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SC Court of Appeals

DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
APPELLATE PANEL

W.C.C. FILE NO. 9928766

South Carolina Property and Casualty Insurance Guaranty Association  
v  
South Carolina Second Injury Fund

In Re:

Michael Quarles,  
Employee/Claimant,

-vs-

Cryovac Sealed Air Corporation, Employer, and  
Lumbermens Mutual Casualty Company in  
liquidation/South Carolina Property and Casualty  
Insurance Guaranty Association, Carrier,  
Defendants.

REVIEW HEARING: Held on January 22, 2018 in Columbia, South  
Carolina per notices timely and properly served  
upon all parties of interest.

APPEARANCES: Robert M. Cook, II, Esquire, Batesburg-Leesville,  
South Carolina appeared on behalf of Appellant  
South Carolina Second Injury Fund.

J. Hubert Wood, III, Esquire, Charleston, South  
Carolina appeared on behalf of Respondent South  
Carolina Property and Casualty Insurance  
Guaranty Association.

PURPOSE OF HEARING: To determine the issues as set forth in the Form  
30 Request for Commission Review.

DECISION & ORDER: By: Aisha Taylor, Commissioner; Susan S.  
Barden and Gene McCaskill, Commissioners,  
concur.

FILED: March 29, 2018

Pursuant of S.C. Code Ann. §42-17-50 (1976, as amended), South Carolina Second Injury Fund (SCSIF) seeks review and reversal of Hearing Commissioner T. Scott Beck's Decision and Order dated October 2, 2017 awarding reimbursement to South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA). SCPCIGA seeks affirmation contending that the Hearing Commissioner's findings of fact, rulings of law, order and award are supported by the greater weight of the evidence in the record and applicable law. SCPCIGA further contends that the Hearing Commissioner made no reversible error of law and did not abuse his discretion.<sup>1</sup>

#### **STATEMENT OF CASE BEFORE COMMISSIONER BECK**

SCPCIGA and SCSIF agreed that the sole issue for determination was whether SCPCIGA is entitled to reimbursement from SCSIF for benefits paid by SCPCIGA on the underlying claim. SCPCIGA sought reimbursement from SCSIF in accordance with an Agreement to Reimburse Compensation entered between the liquidated carrier, Lumbermens Mutual Casualty Company (Lumbermens), and SCSIF dated October 14, 2003 and approved by the Workers' Compensation Commission (Commission) on November 21, 2003, pursuant to the terms and provisions of S.C. Code Ann. §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (1976, as amended) (SCPCIGA's Form 54 Hearing Request dated December 8, 2016). SCSIF disputed SCPCIGA's entitlement to reimbursement contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement; that SCPCIGA does not pay assessments to SCSIF; that the liquidated carrier pursuant to which SCPCIGA asserts its right to reimbursement,

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<sup>1</sup> SCPCIGA and SCSIF are the only parties who have heretofore participated in the current litigation. Counsel for the Claimant, Kathryn Williams, Esquire, and the liquidated carrier, Jeff Jones, Esquire, have been appropriately served with all pleadings and notices from the Commission and their appearance has not been required by the Commission.

Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to SCSIF thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320; and that SCPCIGA's reimbursement claim is barred by reason of a certain Settlement Agreement and Release entered between SCSIF and SCPCIGA dated June 17, 2013 (SCSIF's Form 55 Answer dated January 5, 2017 and Form 58 Pre-Hearing Brief).

### **HEARING BEFORE COMMISSIONER BECK**

SCPCIGA and SCSIF, by and through their respective counsel, appeared before Commissioner Beck for the Forms 54/55 hearing on June 21, 2017 in Columbia, South Carolina. The record reflects that various documentary evidence was submitted and included in the record pursuant to the Administrative Procedures Act (APA). In addition to the APA Submissions, the deposition of David Stooksbury dated April 26, 2017 with exhibits; the deposition of Christopher Lombard dated March 8, 2017 with exhibits; and the deposition of J. Smith Harrison, Jr. dated March 8, 2017 were submitted and included in the record. SCSIF's objection to SCPCIGA's APA Submissions Nos. 1 through 5 was overruled by the Hearing Commissioner. Stipulations were entered concerning jurisdiction, venue and the Commission's file becoming part of the record with the exception of self-serving declarations and unstipulated medical reports. The hearing proceeded in the form of oral argument by counsel.

