THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083

Old Republic Insurance Company, Appellant,

v.

SC Second Injury Fund, Respondent.

(In Re: Carl Hutchins, Employee v. Pepsi Bottling Group and Old Republic Insurance Company, Employer and Carrier)

REPLY BRIEF OF APPELLANTS

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ARGUMENTS

I. THE RESPONDENT FAILED TO TIMELY SERVE THE RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER IN ACCORDANCE WITH RULE, 262(a)(2) SCACR.

Rule 262(a)(2), SCACR states,

> (a) **Filing**. Except for petitions for rehearing (Rule 221) and motions for reinstatement (Rule 260), filing may be accomplished by: . . . .
>
> (2) By depositing the document in the U.S. mail, properly addressed to the clerk, with sufficient first class postage attached. The date of filing shall be the date of delivery or the date of mailing. Any document filed with the appellate court shall be accompanied by proof of service of such document on all parties. . .

The Respondent's Initial Brief was due on July 3, 2014. On July 3, 2014, the Respondent requested a thirty (30) day extension to file the Respondent's Initial Brief. (Item No. 36) An Order of the South Carolina Court of Appeals, filed on July 10, 2014, extended the Respondent's Initial Brief until August 4, 2014. (Item No. 37) The Appellants received the Respondent's Initial Brief on August 11, 2014.

The Appellants then reviewed the Proof of Service accompanied with the Respondent's Initial Brief. The Proof of Service indicates the Initial Brief of the Respondent was placed by same day in the United States Mail, first class postage prepaid on August 6, 2014. (Item No. 38) The Appellants then reviewed the envelope of the Respondent's Initial Brief that indicates U.S. Postage was not paid until August 8, 2014, two (2) days after what is indicated on the Respondent's Proof of Service. (Item No. 39) This is clearly four (4) days after the South Carolina Court of Appeals Order required the Respondent's Initial Brief to be served on the Parties. (Item No. 37)

Rule 208(a)(4), SCACR states, "Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper." In Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 282 S.E.2d 858 (1981) the Court held, "Respondent Turner did not file a brief with this Court. Her failure to do so allows this Court to take such action upon the appeal as it deems proper. This failure alone would justify reversal; however, we simply consider it as an additional ground." In Elliott v. S.C. Dept. of Transp., 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004) the Court held, "Neither respondent filed a brief. Accordingly, we review the appeal based on the record and appellants argument. See Rule 208, SCACR (Upon the failure of respondent to timely file a Brief, the appellate court may take such action as it deems proper.)." Further, in concurring opinion, Rule 208(a)(4), SCACR, provides in part: "Upon the failure of the respondent to timely file a brief, the Appellate Court may take such action as it deems proper." This action includes reversing the judgment below. Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 361 S.C. 258 (Ct. App. 2004) *See also*, Wierszewski v. Tokarick, 308 S.C. 441, 418 S.E.2d 557 (Ct. App. 1992).

No explanation was provided by the Respondent in the Initial Brief as to why the Initial Brief was not filed until August 8, 2014, according to the U.S. Postal Service. Also, no explanation was provided as to why the Proof of Service does not accurately reflect when the Respondent's Initial Brief was actually served. Moreover, the Respondent had already requested an extension and did not meet the extension deadline granted by the Court of Appeals. The Appellants would respectfully request a reversal. At minimum, Appellants respectfully request the Respondent's Initial Brief not be considered in any proceeding.

II. THE ARGUMENTS IN RESPONDENT'S INTIAL BRIEF ARE CONTRARY TO AN ARTICLE WRITTEN BY COUNSEL FOR THE FUND WHO PREPARED RESPONDENT'S INITIAL BRIEF.

Interestingly, Respondent's counsel published in article *SC Lawyer, #2. The South Carolina Second Injury Fund Sunrise Sunset 1972-2013.* Ms. Edwards writes:

> in regard to S.C. Code Ann. § 42-7-320(B)(2), "Section 42-7-320(B)(2) requires carriers to submit materials for reimbursement consideration by June 30, 2011, so that the Second Injury Fund can accept, compromise or deny the claim. After being noticed of a potential reimbursement claim per § 42-7-320(B)(1), the Fund's standard procedure is to notify carriers regarding the required documentation to evaluate the claim. This is to ensure that the Fund is able to make a thorough and informed determination regarding the disposition of a claim.

