefore, **AFFIRMED**.

**STANDARD OF REVIEW**

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Commission. S.C. Code Ann. § 1-23-380; *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. *Hamilton v. Bob Bennett Ford*, 336 S.C. 72, 76, 518 S.E.2d 599, 601 (Ct. App.

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**SCANNED**

1999). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Hicks v. Piedmont Cold Storage*, 335 S.C. 46, 515 S.E.2d 532 (1999); *Broughton v. South of the Border*, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). It is not within the court's province to reverse findings of the Commission which are supported by substantial evidence. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986); *Broughton*, 336 S.C. at 496, 520 S.E.2d at 637.

Findings of fact, inferences, and any conclusions drawn by the Commission may be disturbed on appeal only if they are "clearly erroneous" in view of the reliable, probative and "substantial evidence on the whole record." *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. As defined by South Carolina courts, "substantial evidence" is not a mere scintilla of evidence, nor is the evidence reviewed blindly from one side of the case, but 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. *Id.* at 136, 276 S.E.2d at 306.

#### **STATEMENT OF THE CASE**

The matter originally came before the Commission pursuant to Verizon Wireless' and Sedgwick CMS' (collectively "Sedgwick") Form 54, *Employer's Request for Hearing*, in which Sedgwick sought reimbursement from the South Carolina Second Injury Fund ("SIF") for certain medical and indemnity benefits paid in connection with Cheryl Petway's ("Claimant") workers' compensation claim. This case was heard before Commissioner Susan S. Barden ("Single Commissioner") in Columbia, South Carolina on April 30, 2012. The Record in the case was comprised of: Claimant's deposition testimony; Dr. Jon Peter DeVries' deposition testimony; pertinent medical records; and the first Decision & Order in the case issued by Commissioner Avery B. Wilkerson on January 7, 2009, which found that Claimant was permanently and totally disabled. The record shows that Claimant worked for Verizon Wireless for approximately six

years. She developed carpal tunnel syndrome, which was ultimately determined to be work-related. Claimant had other health conditions, including diabetes, and had an overall decline in her health that ultimately left her unable to maintain gainful employment.

At the hearing before the Single Commissioner, Sedgwick took the position that Claimant had pre-existing diabetes, hypertension, hepatitis C, and degenerative issues with her spine, all of which satisfy the requisites set forth for reimbursement from the SIF in accordance with S.C. Code §42-9-400, et. seq. Sedgwick presented evidence in support of these contentions, including an Employee Knowledge Affidavit and an Employer Knowledge Affidavit. Sedgwick was unable to identify a specific employer representative with knowledge of Claimant's exact conditions but presented evidence that Verizon Wireless had institutional knowledge of Claimant's pre-existing conditions. Procedurally, the SIF argued that this case was not timely heard in accordance with S.C. Code §42-7-320. The SIF further maintained that Sedgwick had insufficient evidence to satisfy the requirements of S.C. Code §42-9-400, et. seq., as related to any of Claimant's enumerated pre-existing health conditions. The SIF also maintained that Verizon Wireless did not have adequate knowledge of Claimant's pre-existing condition(s) to satisfy the employer knowledge requirement and that reimbursement is not proper in this case.

At the hearing before the Single Commissioner, Sedgwick presented evidence in support of its position. The SIF relied on the evidence submitted by Sedgwick and did not present any evidence of its own.<sup>1</sup> The Commission did not accept any live testimony in conjunction with the April 30, 2012 hearing. Of note, the Single Commissioner, took judicial notice of the fact that insulin-dependent diabetics are precluded from certain classes of employment, including jobs in public transportation. (R. p. 290).

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<sup>1</sup> The evidence submitted by Sedgwick at the hearing consisted of the exact same evidence previously submitted to the SIF with its request for reimbursement.

