

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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AUG 29 2014

Appellate Case No.: 2014-001083

SC Court of Appeals

Old Republic Insurance Company, Appellant,

v.

South Carolina Second Injury Fund, Respondent.

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

MOTION TO FILE OUT OF TIME

The undersigned counsel of Dilligard Edwards, LLC, Attorney for the Respondent, respectfully request leave of the Court to file the attached "Initial Brief of Respondent" and "Designation of Matter To Be Included In Record on Appeal" out of time. The Respondent's Brief was due August 4, 2014 pursuant to the Order extending time to file and serve said brief. However, due to a clerical oversight, said Brief was calendared to be due to the South Carolina Court of Appeals on August 6, 2014.

The granting of leave to file the attached Respondent's Brief and Designation of Matter out of will not cause any prejudice to this case.

(See following page for signature)



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August 22, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
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(In Re: Carl Hutchins, Employee v. Pepsi Bottling Group and Old Republic Insurance Company,
Employer and Carrier)

PROOF OF SERVICE

The undersigned counsel of Dilligard Edwards, LLC, Attorney for the Respondent, does hereby certify that service of the **Motion To File Out Of Time** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Appellant, Old Republic Insurance Company, and the South Carolina Workers' Compensation Commission, by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope on this 22nd day of August, 2014, addressed as follows:

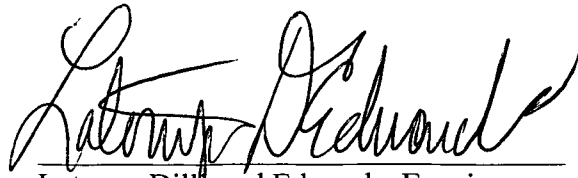
Andrew D. Smith, Esquire
147 Wappoo Creek Drive, Suite 104
Charleston, South Carolina 29412

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

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AUG 22 2014

SC Court of Appeals

A handwritten signature in black ink, appearing to read "Latonya Dillgard Edwards". The signature is written in a cursive style with a horizontal line underneath it.

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083

Old Republic Insurance Company,.....Appellant,

v.

South Carolina Second Injury Fund,.....Respondent.

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

INITIAL BRIEF OF RESPONDENT

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Other Authority

WEBSTER’S DICTIONARY 3864

STATEMENT OF THE ISSUES

1. Was the South Carolina Workers' Compensation Commission's decision that Carrier had not established knowledge pursuant to S.C. Code Ann. § 42-9-400 (c) supported by substantial evidence in the record?
2. Was the South Carolina Workers' Compensation Commission's decision to exclude certain documents consistent with the statutory mandate outlined in S.C. Code Ann. § 42-7-320(B)(2)?
3. Does S.C. Code Ann. § 42-9-400 require Carrier to establish a prima facie case to implicate reimbursement recovery?

STATEMENT OF THE CASE

This is a claim by the South Carolina Second Injury Fund (the "Fund") from an award of partial reimbursement under South Carolina Code Ann. § 42-9-400. Employer, Pepsi Bottling Group, and Carrier, Old Republic Insurance Company (collectively "Carrier") alleged that they incurred substantially greater liability for medical costs and disability when their employee, Carl Hutchins ("Claimant") sustained a work injury on November 29, 2007 that either aggravated or combined with his preexisting lumbar injury. R.p._____. The Fund denied this claim for various reasons. The Fund asserted that the claim was barred by S.C. Code Ann. § 42-7-320(B) and its subsections. R.p._____. Specifically, the Fund asserted that Carrier had not submitted all required information by June 30, 2011, which bars reimbursement. R.p._____. The Fund also asserted that the date of injury was January 16, 2008 rather than November 29, 2007 as alleged by Carrier. R.p._____. The Fund also asserted that it was not provided notice of a potential second injury fund claim prior to the payment of seventy-eight (78) weeks of benefits, as required by S.C. Code Ann. § 42-9-400(f). R.p._____. The Fund also denied that the prior lumbar injury was permanent and serious enough to constitute a hindrance

to employment or that it substantially increased Carrier's liability for medical costs and permanent disability within the meaning of the S.C. Code Ann. § 42-9-400(a). R.p._____.

The Single Commissioner found the claim reimbursable. The Appellate Panel reversed. Carried filed this appeal.

STANDARD OF REVIEW

The standard of review for decisions of the Workers' Compensation Commission is established in the Administrative Procedures Act. S.C. Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003). A reviewing court must not disturb the Workers' Compensation Commission's findings if those findings are supported by substantial evidence in the record. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). The fact that reasonable minds may differ or that there is the possibility of drawing inconsistent conclusions does not prevent an agency's findings from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E. 2d 388 (1995).