At no point in the article does Ms. Edwards try to imply that the Section requires that all "required information," is all of the elements for reimbursement under S.C.Code Ann. § 42-9-400(2010), and these elements need to be submitted by June 30, 2011 or the claim is barred. Her article reflects the purpose of the Section is so that the Fund can make a thorough and informed determination regarding the disposition of the claim prior to the Fund not being able to accept or enter into a compromised settlement after December 30, 2011. S.C.Code Ann. § 42-9-320(B)(2010).

In this instance, the Appellants complied with S.C.Code Ann. § 42-9-320(B)(2)(2010). Almost one (1) year prior to June 30, 2011, it submitted all required information, so the Fund could make its determination as to accept, enter into a compromised settlement or deny. Here, the Fund choose to deny the claim on July 8, 2010. The Fund issued two (2) formal denials. Marla Rehborn, the Claims Analyst for the Fund, per letter dated July 8, 2010, stated,

> Thank you for the ***submissions*** in regards to the above claim. [0800956]. After a careful review of this claim, I find that it does not meet the requirements for Second Injury Fund Reimbursement.

> It appears that this claim was not put on notice in a timely manner... As notice is not proper, we have no choice but to deny this claim for benefits...." [*Emphasis added*] (Item No. 19).

The Respondent refused to acknowledge this claim as a 2007 injury. Thus, it would not accept the Appellants' notice it provided in regard to the 2007 injury. The Fund alleged it was a 2008 injury and argued the employer did not provide the Fund with notice with seventy-eight (78) weeks of payment of compensation for what it claimed to be a 2008 injury. This is discussed more thoroughly in Appellants' Initial Brief.

The Commission held it is a 2007 injury, not a 2008. Since the Respondent did not appeal the Commission's decision that this claim is a 2007 claim, it has abandoned its right to argue otherwise on appeal.

III. RESPONDENT'S INITIAL BRIEF CONFUSES THE ISSUE AS TO WHAT IS REQUIRED UNDER S.C.CODE ANN. § 42-9-400(2010) AND WHAT IS REQUIRED UNDER S.C.CODE ANN. § 42-7-320(B)(2)(2010).

In the Respondent's argument it correctly states what is required for reimbursement under S.C.Code Ann. § 42-9-400(2010). After correctly stating what is required under S.C.Code Ann. § 42-9-400(2010), it the states,

> In reversing the Single Commissioner's decision, the Full Commission determined the documents at issue should have been excluded because they addressed "required information" based on the plain meaning of S.C. Code Ann. § 42-7-320(B). R.P.___. That section further indicates that failure to submit required information to the Fund shall bar recovery. S.C. Code Ann. § 42-7-320(B)(2).

This is not how S.C.Code Ann. § 42-7-320(B)(2)(2010) reads. It reads as follows:

> (2) An employer, self-insurer, or insurance carrier must submit all required information for consideration of accepting a claim to the Second Injury Fund by June 30, 2011. Failure to submit all required information to the fund by June 30, 2011, ***so that the claim can be***

> ***accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.***

[*Emphasis Added*] The Section is clear and unambiguous. Further the Respondent states,

> The statute is crystal clear . . . . Carrier must submit all required information to the Fund by June 30, 2011 or its claim is barred. S.C. Code Ann. § 42-7-320(B)(2). Carrier failed to timely submit all required information; and, as such, it is barred from reimbursement recovery.

The Respondent is trying to add additional provisions in the Section, which simply are not there. One is not supposed to read into a statute that is clear and unambiguous. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the words in the statute are clear and unambiguous, we cannot give them a different meaning. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Section does not mention requiring all elements necessary for reimbursement under S.C.Code Ann. § 42-9-400(2010) be submitted by June 30, 2011 or recovery is barred. By the clear and unambiguous language of the Section, it dictates **"all required information" is information so the Fund may make a determination as to accept, enter into a compromised settlement or deny a claim.** If this is not done by June 30, 2011 then an employer, self-insurer, or insurance carrier shall be barred from recovery from the Fund.

Conveniently, Respondent only once mentions the middle provision of the Section, as to what is required information. This is true despite the fact that it happens to be the most significant guide as to what is "all required" information under the Section. Certainly, the second sentence of Section, S.C.Code Ann. § 42-7-320(B)(2)(2010) is to be read in its entirety to determine its true intent and meaning.

