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SCC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2013-001814

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

v.

Griffco of Wampee, Inc., Employer, and
Commerce & Industry Insurance Company, Carrier,..... Respondents.

In re:
Patricia Fore, Employee, Claimant,

v.
Griffco of Wampee, Inc., Employer, and AIG Domestic Claims, Carrier, Defendants, Respondents

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

1. Under S.C. Code Ann. § 42-9-400, did the Workers' Compensation Commission err in finding that Claimant's preexisting conditions combined with her work injury to create substantially greater liability for permanent disability?
2. Under S. C. Code Ann. § 42-7-320(B), did the Workers' Compensation Commission err in awarding Carrier reimbursement?

STATEMENT OF THE CASE

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, Griffco of Wampee, Incorporated and Carrier, Commerce & Industry c/o Chartis Claims Incorporated (collectively "Carrier") alleged that they incurred substantially greater liability for medical costs and disability when their employee, Patricia Fore ("Claimant"), sustained a work injury on February 24, 2008 that either aggravated or combined with her preexisting diabetes. Carrier further asserted that Claimant's preexisting diabetes was a hindrance to her employment via the statutory presumption. The Fund denied the claim was reimbursable, arguing that Claimant's preexisting diabetes was not aggravated by the work injury to create substantially greater permanent disability as contemplated by S.C. Code Ann. § 42-9-400. The Fund also argued that this claim was barred by S.C. Code Ann. § 42-7-320(B), which prevents the Fund from accepting a reimbursement claim after December 31, 2011.

The Hearing Commissioner found the claim reimbursable but indicated that Carrier was not entitled to reimbursement for medical costs. The Full Commission affirmed. The Fund now 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. 612, 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., 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, 276 S.E.2d 304, 305 (1981); Corbin v. Kohler Co., 351 S.C. 613, 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, 622 S.E.2d 577, 580 (Ct. App. 2005).

ARGUMENT

I. CARRIER'S REIMBURSEMENT CLAIM IS BARRED PURSUANT TO S.C. CODE ANN. § 42-7-320(B).

The 2007 amendments to the Workers' Compensation statute contain important provisions regarding the winding down and ultimate termination of the Fund. See S.C. Code Ann. § 42-7-320. The amendments also require that carriers, self-insurers, and the Fund comply with specific deadlines. Section 42-7-320(B) states the following:

(B) After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-surer, or insurance carrier. The fund shall not consider a claim for reimbursement for any injury that occurs on or after July 1, 2008.

...

(3) Insurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund

assessments, as determined by the State Budget and Control Board, in order to pay accepted claims. The fund shall continue reimbursing employers and insurance carriers for claims accepted by the fund on or before December 31, 2011.

S.C. Code Ann. § 42-7-320.

Section 42-7-320 is mandatory because of its use of the word “shall.” Thompson v. Cisson Constr. Co., 377 S.C. 137, 659 S.E.2d 171, 183 (Ct. App. 2008).

Thus, this provision is absolute and the Fund is not permitted to accept a claim for reimbursement under any circumstances after December 31, 2011. In this case, the Commission’s decision to award reimbursement in this case is tantamount to an order requiring the Fund to accept this claim. Since the Commission’s Order is post December 31, 2011, it violates the statutory mandate of § 42-7-320(B). Furthermore, § 42-7-320(B)(3) only allows for reimbursement of claims that were accepted by the Fund on or before December 31, 2011 and does not include any provision or authority for the Fund to pay a claim that has not been accepted on or before December 31, 2011. We believe this section reinforces the interpretation that this section is absolute and this claim is barred by the statute. Carrier is barred from reimbursement based on the provisions of §42-7-320(B) and its claim should have been denied.

II. CLAIMANT’S PREEXISTING DIABETES WAS NOT AGGRAVATED BY HER FEBRUARY 24, 2008 WORK INJURY TO SUBSTANTIALLY INCREASE CARRIER’S LIABILITY FOR PERMANENT DISABILITY.

The statutory reimbursement scheme also requires that Carrier establish various elements to obtain reimbursement. One of the elements is outlined as follows:

If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability

from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title.

S.C. Code Ann. § 42-9-400(a).

Thus, this element is a two-fold prong where Carrier must establish that Claimant's preexisting condition created substantially greater liability for medical costs and permanent disability than that which would have resulted from the injury alone. S.C. Code Ann. § 42-9-400(a) (emphasis added). Since the Commission's Order specifically found that the Fund is not required to pay any medical costs with respect to this claim, Carrier is required to prove only one (1) prong of this test, which is that Claimant's permanent disability was substantially greater because of Claimant's preexisting diabetes. R.p.45. While the reimbursement scheme allows a presumption that Claimant's preexisting diabetes is a hindrance or obstacle to employment, there is no presumption that diabetes substantially increased Carrier's liability for permanent disability. Here, the medical evidence establishes that Claimant's preexisting diabetes was not aggravated by the February 24, 2008 work injury.