HISTORICAL BACKGROUND

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

First, the statute prohibits the Fund from accepting claims with dates of injury on or after July 1, 2008. S.C. Code Ann. § 42-7-320(B). Then, employers, carriers and self-

insurers must notify the Fund of a potential claim by December 31, 2010. S.C. Code Ann. § 42-7-320(B) (1). In addition, employers, carriers, and self-insurers must submit all required information to the Fund by June 30, 2011. S.C. Code Ann. § 42-7-320(B) (2). The statute further instructs that the Fund shall not accept a claim for reimbursement after December 31, 2011. S.C. Code Ann. § 42-7-320(B). Finally, the programs and appropriations of the Fund are terminated on and after July 1, 2013. S.C. Code Ann. § 42-7-320(A). The dates outlined in the statute are mandatory not discretionary.

ARGUMENT

I. CARRIER'S CLAIM IS BARRED BY THE MANDATES OF § 42-7-320(B) AND ITS SUBSECTIONS.

Section 42-7-320(B) (2) states the following:

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.

S.C. Code Ann. § 42-7-320(B) (emphasis added).

Carrier submitted various documents after June 30, 2011 that the Single Commissioner admitted over the Fund's objection. R.p._____. The documents at issue included knowledge statements dated December 5 and 6, 2011, a medical questionnaire dated January 2012, and medical records dated January 26, 2012. R.p._____. The Fund objected to these records becoming part of the evidence because they were not submitted pursuant to the statutory deadlines. The Single Commissioner overruled the Fund's objection and allowed the documents to become part of the evidence in this case. In

reversing the Single Commissioner's Decision, the Full Commission determined that the documents at issue should not have been admitted because the documents constituted required information that was not timely submitted. The Commission's decision was supported by substantial evidence in the record and should be affirmed.

II. THE DOCUMENTS CARRIER SOUGHT TO ADMIT ARE "REQUIRED INFORMATION" AND THE COMMISSION'S DECISION TO EXCLUDE THE DOCUMENTS IS CONSISTENT WITH S.C. CODE ANN. § 42-7-320(B).

"Required information" is not a term of art; and, as such, Webster's defines "required" as "necessary or indispensable" or "to place under an obligation." WEBSTER'S DICTIONARY 386. In the statutory reimbursement scheme, there are a number of "necessary or indispensable" elements that a carrier has to prove in order to establish its entitlement to reimbursement. The statutory reimbursement scheme places carriers "under an obligation" to meet these requirements. See S.C. Code Ann. § 42-9-400.

Section 42-9-400 requires that (1) Claimant have a permanent preexisting impairment (§ 42-9-400(a)); (2) that the permanent preexisting impairment create substantially greater liability for medical costs and permanent disability than that which would have resulted from the work injury alone (§ 42-9-400(a)); (3) that Carrier have knowledge of the permanent preexisting impairment (§ 42-9-400(c)); (4) that Claimant's permanent preexisting impairment was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment (§ 42-9-400(d)); and (5) that Carrier provide the Fund with notice of a potential claim prior to the payment of seventy-eight (78) weeks of compensation (§ 42-9-400(f)). Case law instructs that a Carrier's right to receive reimbursement from the South Carolina Second Injury Fund depends

upon complete compliance with the requirements for recovery. South Carolina Second Injury Fund v. American Yard Products, 496 S.E.2d 862 (S.C. 1998). Thus, Carrier must establish all elements of reimbursement in order to recover.

Here, Carrier's documents in support of its knowledge of Claimant's preexisting condition included a Statement from Claimant, dated December 6, 2011 and a statement from another individual dated December 5, 2011. R.pp._____. The other excluded documents submitted by Carrier included a medical questionnaire dated January 11, 2012 and a medical narrative dated January 26, 2012. R.pp._____. Carrier submitted the medical questionnaires and the medical narrative to support that Claimant had a preexisting condition and a subsequent injury; aggravation of the preexisting condition; that the preexisting condition was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment; and that the preexisting condition caused Carrier to incur substantially greater medical costs and permanent disability. R.pp._____. All of these elements are "required information" because Carrier has to establish all of these elements to assert a successful reimbursement claim. See S.C. Code Ann. § 42-9-400. In this case, all of these documents addressed "required information" but unfortunately, none of these documents were timely submitted by Carrier in its quest for reimbursement recovery. See. S.C. Code Ann. § 42-7-320(B) and § 42-9-400. To be clear, Carrier submitted several documents prior to June 30, 2011; however, none of the timely submitted documents addressed all of the "required information."

