THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

OCT 21 2014

SC Court of Appeals

APPEAL FROM LAURENS COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-30-00506

Appellate Case No.: 2014-001459

American Home Assurance Co. (Carrier) .....Appellant

v.

South Carolina Second Injury Fund.....Respondent

(In Re: Ben Johnson (Employee/Claimant) v. American Services, Inc. (Employer))

INITIAL BRIEF OF APPELLANT

Robert C. Rogers (S.C. Bar No. 100225)
Jared M. Pretulak (S.C. Bar No. 74884)
Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
rrogers@gwblawfirm.com
jpretulak@gwblawfirm.com

Attorneys for American Home Assurance Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Secondary Sources

ISSUES ON APPEAL

1. Whether the circuit court erred in affirming the Decision and Order of the South Carolina Workers' Compensation Commission finding Johnson did not have preexisting anxiety where Respondent conceded Johnson had anxiety prior to his 2005 work injury and where the only reliable, probative and substantial evidence of the whole record establishes Johnson had preexisting anxiety?

2. Whether the circuit court erred in affirming the Decision and Order of the South Carolina Workers' Compensation Commission finding Johnson did not have preexisting hypertension where the only reliable, probative and substantial evidence of the whole record establishes Johnson had hypertension prior to his 2005 work injury?

3. Whether the circuit court erred in affirming the Decision and Order of the South Carolina Workers' Compensation Commission finding Johnson's preexisting back pain, anxiety, and hypertension were not permanent and serious enough to constitute a hindrance to his employment where Appellant is entitled to a presumption under S.C. Code Ann. § 42-9-400(d)(34)(b) (2003) that each and every one of these preexisting impairments were permanent and a hindrance to Johnson's employment or reemployment and where the only reliable, probative, and substantial evidence of the whole record establishes these conditions were permanent and a hindrance or obstacle to Johnson's employment or reemployment?

4. Whether the circuit court erred in affirming the Decision and Order of the South Carolina Workers' Compensation Commission denying Appellant reimbursement under S.C. Code Ann. § 42-9-400 (2003) where the only reliable, probative and substantial evidence of the whole record supports reimbursement to Appellant?

STATEMENT OF THE CASE

Appellant, American Home Assurance Company, appeals from the Order of the Laurens County Circuit Court affirming the Decision and Order of the South Carolina Workers' Compensation Commission (hereinafter "the Commission") finding Appellant is not entitled to Second Injury Fund reimbursement under S.C. Code Ann. § 42-9-400 (2003) for benefits paid or to be paid to the Claimant/Employee, Ben Johnson (hereinafter "Johnson"), in relation to Johnson's November 15, 2005 work accident.

Johnson injured himself during the course and scope of his employment with Employer, American Services, Inc., when he bent over to pick up a small box weighing between seven and ten pounds (APA 60). He suffered compensable injuries to his back, psyche, and lower extremity (radiculopathy) (Hearing Commissioner Order p. 9, ¶ 1). In relation to this work accident, Appellant paid Johnson compensation benefits and provided him with medical treatment, including medication, physical therapy, MRIs, epidural steroid injections, surgery consisting of L5-S1 laminectomy, work-hardening, spinal cord stimulator trial, and a permanent spinal cord stimulator implant (APA pp. 11, 15, 18, 19, 22, 26, 32–38, 60–62). Dr. David Rogers performed an independent medical evaluation ("IME") and assigned Johnson a rating of forty-two percent (42%) whole person impairment based upon hypertension, lumbar spine impairment, and behavioral/emotional dysfunction (APA 66). Specifically, Dr. Rogers assigned 33% impairment to the back, 10% whole person impairment based upon Class II hypertensive cardiovascular disease, and 15% whole person impairment for Class II Behavioral/Emotional Disorder, as provided for under the American Medical Association's Guide to the Evaluation of Permanent Impairment, which combined to result in the 42% whole person impairment rating (APA 65–66). Ultimately, Johnson's workers' compensation claim was resolved via settlement. Pursuant to the settlement, Johnson received approximately Four Hundred Forty-Six (446) weeks of workers' compensation benefits in total, with $45,000.00 representing settlement of his permanent disability,[1] and Appellant agreed to pay for all future causally-related medical treatment (Form 19 dated March 16, 2009; Order dated March 25, 2009). Upon information and

[1] This equates to approximately two hundred seventy-weeks (275) weeks of permanent disability benefits based upon Johnson's compensation rate of $163.34.

belief, Johnson continues to receive medical treatment in relation to his November 15, 2005 work accident.

Subsequent to the resolution of the workers' compensation claim, Appellant sought Second Injury Fund reimbursement under multiple theories, any one of which is sufficient to entitle Appellant to reimbursement pursuant to § 42-9-400(a). Appellant submitted evidence to the Commission that supported reimbursement based upon preexisting back pain alone, preexisting anxiety alone, preexisting hypertension alone, and any combination of these three preexisting impairments combining together with or being aggravated by his work accident to result in greater liability to Appellant for compensation and medical payments (Aug. 24, 2011 Tr. pp. 4–9; Hearing Commissioner Order p. 3). In addition to presenting substantial evidence meeting all of the requirements for reimbursement under each theory, Appellant relied upon the presumption of permanency and hindrance provided for under § 42-9-400(d)(34)(b) (2003) for work injuries, like Johnson's, occurring before July 1, 2007.