### **BACKGROUND AND EVIDENCE SUMMARY**

The Claimant sustained compensable injuries to his neck and back and a compensable psychological injury as a result of an accident arising out of and in the course of his employment

on December 17, 1999 (SCPCIGA's APA Submission No. 10 at pages 200 - 205). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (SCPCIGA's APA Submission No. 8 at pages 195 - 198). The approved Agreement to Reimburse Compensation entered between Lumbermens and SCSIF provides that Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206). The approved Agreement to Reimburse Compensation was not appealed by any party. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (SCPCIGA's APA Submission No. 11 at pages 207 - 249; see also deposition testimony of David Stooksbury at page 58 and deposition testimony of Chris Lombard at pages 64 - 65).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (SCPCIGA's APA Submission No. 6 at pages 180 - 190). As a result, SCPCIGA became responsible for the claim pursuant to the terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2018) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of SCPCIGA's Executive Director, J. Smith Harrison, Jr., this matter is a covered workers' compensation claim under the Guaranty Act for which SCPCIGA is fully responsible and paying (Harrison deposition at page 56).

## SCPCIGA

SCPCIGA is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2018). SCPCIGA consists of insurers defined as “member insurers” under S.C. Code Ann. §38-31-20(8) (2018) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in §42-7-310(d)(2) and §42-7-320(B)(3), SCPCIGA is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2018).<sup>2</sup>

Pursuant to §38-31-40, SCPCIGA is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the “workers’ compensation insurance account.” Pursuant to §38-31-60(c), SCPCIGA shall allocate claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). Accordingly, SCPCIGA’s workers’ compensation member insurers responsible for assessments necessary to fund its workers’ compensation liabilities are also responsible for payment of assessments necessary to fund SCSIF on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). In addition, SCPCIGA is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2018). Therefore, SCPCIGA asserts that it has a fiduciary responsibility to its member insurers, the

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<sup>2</sup> SCPCIGA acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to SCSIF by self-insurers and the State Accident Fund.

receiver/liquidator of the assets of an insolvent insurer and certain insureds and affiliates of an insolvent insurer (Harrison deposition at pages 38 - 39, 49 - 50 and 52 - 53).

Pursuant to §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent (emphasis added). "Covered claim" is defined under S.C. Code Ann. §38-31-20(8) (2018) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA's liability in certain situations. However, §38-31-60(iv) expressly provides that SCPCIGA "...shall pay the full amount of any covered workers' compensation claim." (Harrison deposition at pages 50 - 51).

#### SCSIF

§42-7-310 provided for the establishment, purpose, administration, funding and staff of SCSIF. A careful reading of §42-7-310(d)(2) reveals that it does not define the term "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund. Reimbursements to an "employer" or "insurance carrier" are governed by, and made pursuant to, §42-9-400 and S.C. Code Ann. §42-9-410 (1976, as amended). In this particular case, the approved Agreement to Reimburse Compensation specifically provides that Lumbermens shall receive reimbursement in accordance with the provisions of §42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206).

The July 1, 2007 amendments to the South Carolina Workers' Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers' Compensation Act) included the enactment of §42-7-320 providing for the termination of SCSIF and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability

Authority (hereinafter referred to collectively as "SFAA") was required to provide for the efficient and expeditious closure of SCSIF with the orderly winding down of the affairs of SCSIF so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund. §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident Fund remain liable for SCSIF's assessments, as determined by SFAA, in order to pay accepted claims and SCSIF shall continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011. §42-7-320 does not define the terms "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of SCSIF's remaining liabilities and options for funding SCSIF's remaining liabilities. In that regard, KPMG produced its initial actuarial report in March 2013 (SCPCIGA's APA Submission No. 4 at pages 114 - 148). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (Exhibit No. 1 to Lombard deposition, Lombard deposition at pages 24 - 45 and Stooksbury deposition at pages 10 - 11 and 21). Concerning the administration of SCSIF's continuing operations, SFAA assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF) which is part of SFAA. SCIRF's administrative responsibilities commenced in May 2013 shortly before termination of the SCSIF's programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (Lombard deposition at pages 8 - 16). Chris Lombard is the Assistant

Director of Claims for SCIRF and in connection therewith, is responsible for the management of SCSIF's operations (Lombard deposition at pages 6 - 8). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of SCSIF's ongoing assessments under §42-7-320 (Lombard deposition at page 16 and Stooksbury deposition at pages 7 - 8).

