

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2013-001892

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APR 11 2014  
SC Court of Appeals

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

v.

Specialty Risk Services,.....Respondent.

**FINAL BRIEF OF APPELLANT**

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### **ISSUES ON APPEAL**

1. Under S.C. Code § 42-9-400, did the Circuit Court err in finding that a change of condition pursuant to S.C. Code Ann. § 42-17-90 implicated reimbursement?
2. Under S.C. Code Ann. § 42-9-400 and the prevailing case law, did the Circuit Court err in finding that Claimant's preexisting hyperthyroidism was permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment?
3. Under S.C. Code Ann. § 42-9-400 and the prevailing case law, did the Circuit Court err in finding that Claimant's preexisting Raynaud's Syndrome was permanent and serious enough to constitute a hindrance or obstacle to her employment?

### **STATEMENT OF THE CASE**

This is a claim for partial reimbursement from the South Carolina Second Injury Fund (the "Fund") by BMW Manufacturing Corporation, Employer, and Specialty Risk Services, Carrier, (collectively the "Carrier"), pursuant to S.C. Code Ann. § 42-9-400. Carrier alleges that it incurred substantially greater liability for compensation and medical benefits when Tunde Quarles Szabo's ("Claimant") preexisting hyperthyroidism and Raynaud's Syndrome were either aggravated by or combined with her February 9, 2004 work related injury to her cervical spine. Carrier further alleged that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment and substantially increased its liability for medical costs and permanent disability. Carrier also asserted that Claimant's change of condition pursuant to S.C. Code Ann. § 42-17-90 implicated reimbursement. R.p. 48.

The Fund argued that Claimant's preexisting hyperthyroidism and Raynaud's Syndrome were not permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund further asserted that a change of condition pursuant to S.C. Code

Ann. § 42-17-90 did not implicate reimbursement and requested that Carrier's reimbursement request be denied.

The Hearing Commissioner denied Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400. The Appellate Panel reversed and found the claim reimbursable. The Circuit Court affirmed and the Fund now appeals to this Court.

### **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, 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., 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 Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).

## ARGUMENT

### I. A CHANGE OF CONDITION PURSUANT TO S.C. CODE ANN. § 42-17-90 DOES NOT IMPLICATE REIMBURSEMENT.

Carrier asserts that Claimant's change of condition implicates reimbursement; however, Carrier's assertion contradicts the plain meaning of the statute. If a statute is unambiguous, statutory construction requires that we utilize its plain meaning to determine legislative intent. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). In this case, the reimbursement statute is plain and unambiguous and there is no need to impose another meaning. Id. at 122, 542 S.E.2d at 739-40. The statutory reimbursement scheme requires that Carrier meet a variety of factors to successfully prove its case for reimbursement. The initial elements include a preexisting condition that creates substantially greater liability to Carrier when Claimant sustains a subsequent injury by accident. Section 42-9-400(a) states 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 the combined effects or 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) (Supp. 2005) (emphasis added).

The plain meaning of this section indicates that reimbursement is implicated by a preexisting condition, not a change of condition, which is governed by S.C. Code Ann. §42-17-90.

In addition, the employer must establish that they had knowledge of Claimant's preexisting condition or that Claimant concealed the existence of the condition. Section 42-9-400(c) states the following:

In order to qualify under this section for reimbursement from the Second Injury Fund, the employer must establish when claim is made for reimbursement thereunder, that the employer had knowledge of the permanent physical impairment at the time that the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge.

S.C. Code Ann. §42-9-400(c) (Supp. 2005).

Furthermore, Carrier must also establish that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. Section 42-9-400(d) states that "[a] permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or reemployment if the employee should become unemployed." S.C. Code Ann. 42-9-400(d) (Supp. 2005).

Carrier also has to establish that it provided notice to the Fund. South Carolina Code Ann. § 42-9-400(f) states in relevant part that Carrier must notify the Fund "in writing of any possible claim against the fund as soon as practicable but in no event later than after the payment of the first seventy-eight weeks of compensation." S.C. Code Ann. § 42-9-400(f). The reimbursement statute is clear and unambiguous and it lists the various factors that are necessary to make a successful claim for reimbursement recovery. A change of condition is not a factor that implicates reimbursement.

In 2007, Claimant filed a Form 50 alleging a change of condition rendering her permanently and totally disabled. R.p. 5. In 2008, Claimant was deemed to have

sustained a change of condition for the worse. R.p. 5. Section 42-17-90(A) addresses changes of condition and states, “[o]n its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing or increasing the compensation previously awarded.” S.C. Code Ann. § 42-17-90(A). This statute is also clear and unambiguous and only allows “ending, diminishing or increasing the compensation previously awarded.” S.C. Code Ann. § 42-17-90(A) (emphasis added). Thus, the change of condition provision applies to awards of compensation in underlying cases but it is inapplicable to the reimbursement cause of action pursuant to S.C. Code Ann. § 42-9-400. The plain meaning of § 42-17-90 and § 42-9-400 establishes that changes of condition do not implicate reimbursement; and as such, the Circuit Court’s decision must be reversed and Carrier’s request for reimbursement must be denied.

II. CLAIMANT’S PREEXISTING HYPERTHYROIDISM WAS NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE TO HER EMPLOYMENT.