On June 21, 2012, the Single Commissioner issued a Decision & Order finding the claim reimbursable by the SIF. Commissioner Barden held that Sedgwick presented adequate evidence to show that the claim is properly reimbursable pursuant to S.C. Code §42-9-400, et. seq., based on Claimant's pre-existing diabetes and she made specific findings that Sedgwick satisfied the employer knowledge requirement by proving institutional knowledge of Claimant's pre-existing diabetes. However, the Single Commissioner rejected Sedgwick's arguments that Claimant's degenerative disc disease, hypertension, or Hepatitis C were sufficient to support a claim for reimbursement due to employee knowledge and/or other issues. Additionally, the Single Commissioner rejected the SIF's argument that S.C. Code §42-7-320(B) prohibits the Commission from ordering that a claim is reimbursable by the SIF for reimbursement after December 31, 2011. Instead, the Single Commissioner accepted Sedgwick's argument that the statute means exactly what it says—specifically, finding that the SIF had to make its decision involving whether to accept any pending cases for reimbursement on or before December 31, 2011, and that such a decision has no impact on the Commission's ability to order that a claim is reimbursable.

The SIF timely appealed the Single Commissioner's Order, alleging multiple grounds of error: whether the case is properly reimbursable pursuant to S.C. Code §42-9-400, et. seq. and whether the Commission has authority to order that a case is reimbursable by the SIF after December 31, 2011. The case was reviewed by the Appellate Panel of the Full Commission and in a February 8, 2013, Order the Commission (Record On Appeal "R.", p. 287) fully affirmed the decision and order of the Single Commissioner. On October 30, 2013, the SIF filed its Notice of Appeal to this Court, asserting that the Commission erred as a matter of law in finding the Appellants should reimburse Sedgwick for medical and indemnity payments made in this case in accordance with S.C. Code Ann. § 42-9-400.



## STATEMENT OF THE FACTS

The Record on Appeal contains relevant medical records regarding Claimant and her medical conditions. See generally, R. pp. 1-142. Also in the Record is a letter dated September 20, 2006, in which Sedgwick notified SIF of its intent to seek reimbursement related to Claimant's claim. R., p. 143. The Record further contains documents before the Single Commissioner at the hearing, included a transcript from the underlying merits hearing. Generally speaking, the hearing transcript does not contain any direct evidence related to the issues in this case but it is important to note that the Commissioner stated at the conclusion of the parties' positions that he felt there is a "possible Second Injury Fund recovery due to the date of the accident and some of these other extenuating circumstances." R., p. 269 lines 1-5.

### Claimant's Deposition Testimony

Claimant did not provide live testimony at the initial merits hearing in Claimant's case. The parties instead stated their respective positions on the record and the Single Commissioner relied on the medical and other evidence, including Claimant's deposition, in reaching his determination that Claimant was permanently and totally disabled from her 2006 workplace injury.

In her deposition, Claimant testified that she completed three years of college but never earned a degree. R., p. 171-72. She then went to work but battled alcoholism for many years. R., pp. 174-75. In 1997, Claimant's son moved her to Ohio and she started working with a telephone call center as a sales representative, which required a lot of data entry. R., pp. 177. She had several other jobs but eventually went to work for Verizon Wireless in Ohio in 2001. R., pp. 184. In May 2006, she moved from Ohio to South Carolina for a promotion she received through Verizon Wireless. R., p. 187. Claimant testified that she first had issues with her hands in roughly March 2006 and that she had pre-existing diabetes. R., p. 191. Claimant was not

exactly sure when she was diagnosed with diabetes but believed it was around 2004. R., p. 193. Claimant further testified that she had problems in her hands as early as March 2006 and that her supervisor in Dublin, OH was aware of these issues, but Claimant could not recall the supervisor's name. R., p. 214. Claimant testified that she did not feel that she was capable of any employment at that time because of her hands, her back, issues with depression, and "with everything", referring to her overall declining health. *See generally* R., pp. 223-24. Claimant testified that she was diagnosed with liver disease in April 2007, had back problems off and on from 1998 until 2007, but her major issues involving her back began after she was written out of work with the carpal tunnel syndrome. R., pp. 224-28.