### **Prior Litigation**

Disputes involving SCPCIGA's entitlement to reimbursement from SCSIF are not new. SCPCIGA and SCSIF extensively litigated many of the same issues in connection with various reimbursement claims made by SCPCIGA for workers' compensation benefits it paid to injured employees as a result of the insolvency of Legion Insurance Company. That litigation resulted in various decisions and orders issued by the Commission and the Circuit Court. Those decisions and orders determined SCPCIGA to be eligible for, and entitled to, reimbursement. In so doing, the Commission and Circuit Court rejected the arguments that SCPCIGA is not an entity statutorily authorized to receive reimbursement and that SCPCIGA cannot be eligible for reimbursement because it does not pay assessments and/or as a result of the underlying insolvent carrier's default status with respect to payment of SCSIF assessments pursuant to the statutory amendment to §42-7-310(d)(2) effective June 25, 2003 (SCPCIGA's APA Submission Nos. 1, 2 and 3 at pages 1 - 113).

In particular, litigation of the reimbursement claim associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, resulted in these issues being presented to the South Carolina Court of Appeals on appeal by SCSIF. Prior to a ruling by the

Court of Appeals, SCPCIGA and SCSIF entered into the June 17, 2003 Settlement Agreement and Release which resulted in dismissal of SCSIF's appeal (SCPCIGA's APA Submission No. 2 at pages 70 - 71). The settlement agreement, which was approved by a majority of the Commission, defined the terms "Legion" and "Reliance" and effectuated SCPCIGA's release of SCSIF on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any and all claims, on which SCSIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement approved by the Commission further states: "The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any "large deductible" policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers" (emphasis added) (Exhibit No. 3 to Lombard deposition).

## COMMISSIONER BECK'S DECISION AND ORDER

The Hearing Commissioner's Decision and Order was filed and served on October 2, 2017. It appropriately lists the documentary evidence included in the record; recites the stipulations entered by the appearing parties; and details the pertinent background and evidentiary facts. Following an exhaustive analysis of the evidentiary record and applicable law concerning the issues in dispute, the Hearing Commissioner made the following findings of fact and conclusions of law:

### Findings of Fact

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.
8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.
12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

#### Conclusions of Law

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on

behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.

3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.
6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).

10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

Based on the foregoing findings and conclusions, the Hearing Commissioner ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Workers' Compensation Commission on November 21, 2003.

### **FULL COMMISSION PROCEEDINGS**

In accordance with S.C. Ann. Regs. 67-701 et seq. (2018), SCSIF timely filed and served its Form 30 Request for Commission Review on October 16, 2017 asserting seven (7) specific questions of alleged error by the Hearing Commissioner. The Commission issued a Form 31 Briefing Schedule and Notice of Appellate Hearing on November 17, 2017 assigning the matter to this Appellate Panel. SCSIF timely filed and served its Appellant Brief on December 18, 2017 wherein it made three (3) arguments asserting that the Hearing Commissioner erred in ruling that SCPCIGA is statutorily authorized to seek reimbursement; erred in ruling that SCPCIGA is entitled to reimbursement even though it does not participate in SCSIF's assessment process; and erred in failing to rule that the Settlement Agreement and Release entered between the parties dated June 17, 2013 does not bar SCPCIGA's reimbursement claim. SCPCIGA timely filed/served its Respondent Brief following which SCSIF filed/served a Reply Brief. Oral argument was held before this Appellate Panel on January 22, 2018.

## ISSUES

### **I. Statutory Authorization**

SCSIF asserts that SCPCIGA, as a statutory entity, is simply not statutorily authorized to seek/receive reimbursement. SCSIF contends that §38-31-60(b) has no relevance or application to reimbursement claims against SCSIF and by its own terms, is limited to matters pertaining to the defense by SCPCIGA of ongoing claims. In conjunction therewith, SCSIF, *citing* Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) for the statutory construction principal of “*expressio unius est exclusion alterius*,” argues that SCPCIGA’s rights of recoupment and offset are limited to those expressly provided in §38-31-90 and S.C. Code Ann. §38-31-100 (2018). SCSIF also argues that SCPCIGA is not an insurance carrier entitled to reimbursement pursuant to §42-7-310, §42-7-320 and §42-9-400. Accordingly, SCSIF contends that the Hearing Commissioner’s findings, rulings, order and award to the contrary are in error. We disagree.