In reversing the Single Commissioner's decision, the Full Commission determined the documents at issue should have been excluded because they addressed "required information" based upon the plain meaning of S.C. Code Ann. § 42-7-320(B).

R.p._____. That section further indicates that failure to submit required information to the Fund shall bar recovery. S.C. Code Ann. § 42-7-320(B) (2). The Commission's decision to exclude certain documents submitted by Carrier was consistent with the statutory mandate.

III. THE REIMBURSEMENT STATUTE REQUIRES CARRIER TO ESTABLISH A PRIMA FACIE CASE FOR REIMBURSEMENT.

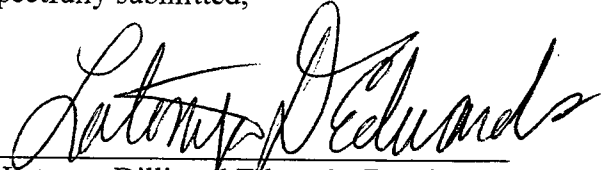
Carrier asserts that the Commission required it to establish a prima facie case for reimbursement. The Commission made no such finding. However, the reimbursement statute requires that Carrier establish a prima facie case for reimbursement. After all, case law instructs that a Carrier's right to receive reimbursement from the South Carolina Second Injury Fund depends upon complete compliance with the requirements for recovery. South Carolina Second Injury Fund v. American Yard Products, 496 S.E.2d 862 (S.C. 1998).

Carrier asserts that it had no duty to provide the Fund with additional documents after its claim was denied in 2010. The Commission found that Carrier's position in this regard was without merit. The statute is crystal clear that Carrier must submit all required information to the Fund by June 30, 2011. S.C. Code Ann. § 42-7-320(B) (2). The fact that a claim had been previously denied does not absolve Carrier of its statutorily mandated responsibility. Carrier must submit all required information to the Fund by June 30, 2011 or its claim is barred. S.C. Code Ann. § 42-7-320(B) (2). Carrier failed to timely submit all required information; and, as such, it is barred from reimbursement recovery.

CONCLUSION

For the reasons cited herein, the Fund requests that this Honorable Court affirm the Full Commission's decision as supported by substantial evidence in the record

Respectfully submitted,

By: 

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August 6, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083

Old Republic Insurance Company, Appellant,

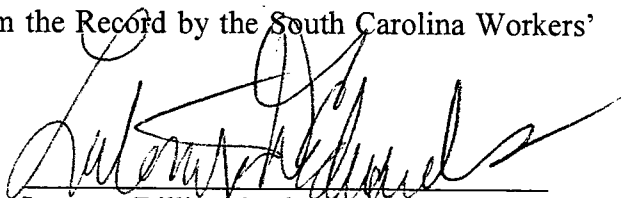
v.

South Carolina Second Injury Fund, Respondent.

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

**DESIGNATION OF MATTER TO
BE INCLUDED IN RECORD ON APPEAL**

The undersigned counsel of Dilligard Edwards, LLC, Attorney for the Respondent, hereby agrees with Appellant's Designation of Matter To Be Included in Record on Appeal; however, we would note that Document Number Twenty-Two (22), Document Number Twenty-Three (23) and Document Number Twenty-Eight (28) listed on Appellant's Designation of Matter To Be Included in Record on Appeal were properly excluded from the Record by the South Carolina Workers' Compensation Commission.



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AUG 22 2014

SC COURT OF APPEALS

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August 22, 2014

HAND-DELIVERED

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

Re: Old Republic Insurance Company v. South Carolina Second Injury Fund
[In Re: Carl Hutchins v. Pepsi Bottling Group]
Appellate Case No.: 2014-001083

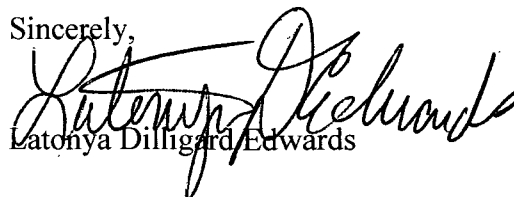
Dear Ms. Kitchings:

Enclosed herewith please find for filing the original and one (1) copy of South Carolina Second Injury Fund's Motion To File Out Of Time, along with Proof of Service thereof.

By copy of this letter, I am notifying Carrier's attorney and the South Carolina Workers' Compensation Commission of this communication to your office.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to give me a call.

Sincerely,


Latonya Dilligard Edwards

LDE/ems
Enclosures

cc: The Honorable Amy Bracy, Judicial Director, SCWCC (w/encls., Via U. S. Mail)
Andrew D. Smith, Esquire (w/encls., Via U. S. Mail)