The Circuit Court affirmed the South Carolina Workers’ Compensation Commission’s finding that Claimant’s hyperthyroidism was permanent and serious enough to constitute a hindrance to her employment. However, that finding is not supported by substantial evidence in the record. While the statutory reimbursement scheme does not define what constitutes a hindrance or obstacle to employment, Webster’s Dictionary defines “hinder” as that which causes delay or difficulty, or to prevent from doing or happening; and “obstacle” as something that obstructs or hinders progress.” WEBSTER’S DESK DICTIONARY 212 and 312 (2004). Additionally, recent case law instructs that “permanent” contemplates that Claimant may require specialized

healthcare without the means to earn a living. Crisp v. SouthCo., 401 S.C. 627, 642, 738 S.E.2d 835, 843 (2013). Furthermore, Larson's instructs that whether a condition is a hindrance to employment depends upon whether an employer would hire, employ or promote Claimant knowing all of the facts. 5 LARSON'S WORKERS' COMPENSATION § 91.02(6). Hyperthyroidism is defined as "excessive functional activity of the thyroid gland." WEBSTER'S MEDICAL DESK DICTIONARY 372 (2005). The definition also notes that hyperthyroidism can lead to a condition marked by "increased metabolic rate, enlargement of the thyroid gland, rapid heart rate and high blood pressure." WEBSTER'S MEDICAL DESK DICTIONARY 372 (2005).

The substantial evidence in the record indicates that Claimant's hyperthyroidism was controlled with medication and Claimant did not report any problems affecting her eyes, ears, nose, throat, heart, stomach, lungs, liver and kidneys. R.p. 112. Furthermore, Claimant had worked consistently for four (4) years without missing time from work. R.p. 107. Thus, Claimant's consistent employment history coupled with the absence of any documented problems during her employment is clear indicia that her hyperthyroidism did not hinder or cause her difficulty in performing the duties of her job as an assembly production associate.

The diagnostic testing further establishes that Claimant's hyperthyroidism was not a hindrance to her employment. Claimant's October 13, 2004 MRI findings were not impressive and her nerve conduction studies were normal, showing no evidence of neuropathy. R.pp. 112-114. Moreover, Claimant's January 31, 2005 examination revealed no resting pain or vascular ulceration, no wound healing or clubbing in her fingers and she had normal sensation in all of her digits. R.p. 118. The totality of the

evidence indicates that Claimant's hyperthyroidism was not a hindrance to her employment and the Circuit Court's decision must be reversed.

III. CLAIMANT'S PREEXISTING RAYNAUD'S SYNDROME WAS NEITHER PERMANENT NOR A HINDRANCE TO HER EMPLOYMENT AS CONTEMPLATED BY S.C. CODE ANN. § 42-9-400.

Claimant's preexisting Raynaud's Syndrome was not permanent and serious enough to constitute a hindrance to employment. Raynaud's Syndrome, named after French physician Dr. Maurice Raynaud, is a "vascular disorder that is marked by recurrent spasm of the capillaries" especially "those of the fingers and toes upon exposure to cold . . . characterized by pallor, cyanosis, and redness in succession", usually "accompanied by pain and that in severe cases progresses to local gangrene." WEBSTER'S MEDICAL DESK DICTIONARY 702 (2005). It is noteworthy that Claimant was admonished multiple times that her condition would improve if she eliminated nicotine. R.pp. 119,139. In addition, there is no indication that Claimant's Raynaud's Syndrome required specialized care that would interfere with her ability to earn a living as contemplated by Crisp v. SouthCo. In fact, the medical evidence indicates that Claimant's vasospastic disease was "mild," "not enough to account for any of her symptomatology," and "quite commonly seen with normal individuals." R.p. 134. Claimant experienced cold fingertips during her examination but this was mild as indicated by the medical narrative notation of "slight cyanotic color" and "slightly cold fingertips." R.p. 123. Moreover, Claimant's autoimmune panel was unremarkable. R.p. 193. The medical evidence also indicates that Claimant's testing for lupus and a test of her vascular system were both negative. R.p. 123. There is no indication that Claimant's

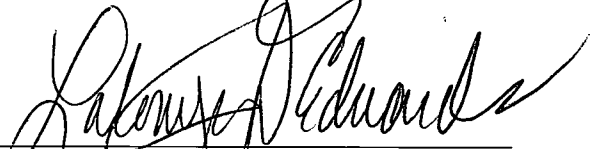
“slightly cold fingertips”, which is “quite commonly seen with normal individuals”, affected her ability to perform her job duties as an assembly production associate.

Claimant’s Raynaud’s Syndrome did not require any specialized care that would render her unable to earn a living; and, as such, it was neither permanent nor a hindrance to employment based on the substantial evidence in the record. Furthermore, since cold hands are common among normal individuals, it is unlikely that an employer would decline to hire or promote her based on this fact. The Circuit Court’s decision should be reversed and Carrier’s request for reimbursement should be denied.

**CONCLUSION**

For the reasons cited herein, the Fund requests that this Honorable Court reverse the Circuit Court’s decision and reinstate the Hearing Commissioner’s decision.

Respectfully submitted,

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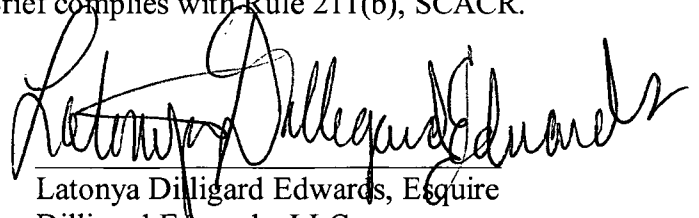
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**CERTIFICATE OF COUNSEL**

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

April 11, 2014



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