

2

24879

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stilwell, Circuit Court Judge

RECEIVED
OCT 16 2019
SC Court of Appeals

Appellate Case No. 2019-000020
Case No. 2018-CP-23-2580

South Carolina Property and Casualty
Insurance Guaranty Association, ... Respondent,

v.

South Carolina Second Injury Fund, ... Appellant,

In Re:

Michael Quarles Employee/Claimant,

v.

Cryovac Sealed Air Corporation, Employer, and Lumbermens
Mutual Casualty Company in Liquidation/South Carolina
Property and Casualty Insurance Guaranty Association, ... Carrier/Defendants.

RECORD ON APPEAL - VOLUME I OF II

Andrew F. Lindemann #13030
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court, Suite 202
Columbia, South Carolina 29260
(803) 881-8920

Robert M. Cook, II #66296
THE ROBERT COOK LAW FIRM, LLC
Post Office Box 3575
Leesville, South Carolina 29070
(803) 317-2171

*Counsel for Appellant Second Injury
Fund Operations of the South
Carolina Insurance Reserve Fund
f/k/a South Carolina Second Injury
Fund*

J. Hubert Wood, III #65169
WOOD LAW GROUP, LLC
1 Wesley Drive
Post Office Box 20550
Charleston, South Carolina 29413
(843) 577-5732

*Counsel for Respondent South
Carolina Property and Casualty
Insurance Guaranty Association*

Index

Volume I

Order issued by Judge Robin Stilwell, filed December 7, 2018.....	1
Order of Workers' Compensation Commission, filed March 29, 2018	28
Order of Hearing Commissioner, filed October 2, 2017	56
WCC Form 54, dated December 8, 2016.....	79
WCC Form 55, dated January 5, 2017.....	80
WCC Form 58, dated June 21, 2017.....	82
WCC Form 30, dated October 16, 2017	83
Petition/Notice of Appeal to Circuit Court, filed April 26, 2018	85
Second Injury Fund's Brief to Full Commission, dated December 18, 2017.....	89
SCPCIGA's Brief to Full Commission, dated January 2, 2018	98
Second Injury Fund's Brief to Circuit Court, filed October 23, 2018.....	121
SCPCIGA's Brief to Circuit Court, dated October 25, 2018	132
Transcript of WCC Single Commissioner Hearing, June 21, 2017.....	157
Transcript of Circuit Court Hearing, October 30, 2018.....	224
Second Injury Fund APA Submission No. 1, Settlement Agreement and Release, executed June 17, 2013	258
SCPCIGA APA Submission No. 1, <i>SC Property and Casualty Insurance Guaranty Association v. SC Second Injury Fund, et al.</i> Re: WCC No.: 9916207, dated June 19, 2008-June 29, 2012.....	272

SCPCIGA APA Submission No. 2, <i>SC Property and Casualty Insurance Guaranty Association v. SC Second Injury Fund, et al.</i> Re: WCC No.: 0000776, dated September 24, 2012-March 27, 2013	308

SCPCIGA APA Submission No. 3, <i>SC Property and Casualty Insurance Guaranty Association v. SC Second Injury Fund, et al.</i> Re: WCC No.: 0013231, dated December 8, 2008-August 20, 2012	343

Volume II

SCPCIGA APA Submission No. 4, South Carolina Second Injury Fund Review of Unfunded Liabilities and Alternative Funding Methods as of June 30, 2013	385

SCPCIGA APA Submission No. 6, Order of Liquidation, entered May 8, 2013	420

SCPCIGA APA Submission No. 7, Claim/Unearned Premium Report.....	431

SCPCIGA APA Submission No. 8, Order, approved January 6, 2005	435

SCPCIGA APA Submission No. 10, Appellate Panel Decision and Order of the SCWCC, filed April 24, 2002.....	439

SCPCIGA APA Submission No. 11, Agreement to Reimburse Compensation	445

Deposition of David Stooksbury.....	489

Deposition of J. Smith Harrison, Jr.....	567

Deposition of Chris Lombard Exhibits 1 and 3	623

Exhibit 1.....	712

Exhibit 3.....	732

Certificate of Counsel

Certificate of Compliance

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

SOUTH CAROLINA PROPERTY
AND CASUALTY INSURANCE
GUARANTY ASSOCIATION,

Respondent,

v.

SOUTH CAROLINA SECOND
INJURY FUND,

Appellant.

IN RE:

MICHAEL QUARLES,

Employee/Claimant,

v.

CRYOVAC SEALED
AIR CORPORATION,

Employer, and

LUMBERMENS MUTUAL CASUALTY
COMPANY IN LIQUIDATION/
SOUTH CAROLINA PROPERTY AND
CASUALTY INSURANCE
GUARANTY ASSOCIATION,

Carrier/Defendants.

ORDER

Docket No.: 2018-CP-2302580

W.C.C. File No.: 998766

This matter is before the Court pursuant to a Petition/Notice of Appeal filed on behalf of the South Carolina Second Injury Fund (SCSIF) seeking judicial review of the Decision and Order of the South Carolina Workers' Compensation Commission (Commission) filed March

29, 2018 in accordance with S.C. Code Ann. §1-23-380 and §42-17-60 (1976, as amended).¹ SCSIF asserts various legal errors by the Commission in connection with its award of reimbursement to South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA). SCPCIGA seeks affirmation of the Commission's Decision and Order. SCPCIGA contends that the Commission's findings of fact, conclusions of law and order are supported by substantial evidence in the record and applicable law. SCPCIGA further contends that the Commission made no reversible error of law and did not abuse its discretion. Memoranda of law were filed by both parties prior to the hearing on October 30th and both parties presented extensive oral argument in support of their respective positions at that hearing.

BACKGROUND AND EVIDENCE SUMMARY

The Claimant sustained compensable injuries to his neck and back and a compensable psychological injury as a result of an accident arising out of and in the course of his employment on December 17, 1999 (SCPCIGA's Administrative Procedures Act (APA) Submission No. 10 at pages 200 - 205). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (SCPCIGA's APA Submission No. 8 at pages 195 - 198). An Agreement to Reimburse Compensation entered between Lumbermens Mutual Casualty Company (Lumbermens) and

¹ §42-17-60 was amended effective July 1, 2007 so as to provide that appeals from the Commission are directly to the South Carolina Court of Appeals. However, the date of accident/loss in the underlying claim for workers' compensation benefits pre-dates the statutory amendment. Therefore, the appeal in this matter is directly to the Court of Common Pleas pursuant to the South Carolina Supreme Court's holding in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) and venue is proper in Greenville County in light of the injury by accident in the underlying claim occurring in Greenville County and the Employer's residence being in Greenville County.

SCSIF dated October 14, 2003 and approved by the Commission on November 21, 2003 provided that Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206) (emphasis added). There is no indication that the approved Agreement to Reimburse Compensation was appealed by any party. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (SCPCIGA's APA Submission No. 11 at pages 207 - 249; see also deposition testimony of David Stooksbury at page 58 and deposition testimony of Chris Lombard at pages 64 - 65).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (SCPCIGA's APA Submission No. 6 at pages 180 - 190). As a result, SCPCIGA became responsible for the claim pursuant to the terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2017) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of SCPCIGA's Executive Director, J. Smith Harrison, Jr., this matter is a covered workers' compensation claim under the Guaranty Act for which SCPCIGA is fully responsible and paying (Harrison deposition at page 56).

SCPCIGA

SCPCIGA is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2017) (emphasis added). SCPCIGA consists of insurers defined as "member insurers" under S.C. Code Ann. §38-31-20(8) (2017) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in S.C. Code Ann. §42-

7-310(d)(2) and §42-7-320(B)(3) (1976, as amended), SCPCIGA is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2017).²

Pursuant to §38-31-40, SCPCIGA is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the “workers’ compensation insurance account.” Pursuant to §38-31-60(c), SCPCIGA shall allocate claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). Accordingly, SCPCIGA’s workers’ compensation member insurers responsible for assessments necessary to fund its workers’ compensation liabilities are also responsible for payment of assessments necessary to fund SCSIF on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). In addition, SCPCIGA is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2017).

Pursuant to §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent (emphasis added). “Covered claim” is defined under S.C. Code Ann. §38-31-20(8) (2017) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA’s liability in certain situations. However,

² SCPCIGA acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to SCSIF by self-insurers and the State Accident Fund.

§38-31-60(iv) expressly provides that SCPCIGA “...shall pay the full amount of any covered workers’ compensation claim.” (emphasis added) (Harrison deposition at pages 50 - 51).

SCSIF

S.C. Code Ann. §42-7-310 (1976, as amended) provided for the establishment, purpose, administration, funding and staff of SCSIF. §42-7-310(d)(2) does not define the term “carrier” or “insurer” nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). Reimbursements to an “employer” or “insurance carrier” are governed by, and made pursuant to, S.C. Code Ann. §42-9-400 and §42-9-410 (1976, as amended). In this particular case, the approved Agreement to Reimburse Compensation specifically provides that Lumbermens shall receive reimbursement in accordance with the provisions of §42-9-400 for the cervical spine only (emphasis added) (SCPCIGA’s APA Submission No. 11 at page 206).

The July 1, 2007 amendments to the South Carolina Workers’ Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers’ Compensation Act) included the enactment of S.C. Code Ann. §42-7-320 (1976, as amended) providing for the termination of SCSIF and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability Authority (hereinafter referred to collectively as “SFAA”) was required to provide for the efficient and expeditious closure of SCSIF with the orderly winding down of the affairs of SCSIF so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund (emphasis added). §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident

Fund remain liable for SCSIF's assessments, as determined by SFAA, in order to pay accepted claims and SCSIF shall continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011 (emphasis added). §42-7-320 does not define the terms "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of SCSIF's remaining liabilities and options for funding SCSIF's remaining liabilities. In that regard, KPMG produced its initial actuarial report in March 2013 (SCPCIGA's APA Submission No. 4 at pages 114 - 148). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (Exhibit No. 1 to Lombard deposition, Lombard deposition at pages 24 - 45 and Stooksbury deposition at pages 10 - 11 and 21). Concerning the administration of SCSIF's continuing operations, SFAA assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF) which is part of SFAA. SCIRF's administrative responsibilities commenced in May 2013 shortly before termination of the SCSIF's programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (Lombard deposition at pages 8 - 16). Chris Lombard is the Assistant Director of Claims for SCIRF and in connection therewith, is responsible for the management of SCSIF's operations (Lombard deposition at pages 6 - 8). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of SCSIF's ongoing assessments under §42-7-320 (Lombard deposition at page 16 and Stooksbury deposition at pages 7 - 8).