*Testimony of Dr. DeVries*

In conjunction with the underlying workers' compensation case, the parties deposed Dr. Jon Peter DeVries and submitted the transcript as evidence in this case. R. pp. 251-58. Dr. DeVries testified that he is a board certified orthopaedic surgeon and that he treated Claimant for bilateral carpal tunnel syndrome. R., p. 251. He performed a surgical release and then assigned permanent work restrictions based on the results of an functional capacity evaluation ("FCE"). R., p. 252. Dr. DeVries did not feel Claimant could return to her pre-injury job due to the keyboarding requirements. *Id.*

As part of his deposition testimony, Dr. DeVries commented on an article published by the National Institute of Neurological Disorders and Stroke, a division of the National Institute of Health, involving carpal tunnel syndrome. R., p. 253. Dr. DeVries confirmed that people with diabetes are more prone to developing carpal tunnel syndrome than the general population stating there an "association between diabetes and carpal tunnel syndrome" and that there is a "higher incidence of carpal tunnel" in people with diabetes. R., pp. 253-254. In addition to raising the risk of developing carpal tunnel, Dr. DeVries further testified that diabetes generally

slows the healing process and makes it more difficult for a person with diabetes to recover from a routine surgery. R., p. 254. Dr. DeVries opined that Claimant's diabetes resulted in her having a much slower healing process and that he feels her progress in therapy was impeded by her diabetic condition. *Id.*

### **Pertinent Medical Evidence**

Part of Sedgwick's medical evidence in support of its request for SIF reimbursement included pre-injury medical records from Dr. Edward T. Arcy. These records show the early progression of Claimant's carpal tunnel syndrome. *See generally* R., pp. 29-36. Of important note, Dr. Arcy references the fact that Claimant was out of work prior to September 22, 2006, for her diabetes under the Family Medical Leave Act ("FMLA"). R., p. 34.

Sedgwick also submitted records from Trident Health Systems Sports Medicine & Rehabilitation. *See generally* R., pp. 1-28. On March 14, 2007, Claimant filled out a health questionnaire, which indicates that she had preexisting diabetes and high blood pressure. R., p. 3. This questionnaire further indicates that Claimant was taking insulin, blood pressure medication, and Advil for ongoing back pain. *Id.* These records further show that Claimant clearly had preexisting Hepatitis but "seemed unaware" that she had the disease based on the comments by her occupational therapist. R., p. 4. An additional patient history sheet indicates Claimant learned of her high blood pressure in January 2007 but knew of degenerative disc disease and diabetes since 2005. R., p. 11. The physical therapy records also reveal that while Claimant made some progress through therapy, her progress generally was very slow compared to her expected recovery. *See generally* R., pp. 1-28.

Records from Julie Lesch, LISC-CP, reveals the impact Claimant's declining health had on her overall condition. Based on an August 3, 2007 note, Claimant was having ongoing issues dealing with "her ongoing disability as a result of her carpal tunnel surgery." R., p. 37. Ms.

Lesch specifically noted that “the loss of functioning in her hands contributes to her depression and anxiety.” *Id.* Claimant’s August 18, 2008 record shows that Claimant experienced increasing difficulty with her back, which began impacting Claimant’s ability to walk. R., p. 39.

Claimant’s records from Roper St. Francis show that Claimant moved from Ohio and was working as an executive for Verizon in January 2007. R., p. 39. Claimant’s records clearly document a history of diabetes and hypertension, as well as depression. *See generally* R., pp. 39-67. Claimant’s February 21, 2007 note compares a flare-up on right leg pain to “radicular pain from past.” R., p. 52. Claimant experienced a spike in her sugar levels immediately after her March 7, 2007 left carpal tunnel release, which is noted in her records. R., p. 54. Her March 7, 2007 record refers to her diabetes as “uncontrolled” and indicates that “stress [is]contributing” to her issues. *Id.* By March 19, 2007, Claimant’s blood sugar was slightly better controlled but she had to be referred to Palmetto Spine for additional treatment for her low back. R., p. 55. In May 2007, Claimant’s physician noted that her blood sugar was “out of control.” R., p. 56.

