

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Commons Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2012-213175

Gilbert Chavis,..... Employee,

v.

AVX Corporation, Employer, and Liberty Mutual Insurance, Carrier,

In Re: AVX Corporation and Liberty Mutual Insurance Company Respondents,

v.

South Carolina Second Injury Fund,..... Appellant.

FINAL BRIEF OF APPELLANT

RECEIVED
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SC Court of Appeals

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ISSUES ON APPEAL

1. Under S.C. Code Ann. § 15-3-600 and the prevailing case law, is Carrier's request for reimbursement barred for failing to file a Form 54 Request for Hearing within ten (10) years of providing notice to the Fund pursuant to S.C. Code Ann. § 42-9-400(f)?

STATEMENT OF THE CASE

Carrier's claim based on Claimant's December 27, 1999 work injury has been accepted by the Fund and is not the subject of this appeal. This is an appeal by the South Carolina Second Injury Fund (the "Fund") from an award of partial reimbursement under South Carolina Code Ann. § 42-9-400. Employer, AVX Corporation and Carrier, Liberty Mutual Insurance Company (collectively "Carrier") allege that they incurred substantially greater liability for medical costs and disability when their employee, Gilbert Chavis ("Claimant"), sustained a work injury on December 7, 1998 that either aggravated or combined with his preexisting diabetes and arthritis. R.p. 299. The Fund denied the claim arguing that Carrier was barred from reimbursement recovery because it did not file its Form 54 within ten (10) years of placing the Fund on notice of a potential claim for reimbursement pursuant to the South Carolina Supreme Court's recent decision in Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010). R.p. 301. The Hearing Commissioner granted Carrier's request for reimbursement and the Appellate Panel affirmed by a majority. R.pp. 45-60. The Circuit Court also affirmed. R.pp. 66-70. It is from the Circuit Court Order that the Fund appeals.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review in workers' compensation cases. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 619, 611 S.E.2d 297 (Ct. App.2005). An appellate court may not substitute its judgment

for that of the Workers' Compensation Commission as to the weight of the evidence on questions of fact. Stone v. Traylor Bros. Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004). Courts can reverse the decision of an administrative agency where it is affected by an error of law or not supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). A reviewing court may reverse an agency decision if the findings or conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Bass v. Kenco Grp., 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).

HISTORICAL BACKGROUND

The South Carolina Second Injury Fund (the "Fund") is a state agency created in 1972 for the purpose of encouraging employers to hire disabled workers. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 318 S.C. 516, 458 S.E.2d 550 (1995). On June 20, 2007, the South Carolina Legislature passed the Workers' Compensation Reform Act, which became effective July 1, 2007. The Workers' Compensation Reform Act provides for the termination of the Fund on June 30, 2013. Subsequent to the passage of the Workers' Compensation Reform Act, requests for reimbursement for older claims increased and the Fund began denying claims based on S.C. Code Ann. §15-3-600. Section 15-3-600 requires that all civil causes of action for relief not expressly enumerated therein be brought within ten (10) years of when the cause of action accrues. S.C. Code Ann. §15-3-600. In 2010, the Fund petitioned the South Carolina Supreme Court in its original jurisdiction for a decision on the applicability of §15-3-600 to reimbursement causes of action. The result of the

Fund's request is Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (S.C. 2010).

In Transp. Ins. Co. v. S.C. Second Injury Fund, the Fund argued that the ten (10) year statute of limitations period applied to reimbursement cases and that the Carrier had ten (10) years to file a Form 54 Request for Hearing. Id. The South Carolina Supreme Court held that the ten (10) year statute applied to reimbursement cases and that the reimbursement cause of action accrued on the date Carrier placed the Fund on notice of a potential claim for reimbursement per S.C. Code Ann. § 42-9-400(f). Id.

In its holding that the ten (10) year statute of limitations in S.C. Code Ann. § 15-3-600 applies to reimbursement cases, the Court indicates “[t]he result in this case of accrual beginning when notice is provided is that Great American’s claim is the only one that is not precluded by the running of the ten year statute of limitations.” Id. at fn.3. In that case, Great American was the only the Carrier that filed a Form 54 Request for Reimbursement within ten (10) years of providing notice to the Fund. The other Carriers, those that failed to file a Form 54 Request for Hearing within ten (10) of providing notice to the Fund, were barred from receiving reimbursement. Transportation is the prevailing case law on this issue.