Prior Litigation

Disputes involving SCPCIGA's entitlement to reimbursement from SCSIF are not new. SCPCIGA and SCSIF extensively litigated many of the same issues in connection with various reimbursement claims made by SCPCIGA for workers' compensation benefits it paid to injured employees as a result of the insolvency of Legion Insurance Company. That litigation resulted in various decisions and orders issued by the Commission and the Circuit Court. Those decisions and orders determined SCPCIGA to be eligible for, and entitled to, reimbursement. In so doing, the Commission and Circuit Court rejected the arguments that SCPCIGA is not an entity statutorily authorized to receive reimbursement and that SCPCIGA cannot be eligible for reimbursement because it does not pay assessments and/or as a result of the underlying insolvent carrier's default status with respect to payment of SCSIF assessments pursuant to the statutory amendment to §42-7-310(d)(2) effective June 25, 2003 (SCPCIGA's APA Submission Nos. 1, 2 and 3 at pages 1 - 113).

In particular, litigation of the reimbursement claim associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, resulted in these issues being presented to the South Carolina Court of Appeals on appeal by SCSIF. Prior to a ruling by the Court of Appeals, SCPCIGA and SCSIF entered into the June 17, 2013 Settlement Agreement and Release which resulted in dismissal of SCSIF's appeal (SCPCIGA's APA Submission No. 2 at pages 70 - 71). The settlement agreement, which was approved by a majority of the Commission, defined the terms "Legion" and "Reliance" and effectuated SCPCIGA's release of SCSIF on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any

and all claims, on which SCSIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement approved by the Commission further states: “The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any “large deductible” policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers” (emphasis added) (Exhibit No. 3 to Lombard deposition).

STATEMENT OF CASE

SCPCIGA sought reimbursement from SCSIF in accordance with the Agreement to Reimburse Compensation entered between Lumbermens and SCSIF pursuant to the terms and provisions of §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (SCPCIGA’s Form 54 Hearing Request dated December 8, 2016). SCSIF disputed SCPCIGA’s entitlement to reimbursement

contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement; that SCPCIGA does not pay assessments to SCSIF; that the liquidated carrier pursuant to which SCPCIGA asserts its right to reimbursement, Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to SCSIF thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320; and that SCPCIGA's reimbursement claim is barred by reason of a certain Settlement Agreement and Release entered between SCSIF and SCPCIGA dated June 17, 2013 (SCSIF's Form 55 Answer dated January 5, 2017 and Form 58 Pre-Hearing Brief dated April 20, 2017).³

SCPCIGA and SCSIF, by and through their respective counsel, appeared before Commissioner T. Scott Beck for the Forms 54/55 hearing on June 21, 2017 in Columbia, South Carolina. The record reflects that various documentary evidence was submitted and included in the record pursuant to the APA. In addition to the APA Submissions, the deposition of David Stooksbury dated April 26, 2017 with exhibits; the deposition of Christopher Lombard dated March 8, 2017 with exhibits; and the deposition of J. Smith Harrison, Jr. dated March 8, 2017 were submitted and included in the record. Stipulations were entered concerning jurisdiction, venue and the Commission's file becoming part of the record with the exception of self-serving declarations and unstipulated medical reports, and the hearing proceeded in the form of oral argument by counsel.

The Single Commissioner's Decision and Order was filed and served on October 2, 2017. It appropriately listed the documentary evidence included in the record; recited the stipulations

³ SCPCIGA and SCSIF are the only parties who have heretofore participated in the current litigation. Counsel for the Claimant, Kathryn Williams, Esquire, and the liquidated carrier, Jeff Jones, Esquire, have been appropriately served with all pleadings.

entered by the appearing parties; and detailed the pertinent background and evidentiary facts. Following an exhaustive analysis of the evidentiary record and applicable law concerning the issues in dispute, the Single Commissioner made various findings of fact and conclusions of law and ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the approved Agreement to Reimburse Compensation.

SCSIF timely filed and served its Form 30 Request for Commission Review of the Single Commissioner's Decision and Order on October 16, 2017 presenting seven specific questions of alleged error by the Single Commissioner. The Commission issued a Form 31 Briefing Schedule and Notice of Appellate Hearing assigning the matter to a Full Commission Appellate Panel which consisted of Commissioners Aisha Taylor, Susan S. Barden and Gene McCaskill. In its Appellant Brief timely filed and served on December 18, 2017, SCSIF made three arguments. SCSIF asserted that the Single Commissioner erred in ruling that SCPCIGA is statutorily authorized to seek reimbursement; erred in ruling that SCPCIGA is entitled to reimbursement even though it does not participate in SCSIF's assessment process; and erred in failing to rule that the Settlement Agreement and Release entered between the appearing parties dated June 17, 2013 does not bar SCPCIGA's reimbursement claim. SCPCIGA timely filed/served its Respondent Brief following which SCSIF filed/served a Reply Brief. Oral argument was held before the Appellate Panel on January 22, 2018 in Columbia, South Carolina per notices timely and properly served upon all parties of interest. Thereafter, the Appellate Panel issued its Decision and Order dated March 29, 2018 wherein it made the following findings of fact and conclusions of law:

Findings of Fact

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.
7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.
8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to

claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.

12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

Conclusions of Law

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.
3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320. Moreover, the South Carolina Supreme Court's decisions in Brock v. South Carolina Property and Casualty Insurance Guaranty Association, 410 S.C. 361, 764 S.E.2d 920 (2014) (involving a policy of liability insurance rather than a policy of workers' compensation insurance under which SCPCIGA is fully responsible for covered claims) is not applicable to this matter.

5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.
6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter and the amount of the monetary consideration is of no consequence.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).
10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
11. Under §38-31-60(b), the rights of the liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains are not limited exclusively to matters pertaining to the defense by SCPCIGA of ongoing claims. Alternatively, SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of this fully covered workers' compensation claim and as such, is part and parcel of SCPCIGA's obligation for payment of this covered claim and its defense thereof.

12. Under §42-7-310 and §42-7-320 and in light of the foregoing Findings of Fact Nos. 7 – 10 and Conclusions of Law Nos. 5 – 8; any assertion that SCPCIGA's reimbursement claim is barred due to a failure to pay assessments, directly or otherwise, is without merit.

Based on the foregoing findings and conclusions, the Appellate Panel affirmed the Decision and Order of the Single Commissioner dated October 2, 2017 in its entirety and ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the approved Agreement to Reimburse Compensation. From that Order, SCSIF appeals to this Court presenting essentially the same grounds of appeal that were presented to the Appellate Panel.

STANDARD OF REVIEW

The standard of review in an appeal from a final decision of an administrative agency is governed by §1-23-380(b) of the South Carolina Code of Laws (1986, as amended) (commonly known as the Administrative Procedures Act). See Pringle v. Builders Transport, Inc., 381 S.E. 2d 731 (1989). See Lark v. Bi Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). The Appellate Court can reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." See Gray v. Club Group, Ltd., 528 S.E. 2d 435

(Ct.App.2000), citing S. C. Code Ann. §1-23-380(g) (1986, as amended). In considering an appeal from a Decision and Order of the South Carolina Workers' Compensation Commission, the Court's role is appellate and is limited to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law. See Rogers v. Kunja Knitting Mills Co., 440 S.E.2d 401, re-hearing denied (Ct. App. 1994). In an appeal from the Workers' Compensation Commission, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(6) (1976), *construed in* Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A decision of the Workers' Compensation Commission must be affirmed if factual findings are supported by substantial evidence. See Stokes v. First National Bank, 410 S.E.2d 248 (1991). Substantial evidence is that evidence which would require refusal to direct a verdict if the matter were before a jury and is something less than the weight of the evidence. See Hoxit v. Michelin Tire Corporation, 405 S.E.2d 407, 304 S.C. 461 (1991). The possibility of drawing two inconsistent conclusions from the evidence does not prevent administrative findings from being supported by substantial evidence. Id. If the factual findings of the Workers' Compensation Commission are supported by substantial evidence, the Commissions' conclusions must be affirmed. See Ross v. American Red Cross, 381 S.E. 2d 728, 298 S.C. 490 (1989).

ISSUES ON APPEAL

I. Statutory Authorization

SCSIF asserts that SCPCIGA, as a statutory entity, is not statutorily authorized to seek/receive reimbursement. SCSIF contends there is no statutory provision or reported appellate court opinion in South Carolina expressly authorizing SCPCIGA to seek/receive reimbursement. SCSIF further contends that §38-31-60(b) has no relevance or application to reimbursement claims against SCSIF and by its own terms, is limited to matters pertaining to the defense by SCPCIGA of ongoing claims. In conjunction therewith, SCSIF, *citing* Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) for the statutory construction principal of “expressio unius est exclusion alterius,” argues that SCPCIGA’s rights of recoupment and offset are limited to those expressly provided in §38-31-90 and S.C. Code Ann. §38-31-100 (2018). SCSIF also argues that SCPCIGA is not an insurance carrier entitled to reimbursement pursuant to §42-7-310, §42-7-320 and §42-9-400. Accordingly, SCSIF contends that the Commission’s findings, rulings, order and award to the contrary are in error.

In construing the pertinent statutory provisions, the Commission cited Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990), for the proposition that the cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without result to subtle or forced construction to limit or expand its operation; Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987), for the proposition that statutory language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose; and Beaufort County v. S.C. State Election Commission, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) *citing* Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000), for the proposition that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result.

§38-31-60 provides for the powers and duties of SCPCIGA. The Commission construed it to be a multi-faceted statute not limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated carrier. In that regard, the Commission cited §38-31-60(j) which authorizes SCPCIGA to sue and §38-31-60(l) which authorizes SCPCIGA to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act.⁴ The Commission concluded there was no language in §38-31-60(b) or elsewhere in the statute which limits the liquidated carrier's rights assumed by SCPCIGA to those pertaining to the defense of ongoing claims. The Commission was not persuaded by SCSIF's suggestion that the second sentence in §38-31-60(b) providing that SCPCIGA has the right but not the obligation to defend an insured that is not a resident of this State weighs in favor of construing §38-31-60(b) to limit the rights of the liquidated carrier assumed by SCPCIGA to matters pertaining to the defense of ongoing claims. The Commission concluded that such merely distinguishes a specific situation where SCPCIGA has a right but not an obligation. Accordingly, the Commission declined to construe §38-31-60(b) so as to limit SCPCIGA's rights thereunder in the manner advocated by SCSIF. Assuming *arguendo* that SCSIF is correct in its statutory construction argument, the Commission concluded that it is self evident SCPCIGA would have no reason to assert the liquidated carrier's right to reimbursement but for its obligation to pay the full amount of this covered workers' compensation claim imposed by §38-31-60(a)(iv) and found that SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of the claim and is part and parcel of SCPCIGA's defense of the claim.