Claimant’s records from Charleston Gastroenterology Specialists provide additional information about Claimant’s medical history. Dr. Brener indicates that Claimant “has had back problems in the past with [a] herniated disc.” R., p. 68. Dr. Brener further noted Claimant’s past history of elevated liver function tests, diabetes, depression, and hypertension. R., p. 69.

#### Other Evidence

On January 7, 2009, Commissioner Wilkerson entered the first Decision & Order in this matter. Commissioner Wilkerson concluded that Claimant worked for Verizon as early as 2001 and that her work ultimately lead her to develop bilateral carpal tunnel syndrome. R., p. 155, Findings of Fact 5-6. Commissioner Wilkerson further found that Claimant “had pre-existing conditions including lumbar disc herniation which will require surgery...chronic liver disease and Hepatitis C....and insulin dependent diabetes...resulting in peripheral neuropathy of bilateral



extremities...and that the Claimant requires extensive treatment and medications for these pre-existing conditions that contribute to and effect her work-related injuries.” R., pp. 155-56,

Finding of Fact No. 8. Commissioner Wilkerson also found that:

Claimant’s pre-existing diabetes aggravated her work-related carpal tunnel injuries and slowed her recovery from her surgeries and prolonged her nerve regeneration. I base this finding on Dr. DeVries’ records and his note indicating that her healing process may be slowed by her diabetes. . . and Dr. DeVries’ deposition testimony regarding the effect of Claimant’s diabetes on her healing process. . . .

R., pp. 156-57, Finding of Fact No. 12 (internal citations omitted). Commissioner Wilkerson also found that Verizon Wireless had knowledge of the Claimant’s pre-existing conditions, including her diabetes. R. P. 157, Finding of Fact No. 14. He also found that Claimant’s overall disability was greater than would have resulted from the subsequent work injury alone because of the aggravation of her preexisting herniated disc and diabetes. R., pp. 157-58, Findings of Fact Nos. 14-15. Commissioner Wilkerson further concluded that SIF reimbursement is appropriate in this case in his initial Order. R., p. 160.

Respondents submitted a Form 19, *Status Report & Compensation Receipt*, showing that Respondents paid One Hundred Sixteen (116) weeks of temporary total disability benefits and then paid a “perm total award” in a lump sum. R. p. 144. The Form 19 reflects total compensation paid of Two Hundred Seventy Thousand Five Hundred Fifty-Four and 89/100 Dollars (\$270,554.89) and medical compensation paid of Five Thousand Seven Hundred Ninety-Seven and 27/100 Dollars (\$5,797.27). The lump sum award figure is further corroborated by the June 26, 2009 Consent Order filed by Commissioner Wilkerson. R., pp. 145-46.

Sedgwick submitted a November 3, 2009 Employee Condition Affidavit indicating that Claimant was aware she had hypertension and diabetes prior to her September 8, 2006 injury but was not aware she had degenerative disc disease. R., p. 162. Sedgwick also submitted a

February 4, 2010, Employer Knowledge Affidavit by Sheila Wyles of Verizon Wireless indicating that she had knowledge that Claimant was out of work for short-term disability and workers' compensation but did not have knowledge of the "specific conditions related to her [short-term disability] claims." R., p. 163.

Sedgwick submitted an August 26, 2010 Affidavit by Dr. Jon DeVries that states Claimant had Type II diabetes and hypertension prior to September 8, 2006, and that these conditions combined with her workplace injury resulting in her losing more time than she should have lost from the work injury alone. R., p. 164. Dr. DeVries indicated that he did not have any information involving whether the diabetes and hypertension were a hindrance or obstacle to her employment. He indicated that these conditions did not result in a "substantially higher percentage of permanent disability" but did "substantially increase" the medical costs associated with this case.

