

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,)
)
)

Respondent,)
)

v.)
)

SOUTH CAROLINA SECOND INJURY FUND,)
)
)

Appellant.)
)

IN RE:)
)

MICHAEL QUARLES,)
)

Employee/Claimant,)
)

v.)
)

CRYOVAC SEALED AIR CORPORATION,)
)
)

Employer, and)
)

LUMBERMENS MUTUAL CASUALTY COMPANY IN LIQUIDATION/ SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,)
)
)
)

Carrier/Defendants.)
)

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SC Court of Appeals

ORDER

Docket No.: 2018-CP-2302580

W.C.C. File No.: 998766

This matter is before the Court pursuant to a Petition/Notice of Appeal filed on behalf of the South Carolina Second Injury Fund (SCSIF) seeking judicial review of the Decision and Order of the South Carolina Workers' Compensation Commission (Commission) filed March

29, 2018 in accordance with S.C. Code Ann. §1-23-380 and §42-17-60 (1976, as amended).¹ SCSIF asserts various legal errors by the Commission in connection with its award of reimbursement to South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA). SCPCIGA seeks affirmation of the Commission's Decision and Order. SCPCIGA contends that the Commission's findings of fact, conclusions of law and order are supported by substantial evidence in the record and applicable law. SCPCIGA further contends that the Commission made no reversible error of law and did not abuse its discretion. Memoranda of law were filed by both parties prior to the hearing on October 30th and both parties presented extensive oral argument in support of their respective positions at that hearing.

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 Administrative Procedures Act (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). An Agreement to Reimburse Compensation entered between Lumbermens Mutual Casualty Company (Lumbermens) and

¹ §42-17-60 was amended effective July 1, 2007 so as to provide that appeals from the Commission are directly to the South Carolina Court of Appeals. However, the date of accident/loss in the underlying claim for workers' compensation benefits pre-dates the statutory amendment. Therefore, the appeal in this matter is directly to the Court of Common Pleas pursuant to the South Carolina Supreme Court's holding in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) and venue is proper in Greenville County in light of the injury by accident in the underlying claim occurring in Greenville County and the Employer's residence being in Greenville County.

SCSIF dated October 14, 2003 and approved by the Commission on November 21, 2003 provided 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) (emphasis added). There is no indication that the approved Agreement to Reimburse Compensation was 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. (2017) (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 (2017) (emphasis added). SCPCIGA consists of insurers defined as "member insurers" under S.C. Code Ann. §38-31-20(8) (2017) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in S.C. Code Ann. §42-

7-310(d)(2) and §42-7-320(B)(3) (1976, as amended), 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 (2017).²

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) (2017).

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) (2017) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA’s liability in certain situations. However,

² 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.

§38-31-60(iv) expressly provides that SCPCIGA “...shall pay the full amount of any covered workers’ compensation claim.” (emphasis added) (Harrison deposition at pages 50 - 51).

SCSIF

S.C. Code Ann. §42-7-310 (1976, as amended) provided for the establishment, purpose, administration, funding and staff of SCSIF. §42-7-310(d)(2) 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 (emphasis added). Reimbursements to an “employer” or “insurance carrier” are governed by, and made pursuant to, S.C. Code Ann. §42-9-400 and §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 (emphasis added) (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 S.C. Code Ann. §42-7-320 (1976, as amended) 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 (emphasis added). §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 (emphasis added). §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, 2013 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).

STATEMENT OF CASE

SCPCIGA sought reimbursement from SCSIF in accordance with the Agreement to Reimburse Compensation entered between Lumbermens and SCSIF pursuant to the terms and provisions of §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (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, 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 dated April 20, 2017).³

SCPCIGA and SCSIF, by and through their respective counsel, appeared before Commissioner T. Scott 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 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. 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, and the hearing proceeded in the form of oral argument by counsel.

The Single Commissioner's Decision and Order was filed and served on October 2, 2017. It appropriately listed the documentary evidence included in the record; recited the stipulations

³ 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.

entered by the appearing parties; and detailed the pertinent background and evidentiary facts. Following an exhaustive analysis of the evidentiary record and applicable law concerning the issues in dispute, the Single Commissioner made various findings of fact and conclusions of law and 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 approved Agreement to Reimburse Compensation.

SCSIF timely filed and served its Form 30 Request for Commission Review of the Single Commissioner's Decision and Order on October 16, 2017 presenting seven specific questions of alleged error by the Single Commissioner. The Commission issued a Form 31 Briefing Schedule and Notice of Appellate Hearing assigning the matter to a Full Commission Appellate Panel which consisted of Commissioners Aisha Taylor, Susan S. Barden and Gene McCaskill. In its Appellant Brief timely filed and served on December 18, 2017, SCSIF made three arguments. SCSIF asserted that the Single 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 appearing 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 the Appellate Panel on January 22, 2018 in Columbia, South Carolina per notices timely and properly served upon all parties of interest. Thereafter, the Appellate Panel issued its Decision and Order dated March 29, 2018 wherein it 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. Moreover, the South Carolina Supreme Court's decisions 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.