⁴ SCPCIGA argues that the purpose of the Guaranty Act is to protect insureds and claimants by paying the claims of liquidated insurance carriers and that funding payment of the claims is an essential component of carrying out that purpose.

With respect to §38-31-90 and §38-31-100, the Commission concluded there was no language thereunder which abrogates the liquidated carrier's rights under the Workers' Compensation Act assumed by SCPCIGA pursuant to §38-31-60(b). The Commission noted that SCSIF had failed to reference any statutory language to that effect and instead, relied on the statutory construction principle of "expressio unius est exclusio" to support its assertion that SCPCIGA's rights of recoupment and offset as provided in §38-31-90 and §38-31-100 are exclusive. In connection with that argument, the SCSIF also noted that Section 42-7-10(A) specifically authorizes the State Accident Fund to seek reimbursement from the SCSIF, but there is no such similar provision elsewhere in either Title 38 or Title 42 that specifically provides for the SCPCIGA to do likewise. The Commission found that to be a misguided argument which ignored the clear, unequivocal and broad language in §38-31-60(b) conferring upon SCPCIGA all rights of the liquidated carrier to the extent of its obligation on this fully covered workers' compensation claim. To illustrate the point that the right to reimbursement pursuant to an approved agreement to reimburse compensation would be one of several recoupment/offset rights of a liquidated carrier that SCPCIGA would maintain under the Workers' Compensation Act in connection with its obligation on a covered workers' compensation claim, the Commission cited subrogation rights under S.C. Ann. Code §42-1-560 (1976, as amended) and the right to assert credit for payments made when not due and payable pursuant to S.C. Ann. Code §42-9-210 (1976, as amended). Accordingly, the Commission declined to construe §38-31-90 and §38-31-100 as limiting or abrogating those rights of a liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains in connection with its obligation on fully covered workers' compensation claims.

Concerning the issue of whether SCPCIGA is an “insurance carrier” entitled to reimbursement pursuant to §42-7-310, §42-7-320 and §42-9-400; the Commission noted that §42-7-310 does not define the term “carrier” nor does it exclude SCPCIGA as an entity entitled to reimbursement. The Commission noted that in this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of §42-9-400 and that §42-9-400(a) states in pertinent part “...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310...” (emphasis added). The Commission also referenced §42-7-320(B)(3) which requires SCSIF to continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011 (emphasis added).

The Commission relied on §42-1-60 which defines the term “carrier” or “insurer” as “any person or fund authorized under §42-5-20 to insure under this title (Title 42) and includes self-insurers.” The Commission also referenced §42-5-20 which states in pertinent part that “[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized...” The Commission cited Black’s Law Dictionary, Abridged Fifth Edition, which defines the term “insure” as “...[t]o engage to indemnify a person against pecuniary loss from specified perils or possible liability.” Finally, the Commission referenced §38-31-60(b), which provides that SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and cited the uncontradicted evidentiary record establishing that this matter involves a covered workers’ compensation claim for which SCPCIGA is responsible for paying the full amount under §38-31-60(a)(iv).

In assessing whether SCPCIGA is authorized under §42-5-20 to insure liabilities under the Workers' Compensation Act thereby meeting the statutory definition of the term "carrier" or "insurer" under §42-1-60 and as used in §42-9-400 and §42-7-320, the Commission concluded that it is self-evident SCPCIGA would not be responsible for paying this claim and would have no reason to be seeking reimbursement if it was not so authorized. The Commission further concluded that the evidentiary record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers' Compensation Act and there was no evidence to the contrary (see Harrison deposition at pages 54 - 56). The Commission also took judicial notice of routine decisions and actions by the Commission with respect to SCPCIGA's data reporting obligations and benefit liabilities on covered workers' compensation claims in carrying out the Commission's administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers' Compensation Act. The Commission found that the uncontradicted evidentiary record and applicable statutory provisions establish SCPCIGA as an association authorized to insure liabilities under the Workers' Compensation Act and in particular, authorized to insure the Employer's liabilities in this fully covered workers' compensation claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

In connection with its argument that SCPCIGA is not an insurance carrier authorized to receive reimbursement, SCSIF cites the South Carolina Supreme Court's Decision in South Carolina Property and Casualty Insurance Guaranty Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) for the proposition that SCPCIGA is not an insurance company/carrier entitled to reimbursement. Notably, SCSIF conceded in its brief that Brock was decided in a different context. The Commission concluded that any reliance on Brock was misplaced. In that regard,

the Commission noted that the Supreme Court's statement in Brock that SCPCIGA is "...neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies" was made in the context of its analysis of SCPCIGA's right to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. The Commission noted that Brock did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which SCPCIGA would be responsible for paying the full amount and concluded that Brock is clearly distinguished from the current matter. More specifically, the Commission concluded that Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply. Accordingly, the Commission found Brock not applicable to the current matter.

The Court has thoroughly reviewed the evidentiary record and carefully considered the arguments of both parties in connection with the statutory authorization issue. In this regard, the Court finds that the Commission's findings of fact and conclusions of law made in connection with the statutory authorization issue are supported by substantial evidence in the record and the applicable statutory provisions. The Court further finds that the Commission's finding and conclusion that SCPCIGA is statutorily authorized to seek/receive reimbursement from SCSIF are not effected by any error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

II. Assessments

SCSIF asserts that the Commission erred in ruling that SCPCIGA is entitled to request/receive reimbursement without having directly participated in the statutory assessment process. In its analysis of this issue, the Commission noted that previously in its Form 55, SCSIF asserted that SCPCIGA was barred from reimbursement because it does not pay assessments and pursuant to §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of assessments. The Commission noted, however, that David Stooksbury, SCIRF's business manager in charge of SCSIF's operations as it relates to assessments, testified clearly and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed (Stooksbury deposition at page 47). The Commission also noted Mr. Stooksbury's testimony that if a carrier goes under and stops paying claims, the assessment goes to zero (Stooksbury deposition at page 47). The Commission further noted that SCSIF made no assertion of the claim being barred under §42-7-310(d)(2) as a result of Lumbermens purported default in payment of assessments during oral argument before the Single Commissioner and did not include such in its Form 30 exceptions on appeal to the Full Commission.

The Commission's analysis also referenced the uncontradicted evidentiary record reflecting that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68) and SCPCIGA's status as an unincorporated entity whose workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51). The Commission noted that any theoretical assessment on SCPCIGA would not alter or affect the total sum of assessments raised on an annual basis by SCSIF under the pre-July 1, 2013 funding mechanism set forth in §42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by

SFAA pursuant to §42-7-320; rather, the only variable would be what entities were paying and in what amounts (Lombard deposition at pages 80 - 84 and Stooksbury deposition at pages 75 - 76). The Commission also noted that the record further reflects SCPCIGA's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included (SCPCIGA's APA Submission No. 4 at page 116 and Stooksbury deposition at pages 58 - 61, 64 and 66). The Commission further noted there was no indication in the record that any of SCPCIGA's workers' compensation member insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51) and that SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim.

The Commission concluded that the only statutory provision which conditions reimbursement upon payment of assessments is the amendment to §42-7-310(d)(2) which became effective June 25, 2003. In light of David Stooksbury's uncontradicted testimony that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, the Commission found any argument that SCPCIGA's reimbursement claim is barred because of an issue connected to assessments to be baseless and without merit.⁵ The Commission further found and concluded that the evidentiary record clearly establishes that SCPCIGA, as an unincorporated entity, effectively pays assessments

⁵ As a result of the uncontradicted record establishing that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, the Commission concluded that it was not necessary to address whether the pertinent statutory amendment to §42-7-310(d)(2) effective June 25, 2003 should be applied retroactively in this claim with an underlying date of accident/injury on December 17, 1999. The Commission also concluded SCSIF had abandoned any position in that regard inasmuch as such was not included in its Form 30 exceptions. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 841 (1940) and Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993).

to SCSIF via the assessments paid by its workers' compensation member insurers and there is no delinquency in payment of those assessments including payment of the assessments associated with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this claim. Given SCSIF's failure to assess SCPCIGA and the overwhelming evidence of participation in the assessment process by SCPCIGA's workers' compensation member insurers to include payment of assessments to fund SCSIF's liability on this particular claim, the Commission found no merit in the assertion that SCPCIGA's reimbursement claim is barred due to its failure to "directly" pay assessments to SCSIF.

The Court has thoroughly reviewed the evidentiary record in connection with the assessment issue and carefully considered the arguments of both parties. In this regard, the Court finds that the Commission's findings of fact and conclusions of law made in connection with the assessment issue are supported by substantial evidence in the record and the applicable statutory provisions. The Court further finds that the Commission's findings and conclusions made in connection with the assessment issue are not affected by any error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

III. Prior Settlement Agreement

SCSIF asserts that the Settlement Agreement and Release entered between it and SCPCIGA dated June 17, 2013 bars SCPCIGA's claim for reimbursement or otherwise releases SCSIF from its liability for reimbursement on this claim (SCSIF's APA Submission No. 1 at pages

1 – 14). In this regard, SCSIF notes provisions in the Settlement Agreement and Release that the language therein should be construed as a whole and not strictly for or against any party and that the terms are to be given the broadest understanding. SCSIF also notes SCPCIGA's knowledge of the Lumbermens' claims to specifically include this claim as of June 17, 2013 and the fact that SCPCIGA had set up reserves and paid benefits on this particular claim prior to execution and Commission approval of the June 17, 2013 Settlement Agreement and Release (SCPCIGA APA Submission No. 7 at pages 191 – 194). SCSIF also argues that the amount of the monetary consideration paid by SCSIF to SCPCIGA for the Settlement Agreement and Release dated June 17, 2013 supports its contention in this regard.