The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result. Beaufort County v. S.C. State Election Commission, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) *citing* Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

§38-31-60 provides for the powers and duties of SCPCIGA. It is a multi-faceted statute not limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated

carrier. For example, §38-31-60(j) authorizes SCPCIGA to sue and §38-31-60(l) authorizes SCPCIGA to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act. In our view, there is no language in §38-31-60(b) or elsewhere in the statute which limits the liquidated carrier's rights assumed by SCPCIGA to those pertaining to the defense of ongoing claims. We are not persuaded by SCSIF's suggestion that the second sentence in §38-31-60(b) providing that SCPCIGA has the right but not the obligation to defend an insured that is not a resident of this State weighs in favor of construing §38-31-60(b) to limit the rights of the liquidated carrier assumed by SCPCIGA to matters pertaining to the defense of ongoing claims. In our judgment, it merely distinguishes a specific situation where SCPCIGA has a right but not an obligation. We decline to construe §38-31-60(b) so as to limit SCPCIGA's rights thereunder in the manner advocated by SCSIF. Moreover and assuming *arguendo* that SCSIF is correct in its statutory construction argument, it is self-evident that SCPCIGA would have no reason to assert the liquidated carrier's right to reimbursement but for its obligation to pay the full amount of this covered workers' compensation claim imposed by §38-31-60(a)(iv) and (b). Accordingly, we find that SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of the claim and is part and parcel of SCPCIGA's defense of the claim.

Similarly, there is no language in §38-31-90 or §38-31-100 which abrogates the liquidated carrier's rights under the Workers' Compensation Act assumed by SCPCIGA pursuant to §38-31-60(b). SCSIF fails to reference any statutory language to that effect. Instead, it relies on the statutory construction principle of "expressio unius est exclusio" to support its assertion that SCPCIGA's rights of recoupment and offset as provided in §38-31-90 and §38-31-100 are exclusive. We find this to be a misguided argument which ignores the clear, unequivocal, and broad language in §38-31-60(b) conferring upon SCPCIGA all rights of the liquidated carrier to

the extent of its obligation on this fully covered workers' compensation claim. By way of illustration, the right to reimbursement pursuant to an approved agreement to reimburse compensation would be one of several recoupment/offset rights of a liquidated carrier that SCPCIGA would maintain under the Workers' Compensation Act in connection with its obligation on a covered workers' compensation claim. Others would include subrogation rights under S.C. Ann. Code §42-1-560 (1976, as amended) and the right to assert credit for payments made when not due and payable pursuant to S.C. Ann. Code §42-9-210 (1976, as amended). We decline to construe §38-31-90 and §38-31-100 as limiting or abrogating those rights of a liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains in connection with its obligation on fully covered workers' compensation claims.

SCSIF uses the terms "insurance company" and "insurance carrier" interchangeably in arguing that SCPCIGA is not entitled to reimbursement pursuant to §42-7-310 and §42-9-400. In so doing, SCSIF misconstrues those statutes and ignores S.C. Code Ann. §42-1-60 and §42-5-20 (1976, as amended). As indicated above, §42-7-310 provided for the establishment, purpose, administration, funding and staff of the SCSIF. It does not define the term "carrier" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it merely provides that the term as used in §42-7-310(d)(2) includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). In this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of §42-9-400 (emphasis added). §42-9-400(a) states in pertinent part that "...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310..." (emphasis added). §42-7-320(B)(3) requires SCSIF to continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011.

§42-1-60 defines the term “carrier” or “insurer” as “any person or fund authorized under §42-5-20 to insure under this title (Title 42) and includes self-insurers.” §42-5-20 states in pertinent part that “[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized...” The term “insure” is defined in Black’s Law Dictionary, Abridged Fifth Edition, as “[t]o make sure or secure, to guarantee, as to insure safety to anyone. To engage to indemnify a person against pecuniary loss from specified perils or possible liability.” Under §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and as set forth above, the uncontradicted record establishes that this matter involves a covered workers’ compensation claim for which SCPCIGA is responsible for paying the full amount under §38-31-60(a)(iv).