Based on the foregoing findings and conclusions, the Appellate Panel affirmed the Decision and Order of the Single Commissioner dated October 2, 2017 in its entirety and 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 approved Agreement to Reimburse Compensation. From that Order, SCSIF appeals to this Court presenting essentially the same grounds of appeal that were presented to the Appellate Panel.

STANDARD OF REVIEW

The standard of review in an appeal from a final decision of an administrative agency is governed by §1-23-380(b) of the South Carolina Code of Laws (1986, as amended) (commonly known as the Administrative Procedures Act). See Pringle v. Builders Transport, Inc., 381 S.E. 2d 731 (1989). See Lark v. Bi Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). The Appellate Court can reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” See Gray v. Club Group, Ltd., 528 S.E. 2d 435

(Ct.App.2000), citing S. C. Code Ann. § 1-23-380(g) (1986, as amended). In considering an appeal from a Decision and Order of the South Carolina Workers' Compensation Commission, the Court's role is appellate and is limited to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law. See Rogers v. Kunja Knitting Mills Co., 440 S.E.2d 401, re-hearing denied (Ct. App. 1994). In an appeal from the Workers' Compensation Commission, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(6) (1976), *construed in* Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A decision of the Workers' Compensation Commission must be affirmed if factual findings are supported by substantial evidence. See Stokes v. First National Bank, 410 S.E.2d 248 (1991). Substantial evidence is that evidence which would require refusal to direct a verdict if the matter were before a jury and is something less than the weight of the evidence. See Hoxit v. Michelin Tire Corporation, 405 S.E.2d 407, 304 S.C. 461 (1991). The possibility of drawing two inconsistent conclusions from the evidence does not prevent administrative findings from being supported by substantial evidence. Id. If the factual findings of the Workers' Compensation Commission are supported by substantial evidence, the Commissions' conclusions must be affirmed. See Ross v. American Red Cross, 381 S.E. 2d 728, 298 S.C. 490 (1989).

ISSUES ON APPEAL

I. Statutory Authorization

SCSIF asserts that SCPCIGA, as a statutory entity, is not statutorily authorized to seek/receive reimbursement. SCSIF contends there is no statutory provision or reported appellate court opinion in South Carolina expressly authorizing SCPCIGA to seek/receive reimbursement. SCSIF further 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 exclusio 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 Commission’s findings, rulings, order and award to the contrary are in error.

In construing the pertinent statutory provisions, the Commission cited Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990), for the proposition that the cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without result to subtle or forced construction to limit or expand its operation; Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987), for the proposition that statutory language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose; and 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), for the proposition that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result.

§38-31-60 provides for the powers and duties of SCPCIGA. The Commission construed it to be a multi-faceted statute not limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated carrier. In that regard, the Commission cited §38-31-60(j) which authorizes SCPCIGA to sue and §38-31-60(l) which authorizes SCPCIGA to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act.⁴ The Commission concluded there was 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. The Commission was 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. The Commission concluded that such merely distinguishes a specific situation where SCPCIGA has a right but not an obligation. Accordingly, the Commission declined to construe §38-31-60(b) so as to limit SCPCIGA's rights thereunder in the manner advocated by SCSIF. Assuming *arguendo* that SCSIF is correct in its statutory construction argument, the Commission concluded that it is self evident 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 found 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.

⁴ SCPCIGA argues that the purpose of the Guaranty Act is to protect insureds and claimants by paying the claims of liquidated insurance carriers and that funding payment of the claims is an essential component of carrying out that purpose.

With respect to §38-31-90 and §38-31-100, the Commission concluded there was no language thereunder which abrogates the liquidated carrier's rights under the Workers' Compensation Act assumed by SCPCIGA pursuant to §38-31-60(b). The Commission noted that SCSIF had failed to reference any statutory language to that effect and instead, relied 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. In connection with that argument, the SCSIF also noted that Section 42-7-10(A) specifically authorizes the State Accident Fund to seek reimbursement from the SCSIF, but there is no such similar provision elsewhere in either Title 38 or Title 42 that specifically provides for the SCPCIGA to do likewise. The Commission found that to be a misguided argument which ignored 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. To illustrate the point that 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, the Commission cited 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). Accordingly, the Commission declined 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.

Concerning the issue of whether SCPCIGA is an “insurance carrier” entitled to reimbursement pursuant to §42-7-310, §42-7-320 and §42-9-400; the Commission noted that §42-7-310 does not define the term “carrier” nor does it exclude SCPCIGA as an entity entitled to reimbursement. The Commission noted that 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 and that §42-9-400(a) states in pertinent part “...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310...” (emphasis added). The Commission also referenced §42-7-320(B)(3) which requires SCSIF to continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011 (emphasis added).