The Commission concluded that the plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein, the settlement and release applied only to those claims on which SCSIF was paying SCPCIGA as of February 22, 2013. The Commission noted the uncontradicted evidentiary record reflecting that Lumbermens was not liquidated until May 8, 2013; that SCPCIGA was not paying this claim as of February 22, 2013 and that at no time has SCSIF reimbursed SCPCIGA in connection with this claim (Lombard deposition at pages 39 – 42 and Harrison deposition at page 47). Based on its view of this language in the Settlement Agreement and Release and what it concluded was any reasonable construction thereof, the Commission found and concluded that the Settlement Agreement and Release does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim. The Commission further found and concluded that the amount of the monetary consideration was of no consequence.

The Court has thoroughly reviewed the evidentiary record and carefully considered the arguments of both parties in connection with this issue. The Court finds that the Commission's

findings of fact and conclusions of law in connection with this issue are supported by substantial evidence in the record and applicable law. The Court further finds that the Commission's findings and conclusions on this issue are not affected by error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

CONCLUSION

In light of the foregoing findings made by the Court in applying the standard of review to the issues on appeal, the Court affirms the Commission's findings of fact, conclusions of law and order awarding reimbursement to SCPCIGA.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Decision and Order of the South Carolina Workers' Compensation Commission issued in connection with this matter and filed March 29, 2018 is hereby affirmed in its entirety.

IT IS SO ORDERED.

Robin B. Stilwell,
Circuit Court Judge

_____, 2018

Greenville, South Carolina



Greenville Common Pleas

Case Caption: Second Injury Fund Operations Of South Carolina Insurance Re ,
plaintiff, et al VS South Carolina Property And Casualty Insurance
Guaranty Fund

Case Number: 2018CP2302580

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2018-12-07 10:56:15 page 27 of 27

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

W.C.C. FILE NO. 9928766

South Carolina Property and Casualty Insurance Guaranty Association

v

South Carolina Second Injury Fund

In Re:

Michael Quarles,
Employee/Claimant,

-vs-

Cryovac Sealed Air Corporation, Employer, and
Lumbermens Mutual Casualty Company in
liquidation/South Carolina Property and Casualty
Insurance Guaranty Association, Carrier,
Defendants.

REVIEW HEARING:

Held on January 22, 2018 in Columbia, South
Carolina per notices timely and properly served
upon all parties of interest.

APPEARANCES:

Robert M. Cook, II, Esquire, Batesburg-Leesville,
South Carolina appeared on behalf of Appellant
South Carolina Second Injury Fund.

J. Hubert Wood, III, Esquire, Charleston, South
Carolina appeared on behalf of Respondent South
Carolina Property and Casualty Insurance
Guaranty Association.

PURPOSE OF HEARING:

To determine the issues as set forth in the Form
30 Request for Commission Review.

DECISION & ORDER:

By: Aisha Taylor, Commissioner; Susan S.
Barden and Gene McCaskill, Commissioners,
concur.

FILED:

March 29, 2018

Pursuant of S.C. Code Ann. §42-17-50 (1976, as amended), South Carolina Second Injury Fund (SCSIF) seeks review and reversal of Hearing Commissioner T. Scott Beck's Decision and Order dated October 2, 2017 awarding reimbursement to South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA). SCPCIGA seeks affirmation contending that the Hearing Commissioner's findings of fact, rulings of law, order and award are supported by the greater weight of the evidence in the record and applicable law. SCPCIGA further contends that the Hearing Commissioner made no reversible error of law and did not abuse his discretion.¹

STATEMENT OF CASE BEFORE COMMISSIONER BECK

SCPCIGA and SCSIF agreed that the sole issue for determination was whether SCPCIGA is entitled to reimbursement from SCSIF for benefits paid by SCPCIGA on the underlying claim. SCPCIGA sought reimbursement from SCSIF in accordance with an Agreement to Reimburse Compensation entered between the liquidated carrier, Lumbermens Mutual Casualty Company (Lumbermens), and SCSIF dated October 14, 2003 and approved by the Workers' Compensation Commission (Commission) on November 21, 2003, pursuant to the terms and provisions of S.C. Code Ann. §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (1976; as amended) (SCPCIGA's Form 54 Hearing Request dated December 8, 2016). SCSIF disputed SCPCIGA's entitlement to reimbursement contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement; that SCPCIGA does not pay assessments to SCSIF; that the liquidated carrier pursuant to which SCPCIGA asserts its right to reimbursement,

¹ SCPCIGA and SCSIF are the only parties who have heretofore participated in the current litigation. Counsel for the Claimant, Kathryn Williams, Esquire, and the liquidated carrier, Jeff Jones, Esquire, have been appropriately served with all pleadings and notices from the Commission and their appearance has not been required by the Commission.

Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to SCSIF thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320; and that SCPCIGA's reimbursement claim is barred by reason of a certain Settlement Agreement and Release entered between SCSIF and SCPCIGA dated June 17, 2013 (SCSIF's Form 55 Answer dated January 5, 2017 and Form 58 Pre-Hearing Brief).

HEARING BEFORE COMMISSIONER BECK

SCPCIGA and SCSIF, by and through their respective counsel, appeared before Commissioner Beck for the Forms 54/55 hearing on June 21, 2017 in Columbia, South Carolina. The record reflects that various documentary evidence was submitted and included in the record pursuant to the Administrative Procedures Act (APA). In addition to the APA Submissions, the deposition of David Stooksbury dated April 26, 2017 with exhibits; the deposition of Christopher Lombard dated March 8, 2017 with exhibits; and the deposition of J. Smith Harrison, Jr. dated March 8, 2017 were submitted and included in the record. SCSIF's objection to SCPCIGA's APA Submissions Nos. 1 through 5 was overruled by the Hearing Commissioner. Stipulations were entered concerning jurisdiction, venue and the Commission's file becoming part of the record with the exception of self-serving declarations and unstipulated medical reports. The hearing proceeded in the form of oral argument by counsel.

BACKGROUND AND EVIDENCE SUMMARY

The Claimant sustained compensable injuries to his neck and back and a compensable psychological injury as a result of an accident arising out of and in the course of his employment

on December 17, 1999 (SCPCIGA's APA Submission No. 10 at pages 200 - 205). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (SCPCIGA's APA Submission No. 8 at pages 195 - 198). The approved Agreement to Reimburse Compensation entered between Lumbermens and SCSIF provides that Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206). The approved Agreement to Reimburse Compensation was not appealed by any party. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (SCPCIGA's APA Submission No. 11 at pages 207 - 249; see also deposition testimony of David Stooksbury at page 58 and deposition testimony of Chris Lombard at pages 64 - 65).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (SCPCIGA's APA Submission No. 6 at pages 180 - 190). As a result, SCPCIGA became responsible for the claim pursuant to the terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2018) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of SCPCIGA's Executive Director, J. Smith Harrison, Jr., this matter is a covered workers' compensation claim under the Guaranty Act for which SCPCIGA is fully responsible and paying (Harrison deposition at page 56).

SCPCIGA

SCPCIGA is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2018). SCPCIGA consists of insurers defined as “member insurers” under S.C. Code Ann. §38-31-20(8) (2018) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in §42-7-310(d)(2) and §42-7-320(B)(3), SCPCIGA is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2018).²

Pursuant to §38-31-40, SCPCIGA is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the “workers’ compensation insurance account.” Pursuant to §38-31-60(c), SCPCIGA shall allocate claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). Accordingly, SCPCIGA’s workers’ compensation member insurers responsible for assessments necessary to fund its workers’ compensation liabilities are also responsible for payment of assessments necessary to fund SCSIF on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). In addition, SCPCIGA is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2018). Therefore, SCPCIGA asserts that it has a fiduciary responsibility to its member insurers, the

² SCPCIGA acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to SCSIF by self-insurers and the State Accident Fund.

receiver/liquidator of the assets of an insolvent insurer and certain insureds and affiliates of an insolvent insurer (Harrison deposition at pages 38 - 39, 49 - 50 and 52 - 53).

Pursuant to §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent (emphasis added). "Covered claim" is defined under S.C. Code Ann. §38-31-20(8) (2018) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA's liability in certain situations. However, §38-31-60(iv) expressly provides that SCPCIGA "...shall pay the full amount of any covered workers' compensation claim." (Harrison deposition at pages 50 - 51).

SCSIF

§42-7-310 provided for the establishment, purpose, administration, funding and staff of SCSIF. A careful reading of §42-7-310(d)(2) reveals that it does not define the term "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund. Reimbursements to an "employer" or "insurance carrier" are governed by, and made pursuant to, §42-9-400 and S.C. Code Ann. §42-9-410 (1976, as amended). In this particular case, the approved Agreement to Reimburse Compensation specifically provides that Lumbers shall receive reimbursement in accordance with the provisions of §42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206).

The July 1, 2007 amendments to the South Carolina Workers' Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers' Compensation Act) included the enactment of §42-7-320 providing for the termination of SCSIF and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability

Authority (hereinafter referred to collectively as "SFAA") was required to provide for the efficient and expeditious closure of SCSIF with the orderly winding down of the affairs of SCSIF so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund. §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident Fund remain liable for SCSIF's assessments, as determined by SFAA, in order to pay accepted claims and SCSIF shall continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011. §42-7-320 does not define the terms "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of SCSIF's remaining liabilities and options for funding SCSIF's remaining liabilities. In that regard, KPMG produced its initial actuarial report in March 2013 (SCPCIGA's APA Submission No. 4 at pages 114 - 148). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (Exhibit No. 1 to Lombard deposition, Lombard deposition at pages 24 - 45 and Stooksbury deposition at pages 10 - 11 and 21). Concerning the administration of SCSIF's continuing operations, SFAA assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF) which is part of SFAA. SCIRF's administrative responsibilities commenced in May 2013 shortly before termination of the SCSIF's programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (Lombard deposition at pages 8 - 16). Chris Lombard is the Assistant

Director of Claims for SCIRF and in connection therewith, is responsible for the management of SCSIF's operations (Lombard deposition at pages 6 - 8). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of SCSIF's ongoing assessments under §42-7-320 (Lombard deposition at page 16 and Stooksbury deposition at pages 7 - 8).

Prior Litigation

Disputes involving SCPCIGA's entitlement to reimbursement from SCSIF are not new. SCPCIGA and SCSIF extensively litigated many of the same issues in connection with various reimbursement claims made by SCPCIGA for workers' compensation benefits it paid to injured employees as a result of the insolvency of Legion Insurance Company. That litigation resulted in various decisions and orders issued by the Commission and the Circuit Court. Those decisions and orders determined SCPCIGA to be eligible for, and entitled to, reimbursement. In so doing, the Commission and Circuit Court rejected the arguments that SCPCIGA is not an entity statutorily authorized to receive reimbursement and that SCPCIGA cannot be eligible for reimbursement because it does not pay assessments and/or as a result of the underlying insolvent carrier's default status with respect to payment of SCSIF assessments pursuant to the statutory amendment to §42-7-310(d)(2) effective June 25, 2003 (SCPCIGA's APA Submission Nos. 1, 2 and 3 at pages 1 - 113).

