

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

TRIAL COURT CASE NO. 0809951

SEP 12 2013

APPELLATE CASE NO. 2013-000286

SC Court of Appeals

Old Republic, Ins. Co., Carrier/Respondent

v.

The South Carolina Second Injury Fund, Defendant/Appellant

In re: Lester Miller, Employee/Claimant

v.

Archer Daniels-Midland Company, Employer/Respondent

FINAL BRIEF OF RESPONDENTS

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 II. The Commission correctly found as a fact and concluded as a matter of law that the Appellant did not sustain a compensable injury by accident “arising out of” her employment with Charter 1 Realty and substantial evidence supports this finding in view of the reliable, competent, and probative evidence in the record.

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STATEMENT OF ISSUES ON APPEAL

1. **WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT THE EMPLOYER/CARRIER MET THE REQUISITES OF S.C. CODE ANN. § 42-7-320(B)**
2. **WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CONSIDERED WITNESS TESTIMONY OFFERED AFTER JUNE 30, 2011**
3. **WHETHER SUBSTANTIAL AND RELIABLE EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S DETERMINATION THAT THE CLAIMANT WAS EMPLOYED BY EMPLOYER ON THE ALLEGED DATE OF INJURY**
4. **WHETHER SUBSTANTIAL AND RELIABLE EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S DETERMINATION THAT CLAIMANT'S PRE-EXISTING MEDICAL CONDITIONS WERE A HINDRANCE OR AN OBSTACLE TO HIS EMPLOYMENT FOLLOWING THE OCCUPATIONAL EXPOSURE DURING HIS EMPLOYMENT**

STATEMENT OF CASE

This appeal was filed by the South Carolina Second Injury Fund following the affirmation by the Workers' Compensation Commission of an award of reimbursement to the Employer/Carrier under S.C. Code Ann. §42-9-400. The Employer, Archer Daniels Midland Co., through its workers' compensation carrier, Old Republic Insurance Company ("Carrier"), and its third-party administrator, Gallagher Bassett, (collectively "Respondents") had placed the South Carolina Second Injury Fund on notice of a possible claim for reimbursement on October 10, 2008. When the Second Injury Fund denied that Respondents were entitled to a reimbursement of benefits, Respondents filed a Form 54, Employer's Notice of Claim and/or Request for Hearing, on June 22, 2011. (R. p. 48) In their Form 54, the Respondents noted that the Claimant Lester Miller ("Claimant") claimed an accidental injury to his lungs, as a result of restricted airways and obstructive pulmonary disease due

to his employment on or about April 11, 2008. (R. p. 48) Respondents alleged that the subsequent injury combined with or was aggravated by pre-existing pulmonary disease or lung disease with limited pulmonary function, asthma, obstructive sleep apnea, chronic obstructive pulmonary disease, and restrictive airway disease. Respondents further contended that the listed impairments pre-existed the injury, were permanent, were physical conditions, combined with or were aggravated by the injury to substantially increase liability for medical and disability costs, and that the prior impairments was hindrances or obstacles to employment or re-employment, of which the employer had knowledge.

Moreover, Respondents claimed that the subsequent injury would not have occurred "but for" the prior impairment. Based upon the filing of the Form 54 and a responsive Form 55, the matter was set for a hearing to be held on September 29, 2011, before Commissioner Susan S. Barden. Prior to that hearing, the Second Injury Fund took the position that the case was premature for a hearing as there had never been a ruling on the compensability of the underlying claim. Therefore, by agreement of all parties including the Claimant, Respondents, and the Second Injury Fund, a Consent Order to Postpone Hearing was entered on October 25, 2011. (R. pp. 18-21) The Consent Order provided that the Claimant would go forward with the filing of a Form 50 to request a hearing; that a responsive Form 51 would be filed, and that this matter would be scheduled before the Workers' Compensation Commission prior to the deadline dates to pursue a claim against the Second Injury Fund. The Second Injury Fund agreed that it would not object to being added as party, and having the underlying claim heard by the Commissioner at the same time.

Pursuant to the Consent Order, this matter was then scheduled for hearing on December 12, 2011, in Columbia, South Carolina. At that time, issues had not yet been resolved as between the

Claimant and Respondents. The Friday prior to the hearing, which was scheduled to be held on a Monday, the Claimant, through counsel, advised the hearing Commissioner assigned to this case (Commissioner Bryan Lyndon) he would be unable to attend a hearing due to an illness. The hearing was postponed per the Commissioner's request. (R. p. 2) Counsel for Respondents then requested that this matter be rescheduled prior to December 30, 2011, the official deadline date that a case would have had to been found compensable as against the Second Injury Fund. Based upon that request, on December 20, 2011, a telephone conference was held with Commission Bryan Lyndon and the parties, at which time it was discussed that the hearing could not be reset prior to December 31, 2011, due to the Commissioner's schedule and the intervening holidays.