Concerning whether SCPCIGA is authorized under §42-5-20 to insure liabilities under the Workers’ Compensation Act thereby meeting the statutory definition of the term “carrier” or “insurer” under §42-1-60 and as used in §42-9-400 and §42-7-320; it is self-evident that SCPCIGA would not be responsible for paying this claim and would have no reason to be seeking reimbursement if it was not so authorized. The evidentiary record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers’ Compensation Act and there is no evidence to the contrary (see Harrison deposition at pages 54 - 56). We also take judicial notice of routine decisions and actions by the Commission with respect to SCPCIGA’s data reporting obligations and benefit liabilities on covered workers’ compensation claims in carrying out the Commission’s administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers’ Compensation Act. In our view, the uncontradicted

evidentiary record and applicable statutory provisions establish SCPCIGA as an association authorized to insure liabilities under the Workers' Compensation Act and in particular, authorized to insure the Employer's liabilities in this fully covered workers' compensation claim.

In connection with its argument that SCPCIGA is not an insurance carrier authorized to receive reimbursement, SCSIF cites the South Carolina Supreme Court's Decision in South Carolina Property and Casualty Insurance Guaranty Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) for the proposition that SCPCIGA is not an insurance company/carrier entitled to reimbursement. Notably, SCSIF concedes in its Appellant Brief that Brock was decided in a different context. In our view, any reliance on Brock is misplaced. The Court's statement in Brock that SCPCIGA is "...neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies" was made in the context of its analysis of SCPCIGA's right to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. Brock did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which SCPCIGA would be responsible for paying the full amount and, therefore, is clearly distinguished from the current matter. More specifically, Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply. Therefore, we find Brock not applicable to the current matter.

## II. Assessments

In its Form 30, SCSIF asserts that the Hearing Commissioner erred in ruling that SCPCIGA is entitled to request/receive reimbursement without having directly participated in the statutory assessment process (emphasis added). Previously in its Form 55, SCSIF asserted that SCPCIGA was barred from reimbursement because it does not pay assessments and

pursuant to §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of assessments. However, deposition testimony of David Stooksbury, SCIRF's business manager in charge of SCSIF's operations as it relates to assessments, testified clearly and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed (Stooksbury deposition at page 47). He also testified that if a carrier goes under and stops paying claims, the assessment goes to zero (Stooksbury deposition at page 47). SCSIF made no assertion of the claim being barred under §42-7-310(d)(2) as a result of Lumbermens purported default in payment of assessments during oral argument before the Hearing Commissioner and did not include such in its Form 30 exceptions.

The uncontradicted evidentiary record reflects that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68). Pursuant to §38-31-40, SCPCIGA is an unincorporated entity and its workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51) (emphasis added). In connection therewith, any theoretical assessment on SCPCIGA would not alter or affect the total sum of assessments raised on an annual basis by SCSIF under the pre-July 1, 2013 funding mechanism set forth in §42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by SFAA pursuant to §42-7-320. Rather, the only variable would be what entities were paying and in what amounts (Lombard deposition at pages 80 - 84 and Stooksbury deposition at pages 75 - 76). The record further reflects that SCPCIGA's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and

included (SCPCIGA's APA Submission No. 4 at page 116 and Stooksbury deposition at pages 58 - 61, 64 and 66). There is no indication that any of SCPCIGA's workers' compensation member insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51). SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim.

The only statutory provision which conditions reimbursement upon payment of assessments is the amendment to §42-7-310(d)(2) which became effective June 25, 2003. In light of David Stooksbury's uncontradicted testimony that neither Lumbermens nor any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, we find any argument that SCPCIGA's reimbursement claim is barred because of an issue connected to assessments to be baseless and without merit.<sup>3</sup> We further find that the foregoing clearly establishes that SCPCIGA, as an unincorporated entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers and there is no delinquency in payment of those assessments including payment of the assessments associated with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this claim. Given SCSIF's failure to assess SCPCIGA and the overwhelming evidence of participation in the assessment process by SCPCIGA's workers' compensation member insurers to include payment of assessments to fund SCSIF's liability on this particular claim, we find no merit in the assertion

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<sup>3</sup> As a result of the uncontradicted record establishing that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, it is not necessary for us to address whether the pertinent statutory amendment to §42-7-310(d)(2) effective June 25, 2003 should be applied retroactively in this claim with an underlying date of accident/injury on December 17, 1999. Moreover, SCSIF has abandoned any position in that regard inasmuch as such was not included in its Form 30 exceptions. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 841 (1940) and Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993).

that SCPCIGA's reimbursement claim is barred due to its failure to "directly" pay assessments to SCSIF.