In particular, litigation of the reimbursement claim associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, resulted in these issues being presented to the South Carolina Court of Appeals on appeal by SCSIF. Prior to a ruling by the

Court of Appeals, SCPCIGA and SCSIF entered into the June 17, 2003 Settlement Agreement and Release which resulted in dismissal of SCSIF's appeal (SCPCIGA's APA Submission No. 2 at pages 70 - 71). The settlement agreement, which was approved by a majority of the Commission, defined the terms "Legion" and "Reliance" and effectuated SCPCIGA's release of SCSIF on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any and all claims, on which SCSIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement approved by the Commission further states: "The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any "large deductible" policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers" (emphasis added) (Exhibit No. 3 to Lombard deposition).

COMMISSIONER BECK'S DECISION AND ORDER

The Hearing Commissioner's Decision and Order was filed and served on October 2, 2017. It appropriately lists the documentary evidence included in the record; recites the stipulations entered by the appearing parties; and details the pertinent background and evidentiary facts. Following an exhaustive analysis of the evidentiary record and applicable law concerning the issues in dispute, the Hearing Commissioner made the following findings of fact and conclusions of law:

Findings of Fact

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.
8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.
12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

Conclusions of Law

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on

behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.

3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.
6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).

10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

Based on the foregoing findings and conclusions, the Hearing Commissioner ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Workers' Compensation Commission on November 21, 2003.

FULL COMMISSION PROCEEDINGS

In accordance with S.C. Ann. Regs. 67-701 et seq. (2018), SCSIF timely filed and served its Form 30 Request for Commission Review on October 16, 2017 asserting seven (7) specific questions of alleged error by the Hearing Commissioner. The Commission issued a Form 31 Briefing Schedule and Notice of Appellate Hearing on November 17, 2017 assigning the matter to this Appellate Panel. SCSIF timely filed and served its Appellant Brief on December 18, 2017 wherein it made three (3) arguments asserting that the Hearing Commissioner erred in ruling that SCPCIGA is statutorily authorized to seek reimbursement; erred in ruling that SCPCIGA is entitled to reimbursement even though it does not participate in SCSIF's assessment process; and erred in failing to rule that the Settlement Agreement and Release entered between the parties dated June 17, 2013 does not bar SCPCIGA's reimbursement claim. SCPCIGA timely filed/served its Respondent Brief following which SCSIF filed/served a Reply Brief. Oral argument was held before this Appellate Panel on January 22, 2018.

ISSUES

I. Statutory Authorization

SCSIF asserts that SCPCIGA, as a statutory entity, is simply not statutorily authorized to seek/receive reimbursement. SCSIF contends that §38-31-60(b) has no relevance or application to reimbursement claims against SCSIF and by its own terms, is limited to matters pertaining to the defense by SCPCIGA of ongoing claims. In conjunction therewith, SCSIF, *citing* Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) for the statutory construction principal of “*expressio unius est exclusion alterius*,” argues that SCPCIGA’s rights of recoupment and offset are limited to those expressly provided in §38-31-90 and S.C. Code Ann. §38-31-100 (2018). SCSIF also argues that SCPCIGA is not an insurance carrier entitled to reimbursement pursuant to §42-7-310, §42-7-320 and §42-9-400. Accordingly, SCSIF contends that the Hearing Commissioner’s findings, rulings, order and award to the contrary are in error. We disagree.

The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result. Beaufort County v. S.C. State Election Commission, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) *citing* Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

§38-31-60 provides for the powers and duties of SCPCIGA. It is a multi-faceted statute not limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated

carrier. For example, §38-31-60(j) authorizes SCPCIGA to sue and §38-31-60(l) authorizes SCPCIGA to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act. In our view, there is no language in §38-31-60(b) or elsewhere in the statute which limits the liquidated carrier's rights assumed by SCPCIGA to those pertaining to the defense of ongoing claims. We are not persuaded by SCSIF's suggestion that the second sentence in §38-31-60(b) providing that SCPCIGA has the right but not the obligation to defend an insured that is not a resident of this State weighs in favor of construing §38-31-60(b) to limit the rights of the liquidated carrier assumed by SCPCIGA to matters pertaining to the defense of ongoing claims. In our judgment, it merely distinguishes a specific situation where SCPCIGA has a right but not an obligation. We decline to construe §38-31-60(b) so as to limit SCPCIGA's rights thereunder in the manner advocated by SCSIF. Moreover and assuming *arguendo* that SCSIF is correct in its statutory construction argument, it is self-evident that SCPCIGA would have no reason to assert the liquidated carrier's right to reimbursement but for its obligation to pay the full amount of this covered workers' compensation claim imposed by §38-31-60(a)(iv) and (b). Accordingly, we find that SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of the claim and is part and parcel of SCPCIGA's defense of the claim.

Similarly, there is no language in §38-31-90 or §38-31-100 which abrogates the liquidated carrier's rights under the Workers' Compensation Act assumed by SCPCIGA pursuant to §38-31-60(b). SCSIF fails to reference any statutory language to that effect. Instead, it relies on the statutory construction principle of "expressio unius est exclusio" to support its assertion that SCPCIGA's rights of recoupment and offset as provided in §38-31-90 and §38-31-100 are exclusive. We find this to be a misguided argument which ignores the clear, unequivocal, and broad language in §38-31-60(b) conferring upon SCPCIGA all rights of the liquidated carrier to

the extent of its obligation on this fully covered workers' compensation claim. By way of illustration, the right to reimbursement pursuant to an approved agreement to reimburse compensation would be one of several recoupment/offset rights of a liquidated carrier that SCPCIGA would maintain under the Workers' Compensation Act in connection with its obligation on a covered workers' compensation claim. Others would include subrogation rights under S.C. Ann. Code §42-1-560 (1976, as amended) and the right to assert credit for payments made when not due and payable pursuant to S.C. Ann. Code §42-9-210 (1976, as amended). We decline to construe §38-31-90 and §38-31-100 as limiting or abrogating those rights of a liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains in connection with its obligation on fully covered workers' compensation claims.

SCSIF uses the terms "insurance company" and "insurance carrier" interchangeably in arguing that SCPCIGA is not entitled to reimbursement pursuant to §42-7-310 and §42-9-400. In so doing, SCSIF misconstrues those statutes and ignores S.C. Code Ann. §42-1-60 and §42-5-20 (1976, as amended). As indicated above, §42-7-310 provided for the establishment, purpose, administration, funding and staff of the SCSIF. It does not define the term "carrier" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it merely provides that the term as used in §42-7-310(d)(2) includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). In this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of §42-9-400 (emphasis added). §42-9-400(a) states in pertinent part that "...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310..." (emphasis added). §42-7-320(B)(3) requires SCSIF to continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011.

§42-1-60 defines the term “carrier” or “insurer” as “any person or fund authorized under §42-5-20 to insure under this title (Title 42) and includes self-insurers.” §42-5-20 states in pertinent part that “[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized...” The term “insure” is defined in Black’s Law Dictionary, Abridged Fifth Edition, as “[t]o make sure or secure, to guarantee, as to insure safety to anyone. To engage to indemnify a person against pecuniary loss from specified perils or possible liability.” Under §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and as set forth above, the uncontradicted record establishes that this matter involves a covered workers’ compensation claim for which SCPCIGA is responsible for paying the full amount under §38-31-60(a)(iv).

Concerning whether SCPCIGA is authorized under §42-5-20 to insure liabilities under the Workers’ Compensation Act thereby meeting the statutory definition of the term “carrier” or “insurer” under §42-1-60 and as used in §42-9-400 and §42-7-320; it is self-evident that SCPCIGA would not be responsible for paying this claim and would have no reason to be seeking reimbursement if it was not so authorized. The evidentiary record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers’ Compensation Act and there is no evidence to the contrary (see Harrison deposition at pages 54 - 56). We also take judicial notice of routine decisions and actions by the Commission with respect to SCPCIGA’s data reporting obligations and benefit liabilities on covered workers’ compensation claims in carrying out the Commission’s administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers’ Compensation Act. In our view, the uncontradicted

evidentiary record and applicable statutory provisions establish SCPCIGA as an association authorized to insure liabilities under the Workers' Compensation Act and in particular, authorized to insure the Employer's liabilities in this fully covered workers' compensation claim.

In connection with its argument that SCPCIGA is not an insurance carrier authorized to receive reimbursement, SCSIF cites the South Carolina Supreme Court's Decision in South Carolina Property and Casualty Insurance Guaranty Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) for the proposition that SCPCIGA is not an insurance company/carrier entitled to reimbursement. Notably, SCSIF concedes in its Appellant Brief that Brock was decided in a different context. In our view, any reliance on Brock is misplaced. The Court's statement in Brock that SCPCIGA is "...neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies" was made in the context of its analysis of SCPCIGA's right to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. Brock did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which SCPCIGA would be responsible for paying the full amount and, therefore, is clearly distinguished from the current matter. More specifically, Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply. Therefore, we find Brock not applicable to the current matter.

II. Assessments

In its Form 30, SCSIF asserts that the Hearing Commissioner erred in ruling that SCPCIGA is entitled to request/receive reimbursement without having directly participated in the statutory assessment process (emphasis added). Previously in its Form 55, SCSIF asserted that SCPCIGA was barred from reimbursement because it does not pay assessments and

pursuant to §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of assessments. However, deposition testimony of David Stooksbury, SCIRF's business manager in charge of SCSIF's operations as it relates to assessments, testified clearly and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed (Stooksbury deposition at page 47). He also testified that if a carrier goes under and stops paying claims, the assessment goes to zero (Stooksbury deposition at page 47). SCSIF made no assertion of the claim being barred under §42-7-310(d)(2) as a result of Lumbermens purported default in payment of assessments during oral argument before the Hearing Commissioner and did not include such in its Form 30 exceptions.