Claimant's work injury occurred when she hit her right hip on the corner of a band saw. R.p.88. The treating physician indicated that Claimant's condition developed from the work place exposure. R.p.85. It was only after Claimant sustained the work injury that she developed chronic symptoms that necessitated surgery. R.p.85. As it relates to causation, the treating physician indicated that it was his opinion "to a

reasonable degree of medical certainty that this patient's condition developed from her workplace exposure." R.p.85. The treating physician further indicated that prior to Claimant's work injury, she was not experiencing any back or leg pain and that surgical intervention was being considered as a result of her workplace injury. R.p.85.

Claimant also underwent conservative treatment in the form of physical therapy and a brace due to the consequences of her work injury. R.pp.101-104. She also received medication and injections for pain management as a result of her work injury. R.pp.119, 121, 123-124, 126 and 129. While there was reservation about giving Claimant injections for pain because she had diabetes, she did, in fact, receive the recommended injections without any diabetic complications. R.pp.126 and 129. Moreover, the medical narratives do not indicate that Claimant's diabetes was aggravated by her work injury. For example, none of the narratives mentioned an increase in diabetic medication or increased or unstable insulin levels, any of which would indicate an aggravation of Claimant's preexisting diabetes. The medical narratives indicate that Claimant was an insulin-dependent diabetic whose medications remained the same throughout the duration of her treatment and there was no indication of fluctuation in blood sugars or other diabetic complications. R.pp.88, 92, 109, 116. In fact, Claimant was admonished to discontinue her ½ pack a day smoking habit so that it would not affect her ability to heal after the surgical intervention. R.p.115.

The medical evidence establishes that there was no substantially greater permanent disability incurred as a result of Claimant's preexisting diabetes. The treating physician indicated via medical questionnaire that Claimant's diabetes probably resulted in a higher percentage of permanent disability. R.p.68. However, the treating physician

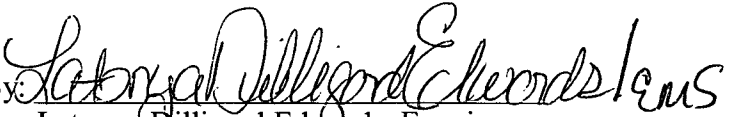
also indicated that he could not determine how much the diabetes affected or prevented the healing of Claimant's fusion. R.p.69. In his medical narratives, the treating physician also indicated that Claimant's diabetes was not a deterrent to proceeding with surgery. R.p.84. When Claimant presented to Orthopaedic Specialists on April 17, 2009, her treatment plan included surgical intervention to correct facet arthrosis and disc degeneration. R.p.86. Claimant ultimately underwent surgical intervention on May 19, 2010. R.pp. 105-111. The medical narratives indicate that the delay in surgery occurred because the workers' compensation approval process took more than a year. R.p.105.

Upon completion of the surgery, Claimant was disconnected from monitoring equipment and her "postoperative assessment revealed no new neurological deficits." R.p.139. Claimant was initially deemed at maximum medical improvement on February 14, 2011, and assigned a thirty-six (36%) percent impairment. R.p.27. Claimant's final impairment rating was forty (40%) percent permanent partial disability to the back, which was assigned by a Hearing Commissioner via January 18, 2012 Order. R.p.30. The forty (40%) percent permanent partial disability rating was subsequently affirmed by the Full Commission. Claimant's preexisting diabetes did not contribute to her impairment rating. Claimant's disability resulted from an unsuccessful fusion surgery to her back; and, preexisting diabetes was not a contributing factor.

CONCLUSION

For the reasons cited herein, the Fund requests that the South Carolina Workers' Compensation Commission's decision be reversed because it is erroneous and not supported by substantial evidence in the record.

Respectfully submitted,

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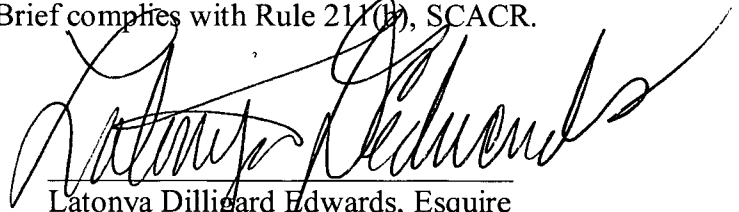
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CERTIFICATE OF COUNSEL

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

February 7, 2014



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