### **III. Prior Settlement Agreement**

SCSIF asserts that the Settlement Agreement and Release entered between it and SCPCIGA dated June 17, 2013 bars SCPCIGA's claim for reimbursement or otherwise releases SCSIF from its liability for reimbursement on this claim (SCSIF's APA Submission No. 1 at pages 1 – 14). In this regard, SCSIF notes provisions in the Settlement Agreement and Release that the language therein should be construed as a whole and not strictly for or against any party and that the terms are to be given the broadest understanding. SCSIF also notes SCPCIGA's knowledge of the Lumbersmens' claims to specifically include this claim as of June 17, 2013 and the fact that SCPCIGA had set up reserves and paid benefits on this particular claim prior to execution and Commission approval of the June 17, 2013 Settlement Agreement and Release (SCPCIGA APA Submission No. 7 at pages 191 – 194). SCSIF also argues that the amount of the monetary consideration paid by SCSIF to SCPCIGA for the Settlement Agreement and Release dated June 17, 2013 supports its contention in this regard.

The plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein; the settlement and release applied only to those claims on which SCSIF was paying SCPCIGA as of February 22, 2013. The uncontradicted evidentiary record reflects that Lumbersmens was not liquidated until May 8, 2013; that SCPCIGA was not paying this claim as of February 22, 2013 and that at no time has SCSIF reimbursed SCPCIGA in connection with this claim (Lombard deposition at pages 39 – 42 and Harrison deposition at page 47). Based on the plain, clear and unequivocal language in the Settlement Agreement and Release, and any reasonable construction thereof; we find and

conclude that it does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim. We further find and conclude that the amount of the monetary consideration is of no consequence.

#### **IV. Conclusion**

Based on the foregoing review and analysis, we make the following findings of fact and conclusions of law and issue the following Order:

#### **FINDINGS OF FACT**

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.

5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.
7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.
8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to

claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.

12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

#### **CONCLUSIONS OF LAW**

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.
3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of

Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320. Moreover, the South Carolina Supreme Court's decision in Brock v. South Carolina Property and Casualty Insurance Guaranty Association, 410 S.C. 361, 764 S.E.2d 920 (2014) (involving a policy of liability insurance rather than a policy of workers' compensation insurance under which SCPCIGA is fully responsible for covered claims) is not applicable to this matter.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.

6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter and the amount of the monetary consideration is of no consequence.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).
10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

11. Under §38-31-60(b), the rights of the liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains are not limited exclusively to matters pertaining to the defense by SCPCIGA of ongoing claims. Alternatively, SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of this fully covered workers' compensation claim and as such, is part and parcel of SCPCIGA's obligation for payment of this covered claim and its defense thereof.
12. Under §42-7-310 and §42-7-320 and in light of the foregoing Findings of Fact Nos. 7 – 10 and Conclusions of Law Nos. 5 – 8; any assertion that SCPCIGA's reimbursement claim is barred due to a failure to pay assessments, directly or otherwise, is without merit.

### ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Decision and Order of the Hearing Commissioner dated October 2, 2017, along with the findings of fact and conclusions of law contained therein, are hereby affirmed in their entirety.

IT IS FURTHER ORDERED that the South Carolina Second Injury Fund shall make reimbursement to South Carolina Property and Casualty Insurance Guaranty Association for workers' compensation benefits paid by South Carolina Property and Casualty Insurance Guaranty Association in this matter in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Workers' Compensation Commission on November 21, 2003.

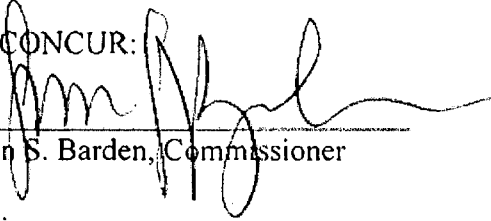
IT IS SO ORDERED.



Aisha Taylor, Commissioner,  
for the Appellate Panel

Date: \_\_\_\_\_

WE CONCUR:



Susan S. Barden, Commissioner

Date: \_\_\_\_\_



Gene McCaskill, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Valerie Deller on March 29, 2018***