

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Appellate Case No.: 2014-001459

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SC Court of Appeals

American Home Assurance Co., Carrier, Appellant,

v.

South Carolina Second Injury Fund, Respondent.

(In Re: Ben Johnson, Employee/Claimant,

v.

American Services, Inc., Employer)

FINAL BRIEF OF RESPONDENT

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ISSUE ON APPEAL

1. Was the South Carolina Workers' Compensation Commission's decision to deny Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400 supported by substantial evidence in the record?

STATEMENT OF THE CASE

This is a claim for reimbursement from the South Carolina Second Injury Fund (the "Fund") by American Services, Incorporated, Employer, and American Home Assurance (collectively the "Carrier"), pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that they incurred substantially greater liability for compensation and medical benefits when Ben Johnson's ("Claimant") preexisting anxiety, back pain and hypertension were either aggravated by or combined with his November 15, 2005 work related injury to his back, psyche and right lower extremity. Carrier further alleged that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund denied that Claimant had a permanent physical impairment that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment and denied that this claim qualified for reimbursement as contemplated by S.C. Code Ann. § 42-9-400.

The Single Commissioner denied Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400. The Full Commission affirmed and Carrier appealed to the Circuit Court. The Circuit Court remanded for reconsideration in light of the recently decided cases of Carolinas Recycling Group v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324, 327 (Ct. App. 2012) and Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012). After considering Carolinas Recycling Group and Burnette, the Full Commission again found that

Carrier did not meet the requirements for reimbursement pursuant to S.C. Code Ann. 42-9-400. Carrier appealed.

STANDARD OF REVIEW

The standard of review for decisions of the Workers' Compensation Commission is established in the Administrative Procedures Act. South Carolina Second Injury Fund v. Liberty Mutual Insurance Co., 353 S.C. 117, 576 S.E.2d 199 (S.C. 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 (S.C. 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. South Carolina Coastal Council, 319 S.C. 348, 461 S.E. 2d 388 (S.C. 1995).

ARGUMENT

I. THE COMMISSION'S DECISION THAT CLAIMANT'S PREEXISTING BACK PAIN WAS NOT A HINDRANCE TO EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Section 42-9-400 requires Carrier to establish various elements in order to recover reimbursement from the Fund. Carrier must establish that Claimant had a permanent physical impairment that is permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. S.C. Code Ann. § 42-9-400(a) and (d). Carrier must also establish that Claimant sustained a subsequent work injury that either aggravated or combined with the work injury to create substantially greater medical costs and permanent disability than that which would

have resulted from the work injury alone. S.C. Ann. § 42-9-400(a). In addition, Carrier must establish its knowledge of the preexisting impairment and that they have provided the Fund notice of a potential claim prior to the payment of seventy-eight (78) weeks of benefits to Claimant. S.C. Code Ann. § 42-9-400(c) and (f). Carrier has not established all of the reimbursement prerequisites. Specifically, the medical evidence does not establish that Claimant had a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment pursuant to S.C. Code Ann. § 42-9-400(d).

The medical records indicate that Claimant was prescribed medication in 2005. R.pp. 148-149. However, the 2005 medication prescriptions do not indicate the purpose for which they were written. R.pp. 148-149. One (1) prescription indicates that Claimant should take the medication “prn” or as needed. R.p. 149. On April 15, 2008, approximately three (3) years after Claimant’s work injury, Dr. David S. Rogers evaluated Claimant. R.pp. 214-220. Claimant’s past medical history notes a prior back injury approximately fifteen (15) years prior to this evaluation. R.p. 217.

In 2007, 2008, and 2009, years after the 2005 work injury, Claimant was prescribed medication. R.pp. 150-153. The 2008 post injury medication prescription, which is prescribed three (3) years post injury, indicates that Claimant had chronic spinal pain. R.p. 151. On March 1, 2011, six (6) years after Claimant’s work injury and six (6) years after the initial prescription was written, an addendum indicates that Claimant was treated for chronic back pain on August 12, 2005. R.p. 148. The pre-injury prescriptions, if prescribed for back pain, do not establish that Claimant’s preexisting back pain was permanent and serious enough to constitute a hindrance or obstacle to his employment. At best, the pre-injury prescriptions indicate that Claimant had

sporadic incidents of prior back pain, which do not rise to the level of being permanent and serious enough to constitute a hindrance to his employment.

Claimant indicated that he “pulled a muscle” in his low back approximately fifteen (15) years prior to the work injury, which was successfully treated chiropractically “with no significant sequelae.” R.p. 217. The post injury medical narratives also note that Claimant “had a long history of back and lower extremity pain following an apparent work-related injury.” R.p. 185. The medical evidence does not support Carrier’s assertion that Claimant had preexisting chronic back pain. On the contrary, the record reveals that Claimant’s chronic low back pain did not begin until after he sustained his 2005 work injury. Claimant’s back pain prior to the work injury was sporadic rather than chronic and was not permanent and serious enough to constitute a hindrance or obstacle to employment.