### DISCUSSION

**1. The Commission did not err holding that Claimant's employer's institutional knowledge was sufficient under S.C. Code §42-9-400.**

In its brief, Appellant argues that Respondent did not present adequate evidence of employer knowledge to satisfy S.C. Code §42-9-400. In pertinent part, S.C. Code §42-9-400(c) provides that the employer must establish "that the employer had knowledge of the [employee's] permanent physical impairment at the time that the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge." No South Carolina appellate court has rendered an opinion on what evidence is required to satisfy the knowledge requirement of this code section.

As noted by one commentator, in states that require actual employer knowledge, like South Carolina, "an obvious question. . . is [h]ow much must the employer have known about the

actual nature of the prior injury?" 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation § 91.03[3] (6th Ed. 1997). For example, the employer would have sufficient knowledge if "the employer, a brewmaster, knew [claimant's] previous shoulder injury [was permanent], but did not know 'what the trouble was.'" Larson's § 91.03[3]; see also *Kirchner v. Standard Rochester Brewing Co.*, 238 N.Y.S.2d 1019 (1963). The requirement for an employer to have actual knowledge of an employee's preexisting condition is based on the rationale that the claimant's prior handicap would impact the employer's hiring policy. Therefore, it "might be expected that the ultimate test would be what the employer believed." Larson's § 91.03[3]. In other words, the employer "would have to know, not just that the employee had some abnormal condition, but that the condition was permanent in character." Larson's § 91.03[3].

In addition to believing the injury was permanent, the employer must also know that the condition was of such a kind likely to be a hindrance to employment. A hindrance to employment exists where:

the preexisting permanent condition would reasonably cause a potential employer to be reluctant to hire a person because of concerns such as the person's preexisting condition made him a less capable worker, a greater risk in terms of getting injured, or a greater risk in terms of the amount of potential permanent disability that the worker would suffer from an injury.

*Royce v. Sw. Pipe of Idaho*, 647 P.2d 746, 749-50 (Idaho 1982). In *Salto v. M. Ruzza & Sons*, 220 N.Y.S.2d 977 (1961), the employer knew his employee had "[diabetes] . . . but he did not consider the claimant disabled from performing his usual work or that it in any way handicapped him as a house painter. He stated he considered someone disabled when he could not work." *Id.* Nevertheless, the New York Supreme Court recognized diabetes as a condition that is of a kind likely to be a hindrance to employment and the employer was reimbursed from the state's Special Fund.

Finally, the preexisting condition of which the employer has knowledge must be the very condition that caused the final disability. Larson's § 91.03[3]. The Court also notes that insulin-dependent diabetics are restricted from certain types of employment under federal and state law. For example, pilots with insulin-dependent diabetes cannot obtain the Federal Aviation Administration's medical certification needed to operate large commercial airplanes, the Department of Transportation will not allow diabetics to be long-haul truck drivers, and most branches of the military still restrict enlistment for individuals with diabetes. In addition, under S.C. Code Ann. § 42-9-400(D), diabetes is listed as a condition for which there is an automatic presumption that it will be a hindrance to employment. The substantial evidence in the records shows that Claimant was severely impacted by her preexisting diabetes, which ultimately caused her substantial final disability, a point which Appellant does not contest.

The next question is “*how* does the employer acquire the requisite actual knowledge?” Larson's § 91.03[3] (emphasis in original). The “most reliable evidence of the employer's knowledge is the written notation of the prior condition in the employer's medical record of the employee.” Larson's § 91.03[4]; see *Fitzgerald v. News Syndicate Co.*, 233 N.Y.S.2d 663 (1962). Under certain circumstances, however, the employer is relieved of the requirement to have actual knowledge of the employee's pre-existing condition. For example, knowledge will also be imputed to an employer when an employee lists a condition on an application for a life insurance policy, which the employer also signs. See *Am. Motorists Ins. Co. v. State, Workers' Comp. Second Injury Bd.*, 544 So. 2d 595, 599 (La. Ct. App. 1989). As evidence by the record in this case, Claimant applied for FMLA while working for Verizon in Ohio. Additionally, the record reflects that Verizon Wireless was aware that Claimant had received short-disability benefits with Verizon during her time in Ohio.