This matter was eventually heard by Commissioner Lyndon on January 4, 2012. (Transcript of Hearing was Designated as Matter on Appeal but Omitted from Record on Appeal) At the time of the hearing, the Second Injury Fund objected to the hearing being held based upon the fact that it was beyond the date of December 31, 2011, the last date that the Second Injury Fund could, by its own assertion, be ordered to accept a claim for reimbursement. Commissioner Lyndon allowed the hearing to go forward, and, following the hearing, issued an Order on April 16, 2012. (R. pp. 1-10) The Commissioner's Order found that the Claimant suffered from permanent physical conditions including COPD, sleep apnea, morbid obesity and restrictive breathing problems which resulted in compensation for medical payments, lost time from work, and disability that was substantially greater and caused by an aggravation or combination of the pre-existing conditions with the injury. The Order further found that the Claimant's pre-existing conditions constituted physical impairments within the definition set forth in §42-9-400(d). Moreover, the Order found that Respondents met

all prerequisites for reimbursement by the Second Injury Fund, and that Respondents were entitled to reimbursement. The Hearing Commissioner also noted that nothing precluded the Commission from ordering reimbursement after December 31, 2011, and that the failure to go forward to a hearing in 2011 was not a fault of Respondents when this matter had been set for a hearing in December 2011. (R. pp. 8-9) Therefore, the Order required that the Second Injury Fund reimburse the carrier, Old Republic Insurance Company, as is required by the Workers' Compensation Act.

The Second Injury Fund appealed the hearing Commissioner's April 16, 2012, Order, which was heard by the South Carolina Workers' Compensation Commission Appellate Panel (the "Full Commission") on September 17, 2012. (R. pp. 22-47) The Full Commission entered an Order dated January 8, 2013, affirming Commissioner Lyndon's April 16, 2012, Order requiring the Second Injury Fund to reimburse the Carrier. (R. pp. 11-17) This appeal follows.

STANDARD OF REVIEW

The Appellate Panel of the South Carolina Workers' Compensation Commission shall review an award, weigh the evidence as presented at the initial hearing, and, if good grounds be shown make its own Findings of Fact and Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner. S.C. Code Ann. §42-17-50 (2010).

While the Full Commission may act as findings of fact, Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2nd 304 (1981) establishes the Administrative Procedures Act as governing the scope of jurisdictional review of determinations by the South Carolina Workers' Compensation Commission. S.C. Code Ann §1-23-380 (A)(6)(Supp. 2010) [The Administrative Procedures Act] provides:

The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings.

The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedures;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or uncharacterized by abusive discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(A)(6)(2003 Supp.). Instead, judicial review of a Workers' Compensation decision beyond the Full Commission is governed by the substantial evidence rule. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 344 (Ct. App. 2003). It is the well-settled rule of law that the court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, and may only reverse a decision that is affected by an error of law. *Id.* In reviewing the Workers' Compensation Commission decision, the court may only review the decision to assess whether the Commission's decision is supported by substantial evidence or whether the decision is controlled by error of law. *Id.* Substantial evidence is evidence, which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Id.* at 345. The court may reverse the Commission when its decision is affected by an error of law. Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

An Appellate Court in a workers' compensation case has the authority to review the facts only to determine whether or not there is competent evidence to support the Commission's findings. Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E.2d 830 (1971). To this end, an award of the South Carolina Workers' Compensation Commission may not be reversed unless there is an absence of substantial competent evidence supporting it. *See* Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d (1960).

In assessing the term "substantial evidence," South Carolina Appellate Courts have ruled that such is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its action. *See* Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); and Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).

The Appellant filed this appeal contending that the Commission's findings are not supported by substantial evidence and that the Orders of the Hearing Commissioner and Appellate Panel contain errors of law. Respondents assert the Orders of the Hearing Commissioner and Appellate Panel are supported not only the reliable, competent, and substantial evidence, but by overwhelming evidence, and therefore request the Commission's Orders to be affirmed in their entirety.