Respondent denied the claim on three grounds: (1) Johnson did not have preexisting hypertension; (2) Johnson's preexisting anxiety was not permanent and serious enough to constitute a hindrance or obstacle to his employment;[2] and (3) Johnson's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment (Aug. 24, 2011 Hearing Tr. p. 9:23–25, p. 10:2–3, p. 11:7–8, 13:2–4, 13:8–13). Before the Hearing Commissioner, Respondent did not

[2] The orders from the Commission and circuit court state Respondent denied Johnson had preexisting anxiety and find Appellant did not prove preexisting anxiety. However, as discussed in Part I.A. below, these statements and findings are inconsistent with Respondent's position before the Commission and the circuit court.

challenge whether Appellant met the other requirements for reimbursement under § 42-9-400. Instead, Respondent based its denial solely on these three grounds.

On October 12, 2011, the Hearing Commissioner issued an Order denying reimbursement to Appellant (Hearing Commissioner Order). First, the Hearing Commissioner concluded Appellant failed to prove Johnson had preexisting anxiety, despite the fact Respondent conceded, or failed to challenge, this point during the hearing (Hearing Commissioner Order p. 11 ¶ 7, p. 12 ¶ 3; Aug. 24, 2011 Hearing Tr. p. 13:2–4, 8–12). Second, the Hearing Commissioner found Appellant failed to prove Johnson had preexisting hypertension (Hearing Commissioner Order p. 12 ¶ 3). Third, the Hearing Commissioner concluded Appellant did not prove Johnson's anxiety, if it existed prior to his work accident, was serious enough to constitute a hindrance or obstacle to his employment (Hearing Commissioner Order pp. 12–13 ¶ 4). Fourth, the Hearing Commissioner found Johnson's hypertension, if it preexisted, was not a hindrance or obstacle to his employment (Hearing Commissioner Order pp. 12–13 ¶ 4). This finding is also inconsistent with Respondent's argument before the Commission, as Respondent did not raise this as a defense to reimbursement during the hearing. Last, the Hearing Commissioner concluded Appellant did not meet its burden to prove Johnson's preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment (Hearing Commissioner Order p. 13 ¶ 5). As it relates to proving "permanent physical impairment" under § 42-9-400(d), the Hearing Commissioner concluded as a matter of law Appellant had the burden to prove that the preexisting conditions were serious enough to constitute a hindrance or obstacle to Johnson's employment in order to be entitled to reimbursement (Hearing Commissioner

Order pp. 12–13, ¶¶ 3–5). Notably, the Hearing Commissioner's Order fails to address Appellant's contention it is entitled to a statutory presumption of permanency and hindrance under multiple theories pursuant to § 42-9-400(d)(34)(b) (2003). In placing the burden upon Appellant to prove hindrance, it appears the Hearing Commissioner found Appellant was not entitled to the presumption because the Order does not state Respondent rebutted the presumption with substantial evidence. The Hearing Commissioner therefore denied Appellant reimbursement under § 42-9-400 (2003).

On October 26, 2011, Appellant filed a Request for Commission Review (Oct. 26, 2011 Form 30 & Exceptions). On May 22, 2012, The Appellate Panel of the Workers' Compensation Commission issued an Order, determining "all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become the law of the case, and are sustained in their entirety" (Commission Order p. 2).[3]

Appellant timely filed its Notice of Appeal and Petition for Judicial Review to the Laurens County Circuit Court on June 21, 2012 (June 21, 2012 Notice and Exceptions). The parties submitted briefs and appeared before the Honorable Frank R. Addy, Jr. for oral argument on February 21, 2013. After hearing oral argument and considering the positions of the parties, the court remanded the case back to the Commission with instructions to consider the evidence in light of Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) and Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012) (Form 4 Judgment dated June 21, 2012).

[3] The Appellate Panel accepted each and every Finding of Fact and Conclusion of Law contained in the Hearing Commissioner's Order dated October 12, 2011. Except where specified otherwise, Appellant will refer to all such decisions as those of the Commission and will cite to the Appellate Panel Orders.

Upon remand to the Commission, Appellant and Respondent were not afforded the opportunity to submit briefs outlining their positions with respect to the recent decisions and the Commission did not schedule oral argument. On June 14, 2013, the Commission issued an Order affirming its prior decision to deny reimbursement (Commission Remand Order). The Commission included three Findings of Fact with respect to the cases the circuit court instructed it to consider on remand (Commission Remand Order pp. 5–6 ¶¶ 8–10). Notably, the remand order from the Commission does not contain any reference to the substantial evidence standard.

Appellant filed a second Notice of Appeal and Petition for Judicial Review to the Laurens County Circuit Court on July 2, 2013 (July 2, 2013 Notice and Exceptions). The parties once again submitted briefs to the court and appeared for oral argument. Appellant maintained its position that the Commission's denial of reimbursement was not supported by substantial evidence and affected by other error of law. The Honorable Eugene C. Griffeth, Jr. entered an Order on June 9, 2014, affirming the Decision and Order of the Commission denying reimbursement to Appellant and finding it was supported by substantial evidence (Order dated June 4, 2014).

On July 3, 2014, Appellant timely filed Notice of Appeal to this Court.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act ("SCAPA") establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 15–16, 682 S.E.2d 516, 519 (Ct. App. 2009); see Lark v. Bi-Lo, Inc., 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under the scope of review established by the SCAPA, this Court may

reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Carolinas Recycling Group, 398 S.C. at 483, 730 S.E.2d at 326; see S.C. Code Ann. § 1-23-380 (1976).