Based on the substantial evidence in the record, this Court finds that Verizon Wireless had both actual and imputed knowledge of Claimant's diabetes, which by its very nature is a permanent condition, and decided to not only continue to employ her, but accommodate her transfer to another location. Claimant began working as a call center clerk Verizon Wireless in Ohio in 1997. R., pp. 186-87. Prior to moving to South Carolina for a promotion with Verizon Wireless in May 2006, Claimant developed CTS and learned that she had diabetes. R., p. 191. Claimant believes she learned of her diabetes in 2004. R., p. 191. Thus, Claimant clearly had knowledge of her diabetes at least two years prior to the injury at issue in this case. Additionally, Claimant testified that her supervisor in Dublin, Ohio was aware of her diabetes and the issues with her hands before she made the move to South Carolina. R., p. 191.

There is substantial evidence in the record that Verizon Wireless was aware of and had granted Claimant FMLA leave for her diabetes prior to her September 8, 2006 workplace injury. In addition to Claimant's testimony that her supervisor in Dublin, Ohio, was aware of her diabetes, Respondent also presented the notes of Dr. Edward T. Arcy stating that Claimant was out of work prior to September 22, 2006, on FMLA for her diabetes. R., p. 34. Claimant's date of injury for this claim is September 8, 2006.

In addition to Verizon Wireless having actual knowledge of Claimant's diabetes, Respondent also showed that knowledge of Claimant's condition can also be imputed to the employer. The Commission found that Verizon Wireless had institutional knowledge of Claimant's diabetic condition based on its granting Claimant short-term disability related to her diabetes and that this institutional knowledge was sufficient to satisfy S.C. Code §42-9-400(c). This finding is in line with cases like *Am. Motorists Ins. Co.*, which allow knowledge of an employee's preexisting condition to be imputed to an employer when the employee applies for benefits through their employer. Here, Claimant previously filed for and received both FMLA

and short-term disability benefits through her employer prior to her workers' compensation injury in South Carolina. Verizon Wireless provided both benefits to Claimant with the knowledge that she had a personal health condition. Therefore, the substantial evidence is sufficient to show that knowledge of Claimant's personal health condition, namely diabetes, can be imputed to Verizon Wireless and the Commission's findings on these matters is affirmed.

**2. The Commission did not err in holding that Claimant's diabetic condition was permanent and serious enough to constitute a hindrance or obstacle to her employment.**

On appeal, Appellant argues that the Commission's holding that Claimant's diabetic condition was permanent and serious enough to constitute a hindrance or obstacle to her employment or reemployment is not supported by substantial evidence. Appellant admits that S.C. Code §42-9-400(d)(2) creates a presumption that diabetes is permanent and serious enough to constitute a hindrance or obstacle to employment. However, Appellant contends that the medical evidence in this case overcomes this presumption.

In support of this contention, Appellant cites *Davis v. Epting*, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994). This case, however, deals with a real estate dispute and is not applicable to any issue involved in this case. Appellant further relies on the Physician's Affidavit of Dr. DeVries. R., p. 164. In this affidavit, Dr. DeVries responds to the question of whether Claimant's pre-existing diabetes was a "hindrance or obstacle to employment" by checking "No" and adding the phrase "Not to my knowledge." In addition, Appellant cites to evidence in the record that Claimant's hemoglobin percentages met the treatment goal of less than seven percent (7%) and her diabetes was noted to be controlled. The Court first notes that there is no evidence in the record establishing what the "treatment goal" for diabetics entails and finds this an insufficient basis for reversing the Commission. Secondly, this argument disregards other

subsequent evidence in the record showing Claimant's sugars were "out of control." *See e.g., R.*, pp. 54, 56, 60.