Webster’s defines “hinder” and “obstacle” respectively, as that which causes delay or difficulty, or to prevent from doing or happening; and “something that obstructs or hinders progress.” WEBSTER’S DESK DICTIONARY 212 and 312 (2004). Here, Claimant’s prior back pain does not meet the Webster definition. While Claimant may have had prior back pain, the fact that his back was not problematic for the fifteen (15) years between the initial back pain and the 2008 evaluation by Dr. David Rogers establishes that his back pain did not hinder him and was not an obstacle to his employment. Additionally, Larson’s instructs that whether a condition is a hindrance to employment depends upon whether an employer would hire, employ or promote Claimant knowing all of the facts. 5 Larson, Workers’ Compensation § 91.02(6). It is doubtful that an employer would fail to hire a potential employee based on a minor complaint of back pain. The Commission’s decision to deny Carrier’s request for reimbursement was supported by the substantial medical evidence in the record.

II. THE COMMISSION'S FINDING THAT CLAIMANT DID NOT HAVE PREEXISTING HYPERTENSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Carrier also alleges that Claimant had preexisting hypertension. However, the medical records indicate otherwise. On April 15, 2008, Dr. David Rogers noted that Claimant "reports no prior history of hypertension before his work related injury" and that there were "no medical records to indicate pre-existing hypertension." R.p. 219. While Carrier presented a questionnaire supporting reimbursement, the Commission is not required to give conclusive effect to a questionnaire to the exclusion of other more compelling medical evidence in the record. R.p. 225; See, Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (S.C. 1946). In this case, Dr. Rogers completed a medical questionnaire approximately three (3) years after his last treatment of Claimant in 2008 and his questionnaire was not supported by his own medical records or the totality of the medical records in evidence. R.pp. 214-220 and 229.

Even if Claimant had preexisting hypertension, which the Fund expressly denies, it was not permanent and serious enough to constitute a hindrance or obstacle to his employment. In this case, the record is devoid of evidence, notwithstanding the questionnaire, that hypertension hindered Claimant's employment prospects or even factored into an employment equation. The substantial evidence in the record supports the Commission's finding that Claimant did not have preexisting hypertension. Moreover, if Claimant had preexisting hypertension, the totality of the evidence establishes that it was not permanent and serious enough to constitute a hindrance or obstacle to employment. The Commission's decision must be affirmed.

III. THE COMMISSION'S FINDING THAT CLAIMANT'S PREEXISTING ANXIETY WAS NOT SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE

TO EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The substantial medical evidence in the record supports the Commission's finding that Claimant's preexisting anxiety was not a hindrance to his employment. Claimant admitted to mild symptoms of stress, worry and anxiety, and denied psychological problems of significant intensity. R.p. 210. An assessment of Claimant's mental status revealed mild anxiety that was "pretty well controlled," "does not appear to be influencing his perception of pain or treatment" and "no psychological contraindications" were observed. R.pp. 211-212. This evidence is both probative and substantial on the issue of whether Claimant had preexisting anxiety that was permanent and serious enough to constitute a hindrance or obstacle to his employment. The Commission determined that Claimant's anxiety was not permanent and serious enough to constitute a hindrance or obstacle to employment because it was well controlled, had no impact on Claimant's pain and resulted in no contraindications. Also, there is no evidence to suggest that Claimant's preexisting stress, worry or anxiety hindered his progress especially in light of the fact that it was well controlled and had no influence or effect on Claimant's treatment. The Commission's decision was based on the substantial evidence in the record.

IV. CARRIER IS NOT ENTITLED TO A PRESUMPTION UNDER S.C. CODE ANN. §42-9-400(d) (34).

Carrier asserts that it is entitled to a presumption that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment pursuant to S.C. Code Ann. §42-9-400(d) (34). The Fund asserts that this issue has not been preserved for appellate review because it was not addressed or ruled upon below. Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 120, 754 S.E.2d 486, 490 (2014). However, assuming

it was properly preserved for appellate review, it is inapplicable in this instance. Section 42-9-400(d) (34) states as follows:

- (34) Any other pre-existing disease, condition or impairment which is permanent in nature and which:
 - (a) Would qualify for payment of weekly disability benefits of seventy-eight weeks or more under §42-9-30 exclusive of benefits payable for disfigurement; or
 - (b) Would support a rating of seventy-eight or more weeks of weekly disability benefits evaluated according to the standards applied to Workers' Compensation claims in South Carolina; or combines with a subsequent injury to cause permanent impairment rated at seventy-eight weeks or more under §42-9-30.

S.C. Code Ann. §42-9-400(d) (34).