Substantial evidence is defined as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion as the Commission. Carolinas Recycling Group, 398 S.C. at 483, 730 S.E.2d at 326 (citing Lark, 276 S.C. at 135, 276 S.E.2d at 306). More specifically, substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the same conclusion the Commission reached. Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 62, 693 S.E.2d 436, 438 (Ct. App. 2010) (citing Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)). This Court may find the Commission's findings clearly erroneous if they are based on a mistaken view of the evidence. State Accident Fund v. South Carolina Second Injury Fund, 409 S.C. 240, 245, 762 S.E.2d 19, 21–22 (2014) (citing Grayson v. Carter Rhoad Furniture, 312 S.C. 250, 252, 439 S.E.2d 859, 860 (Ct. App. 1993)). Where the decision of the Commission denying Second Injury Fund reimbursement is not supported by substantial evidence and the only reasonable conclusion that may be drawn from the substantial evidence in the record is in favor of reimbursement, this Court should reverse the decision of Commission and grant the carrier reimbursement. See Burnette, 398 S.C. at 486, 730 S.E.2d at 328.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AFFRIMING THE DECISION AND ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION FINDING JOHNSON DID NOT HAVE PREEXISTING ANXIETY.

A. Respondent conceded or otherwise failed to challenge Johnson had preexisting anxiety.

The Commission found Johnson did not have preexisting anxiety (Commission Remand Order p. 5 ¶ 7, p. 7 ¶ 3). While the circuit court did not expressly affirm this particular finding, it affirmed the Order of the Commission denying reimbursement as supported by substantial evidence, without excepting this particular finding (June 4, 2014 Order p. 5–6). The Commission's finding that Johnson did not have preexisting anxiety is inconsistent with Respondent's concession of the preexisting anxiety before the Commission and at all subsequent stages of this litigation. Although the orders of the Commission and circuit court likewise state Respondent denied anxiety preexisted, this is inconsistent with the record in this case (Hearing Commissioner Order p. 3; June 4, 2014 Order p. 1).

Before the Hearing Commissioner, Respondent argued the evidence submitted by Appellant "establishes that the anxiety was not a hindrance to employment" (Aug. 24, 2011 Hearing Tr. p. 13:3–4). Respondent further contended "based on our arguments that . . . the prior anxiety was not a hindrance to employment . . . we'd request denial" (Aug. 24, 2011 Hearing Tr. p. 13:8–12). Therefore it is axiomatic Respondent conceded the preexisting nature of Johnson's anxiety before the Commission. Further supporting this important concession by Respondent, during the first hearing before the Laurens County Circuit Court, Respondent stated "on the issue of claimant's preexisting anxiety . . . we think that is pretty substantial on the issue of whether anxiety would be serious

enough to be a hindrance of employment" (Feb. 21, 2013 Hearing Tr. p. 22:8–19). During the second hearing before the circuit court, Respondent reiterated this same position, that "[t]he issues that we are disputing that the Carrier met, one is that the condition was a hindrance or obstacle to employment" and "Claimant's anxiety was not serious enough to constitute a hindrance or obstacle to employment" (Jan. 23, 2014 Hearing Tr. p. 11:16–21, p. 15:4–6). Respondent has not argued that Johnson did not have preexisting anxiety. Instead, Respondent only asserted Johnson's preexisting anxiety was not permanent and serious enough to constitute a hindrance to his employment.

The concession that Johnson had preexisting anxiety is critical, because once Respondent concedes the preexisting nature of Johnson's anxiety, Appellant only needs to prove the preexisting anxiety was a hindrance or obstacle to Johnson's employment or reemployment in order to obtain reimbursement.[4] As discussed in Part III below, Appellant made this showing via substantial evidence and by operation of the statutory presumption under § 42-9-400(d)(34)(b) (2003).

The circuit court erred in affirming the Order of the Commission denying Appellant Second Injury Fund reimbursement on the basis that Johnson did not have preexisting anxiety. Respondent conceded this issue and thus the Commission's finding is erroneous in light of the reliable, probative and substantial evidence of the whole record.

[4] As discussed in the Statement of the Case, Respondent only denied the claim on three grounds: (1) Johnson did not have preexisting hypertension; (2) Johnson's preexisting anxiety was not permanent and serious enough to constitute a hindrance or obstacle to his employment;[4] and (3) Johnson's preexisting back pain was not permanent and serious enough to constitute a hindrance or obstacle to his employment (Aug. 24, 2011 Hearing Tr. p. 13:2–4, 13:8–13).

B. The only reliable, probative and substantial evidence in the record establishes Johnson had preexisting anxiety.

In addition to Respondent conceding preexisting anxiety, the only reliable, probative and substantial evidence in the record addressing this issue was submitted by Appellant and establishes Johnson had anxiety prior to his 2005 work injury. Appellant submitted into evidence a medical certificate from Dr. David Tollison, who treated Johnson following his work injury (APA 71). This certificate was in the form recommended by the Second Injury Fund.[5] Dr. Tollison provided expert testimony that Johnson had anxiety prior to the November 2005 work injury for which he treated Johnson. In addition to the medical certificate, Appellant submitted into evidence prescription records from Johnson's primary care physician that pre-date his work injury and establish Dr. Toussaint was prescribing medication to Johnson for anxiety at that time[6] (APA 2). Thus, the objective medical records substantiate Dr. Tollison's expert opinion that Johnson had preexisting anxiety. Dr. Tollison's medical opinion and the prescription records from Dr. Toussaint are the only evidence in the record addressing Johnson's pre-injury mental condition. Thus the only reliable, probative and substantial evidence in the record establishes Johnson had preexisting anxiety.

According to this Court's holding in Carolinas Recycling Group, once a carrier submits substantial evidence proving the elements of reimbursement, the Fund must rebut the carrier's evidence with substantial evidence of its own. In that case, this Court found the record was "replete with expert medical testimony" establishing the requirements for

---

[5] The Second Injury Fund provides that carriers, such as Appellant, are required to submit these questionnaires in support of their claim for reimbursement, and even points to these questionnaires as examples of how a carrier might satisfy the elements of reimbursement. See South Carolina Second Injury Fund, A Step-by-Step Approach for Handling Second Injury Fund Claims, section I (July 2002).