IV. THE RESPONDENT ERRONEOUSLY STATED ON NUMERIOUS OCCASSIONS IN ITS INITIAL BRIEF THAT THE COMMISSION EXCLUDED KNOWLEDGE STATEMENTS AND MEDICAL RECORDS FROM THE RECORD, AS THE COMMISSION MADE NO SUCH FINDING TO EXCLUDE ANY STATEMENT OR SUBMISSION FROM THE RECORD.

The Respondent did object, at the Hearing Commissioner level and at the Full Commission level, to any submissions to any evidence not submitted to the Fund prior to June 30, 2011, being entered into the record. The Hearing Commissioner held that all submissions by the Appellants were a part of the record, and the Full Commission did not make any Findings of Fact or Conclusions of Law excluding any submissions. Since the Respondent did not appeal the Commission's findings it has also waived its ability to argue whether all submissions of the Appellant were properly submitted into the record on this appeal.

Erroneously, the Respondent states on page 4 of its Initial Brief, "the Full Commission determined that the documents at issue should not have been admitted because the documents constituted required information that was not timely submitted." The Respondent makes this statement in regard to the knowledge statements dated December 5, 2011, December 6, 2011 and in regard to two (2) medical questionnaires dated January 2012 as well as medical records dated January 26, 2012

The Respondent further erroneously argues on page 5 in regard to other allegedly excluded evidence from the record. It states as follows,

> Here, Carrier's documents in support of its knowledge of Claimant's preexisting condition included a Statement from Claimant, dated December 6, 2011 and a statement from another individual dated December 5, 2011. R.pp.____. The other excluded documents submitted by Carrier included a medical questionnaire dated January 11, 2012 and a medical narrative dated January 26, 2012. . . .

> In reversing the Single Commissioner's decision, the Full Commission determined the documents at issue should have been excluded because they addressed "required information" based upon the plain meaning of S.C. Code Ann. §42-7-320(B). . . .
>
> The Commission's decision to exclude certain documents submitted by Carrier was consistent with the statutory mandate.

In addition, the Respondent's erroneously argued in its Designation of Matter to be Included in Record on Appeal as follows,

> however, we would note that Document Number Twenty-Two (22), Document Number Twenty-Three (23) and Document Number Twenty-Eight (28) listed on Appellant's Designation of Matter to Be Included in Record Appeal were properly excluded from the Record by the South Carolina Workers' Compensation Commission.

This statement is clearly erroneous as no such Finding of Fact or Conclusion of Law was made in regard to the "exclusion" of information submitted by the Appellants.

V. THE RESPONDENT DID NOT ADEQUATELY CITE THE APPROPRIATE STANDARD OF REVIEW ON APPEAL.

The central issue regarding this appeal is a matter of law, not factual findings, which the Court need only find substantial evidence in the record to support. The Respondent only addressed the Court's review regarding matters of fact, not matters of law. The Court may reverse or modify the Workers' Compensation Commission's decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. (2002). The Court of Appeals may reverse where the decision is affected by error of law. Hamilton v. Bob Bennett, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999)

CONCLUSION

For the reasons set forth herein, the Appellants respectfully request the Court only consider the Appellants' Initial Brief and Reply Brief, excluding the Respondent's Initial Brief, and reverse and reinstate the Hearing Commissioners' Findings of Fact and Conclusions of Law. Irrespective of excluding and reversing the appeal from the Full Commission, based on the untimeliness of the Initial Brief of the Respondent, the Appellants respectfully request that S.C.Code Ann. § 42-9-320(B)(2)(2010) be given its true and unambiguous meaning that "all required" information is merely information necessary to deny an employer's request for reimbursement on a necessary element of reimbursement under S.C.Code Ann. § 42-7-400(2010), information for the Fund to enter into a compromised settlement or accept a claim for reimbursement prior to December 30, 2011; thereby, reversing the majority of the Full Commission and reinstating the Hearing Commissioner's Findings of Fact and Conclusions of Law.

Respectfully submitted,

BY: _____

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August 18, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083

Old Republic Insurance Company, Appellant,

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellants and Designation of Matter to be Included in the Record on Appeal to Respondent by depositing a copy of the documents in the United States mail, first class postage prepaid, on September 26, 2014 to Ms. Latonya D. Edwards, Esq., Dilligard Edwards, LLC, 3790 Fernandina Road, Suite 103, Columbia, SC 29210.

This 26th day of September, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-001083
WCC Number: 0800956

Old Republic Insurance Company, Appellant,

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SC Second Injury Fund, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 209(c) and does not contain matter which is irrelevant to the appeal.

This 13 day of January 2015

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