ARGUMENT

I. A CAUSE OF ACTION COMMENCES WHEN A PARTY INITIATES A JUDICIAL PROCESS.

It is well settled in our procedural jurisprudence that statutes of limitation run until a judicial process is commenced. Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 781, 245 S.E.2d 234, 235 (1978); *See also*, B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966). A civil action is

commenced by the filing of a summons and complaint. S.C. Code Ann. §15-3-20(B) and SCRCP 3(a)(1). The North Carolina rules, after which South Carolina rules are fashioned, also indicate that a civil action is commenced by filing a complaint with the court. G.S. 1A-1, Rule 3. North Carolina General Statute §1-56 is identical to S.C. Code Ann. §15-3-600, and that statute states that an action for relief not otherwise limited may not be commenced more than ten (10) years after the cause of action accrued. N.C. Gen. Stat. §1-56 (2011). While the Fund concedes that a summons and complaint does not commence a reimbursement cause of action, the Fund disagrees that submitting documents to the Fund does.

In reimbursement cases brought pursuant to S.C. Code Ann. §42-9-400, a Form 54 Request for Hearing is the document that commences a judicial process. Also, Workers' Compensation Regulation 67-208(D) states that "to request a hearing between the employer and the Second Injury Fund, file a Form 54 with the Judicial Department and serve the Form 54 on the Second Injury Fund." S.C. Code Ann. Regs. 67-208. Regulation 67-208 is clear indicia of when a judicial process is commenced and instructs on the requisite documents to file.

In this case, Carrier's cause of action accrued in August 1999, which is when it provided the Fund with notice of a potential reimbursement claim pursuant to S.C. Code Ann. §42-9-400(f). Thus, Carrier had until August 2009 to commence a cause of action pursuant to S.C. Code Ann. §15-3-600. Here, Carrier commenced its cause of action in either February 2010, which is the date Carrier alleges it initially filed its Form 54, or in May 2010, which is the date Carrier refiled its Form 54 based per correspondence with the Workers Compensation Commission. R.pp. 302-303. Both of these dates are well

outside of the ten (10) year statute of limitations period. Contrary to Carrier's assertion, Transportation does not contemplate a Carrier meeting the mandate of §15-3-600 by simply submitting documents to the Fund. Here, Carrier's reimbursement cause of action is time barred pursuant to §15-3-600 and Transportation; and, as such, it is not entitled to reimbursement.

II. FILING A CLAIM WITH THE FUND DOES NOT COMMENCE A JUDICIAL PROCESS.

Carrier asserts that filing a claim with the Fund commences a reimbursement cause of action because it notified the Fund of its claim, copied the Commission, the Fund assigned a claim number and was investigating the claim. R.p. 289. However, none of these steps commence a judicial process. A cause of action is commenced by initiating a judicial process. Carl Rose, 26 N.C. App. at 781, 245 S.E.2d at 235. Filing a claim with the Second Injury Fund does not commence a judicial process. The Fund does not conduct administrative hearings and thus, submitting forms and other documents to the Fund cannot commence a judicial process. On the contrary, filing a Form 54 Request for Hearing commences a judicial process with the Judicial Department of the South Carolina Workers' Compensation Commission. Regulation 67-208. A Form 54 commences a judicial process because the Form 54 Request for Hearing is filed with the Workers' Compensation Commission, and adjudicated by Commissioners who are quasi judicial officials subject to the Code of Judicial Conduct. Thus, it is crystal clear that filing a Form 54 Request for Hearing with the SC Workers' Compensation Commission commences a judicial process.

III. WORKERS' COMPENSATION REGULATION 67-206 IS INAPPLICABLE TO THIS CASE.

The decisions below rely on Workers' Compensation Commission Regulation 67-206 to find that Carrier had met the statute of limitations outlined in S.C. Code Ann. §15-3-600. Workers' Compensation Regulation 67-206 addresses filing a claim and states that the Form 50, 52 or a letter containing very specific information may be used to file a claim with the Commission's Claim Department. Reg. 67-206. That section is inapplicable to this case because it only addresses filing a claim not commencing a cause of action, which is the issue in this case. Further, Regulation 67-206 applies to underlying cases between claimants and employers or carriers and Forms 50 and 52 are utilized. Regulation 67-206 does not apply to cases between carriers and the Fund, where Forms 54 are utilized. In addition, Regulation 67-206 does not address statutes of limitation issues, which is the issue in this case.