[6] Klonopin is used to treat panic disorder. Drug Summary Klonopin (clonazepam)—Genentech, Inc., PDR.net (Oct. 7, 2014, 10:29 a.m.) http://www.pdr.net/drug-summary/klonopin?druglabelid=3064.

reimbursement were met. Carolinas Recycling Group, 398 S.C. at 485, 730 S.E.2d at 327. This Court determined "the Fund failed to present any expert testimony . . . to discredit the overwhelming medical testimony and evidence [the carrier] presented to the Appellate Panel." Id. Accordingly, this Court determined the "only reasonable conclusion to be drawn from the substantial evidence in the record is that [the carrier] is entitled to partial reimbursement from the Fund" and the Commission's decision was not supported by substantial evidence. Id. at 486, 730 S.E.2d at 328. Additionally, where the carrier submits into evidence expert medical opinions favoring reimbursement, the Fund must present expert opinions of its own or "other competent evidence" sufficient to rebut the expert opinions submitted by the carrier. The Commission may disregard medical evidence, including expert medical opinions, but *only* when contrary expert opinions or "other competent evidence" exists in the record. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011); see also Burnette, 401 S.C. at 428, 737 S.E.2d at 206.

In accordance with Carolinas Recycling Group, Burnette, and Potter, Respondent had the burden to submit substantial evidence of its own to rebut the evidence presented by Appellant establishing Johnson had preexisting anxiety. In order to rebut Dr. Tollison's expert medical opinion, Respondent was required to submit an expert opinion of its own or a least "other competent evidence." See Burnette, 401 S.C. at 428, 737 S.E.2d at 206 (citing the holding of Potter as "permitting the Commission to disregard medical evidence only when other competent evidence exists in the record"). Respondent failed to do so. Respondent did not submit any expert opinions of its own. See e.g. Potter, 395 S.C. at 23–24, 716 S.E.2d at 127 (contrary opinions from other

physicians would be "other competent evidence" that the Commission could weigh in assessing credibility of a physician's opinion). Further, Respondent did not depose Dr. Tollison regarding his expert medical testimony, did not depose Dr. Toussaint regarding the prescription records and his treatment of Johnson, and did not submit into evidence any medical records. Respondent did not obtain testimony from Johnson or ask him to testify at the hearing about whether he had preexisting anxiety. See e.g. Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946) (testimony by the claimant would be "other competent evidence" sufficient to overcome expert medical testimony). The record is void of any contrary expert opinion or "other competent evidence" to rebut the evidence submitted by Appellant and which establishes Johnson had preexisting anxiety. Thus, the Commission's finding, affirmed by the circuit court, that Johnson did not have preexisting anxiety is not supported by the reliable, probative and substantial evidence of the whole record and cannot be a basis for denying Appellant Second Injury Fund reimbursement pursuant to § 42-9-400(a). See Carolinas Recycling Group, 398 S.C. at 485, 730 S.E.2d at 327 (reversing decision by Commission denying reimbursement as not supported by substantial evidence where the Fund failed to present any evidence to discredit the overwhelming medical testimony and evidence favoring reimbursement); see also State Accident Fund, 409 S.C. at 250, 762 S.E.2d at 24 (finding carrier satisfied the element of reimbursement where the Fund presented "no evidence or expert opinion that contradicted" the medical opinion submitted by the carrier).

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE DECISION AND ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION FINDING JOHNSON DID NOT HAVE PREEXISTING HYPERTENSION.

The circuit court erred in affirming the Commission's finding that Johnson did not have preexisting hypertension (June 4, 2014 Order pp. 4, 6; Commission Remand Order p. 4 ¶ 6, p. 7 ¶ 3). This affirmation was erroneous because the Commission's finding is not supported by the reliable, probative and substantial evidence of the whole record.

The only evidence submitted to the Commission addressing this issue was submitted by Appellant and establishes Johnson had and was treating for hypertension prior to his 2005 work injury. First, Appellant submitted medical testimony in the form of the recommended Second Injury Fund questionnaire from Dr. David Rogers (APA 72). Dr. Rogers performed an IME on Johnson following his work accident and ultimately assigned Johnson permanent impairment based upon Johnson's Class II hypertensive cardiovascular disease (APA 65). Dr. Rogers offered expert medical testimony indicating Johnson had hypertension prior to his November 15, 2005 work injury (APA 72). In addition, Appellant submitted prescription records from Johnson's primary care physician establishing that prior to the work injury Dr. Toussaint was prescribing Johnson medication for hypertension.[7] Thus, Appellant submitted into evidence reliable, probative and substantial evidence establishing Johnson had preexisting hypertension.

As discussed in Part I.B., Carolinas Recycling Group, Burnette, and Potter hold that once Appellant sets forth substantial evidence meeting the requirement for reimbursement, Respondent bears the burden to rebut such evidence with "other competent evidence" or expert opinions of its own. Respondent did not satisfy its

[7] Lopressor is used alone or in combination with other medications to treat hypertension. Drug Summary Lopressor Tablets (metoprolol tartrate)—Validus Pharmaceuticals LLC, PDR.net (Oct. 7, 2014, 10:21 a.m.), http://www.pdr.net/drug-summary/lopressor-tablets?druglabelid=1987.

burden. Respondent did not depose Dr. Rogers regarding his expert opinion that Johnson had preexisting hypertension. Nor did Respondent depose Dr. Toussaint regarding his evaluation and treatment of Johnson prior to the work injury or the prescription records submitted into evidence by Appellant. Respondent did not depose Johnson or have him testify at the hearing to discuss whether he had preexisting hypertension. In fact, Respondent submitted no evidence addressing whether Johnson's hypertension existed before his work accident. See State Accident Fund, 409 S.C. at 250, 762 S.E.2d at 24 (reversing the decision of the Commission denying reimbursement as clearly erroneous where the Fund presented "no evidence or expert opinion that contradicted" the medical opinion submitted by the carrier).