In the Order, the Commission found that Sedgwick was entitled to the statutory presumption under S.C. Code Ann. §42-9-400(d)(2). The Commission further found that "[e]ven without the statutory presumption...Claimant's diabetes was in fact 'permanent' and a 'hindrance of obstacle to employment or reemployment' because Claimant previously had to take short-term disability due to her diabetes." *R.*, p. 283, Finding of Fact No. 12. The substantial evidence in the record supports these findings by the Commission. The simple fact that Claimant's diabetic condition was noted as being controlled at certain points after she developed the condition is simply not enough to overcome the statutory presumption enacted by the General Assembly. The evidence in the records clearly shows that prior to Claimant's transfer to SC, she was out of work on short-term disability/FMLA leave trying to get her diabetes under control. *R.*, p. 34. This leave clearly occurred prior to her September 8, 2006 injury the fact that Claimant, in fact, had to leave the workforce for a period of time related to her diabetes establishing that her diabetes was serious enough to constitute a "hindrance or obstacle to her employment."

For these reasons, the Court finds that the Commission's holding that Claimant's condition was "permanent" and a "hindrance to her employment" is supported by the substantial evidence in the record and is affirmed.

**3. The Commission did not err in holding that Claimant's overall impairment was substantially increased due to Claimant's pre-existing diabetes.**

Appellant argues that the Commission's holding that Respondent's overall liability was substantially increased due to Claimant's preexisting diabetes and hypertension is not supported by the record. In the order, the Commission found, based on the medical records, Dr. DeVries

testimony, Claimant's deposition testimony and other evidence in the record that Claimant's pre-existing diabetes resulted in substantially greater impairment. As stated in the order, the Commission concluded that Claimant ended up permanently and totally disabled due to what otherwise would have been a relatively small impairment to her upper extremities.

Appellant points to Dr. DeVries affidavit in which he answers "No" to the question of whether Respondent's liability was substantially increased based on Claimant's pre-existing conditions. R. p. 164. This opinion by Dr. DeVries, however, is not dispositive of the issue and is contradicted by additional evidence in the record. For example, in his deposition, Dr. DeVries testified that there is a "higher incident of carpal tunnel" in people with diabetes and that diabetes generally slows the healing process and makes it more difficult for a person with diabetes to heal from a routine surgery. R., p. 254. Dr. DeVries further testified that Claimant's diabetes impeded her healing process and undermined her success with physical therapy. *Id.* Accordingly, Dr. DeVries' testimony establishes that Claimant was out of work longer and suffered greater impairment due to her diabetes. Also, due to Claimant's poor performance on an FCE ordered by Dr. DeVries, Claimant was awarded permanent and total disability. R., pp. 156,158. Further, Claimant experienced an immediate spike in her blood sugar levels following her March 7, 2007 left carpal tunnel release. *See generally* R., pp. 55-58. Her physicians indicated that her diabetes was "uncontrolled" and that "stress" from the workers' compensation claim and other issues contributed to the flare-up in Claimant's diabetic condition. Claimant's diabetes remained uncontrolled more than two months following her surgery.

Based on this evidence, the Court finds that the findings of the Commission on this issue are clearly supported by substantial evidence in the record and are affirmed.



**4. The Commission correctly interpreted S.C. Code §42-7-320(B) in finding that Appellant is required to reimburse Respondent for this claim.**

Appellant contends that S.C. Code Ann. §42-7-320(B) bars it from accepting any claim for reimbursement on or after December 31, 2011. S.C. Code §42-730(B) states: “After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier.” Appellant contends that this statute is mandatory and prohibits the Commission from ordering reimbursement of an otherwise reimbursable claim after December 31, 2011. In support of this argument, Appellant references S.C. Code §42-7-320(B)(3), which requires the SIF to “continue reimbursing employers and insurance carriers for claims accepted by the Fund on or before December 31, 2011.”