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT ERR IN FINDING THAT THE EMPLOYER/CARRIER MET THE REQUISITES OF S.C. CODE ANN. § 42-7-320(B) FOR REIMBURSEMENT FROM THE SECOND INJURY FUND

The Second Injury Fund contends that § 42-7-320(B) bars all claims for reimbursement made after December 31, 2011. This does not, however, address the question of whether a

Commissioner could order a claim after that date nor the unique issue raised in the case at hand, and the Commissioner's finding of an equitable remedy. As discussed previously, in the Summary of the Case, this case was initially set for a hearing to be held on September 29, 2011. That hearing, however, was postponed, based upon the Second Injury Fund's position that there had been no resolution of the underlying issues. The Consent Order specifically held that the Claimant would immediately re-file his Form 50 and Respondents file a Form 51 to enable this matter to be set for a hearing prior to the ending statutory date of December 31, 2011. The matter was then set for a hearing to be held on December 12, 2011, upon all issues with notice to all parties. As a result of it being set upon all issues prior to this matter being settled, it would have been necessary for the Claimant to be at the hearing. Unfortunately, the Friday prior to the hearing, Claimant's counsel advised the Hearing Commissioner that the Claimant was ill and unable to attend a hearing. The Commissioner then postponed the hearing, per the Claimant's request. Despite a telephone conference involving all parties and the Hearing Commissioner being made aware that the statutory deadline was December 31, 2011, the Commissioner was unable to reschedule this matter prior to that time. Instead, it was scheduled for the actual hearing date of January 4, 2012.

The Second Injury Fund states that the Carrier's reimbursement request did not meet the statutory mandates. In fact, Respondents reimbursement request did meet all deadlines, and this matter was scheduled for a hearing prior to the mandatory deadline. Had the matter been heard as scheduled for December 12, 2011, Commissioner Lyndon could have issued his ruling, either at the bench, or by Order prior to December 31, 2011; which would have ordered the acceptance of this claim by the Second Injury Fund. Clearly, it would have been grossly unjust and inequitable to not allow Respondents to go forward to a hearing that was canceled through no fault of their own. The equities are in favor of the ruling to be issued by the Hearing Commissioner and by the Court. The

Second Injury Fund argument that equities are inapplicable where the statute is clear and unambiguous does not apply to the facts in the case at hand. There are ambiguities in that the Statute did not address this very situation, nor that a Commissioner could order reimbursement. Respondents clearly complied with all provisions of the Second Injury Fund Act, and through no fault of their own, were unable to *obtain a ruling* prior to the deadline.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT ERR IN CONSIDERING WITNESS TESTIMONY OFFERED AFTER JUNE 30, 2011, AND, EVEN IF IT DID, SUCH ERROR WAS HARMLESS

Appellant also contends that the Commission erred in allowing the testimony of Bryce Neilson at the January 4, 2012, hearing. Neilson was plant manager at Employer's Kershaw Soybean Facility. He testified that Employer was aware of Claimant's medical condition and that Claimant's respiratory problems were a hindrance or obstacle to Claimant's ability to perform his job requirements. (Transcript of Hearing, January 4, 2012, pp. 18-22) (Transcript was Designated as Matter on Appeal but apparently inadvertently omitted from Record on Appeal) The Second Injury Fund contends that § 42-7-320(B)(2) requires that all materials to support a Second Injury Fund claim be received by June 30, 2011. The Fund specifically argues this temporal restriction would include live testimony, if it was being used to prove an element, and states that the live witness testimony at the hearing should have not been allowed. Consideration of evidentiary testimony, however, is within the Commission's discretion, and, even if inadmissible, such evidence caused no prejudice to the Second Injury Fund. The information previously submitted to the Second Injury Fund was sufficient to meet all the requirements, including knowledge and notice, to support Respondents' claim for reimbursement. This included the prior communications of the Employer concerning the Claimant's preexisting conditions and his inability to wear respiratory equipment,

which reflected knowledge by the Employer of the Claimant's preexisting conditions. (R. pp. 185-187) Additionally, Respondents submitted to the Commission and the Second Injury Fund the expert medical report of Ifediora F. Afulukwe, M.D., evidencing the Claimant's preexisting condition. constituted hindrances or obstacles to employment. (R. pp. 94-95, 123-24) The knowledge and hindrance or obstacle requirements having been met by other evidence submitted into the Commission's record, it was not reversible error for testimony to have been presented on that issue. Even if ignored or discarded, there is still substantial evidence in the record to support the Hearing Commissioner's finding of knowledge of a hindrance or obstacle to employment and continued employment despite that knowledge.

III. SUBSTANTIAL AND RELIABLE EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S DETERMINATION THAT THE CLAIMANT WAS EMPLOYED BY THE EMPLOYER ON THE DATE OF INJURY

The Claimant alleged in his Form 50 that he sustained an injury to his lungs or an occupational disease, under either of which theory he may have prevailed in this case. There are several important dates considered by the Commission in accepting those claims and finding substantial evidence that Claimant was an employee at the time of his injury whether or not the Commission considered Neilson's testimony at the initial hearing.