Just as in Carolinas Recycling Group and State Accident Fund, Respondent simply pointed to isolated medical records submitted by Appellant, and argued the records did not support Appellant's claim for reimbursement. In so doing, Respondent asked the Commission to render medical opinions that did not originate from a medical provider and that did not have support in the record. As this Court explained in Burnette, lay interpretation of medical records submitted into evidence as expert medical opinion unsupported by the record is not "other competent evidence." Accordingly, Respondent's attempts are not sufficient to rebut the evidence and expert opinions submitted by Appellant, all of which supported reimbursement. Where there is no evidence challenging the conclusions of medical experts, a decision of the Commission contrary to that of medical experts cannot be supported by substantial evidence. Burnette, 401 S.C. at 428–429, 737 S.E.2d at 206. Respondent has therefore failed its burden of presenting expert opinions of its own or "other competent evidence." The only

evidence submitted in this case supports Johnson had preexisting hypertension. Thus, the Commission's finding that Johnson did not have preexisting hypertension is not supported by the reliable, probative and substantial evidence in the record.

Further, the Commission's finding that Johnson did not have preexisting hypertension is clearly erroneous in light of the reliable, probative and substantial evidence of the whole record. Where the Commission's findings are clearly erroneous based on a mistaken view of the evidence, this Court may reverse. See State Accident Fund 409 S.C. at 245, 762 S.E.2d at 21–22. The Commission found the IME from 2008 to be "more convincing" than Dr. Rogers' medical testimony because Dr. Rogers supposedly changed his position "with no new information" (Commission Remand Order, pp. 4–5 ¶ 6). However, this finding conflicts with the objective facts. Appellant forwarded Johnson's medical records to Dr. Rogers on June 7, 2011, including those predating his work accident, which Dr. Rogers did not have at the time of the IME (APA 60). After his review of the complete records, Dr. Rogers rendered his expert medical opinion that Johnson's hypertension existed prior to the 2005 work accident. Thus, Dr. Rogers did receive new information that influenced his opinion. Contrary to the Commission's findings, Dr. Rogers' medical testimony is consistent with his IME Report from 2008 and Johnson's pre-injury medical records. To the extent the Commission based its finding on Johnson's denial of preexisting hypertension during the IME, this is not "other competent evidence" where it is refuted by the objective medical evidence in the record. Accordingly, this finding by the Commission is not supported by substantial evidence and is erroneous based upon the evidence.

The only reliable, probative and substantial evidence submitted in this case establishes Johnson suffered from and treated for hypertension prior to his 2005 work injury. Thus, the circuit court erred in affirming the findings of the Commission that Johnson did not have preexisting hypertension and this finding cannot be the basis for denying Appellant Second Injury Fund reimbursement pursuant to § 42-9-400(a).

III. THE CIRCUIT COURT ERRED IN AFFIRMING THE DECISION AND ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION FINDING JOHNSON'S PREEXISTING BACK PAIN, ANXIETY, AND HYPERTENSION WERE NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO JOHNSON'S EMPLOYMENT.

A. Appellant is entitled to a presumption under § 42-9-400(d)(34)(b) (2003) that Johnson's preexisting back pain, anxiety, and hypertension were permanent and a hindrance or obstacle to his employment or reemployment.

The circuit court erred in affirming the Decision and Order of the Commission finding that Johnson's preexisting back pain, preexisting anxiety, and preexisting hypertension were not permanent and serious enough to constitute a hindrance or obstacle to his employment (Commission Remand Order p. 3 ¶ 4, p. 4 ¶ 5, p. 5 ¶ 7, p. 7 ¶¶ 4–5; June 4, 2014 Order pp. 3–5). This finding is erroneous as a matter of law. Appellant is entitled to a presumption under § 42-9-400(d)(34)(b) (2003) that each and every one of Johnson's preexisting impairments are both permanent and a hindrance or obstacle to his employment or reemployment.

Appellant contended before the Commission that it was entitled to the presumption under multiple and alternate theories, specifically: (a) back alone; (b) back and anxiety; (c) back and hypertension; (d) anxiety and hypertension; and (e) back, anxiety, and hypertension. Respondent conceded the preexisting back pain and anxiety, and as discussed in the preceding section, the only reliable, probative and substantial

evidence in the record establishes Johnson had preexisting hypertension. Therefore, for the presumptions to apply, Appellant need only submit evidence establishing Johnson's preexisting impairments, alone or together, combined with or were aggravated by his 2005 work injury to result in permanent impairment rated at seventy-eight (78) weeks or more under § 42-9-30. Appellant satisfied this burden via substantial evidence.