The uncontradicted evidentiary record reflects that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68). Pursuant to §38-31-40, SCPCIGA is an unincorporated entity and its workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51) (emphasis added). In connection therewith, any theoretical assessment on SCPCIGA would not alter or affect the total sum of assessments raised on an annual basis by SCSIF under the pre-July 1, 2013 funding mechanism set forth in §42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by SFAA pursuant to §42-7-320. Rather, the only variable would be what entities were paying and in what amounts (Lombard deposition at pages 80 - 84 and Stooksbury deposition at pages 75 - 76). The record further reflects that SCPCIGA's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and

included (SCPCIGA's APA Submission No. 4 at page 116 and Stooksbury deposition at pages 58 - 61, 64 and 66). There is no indication that any of SCPCIGA's workers' compensation member insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51). SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim.

The only statutory provision which conditions reimbursement upon payment of assessments is the amendment to §42-7-310(d)(2) which became effective June 25, 2003. In light of David Stooksbury's uncontradicted testimony that neither Lumbermens nor any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, we find any argument that SCPCIGA's reimbursement claim is barred because of an issue connected to assessments to be baseless and without merit.³ We further find that the foregoing clearly establishes that SCPCIGA, as an unincorporated entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers and there is no delinquency in payment of those assessments including payment of the assessments associated with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this claim. Given SCSIF's failure to assess SCPCIGA and the overwhelming evidence of participation in the assessment process by SCPCIGA's workers' compensation member insurers to include payment of assessments to fund SCSIF's liability on this particular claim, we find no merit in the assertion

³ As a result of the uncontradicted record establishing that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, it is not necessary for us to address whether the pertinent statutory amendment to §42-7-310(d)(2) effective June 25, 2003 should be applied retroactively in this claim with an underlying date of accident/injury on December 17, 1999. Moreover, SCSIF has abandoned any position in that regard inasmuch as such was not included in its Form 30 exceptions. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 841 (1940) and Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993).

that SCPCIGA's reimbursement claim is barred due to its failure to "directly" pay assessments to SCSIF.

III. Prior Settlement Agreement

SCSIF asserts that the Settlement Agreement and Release entered between it and SCPCIGA dated June 17, 2013 bars SCPCIGA's claim for reimbursement or otherwise releases SCSIF from its liability for reimbursement on this claim (SCSIF's APA Submission No. 1 at pages 1 – 14). In this regard, SCSIF notes provisions in the Settlement Agreement and Release that the language therein should be construed as a whole and not strictly for or against any party and that the terms are to be given the broadest understanding. SCSIF also notes SCPCIGA's knowledge of the Lumbersmen's claims to specifically include this claim as of June 17, 2013 and the fact that SCPCIGA had set up reserves and paid benefits on this particular claim prior to execution and Commission approval of the June 17, 2013 Settlement Agreement and Release (SCPCIGA APA Submission No. 7 at pages 191 -- 194). SCSIF also argues that the amount of the monetary consideration paid by SCSIF to SCPCIGA for the Settlement Agreement and Release dated June 17, 2013 supports its contention in this regard.

The plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein; the settlement and release applied only to those claims on which SCSIF was paying SCPCIGA as of February 22, 2013. The uncontradicted evidentiary record reflects that Lumbersmen was not liquidated until May 8, 2013; that SCPCIGA was not paying this claim as of February 22, 2013 and that at no time has SCSIF reimbursed SCPCIGA in connection with this claim (Lombard deposition at pages 39 – 42 and Harrison deposition at page 47). Based on the plain, clear and unequivocal language in the Settlement Agreement and Release, and any reasonable construction thereof; we find and

conclude that it does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim. We further find and conclude that the amount of the monetary consideration is of no consequence.

IV. Conclusion

Based on the foregoing review and analysis, we make the following findings of fact and conclusions of law and issue the following Order:

FINDINGS OF FACT

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.

5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
 6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.
 7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.
 8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
 9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
 10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
-
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to

claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.

12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

CONCLUSIONS OF LAW

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.
3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of

Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320. Moreover, the South Carolina Supreme Court's decision in Brock v. South Carolina Property and Casualty Insurance Guaranty Association, 410 S.C. 361, 764 S.E.2d 920 (2014) (involving a policy of liability insurance rather than a policy of workers' compensation insurance under which SCPCIGA is fully responsible for covered claims) is not applicable to this matter.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.

6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter and the amount of the monetary consideration is of no consequence.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).
10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

11. Under §38-31-60(b), the rights of the liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains are not limited exclusively to matters pertaining to the defense by SCPCIGA of ongoing claims. Alternatively, SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of this fully covered workers' compensation claim and as such, is part and parcel of SCPCIGA's obligation for payment of this covered claim and its defense thereof.
12. Under §42-7-310 and §42-7-320 and in light of the foregoing Findings of Fact Nos. 7 – 10 and Conclusions of Law Nos. 5 – 8; any assertion that SCPCIGA's reimbursement claim is barred due to a failure to pay assessments, directly or otherwise, is without merit.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Decision and Order of the Hearing Commissioner dated October 2, 2017, along with the findings of fact and conclusions of law contained therein, are hereby affirmed in their entirety.

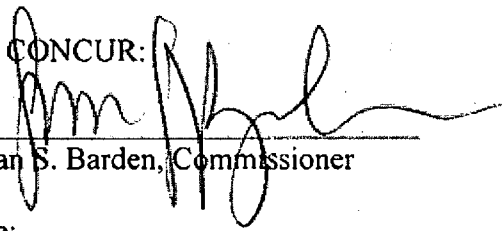
IT IS FURTHER ORDERED that the South Carolina Second Injury Fund shall make reimbursement to South Carolina Property and Casualty Insurance Guaranty Association for workers' compensation benefits paid by South Carolina Property and Casualty Insurance Guaranty Association in this matter in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Workers' Compensation Commission on November 21, 2003.

IT IS SO ORDERED.

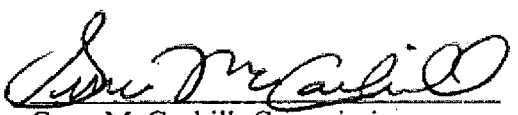

Aisha Taylor, Commissioner,
for the Appellate Panel

Date: _____

WE CONCUR:


Susan S. Barden, Commissioner

Date: _____


Gene McCaskill, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on March 29, 2018

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 9928766

South Carolina Property and Casualty Insurance Guaranty Association

v.

South Carolina Second Injury Fund

In Re:

Michael Quarles,
Employee/Claimant,

-vs-

Cryovac Sealed Air Corporation, Employer, and
Lumbermens Mutual Casualty Company in
liquidation/South Carolina Property and Casualty
Insurance Guaranty Association, Carrier,
Defendants.

HEARING:

Held on June 21, 2017 in Columbia, South
Carolina per notices timely and properly served
upon all parties of interest.

APPEARANCES:

J. Hubert Wood, III, Esquire, Charleston, South
Carolina appeared on behalf of South Carolina
Property and Casualty Insurance Guaranty
Association.

Robert M. Cook, II, Esquire, Batesburg-Leesville,
South Carolina appeared on behalf of South
Carolina Second Injury Fund.

PURPOSE OF HEARING:

To determine the issues as set forth on the Forms
54 and 55.

DECISION & ORDER:

By: T. Scott Beck, Commissioner

FILED:

October 2, 2017

ADMINISTRATIVE PROCEDURES ACT (APA)
SUBMISSIONS AND EXHIBITS

South Carolina Property and Casualty Insurance Guaranty Association's APA Submissions

1. Decisions/Orders Re: South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund, et al. in re: WCC No. 9916207 dated June 19, 2008 through June 29, 2012;*
2. Decisions/Orders Re: South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund, et al. in re: WCC No. 0000776 dated December 18, 2008 through July 2, 2013;*
3. Decisions/Orders Re: South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund, et al. in re: WCC No. 0013231 dated March 10, 2008 through August 20, 2012;*
4. KPMG/South Carolina Second Injury Fund Review of Unfunded Liabilities and Alternative Funding Methods dated June 30, 2013;*
5. KPMG/South Carolina Second Injury Fund Review of Unpaid Liabilities and Funding dated June 30, 2015;*
6. Order of Liquidation Re: Lumbermens Mutual Casualty Company dated May 8, 2013;
7. South Carolina Property and Casualty Insurance Guaranty Association Combined Claim/Unearned Premium Report with Reserves dated October 25, 2016;
8. South Carolina Workers' Compensation Commission Order dated January 6, 2005 Re: WCC No. 9928766;
9. South Carolina Second Injury Fund Reimbursement Claim Acceptance Letter dated October 14, 2003;
10. South Carolina Workers' Compensation Commission Appellate Panel Decision and Order RE: WCC File Nos. 9928766 and 0027997 dated April 24, 2002; and
11. South Carolina Second Injury Fund Claim File Records Re: WCC No. 9928766 dated November 21, 2003 through January 16, 2014.

*South Carolina Second Injury Fund objected to the foregoing APA Submissions Nos. 1 through 5. This objection was overruled by the undersigned Commissioner. The applicable weight and relevancy of each were considered by the undersigned Commissioner in my deliberations.

South Carolina Property and Casualty Insurance Guaranty Association's Exhibits

1. Deposition of David Stooksbury dated April 26, 2017 with Exhibits;
2. Deposition of Christopher Lombard dated March 8, 2017 with Exhibits.

South Carolina Second Injury Fund's APA Submissions

1. Settlement Agreement and Release of All Claims dated June 17, 2013.

South Carolina Second Injury Fund's Exhibits

1. Deposition of J. Smith Harrison, Jr. dated March 8, 2017.*

*South Carolina Property and Casualty Insurance Guaranty Association also listed the deposition of J. Smith Harrison, Jr. dated March 8, 2017 as a proposed exhibit; however, that deposition was noticed and taken by counsel for South Carolina Second Injury Fund who was in possession of the original transcript which was submitted and marked as South Carolina Second Injury Fund Exhibit No. 1.

STIPULATIONS

With the exception of South Carolina Second Injury Fund's objection to South Carolina Property and Casualty Insurance Guaranty Association's APA Submissions Nos. 1 through 5 which was overruled; the appearing parties stipulated to inclusion of the foregoing APA Submissions and Exhibits into the record. The appearing parties stipulated to jurisdiction of the South Carolina Worker's Compensation Commission with venue being appropriate at the Commission's offices in Columbia, South Carolina (Richland County). The appearing parties further stipulated to inclusion of the Workers' Compensation Commission's file becoming a part

of the record with the exception of self-serving declarations and unstipulated medical reports. The appearing parties further agreed that the matter would be presented via oral argument of counsel which the undersigned Commissioner would consider along with the documentary evidence submissions in reaching a decision.