Under § 42-11-20, "date of disability" means the event of an employee actually becoming incapacitated from performing in the last occupation in which he was injuriously exposed to the hazard in his employment. In the case at hand, although the Claimant was still employed by the employer on April 11, 2008, he was not actually working at their facility, because he had sustained an injury to his right knee, a result of which he was out of work. (R. pp. 218-226) The Claimant presented to the Commission, however, evidence of his becoming disabled on April 11, 2008. The

Springs Memorial Hospital record of that date revealed the Claimant to have had a pulmonary function test revealing moderately severe restrictive defects. (R. pp. 90-91)

Further, under § 42-15-20, in the case of repetitive trauma, notice is to be given to the employer within ninety (90) days of the date the Employee discovered, or could have discovered, that his condition was compensable. (Emphasis added). Again, in the case at hand, the Claimant underwent a pulmonary function test on April 11, 2008, the date he used to claim an injury, which advised him of his moderately severe restrictive disease. Another possible date that could have been used by the Commission was the date of diagnosis. The Claimant was advised of the moderately severe restrictive defect on April 8, 2008.

As this claim was settled with the Claimant prior to going forward to the hearing as against the Second Injury Fund, this was not an issue at the hearing. It is clear, however, that there is substantial evidence to support a finding by the Commission, had this been an issue, that the Claimant either became aware of a diagnosis of restrictive lung disease or, of his disability from that on April 11, 2008. Therefore, it did not matter whether he was physically working for the employer on that date, and the Second Injury Fund's argument is without merit.

IV. SUBSTANTIAL AND RELIABLE EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S DETERMINATION THAT CLAIMANT'S PRE-EXISTING MEDICAL CONDITIONS WERE A HINDRANCE OR AN OBSTACLE TO HIS EMPLOYMENT FOLLOWING OCCUPATIONAL EXPOSURE DURING HIS EMPLOYMENT

The Second Injury Fund contends, in its brief, that the Claimant must have had a preexisting condition before his "occupational exposure" in order for it to qualify for benefits under the Second Injury Fund statute. This is a misstatement of that Statute. Section 42-9-400(d), specifically, defines

a physical impairment as a permanent condition, whether congenital or due to injury or disease of the such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the employee should be become unemployed. (Emphasis added)

The Second Injury Fund claims that the Claimant, in 2007, received medical clearance to work using protective equipment, when, in fact, the Claimant was prohibited from wearing protective equipment due to his pre-existing respiratory conditions. As discussed in the summary of the evidence, the Claimant, prior to his claim for an injury, had been repeatedly diagnosed with sleep apnea, bronchial asthma with restrictive disease, increased respiratory effort, and was not certified for respiratory wear in 2007. (R. pp. 185-187) Claimant was also found to have lung disease with worsening pulmonary function prior to that time.

Clearly, the Claimant's inability to wear respiratory equipment prior to his claim for an injury constituted a hindrance or obstacle to his employment where respiratory wear was required. Further, although the Second Injury Fund submitted absolutely no evidence upon this issue, the Employer/Carrier specifically submitted the report of Dr. Afulukwe dated February 23, 2011, in which Dr. Atutukwe specifically stated that the Claimant had preexisting chronic obstructive disease and reactive airway disease, both of which were hindrances or obstacles to employment. (R. pp. 94-95, 123-24) Dr. Afulukwe, also in a statement obtained by Claimant's attorney dated July 21, 2008, stated that the Claimant suffered from occupational asthma, sleep apnea and morbid obesity which conditions were aggravated or exacerbated by his work conditions. (R. pp. 110-11)

The substantial evidence supports a finding that physical conditions constituting hindrances or obstacles to employment preexisted the Claimant's claim of any injury on April 11, 2008.

CONCLUSION

The Commission's decision should be affirmed when its factual findings are supported by substantial evidence in the record. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999) (stating that factual findings must be supported by substantial evidence in the record). Further, since the Commission's decision does not contain prejudicial or reversible errors of law the decision should be affirmed in its entirety. See Larke v. Bi-Lo, Inc. 276 S.C. 130, 276 S.E.2d 304, 306 (1981) and Stephen v. Evins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Based upon the foregoing, the Commission's decision is supported by substantial evidence and therefore the Respondents respectfully request full affirmation of the Commission's Orders.

Dated: September 10, 2013



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CERTIFICATE OF COUNSEL

The undersigned attorney certified that the Respondent's Final Brief complies with Rule
211(b), SCACR.



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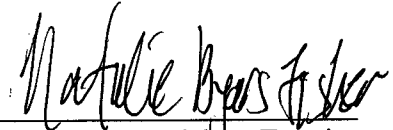
PROOF OF SERVICE

I certify that on the 10th day of September, 2013, I have served a copy of the Final Brief of Respondent by United States Postal Service, postage prepaid addressed to the attorneys of record as listed below.

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