Section 42-9-400(d) (34) is the reimbursement catchall provision and it was eliminated in 2007. Section 42-9-400(d) (34) is inapplicable for various reasons. Though Carrier indicates that Claimant has combined impairment ratings of forty-two (42%) percent, the underlying claim was settled without a hearing based solely on a twenty-five (25%) percent whole person rating provided by Dr. Sameer Lal. Furthermore, since §42-9-30 addresses single member injuries, a whole person rating would necessarily be converted to a single member or regional rating. A twenty-five (25%) percent regional rating to the back yields seventy-five (75) weeks and would not entitle Carrier to a presumption based S.C. Code §42-9-400(d) (34) (b). Furthermore, the determination of whether a preexisting condition would support a rating of more than seventy-eight (78) weeks is a determination that must be adjudicated by the South Carolina Workers' Compensation Commission and the underlying case was settled without a hearing. Since no presumption applies, the Fund did not have the burden to rebut a presumption.

V. THE COMMISSION'S DECISION IS CONSISTENT WITH RECENT CASE LAW.

The Commission's decision is consistent with recent South Carolina Court of Appeals decisions. In Carolinas Recycling Group v. S.C. Second Injury Fund, the Court of Appeals reversed the Commission's decision because it was based on an evaluation by a non-treating physician who only met with Claimant on one occasion. 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct. App. 2012). In this case, the Commission's decision is based on the medical records of the treating physicians, which clearly established that Claimant did not have preexisting hypertension, that his prior back strain was successfully treated "with no significant sequelae"; that Claimant's anxiety was mild, well controlled, did not influence his pain or treatment and did not result in any psychological contraindications. R.pp. 211-212, 217, and 219. The treating physician also indicated that Claimant "reports no prior history of hypertension before his work related injury" and that there were "no medical records to indicate pre-existing hypertension." R.p. 219. These medical opinions relied upon by the Commission are those of the treating physicians and those medical opinions do not support Carrier's request for reimbursement.

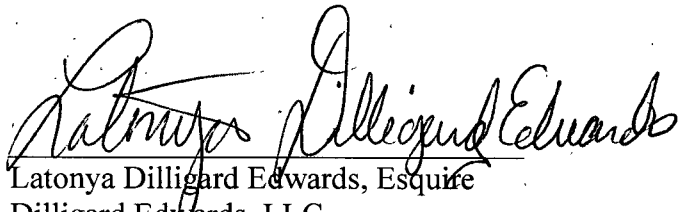
In Burnette v. City of Greenville, the South Carolina Court of Appeals reversed and remanded because the Commission's decision was based on a single commissioner's interpretation of medical data. 401 S.C. 417, 737 S.E.2d 2000 (Ct. App. 2012). Here, the Commission's decision is based on the treating physicians' own interpretations of the medical data, which clearly does not support reimbursement. To reiterate, the medical narratives of the treating physicians indicated that Claimant's prior back strain was successfully treated "with no significant sequelae"; that Claimant's anxiety was mild, well controlled, did not influence his pain or treatment and did not result in any psychological contraindications. R.pp. 211-212, 217, and 219.

While case law instructs that the Commission may disregard medical evidence in favor of other competent evidence, the Commission relied heavily on the medical narratives rather than solely relying on the questionnaires submitted by the Carrier. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). The Commission gave greater weight to the medical narratives and reports, which provided more detailed and competent medical evidence on the issues involved in this case rather than relying solely on medical questionnaires, which in this case, were not supported by the medical narratives and were completed years after Claimant completed treatment. The Commission's decision to deny Carrier's request for reimbursement was supported by the substantial evidence in the record.

CONCLUSION

For the reasons cited here, the South Carolina Second Injury Fund requests that this case be affirmed because it was supported by substantial evidence in the record.

Respectfully submitted,

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January 7, 2015
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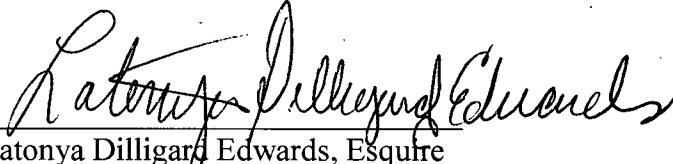
JAN 07 2015

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR.

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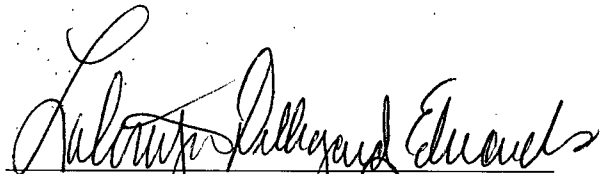
American Services, Inc., Employer)

PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Respondent, does hereby certify that service of the **Final Brief of Respondent** and **Certificate of Counsel** to South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Appellants, American Home Assurance Co., and the South Carolina Workers' Compensation Commission, by placing same in the United States mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope on this 7th day of January, 2015, as follows:

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