Each of Johnson's physicians opined his preexisting impairments combined with or were aggravated by his work injury to result in his ultimate condition and caused greater disability than would have resulted from the 2005 work injury alone (APA 65–66; 70–73). Dr. Rogers assigned 33% impairment rating to Johnson for his back, which alone results in impairment rated at greater than seventy-eight weeks under § 42-9-30(21) so as to trigger the presumption. Johnson's other preexisting impairments, hypertension and anxiety, qualify for the presumption under § 42-9-30(22) and S.C. Code Reg. 67-1101(B), which provide for scheduled member recovery for any loss that can be assigned an impairment rating under the American Medical Association's Guide to the Evaluation of Permanent Impairment. Dr. Rogers assigned impairment for Johnson's back, anxiety, and hypertension consistent with the AMA Guide. Thus, Johnson's preexisting anxiety and hypertension, together or with each or both combining with the back injury, resulted in impairment exceeding the threshold so as to trigger the presumption. Last, Dr. Rogers assigned Johnson 42% whole person impairment consistent with the AMA Guide based upon Johnson's resulting condition that was caused by his preexisting impairments combining with or being aggravated by his work injury (APA 65). This 42% whole person impairment rating also triggers the presumption. Therefore, Appellant is entitled to the presumption under § 42-9-400(d)(34)(b) (2003) under each of these alternate

theories. The Commission's finding, as affirmed by the circuit court, that Appellant did not prove Johnson's preexisting impairments were permanent and serious enough to constitute a hindrance to his employment is erroneous as a matter of law because the finding is inconsistent with the statutorily-provided presumption under § 42-9-400(d)(34)(b) (2003) to which Appellant is entitled. See State Accident Fund, 409 S.C. at 247, 762 S.E.2d at 22–23 (finding that Commission decision failing to apply presumption under § 42-9-400(d) and incorrectly placing the burden of proof on carrier is erroneous as a matter of law).

Recently, the South Carolina Supreme Court adopted and emphasized the rationale from Carolinas Recycling Group regarding the Fund's burden to come forward with substantial evidence of its own, and applied it to the context where the carrier is entitled to the presumption under § 42-9-400(d). The court held where a carrier is entitled to the presumption, the Fund must present substantial evidence in order to rebut the presumption. State Accident Fund, 409 S.C. at 247, 762 S.E.2d at 23. Where the Fund does not, the carrier is granted the presumption and this element of reimbursement is satisfied.

Under State Accident Fund, Respondent had the burden to rebut the multiple and alternate presumptions of permanency and hindrance with substantial evidence, but it failed to do so. Respondent failed to present any expert opinion that Johnson's preexisting impairments were not permanent or were not serious enough to constitute a hindrance or obstacle to his employment or reemployment. Respondent did not depose any of Johnson's physicians or have them testify at the hearing regarding this issue. Respondent did not depose Johnson on this issue or have him testify at the hearing.

Respondent presented no evidence from a vocational expert addressing hindrance to Johnson's employment or reemployment. Respondent failed to present any "other competent evidence" and did not submit anything into evidence addressing the issues of permanency and hindrance.

Rather than submitting expert opinions or "other competent evidence," Respondent attempted to offer its lay interpretation of the medical records submitted into evidence by Appellant, which is not permitted under this Court's holding in Burnette. Specifically, Respondent attempted to argue that the lack of extensive documentation of pre-injury treatment for Johnson's back evidences it was not permanent and not serious enough to constitute a hindrance to his employment (Aug. 24, 2011 Hearing Tr. p. 11:9–25). First, Respondent's position is inconsistent with the objective medical records in evidence establishing Johnson was treating with Dr. Toussaint for chronic back pain in the months leading up to his work injury (APA 2). See State Accident Fund 409 S.C. at 245, 762 S.E.2d at 21–22 (noting where the Commission's findings are clearly erroneous based on a mistaken view of the evidence, this Court may reverse). Further, the lack of detailed and extensive records is not substantial evidence sufficient to overcome the presumption. Respondent also argues that Johnson receiving a "prn" prescription is evidence of the condition not being permanent or a hindrance (Feb. 21, 2013 Hearing Tr. p. 18:13–18; Jan. 23, 2014 Hearing Tr. p. 12:4–8, 12:18–20). This is a lay interpretation offered as a medical opinion for which Respondent has no support in the record. This runs afoul of Burnette.

Respondent also argues that "all of the physical manifestations that come from the problems, all of that is the result of the work injury" to support an argument that the

preexisting impairments were not a hindrance (Jan. 23, 2014 Hearing Tr. p. 13:17–19). This medical opinion does not originate from a medical provider and lacks support in the record. See Burnette, 401 S.C. at 428, 737 S.E.2d at 206 (holding that the circuit court erred in affirming a finding by the commission that did not originate from a medical provider and was unsupported by substantial evidence in the record). With respect to whether Johnson's anxiety was a hindrance or obstacle to employment, Respondent only cites post-injury medical records in an attempt to make medical conclusions about what these isolated references in the records reveal about his pre-injury mental status (Feb. 21, 2013 Hearing Tr. p. 22:8–19; Jan. 23, 2014 Hearing Tr. p. 15:5–17). Again, in Respondent lacks any support in the record, medical or otherwise, for this medical opinion. See id.

Respondent failed to present substantial evidence sufficient to rebut the presumptions of permanency and hindrance afforded Appellant with respect to Johnson's preexisting back pain, anxiety, and hypertension. Accordingly, the finding of the Commission, affirmed by the circuit court, is erroneous as a matter of law insofar as it finds Johnson's preexisting impairments were not permanent and serious enough to constitute a hindrance or obstacle to his employment or reemployment and cannot be the basis for denying Second Injury Fund reimbursement to Appellant.

B. The only reliable, probative and substantial evidence establishes Johnson's preexisting back pain, anxiety, and hypertension were permanent and a hindrance or obstacle to his employment or reemployment.

Beyond the presumption discussed in the preceding section, the only reliable, probative and substantial evidence in the record establishes Johnson's preexisting back pain, hypertension, and anxiety were permanent and serious enough to constitute a

hindrance to his employment or reemployment. Thus, the circuit court erred in affirming the Decision and Order of the Commission finding that Johnson's preexisting impairments were not permanent and serious enough to constitute a hindrance to his employment.