The Commission relied on §42-1-60 which 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.” The Commission also referenced §42-5-20 which 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 Commission cited Black’s Law Dictionary, Abridged Fifth Edition, which defines the term “insure” as “...[t]o engage to indemnify a person against pecuniary loss from specified perils or possible liability.” Finally, the Commission referenced §38-31-60(b), which provides that SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and cited the uncontradicted evidentiary record establishing 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).

In assessing 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, the Commission concluded that it is self-evident 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 Commission further concluded that the evidentiary record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers' Compensation Act and there was no evidence to the contrary (see Harrison deposition at pages 54 - 56). The Commission also took 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. The Commission found that 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 thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

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 conceded in its brief that Brock was decided in a different context. The Commission concluded that any reliance on Brock was misplaced. In that regard,

the Commission noted that the Supreme 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. The Commission noted that 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 concluded that Brock is clearly distinguished from the current matter. More specifically, the Commission concluded that Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply. Accordingly, the Commission found Brock not applicable to the current matter.

The Court has thoroughly reviewed the evidentiary record and carefully considered the arguments of both parties in connection with the statutory authorization issue. In this regard, the Court finds that the Commission's findings of fact and conclusions of law made in connection with the statutory authorization issue are supported by substantial evidence in the record and the applicable statutory provisions. The Court further finds that the Commission's finding and conclusion that SCPCIGA is statutorily authorized to seek/receive reimbursement from SCSIF are not effected by any error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

II. Assessments

SCSIF asserts that the Commission erred in ruling that SCPCIGA is entitled to request/receive reimbursement without having directly participated in the statutory assessment process. In its analysis of this issue, the Commission noted that 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. The Commission noted, however, that 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). The Commission also noted Mr. Stooksbury's testimony that if a carrier goes under and stops paying claims, the assessment goes to zero (Stooksbury deposition at page 47). The Commission further noted that 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 Single Commissioner and did not include such in its Form 30 exceptions on appeal to the Full Commission.

The Commission's analysis also referenced the uncontradicted evidentiary record reflecting that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68) and SCPCIGA's status as an unincorporated entity whose workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51). The Commission noted that 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 Commission also noted that the record further reflects 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). The Commission further noted there was no indication in the record that any of SCPCIGA's workers' compensation member insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51) and that SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim.

The Commission concluded that 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 or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, the Commission found any argument that SCPCIGA's reimbursement claim is barred because of an issue connected to assessments to be baseless and without merit.⁵ The Commission further found and concluded that the evidentiary record clearly establishes that SCPCIGA, as an unincorporated entity, effectively pays assessments

⁵ 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, the Commission concluded that it was not necessary 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. The Commission also concluded SCSIF had 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).

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, the Commission found no merit in the assertion that SCPCIGA's reimbursement claim is barred due to its failure to "directly" pay assessments to SCSIF.

The Court has thoroughly reviewed the evidentiary record in connection with the assessment issue and carefully considered the arguments of both parties. In this regard, the Court finds that the Commission's findings of fact and conclusions of law made in connection with the assessment issue are supported by substantial evidence in the record and the applicable statutory provisions. The Court further finds that the Commission's findings and conclusions made in connection with the assessment issue are not affected by any error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

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 Lumbermen's 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 Commission concluded that 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 Commission noted the uncontradicted evidentiary record reflecting that Lumbermen 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 its view of this language in the Settlement Agreement and Release and what it concluded was any reasonable construction thereof, the Commission found and concluded that the Settlement Agreement and Release does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim. The Commission further found and concluded that the amount of the monetary consideration was of no consequence.

The Court has thoroughly reviewed the evidentiary record and carefully considered the arguments of both parties in connection with this issue. The Court finds that the Commission's

findings of fact and conclusions of law in connection with this issue are supported by substantial evidence in the record and applicable law. The Court further finds that the Commission's findings and conclusions on this issue are not affected by error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

CONCLUSION

In light of the foregoing findings made by the Court in applying the standard of review to the issues on appeal, the Court affirms the Commission's findings of fact, conclusions of law and order awarding reimbursement to SCPCIGA.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Decision and Order of the South Carolina Workers' Compensation Commission issued in connection with this matter and filed March 29, 2018 is hereby affirmed in its entirety.

IT IS SO ORDERED:

Robin B. Stilwell,
Circuit Court Judge

_____, 2018

Greenville, South Carolina



Greenville Common Pleas

Case Caption: Second Injury Fund Operations Of South Carolina Insurance Re ,
plaintiff, et al VS South Carolina Property And Casualty Insurance
Guaranty Fund

Case Number: 2018CP2302580

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158