STATEMENT OF CASE

The appearing parties, South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA) and South Carolina Second Injury Fund (SCSIF), agree that the sole issue for determination by the undersigned Commissioner is whether SCPCIGA is entitled to reimbursement from SCSIF for benefits paid by SCPCIGA on the underlying claim.¹ SCPCIGA seeks reimbursement from SCSIF in accordance with an Agreement to Reimburse Compensation entered between the liquidated carrier, Lumbermens Mutual Casualty Company (Lumbermens) and SCSIF dated October 14, 2003 and approved by the Workers' Compensation Commission (Commission) on November 21, 2003, pursuant to the terms and provisions of S.C. Code Ann. §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (1976, as amended) (SCPCIGA's Form 54 Hearing Request dated December 8, 2016). SCSIF disputes SCPCIGA's entitlement to reimbursement contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement; that SCPCIGA does not pay assessments to SCSIF; that the liquidated carrier pursuant to which SCPCIGA asserts its rights to reimbursement, Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to SCSIF thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320;

¹ The appearing parties were limited to SCPCIGA and SCSIF. Counsel for the Claimant, Kathryn Williams, Esquire, and the liquidated carrier, Jeff Jones, Esquire, were provided timely notice of the hearing; however, their presence was not required. Therefore, neither Ms. Williams or Mr. Jones appeared at the hearing.

and that SCPCIGA's reimbursement claim is barred by reason of a certain Settlement Agreement and Release entered between the appearing parties dated June 17, 2013 (SCSIF's Form 55 Answer dated January 5, 2017 and Form 58 Pre-Hearing Brief dated April 20, 2017).

BACKGROUND AND EVIDENCE SUMMARY

The Claimant sustained compensable injuries to his neck and back and a compensable psychological injury as a result of an accident arising out of and in the course of his employment on December 17, 1999 (SCPCIGA's APA Submission No. 10 at pages 200 - 205). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (SCPCIGA's APA Submission No. 8 at pages 195 - 198). The approved Agreement to Reimburse Compensation entered between Lumbermens and SCSIF provides that Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206) (emphasis added). There is no indication that the approved Agreement to Reimburse Compensation was appealed by any party. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (SCPCIGA's APA Submission No. 11 at pages 207 - 249; see also deposition testimony of David Stooksbury at page 58 and deposition testimony of Chris Lombard at pages 64 - 65).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (SCPCIGA's APA Submission No. 6 at pages 180 - 190). As a result, SCPCIGA became responsible for the claim pursuant to the

terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2017) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of SCPCIGA's Executive Director, J. Smith Harrison, Jr., this matter is a covered workers' compensation claim under the Guaranty Act for which SCPCIGA is fully responsible and paying (Harrison deposition at page 56).

SCPCIGA

SCPCIGA is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2017) (emphasis added). SCPCIGA consists of insurers defined as "member insurers" under S.C. Code Ann. §38-31-20(8) (2017) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in §42-7-310(d)(2) and §42-7-320(B)(3), SCPCIGA is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2017).²

Pursuant to §38-31-40, SCPCIGA is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the "workers' compensation insurance account." Pursuant to §38-31-60(c), SCPCIGA shall allocate claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). Accordingly, SCPCIGA's workers' compensation member insurers responsible for

² SCPCIGA acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to SCSIF by self-insurers and the State Accident Fund.

assessments necessary to fund its workers' compensation liabilities are also responsible for payment of assessments necessary to fund SCSIF on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). In addition, SCPCIGA is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2017). Therefore, SCPCIGA asserts that it has a fiduciary responsibility to its member insurers, the receiver/liquidator of the assets of an insolvent insurer and certain insureds and affiliates of an insolvent insurer (Harrison deposition at pages 38 - 39, 49 - 50 and 52 - 53).

Pursuant to §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent (emphasis added). "Covered claim" is defined under S.C. Code Ann. §38-31-20(8) (2017) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA's liability in certain situations. However, §38-31-60(iv) expressly provides that SCPCIGA "...shall pay the full amount of any covered workers' compensation claim." (emphasis added) (Harrison deposition at pages 50 - 51).

SCSIF

§42-7-310 provided for the establishment, purpose, administration, funding and staff of SCSIF. A careful reading of §42-7-310(d)(2) reveals that it does not define the term "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). Reimbursements to an "employer" or "insurance carrier" are governed by, and made pursuant to, §42-9-400 and S.C. Code Ann. §42-9-410 (1976, as

amended). In this particular case, the approved Agreement to Reimburse Compensation specifically provides that Lumbermens shall receive reimbursement in accordance with the provisions of §42-9-400 for the cervical spine only (emphasis added) (SCPCIGA's APA Submission No. 11 at page 206).

The July 1, 2007 amendments to the South Carolina Workers' Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers' Compensation Act) included the enactment of §42-7-320 providing for the termination of SCSIF and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability Authority (hereinafter referred to collectively as "SFAA") was required to provide for the efficient and expeditious closure of SCSIF with the orderly winding down of the affairs of SCSIF so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund (emphasis added). §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident Fund remain liable for SCSIF's assessments, as determined by SFAA, in order to pay accepted claims and SCSIF shall continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011 (emphasis added). §42-7-320 does not define the terms "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of SCSIF's remaining liabilities and options for funding SCSIF's remaining liabilities. In that regard, KPMG produced its initial actuarial report in March 2013 (SCPCIGA's APA Submission No. 4 at pages 114 - 148). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA

adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (Exhibit No. 1 to Lombard deposition, Lombard deposition at pages 24 - 45 and Stooksbury deposition at pages 10 - 11 and 21). Concerning the administration of SCSIF's continuing operations, SFAA assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF) which is part of SFAA. SCIRF's administrative responsibilities commenced in May 2013 shortly before termination of the SCSIF's programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (Lombard deposition at pages 8 - 16). Chris Lombard is the Assistant Director of Claims for SCIRF and in connection therewith, is responsible for the management of SCSIF's operations (Lombard deposition at pages 6 - 8). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of SCSIF's ongoing assessments under §42-7-320 (Lombard deposition at page 16 and Stooksbury deposition at pages 7 - 8).

Prior Litigation

Disputes involving SCPCIGA's entitlement to reimbursement from SCSIF are not new to the appearing parties. SCPCIGA and SCSIF extensively litigated many of the same issues in connection with various reimbursement claims made by SCPCIGA for workers' compensation benefits it paid to injured employees as a result of the insolvency of Legion Insurance Company. That litigation resulted in various decisions and orders issued by the Commission and the Circuit Court. ~~Those decisions and orders determined SCPCIGA to be eligible for, and entitled to,~~ reimbursement. In so doing, the Commission and Circuit Court rejected the arguments that SCPCIGA is not an entity statutorily authorized to receive reimbursement and that SCPCIGA cannot be eligible for reimbursement because it does not pay assessments and/or as a result of the

underlying insolvent carrier's default status with respect to payment of SCSIF assessments pursuant to the statutory amendment to §42-7-310(d)(2) effective June 25, 2003 (SCPCIGA's APA Submission Nos. 1, 2 and 3 at pages 1 - 113).

In particular, litigation of the reimbursement claim associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, resulted in these issues being presented to the South Carolina Court of Appeals on appeal by SCSIF. Prior to a ruling by the Court of Appeals, SCPCIGA and SCSIF entered into the June 17, 2003 Settlement Agreement and Release which resulted in dismissal of SCSIF's appeal (SCPCIGA's APA Submission No. 2 at pages 70 - 71). The settlement agreement, which was approved by a majority of the Commission, defined the terms "Legion" and "Reliance" and effectuated SCPCIGA's release of SCSIF on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any and all claims, on which SCSIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement approved by the Commission further states: "The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is

currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any "large deductible" policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers" (emphasis added) (Exhibit No. 3 to Lombard deposition).

ANALYSIS

§42-7-310(b) provides in pertinent part that "...[a]greements to reimburse an employer or his carrier for compensation or medical benefits as provided in Section 42-9-400 or 42-9-410 shall be forwarded to the commission for approval. If approved and unappealed, such agreement shall be binding in the same manner as other orders, decisions or awards of the Commission." §42-7-320(B)(3) provides in pertinent part that SCSIF "... shall continue reimbursing employers and insurance carriers for claims accepted by the fund on or before December 31, 2011" (emphasis added). Therefore, SCPCIGA, having all rights of Lumbermens on this covered workers' compensation claim pursuant to §38-31-60(b); has, in my judgment, established as a matter of law, a prima facie claim for reimbursement from SCSIF in accordance with the approved and unappealed Agreement to Reimburse Compensation pending analysis of SCSIF's defenses and a determination concerning applicability of the same by the undersigned Commissioner.

I. Statutory Authorization

In contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement, SCSIF asserts there is no statutory provision that expressly authorizes SCPCIGA to receive reimbursement from SCSIF and without such, SCPCIGA, as an entity created by statute, is precluded from doing so. In furtherance of this argument, SCSIF asserts that SCPCIGA's rights of recoupment and setoff are limited to those expressly provided for in §38-31-90 and S.C. Code Ann. §38-31-100 (2017). SCSIF also asserts that SCPCIGA is not an insurance company or carrier inasmuch as it does not issue policies of insurance or collect premiums. Relying on the provisions of §42-7-310(d)(2) which provide that the State Accident Fund and self-insured employers/funds are also responsible for payment of assessments to SCSIF; SCSIF further asserts that in the event reimbursement is awarded to SCPCIGA, the State Accident Fund and authorized self-insured employers/funds will, in effect, be paying for this particular claim despite never having any dealings on behalf of the liquidated carrier.

SCSIF's arguments in this regard ignore the terms and provisions of §38-31-60(b) along with relevant and applicable statutory provisions of the Workers' Compensation Act. As indicated above, §42-7-310 provided for the establishment, purpose, administration, funding and staff of the SCSIF. It does not define the term "carrier" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it merely provides that the term as used in §42-7-310(d)(2) includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). In this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of §42-9-400 (emphasis added). §42-9-400(a) states in pertinent part that "...such employer or insurance

carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310..." (emphasis added).

S.C. Code Ann. §42-1-60 (1976, as amended) defines the term "carrier" or "insurer" as "any person or fund authorized under §42-5-20 to insure under this title (Title 42) and includes self-insurers." S.C. Code Ann. §42-5-20 (1976, as amended) states in pertinent part that "[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized..." The term "insure" is defined in Black's Law Dictionary, Abridged Fifth Edition, as "[t]o make sure or secure, to guarantee, as to insure safety to anyone. To engage to indemnify a person against pecuniary loss from specified perils or possible liability." Under §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and as set forth above, the uncontradicted record establishes that this matter involves a covered workers' compensation claim for which SCPCIGA is responsible for paying the full amount under §38-31-60(iv).