Appellant submitted expert medical testimony from Johnson's physicians in the form of medical certificates as recommended by the Second Injury Fund (APA 70–73). Based upon the physicians' evaluation and treatment of Johnson, and following their review of his medical records, each opined that Johnson's preexisting chronic back pain, hypertension, and anxiety was permanent and serious enough to constitute a hindrance or obstacle to his employment or reemployment (APA 70–73).

As discussed in the preceding section, Respondent failed to present any expert opinions of its own rebutting those submitted into evidence by Appellant or "other competent evidence" sufficient to rebut the expert opinions on the issue of hindrance or obstacle to employment or reemployment. Therefore, the only reliable, probative and substantial evidence in the record in this case establishes Appellant met this element of reimbursement.

In addition, the Orders of the Commission lack any reference to "obtaining employment or to obtaining *reemployment* if the employee should become unemployed" as contained in the statute. S.C. Code Ann. § 42-9-400(d) (2003) (emphasis added). The critical inquiry is whether the impairment would constitute a hindrance or obstacle to obtaining employment should the employee become unemployed, rather than if it served as a hindrance to employment at the time of the injury. State Accident Fund, 398 S.C. at 247, 762 S.E.2d at 23. Here, just as in State Accident Fund, the Commission did not

analyze whether Johnson's preexisting impairments would have constituted a hindrance or obstacle to reemployment should he have become unemployed (Commission Remand Order p. 3 ¶ 4, p. 4 ¶ 5, p. 5 ¶ 7, p. 7 ¶¶ 4–5). Where the Commission applies the incorrect standard, this Court may analyze whether the Fund presented evidence sufficient to rebut the presumption. See State Accident Fund, 398 S.C. at 246–248, 762 S.E.2d at 22–23. A potential employee presenting with a history of chronic back pain, hypertension, and anxiety, each requiring prescription medication, would be viewed differently by a potential employer for certain jobs than would someone without this medical history. This common sense proposition finds support in the record via the presumptions under § 42-9-400(d)(34)(b) and Appellant's expert medical testimony.

Under the applicable standard, the only reliable, probative and substantial evidence submitted into evidence establishes that Johnson's preexisting chronic back pain, preexisting anxiety, and preexisting hypertension were all permanent impairments and were of such seriousness as to constitute a hindrance or obstacle to Johnson's employment *or reemployment*. Thus, the Commission's findings, affirmed by the circuit court, that Johnson's preexisting impairments were not permanent or serious enough to constitute a hindrance to his employment are erroneous as a matter of law because they are based on the incorrect standard and are not supported by the reliable, probative, and substantial evidence of the whole record. These findings therefore cannot be the basis for denying Appellant Second Injury Fund reimbursement.

IV. THE CIRCUIT COURT ERRED IN AFFIRMING THE DECISION AND ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DENYING APPELLANT SECOND INJURY FUND REIMBURSEMENT BECAUSE THE ONLY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD ESTABLISHES APPELLANT SATISFIED ALL REQUIREMENTS FOR REIMBURSEMENT UNDER § 42-9-400 (2003).

Respondent did not challenge that Appellant met the two remaining elements for reimbursement, which are employer knowledge under § 42-9-400(c) and that the preexisting impairments combined with or were aggravated by the subsequent injury to result in substantially greater disability, medical payments, or compensation under § 42-9-400(a) (2003). The Commission did not base its decision to deny reimbursement to Appellant on either of these grounds. These issues are not properly before this court. Howell v. Pacific Columbia Mills, 291 S.C. 469, 474, 345 S.E.2d 384, 386 (1987) ("issues not presented below may not be addressed on appeal"). However, *assuming arguendo* that Respondent has properly preserved these issues, the only reliable, probative and substantial evidence in this case establishes these requirements were met.

In order to qualify for reimbursement, the employer must establish it had knowledge of the permanent physical impairment. This requirement can be met upon proof that the employee concealed the existence of the preexisting condition from the employer. S.C. Code Ann. § 42-9-400(c) (2003). Accordingly, Appellant satisfied the knowledge requirement by submitting proof Johnson concealed his preexisting impairments from Employer. Specifically, Appellant submitted an employee health questionnaire dated August 19, 2005, wherein Johnson failed to positively respond to questions asking him about: high blood pressure; previous back injury; back trouble or disc problems; back pain with lifting; and prescriptions he was currently taking (APA 68–69). Johnson completed this questionnaire a week after he treated with Dr. Toussaint

and received medication for chronic back pain, hypertension, and anxiety (APA 2). The questions were specific and asked Johnson about particular conditions and prescriptions. This constitutes concealment as contemplated by § 42-9-400(c) (2003). Cf. Hartford Accident & Indem. v. South Carolina Second Injury Fund, 316 S.C. 420, 450 S.E.2d 110 (Ct. App. 1994) (holding that "conceal" means to hide, secret or withhold from the knowledge of others, but an employee who did not willfully misrepresent a question asked of him on a "very broad" employee health questionnaire did not conceal the condition under 42-9-400(c)).

Johnson's physicians offered expert testimony via the recommended Second Injury Fund questionnaires that Johnson's 2005 work combined with or aggravated his preexisting impairments to result in substantially greater lost time from work, substantially greater permanent disability, and substantially greater medical costs (APA 70–73). The only expert testimony in the record therefore supports reimbursement to Appellant.