Also, a Form 50, which is addressed in Regulation 67-206, contains an option to either file a claim or request a hearing, while a Form 54, which is not addressed in Regulation 67-206, does not provide the same option. The decisions below must be reversed as they are inconsistent with the Supreme Court's Transportation decision.

IV. CARRIER'S RELIANCE ON HAMILTON V. BOB BENNETT IS MISPLACED.

While not cited in the Circuit Court Order, the Appellate Panel's decision gave great weight to Hamilton v. Ford in finding that Carrier satisfied the ten (10) year statute of limitations outlined in S.C. Code Ann. §15-3-600. 336 S.C. 72, 78, 518 S.E.2d 599, 602 (Ct. App. 1999), modified in part, 339 S.C. 68, 528 S.E.2d 667 (2000), reversed in part, 394 S.C. 185, 714 S.E.2d 547 (2011).

In Hamilton, an auto mechanic sustained an admitted injury in 1992. That same year, Claimant and Bob Bennett Ford executed an Agreement, after which Claimant

began receiving temporary total disability benefits. Id. at 600. Claimant's Form 17 indicated that he was retaining his right to compensation for future and permanent disability, disfigurement and medical care. Id. In finding that Claimant had satisfied the statute of limitations outlined in §42-15-40 with respect to a subsequent claim arising out of the same injury, this Court noted that the injured Claimant was confined to the hospital, was without counsel during the one year period with respect to pursuing a change of condition, and that the extent of Claimant's injuries were not immediately apparent. Id. at 602.

Hamilton is inapplicable to this case. First and foremost, Hamilton applies to underlying claims between claimants and employers or carriers. This is a request for reimbursement by the Carrier from the Fund and Claimant is not a party. Even if we assume, arguendo, that Hamilton applied, it is distinguished from the facts of this case because the considerations addressed in Hamilton are absent in this case. This case involves sophisticated parties who were represented by attorneys and contrary to the facts in Hamilton, the parties to the reimbursement cause of action did not have an Agreement.

V. THE FUND IS NOT ESTOPPED FROM ASSERTING §15-3-600.

Carrier also argued that the Fund should be estopped from denying this claim for reimbursement. The South Carolina Court of Appeals addressed this argument asserted by a Carrier in another Second Injury Fund reimbursement case. In State Accident Fund v. S.C. Second Injury Fund, State Accident Fund argued that the Fund should be estopped from denying reimbursement for additional costs not contemplated by the signed Agreement to Reimburse. 388 S.C. 67, 693 S.E.2d 441 (Ct. App. 2010). The Court held that equitable estoppel required misrepresentation in action, conduct, words or

concealment of material facts that causes one to change his position to his detriment. Id. The factors required to establish a showing of estoppel are absent here. Carrier did not assert misrepresentation and the evidence did not suggest any misrepresentation in the Fund's conduct, or words, nor did the Fund conceal any material facts about this case. Thus, Carrier assertion that the Fund should be estopped from denying this claim is without merit.

CONCLUSION

For reasons cited herein, the Second Injury Fund requests that this Honorable Court reverse the decision below and deny this reimbursement request.

Respectfully submitted,

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June 7, 2013
Columbia, South Carolina

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Benjamin H. Culbertson, Circuit Court Judge

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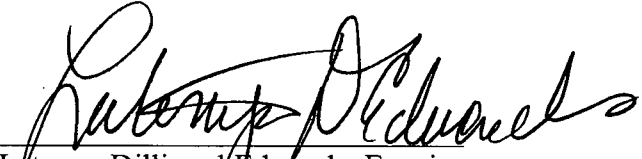
v.

South Carolina Second Injury Fund, Appellant.

CERTIFICATE OF COUNSEL

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

June 7, 2013



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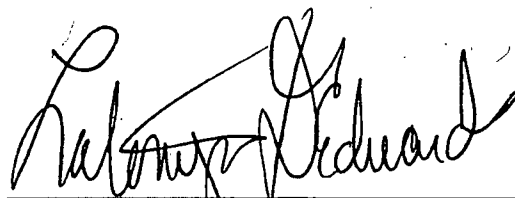
South Carolina Second Injury Fund, Appellant.

PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **Appellant's Final Brief, Record on Appeal and Certificate of Counsel** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondents AVX Corporation, Employer and Liberty Mutual Insurance, Carrier, and the South Carolina Workers' Compensation Commission, by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope on this 7th day of June, 2013, addressed as follows:

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