In this case, it is particularly helpful to look at the overall scheme set forth in S.C. Code §42-7-320 to provide context to the provision in dispute. S.C. Code §42-7-320 provides for the “orderly winding down” of the SIF. Subsection (B) states that the SIF “shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier.” It further provides that claims arising on or after July 1, 2008 will not be eligible for reimbursement. Subsection (B)(1) requires that the SIF have notice “of a potential claim by December 31, 2010.” Subsection (B)(2) states that “all required information for consideration of accepting a claim” must be submitted to the SIF by June 30, 2011. Subsection (B)(1) further provides that “failure to submit all required information...so that the claim can be accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery.” Finally, Subsection (B)(3) states that carriers, self-insurers, and the State Accident Fund will “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.” In context, S.C. Code §42-7-320 simply

sets forth a timeline for winding down the Fund and establishes December 31, 2011, as the date by which the SIF must make a determination as to whether to accept a case.

When faced with questions of statutory construction, the primary goal of the Court or agency reviewing the statute is to discern the legislature's intent in creating the statute. *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). In discerning legislative intent, courts primarily look to the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); *Morgan*, 352 S.C. at 366, 574 S.E.2d at 206; *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989). Here, the plain language of the statute states that the Fund "shall not accept" cases for reimbursement after December 31, 2011. The statute is silent as to the Commission's power to order reimbursement. There is absolutely nothing in the plain language of the statute that suggests the General Assembly intended to rob the Commission of its authority to render a determination regarding whether a case is reimbursable after the December 31, 2011 deadline. The SIF argues that S.C. Code §42-7-320(B) imposes an absolute deadline of December 31, 2011, after which no cases can be accepted by the SIF even pursuant to an Order of the Commission. However, this interpretation is contrary to the plain language of the statute and urges a result that is against public policy. Carriers and other parties seeking reimbursement from the SIF had until June 30, 2011, to submit information for consideration by the SIF. Then, the SIF had six (6) months to consider this information and issue an acceptance or denial.

In this case, Appellant first received notice of this claim on or around September 20, 2006. Respondent's claim, however was denied and then Respondent sought an offer of compromise. When Respondents learned that Appellant would not change its position,

Respondents filed its Form 54 on December 21, 2011, before the December 31, 2011 deadline.

The Court finds that Appellant's interpretation of this statute would reward it for dragging its feet until the last minute and then summarily denying cases just prior to the December 31, 2011 deadline. The Court finds that this result would be contrary to the intent of the statute. Consequently, the finding of the Commission that S.C. Code §42-7-320(B) is not a bar to this claim is affirmed.

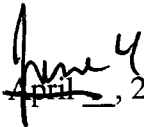
**CONCLUSION**

For the foregoing reasons, the February 8, 2013 Order of the Commission is supported by the substantial evidence in the record and is affirmed in its entirety.



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Eugene C. Griffith, Jr.  
Circuit Court Judge

  
~~April~~, 2014

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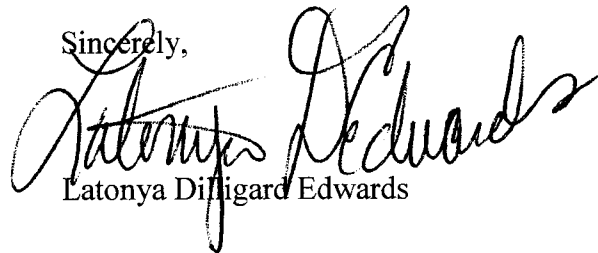
Re: Sedgwick CMS v. S.C. Second Injury Fund  
[In Re: Cheryl Petway v. Verizon Wireless]  
C/A Case No.: 2013-CP-40-01592

Dear Ms. Holston:

On March 7, 2014, the above-referenced case was heard in the Court of Common Pleas of the Fifth Judicial Circuit for Richland County. My records indicate that you were the court reporter for this case.

I am requesting that you provide me with a transcript of the proceedings. Please transcribe the entire record. I agree to pay the per page charge for this transcript as provided by Rule 607 of the South Carolina Appellate Court Rules.

Sincerely,



Latonya Dilligard Edwards

LDE/ems

cc: The Honorable Jenny Abbott Kitchings, Clerk, SC Court of Appeals  
Judicial Director, SCWCC  
S.C. Court Administration  
R. Daniel Addison, Esquire

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**SC Court of Appeals**