Appellant also submitted medical records satisfying this requirement and providing support to the physicians' medical testimony. See Carolinas Recycling Group, 398 S.C. at 485–86, 730 S.E.2d at 327–28 (reversing decision of Commission where medical records supported physicians' opinions and holding the only reasonable conclusion to be drawn from the substantial evidence is carrier is entitled to reimbursement). In assigning an impairment rating for Johnson's hypertension, Dr. Rogers considered how Johnson's decreased activity and chronic pain as a result of the work accident would have a "direct impact" on his cardiovascular status (APA 65 ¶ 1). Additionally, during his psychological evaluation for the spinal cord stimulator, Johnson

reported to Dr. Tollison that he experienced "mild intensity symptoms of stress, worry, and anxiety" and "times when [he] feels anxious and nervous," which Dr. Tollison indicated was "mild intensity adjustment with anxiety" (APA 57–58). Johnson also reported increased anxiety during a follow up visit at Self Regional Healthcare, which he related to his pain and returning to work following his accident (APA 53). Johnson also reported he experienced a significant decrease in activities of daily living and reduced recreational and occupational capacities, which factored in to Dr. Rogers assignment of impairment for "behavioral/emotional dysfunction (i.e. depression with features of anxiety and insomnia)" (APA 66). Finally, Dr. Lal noted Johnson's back pain was "a lot worse than one could account based on his imaging" (APA p. 17–18). Thus, the medical records in evidence substantiate the expert medical testimony indicating Johnson experienced an aggravation of his preexisting impairments following his work injury and these impairments combined with or were aggravated by his work injury to result in greater time out of work, greater permanent disability, and increased medical costs incurred by Appellant.

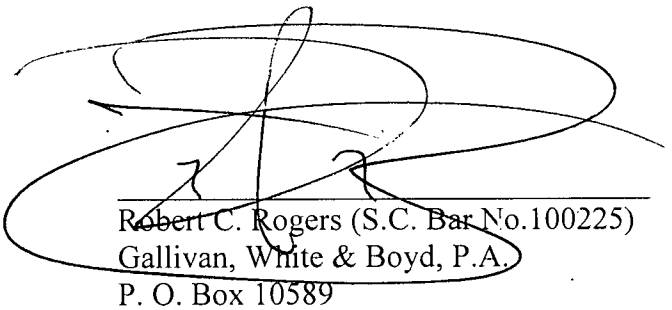
Appellant satisfied the remaining elements for reimbursement via reliable, probative and substantial evidence. Respondent failed its burden to rebut Appellant's expert medical testimony and supporting medical records with any expert opinions of its own or "other competent evidence." Therefore, the only reliable, probative and substantial evidence in the record establishes that Appellant satisfied these requirements for reimbursement.

CONCLUSION

Appellant satisfied every requirement for Second Injury Fund reimbursement pursuant to § 42-9-400 under multiple theories via reliable, probative and substantial evidence in the form of expert medical opinions, supporting medical records and evidence, and through statutorily-provided presumptions in its favor. Respondent failed to rebut the evidence submitted by Appellant with substantial evidence because it failed to submit any expert opinions of its own or "other competent evidence." The only reliable, probative and substantial evidence in the record establishes Appellant is entitled to reimbursement pursuant to § 42-9-400(a) under multiple theories. The Decision and Order of the Commission denying reimbursement to Appellant, affirmed by the circuit court, is erroneous as a matter of law and is not supported by the reliable, probative and substantial evidence of the whole record. Appellant therefore requests this Court reverse the Order of the Laurens County Circuit Court dated June 4, 2014 and award Appellant Second Injury Fund reimbursement pursuant to § 42-9-400(a).

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Robert C. Rogers (S.C. Bar No.100225)
Gallivan, White & Boyd, P.A.
P. O. Box 10589
Greenville, SC 29603
(864) 241-7000
rrogers@gwblawfirm.com

Jared M. Pretulak (S.C. Bar No. 74884)
Gallivan, White & Boyd, P.A.
P. O. Box 10589
Greenville, SC 29603
(864) 271-5354
jpretulak@gwblawfirm.com

Attorneys for American Home Assurance Co.

Date: October 17, 2014
Greenville, SC

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-30-506

Appellate Case No.: 2014-001459

American Home Assurance Company, (Carrier), ...Appellant,

v.

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

(IN RE: Ben Johnson (Employee/Claimant) v. American Services, Inc. (Employer))

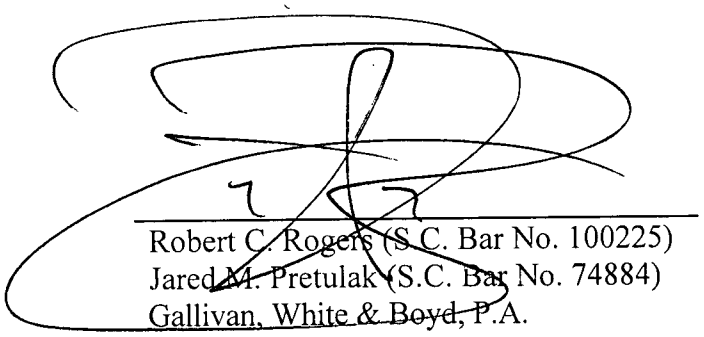
CERTIFICATE OF SERVICE

I do hereby certify that on the 17th day of October, 2014, I served a copy of the **APPELLANT'S INITIAL BRIEF** upon the Clerk of Court for the South Carolina Court of Appeals, the attorney for the Respondent, and others as specified below, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, to the following:

Latonya D. Edwards, Esq.
Dilligard Edwards, LLC
3790 Fernandina Road, Ste. 103
Columbia, SC 29210

The Honorable Lynn Lancaster
Laurens County Clerk of Court
P.O. Box 287
Laurens, SC 29360

Ms. Amy Bracy
Judicial Director
S. C. Workers' Compensation Commission
P O Box 1715
Columbia, SC 29202



Robert C. Rogers (S.C. Bar No. 100225)
Jared M. Pretulak (S.C. Bar No. 74884)
Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
rrogers@gwblawfirm.com
jpretulak@gwblawfirm.com

Attorneys for Appellant

October 17, 2014