As a threshold matter, I am not persuaded by SCSIF's argument that the State Accident Fund and self-insured employers/funds should not, through their assessments paid to SCSIF, be responsible for paying any portion of this claim. In that regard, there is no indication that the State Accident Fund or any self-insured employers/funds are not being reimbursed by SCSIF on their accepted reimbursement claims. Furthermore, there is no indication in the record that an award of reimbursement to SCPCIGA in this matter would affect reimbursements to the State Accident Fund or any authorized self-insured employers/funds on their accepted reimbursement claims. It should also be noted that SCPCIGA's workers' compensation member insurers are

effectively paying, via their assessments to SCSIF, a portion of the accepted reimbursement claims of the State Accident Fund and authorized self-insured employers/funds.

Concerning whether SCPCIGA is authorized under §42-5-20 to insure liabilities under the Workers' Compensation Act thereby meeting the statutory definition of the term "carrier" or "insurer" under §42-1-60 and as used in §42-9-400; I find it self-evident that SCPCIGA would not be responsible for paying this claim and would have no reason to be seeking reimbursement from SCSIF if it was not so authorized. The evidentiary record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers' Compensation Act and there is no evidence in the record to the contrary (see Harrison deposition at pages 54 - 56). In this regard, judicial notice is also taken of routine decisions and actions by the Commission with respect to SCPCIGA's data reporting obligations and benefit liabilities on covered workers' compensation claims in carrying out the Commission's administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers' Compensation Act.³

Concerning SCSIF's assertions that SCPCIGA's rights of recoupment and offset are limited to those provided in §38-31-90, I find that such is not dispositive in determining whether

³ Although not specifically addressed by its counsel in oral argument, SCSIF cited the South Carolina Supreme Court's decision in South Carolina Property and Casualty Insurance Guaranty Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) in its pre-hearing brief filing. To the extent that SCSIF relies on Brock for the proposition that SCPCIGA is not an "insurer" entitled to reimbursement from SCSIF; I conclude that such reliance is misplaced. The Court's statement in Brock that SCPCIGA is "...neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies" was made in the context of its analysis of SCPCIGA's right to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. Brock did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which SCPCIGA would be responsible for paying the full amount and, therefore, is clearly distinguished from the current matter. Similarly, the case of South Carolina Property and Casualty Insurance Guaranty Association v. Carolinas Roofing and Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991) cited in Brock involved SCPCIGA's liability to the Self-Insurers Fund under a policy of reinsurance maintained by the Self-Insurers Fund with a reinsurance carrier that became insolvent and whether jurisdiction to determine a declaratory judgment action filed in connection therewith by SCPCIGA in the Court of Common Pleas was within the jurisdiction of the Workers' Compensation Commission to determine and, in my view, has no relevance to a covered workers' compensation claim involving an insolvent workers' compensation insurer for which SCPCIGA is directly liable to an injured employee for the entirety of the claim.

SCPCIGA is statutorily authorized to receive reimbursement. As a threshold matter, this argument ignores the clear, unequivocal and broad language in §38-31-60(b) conferring upon SCPCIGA all rights of Lumbermens to the extent of its obligation on this covered workers' compensation claim. In this instance, I find that one of Lumbermens' rights assumed by SCPCIGA is the right to reimbursement from SCSIF pursuant to, and in accordance with, the approved Agreement to Reimburse Compensation. Moreover, the right to reimbursement from SCSIF pursuant to an approved agreement to reimburse compensation would be one of several recoupment/offset rights of an insolvent insurer that SCPCIGA would maintain under the Workers' Compensation Act including subrogation rights under S.C. Code Ann. §42-1-560 (1976, as amended) and the right to assert credit for payments made when not due and payable pursuant to S.C. Code Ann. §42-9-210 (1976, as amended). Based on the foregoing analysis, I find and conclude that the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate the rights of an insolvent insurer under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).

II. Assessments

The uncontradicted evidentiary record reflects that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68). Pursuant to §38-31-40, SCPCIGA is an unincorporated entity and its workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51). In connection therewith, it should also be noted that any theoretical assessment on SCPCIGA would not alter or affect the total sum of assessments raised on an annual basis by SCSIF under the pre-July 1, 2013 funding mechanism set forth in

§42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by SFAA pursuant to §42-7-320. Rather, the only variable would be what entities were paying and in what amounts (Lombard deposition at pages 80 - 84 and Stooksbury deposition at pages 75 - 76).

The record further reflects that SCPCIGA's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included (SCPCIGA's APA Submission No. 4 at page 116 and Stooksbury deposition at pages 58 - 61, 64 and 66). There is no indication that any of SCPCIGA's workers' compensation member insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51). SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim. In view of the foregoing, I find SCSIF's assertion that SCPCIGA's reimbursement claim is barred for failure to pay assessments to be without merit and further find that SCPCIGA as an unincorporated entity, effectively pays assessments to SCSIF via the assessments paid by its member workers' compensation insurers. I further find that there is no delinquency in payment of those assessments including payment of the assessments associated with the five year \$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.

I find SCSIF's contentions that SCPCIGA's reimbursement claim is barred by §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of its statutory assessments and/or as a result Lumbermens non-participation in the assessment process subsequent to its liquidation under §42-7-310 and/or §42-7-320 to be without merit. David Stooksbury, SCSIF's business manager in charge of SCSIF's operations as it relates to assessments, testified clearly

and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and has paid all amounts assessed (Stooksbury deposition at page 47). He testified further that if a carrier goes under and stops paying assessments, the assessment goes to zero (Stooksbury deposition at page 47). Accordingly, I further find, based on Mr. Stooksbury's deposition testimony, that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed by SCSIF.⁴ I also conclude that Lumbermens' non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.

III. Prior Settlement Agreement

SCSIF asserts that the Settlement Agreement and Release entered between it and SCPCIGA dated June 17, 2013 bars SCPCIGA's claim for reimbursement or otherwise releases SCSIF from its liability for reimbursement on this claim (SCSIF APA Submission No. 1 at pages 1 – 14). In this regard, SCSIF notes various ambiguities and the confusing and broad language contained in the agreement along with SCPCIGA's knowledge of the Lumbermens' claims to specifically this claim as of June 17, 2013. SCSIF argues that SCPCIGA had set up reserves and paid benefits on this particular claim prior to execution and Commission approval of the June 17,

⁴ In light of these findings, it is unnecessary to determine whether the statutory amendment to §42-7-310(d)(2) which became effective June 25, 2003 applies retroactively to this claim with an underlying date of injury/accident on December 17, 1999.

2013 Settlement Agreement and Release (SCPCIGA APA Submission No. 7 at pages 191 – 194). SCSIF also argues that the extent of the monetary consideration paid by SCSIF to SCPCIGA for the Settlement Agreement and Release dated June 17, 2013 supports its contention in this regard and that the intentions of the parties as to the scope of the settlement should be ascertained in making a ruling on this issue.

The plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein; the settlement and release applied only to those claims on which SCSIF was paying SCPCIGA as of February 22, 2013. The uncontradicted evidentiary record reflects that Lumbermens was not liquidated until May 8, 2013; that SCPCIGA was not paying this claim as of February 22, 2013 and that at no time has SCSIF reimbursed SCPCIGA in connection with this claim (Lombard deposition at pages 39 – 42 and Harrison deposition at page 47). Based on the plain, clear and unequivocal language in the Settlement Agreement and Release, and any reasonable construction thereof, I hold that it does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim.

IV. Conclusion

Based on the foregoing analysis, the undersigned Commissioner makes the following findings of fact and conclusions of law and issues the following order:

FINDINGS OF FACT

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.

2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.
- ~~7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.~~

8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.
12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

CONCLUSIONS OF LAW

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.
3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any

assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.

6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate

or limit the rights of Lumbersmens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).

10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the South Carolina Second Injury Fund shall make reimbursement to South Carolina Property and Casualty Insurance Guaranty Association for workers' compensation benefits paid by South Carolina Property and Casualty Insurance Guaranty Association in this matter in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Workers' Compensation Commission on November 21, 2003.

IT IS SO ORDERED.



T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
October 2, 2017

By: Shawnee DeBruhl, Administrative Assistant to Commissioner Beck

(23)



WCC File #: 9928766

Carrier File #: 224CU199962

Carrier Code #: _____

Employer FEIN #: _____

Claimant's Name: Michael T. Quarles SSN: [REDACTED] Employer's Name: Cryovac Sealed Air Corporation
Address: #4 Hatteras Lane Address: 803 W. Maple Street
City: Simpsonville State: SC Zip: 29680 City: Simpsonville State: SC Zip: 29681
Home Phone: () - Work Phone: () - Carrier: Lumbermens Mutual Casualty Company In liquidation/SCPCIGA
Preparer's Name: J. Hubert Wood, III Preparer's Phone #: (843) 577-5732

Check applicable claims and complete all blanks.

1. The employee sustained a compensable accidental injury to the Neck, back and psychological (part of the body) on 12/17/1999 (date) in Greenville (county), State of South Carolina (state).
2. That the Second Injury Fund was put on notice of the claim on 12/21/2000 (date).
3. That the carrier concluded the disability claim by ☐ Award ☒ Agreement on 1/06/05 (date).
4. That the subsequent injury combined with or was aggravated by the below-named permanent impairment under S.C. Code Section 42-9-400(d):
 - a. Listed Impairment - (1) - (33) _____
 - b. (34) (a) Degenerative changes
 - c. (34) (b) Degenerative changes
5. ☒ a. That the impairment preexisted;
☒ b. That the impairment was permanent; and
☒ c. That the impairment is a physical condition.
6. ☒ That the prior impairment combined with or was aggravated by the subsequent injury.
7. ☒ That the combination/aggravation substantially increased the liability of the carrier for: ☐ disability ☐ medical or ☐ both.
8. ☒ That the impairment was a hindrance or obstacle to employment or re-employment.
9. ☐ a. That the employer has knowledge of the prior impairment;
☒ b. That the impairment was unknown to the employee and the employer; or
☐ c. That the employee concealed the prior impairment from the employer.
10. ☐ That the subsequent injury would not have occurred "but for" the prior impairment.
11. That the above claim qualifies for reimbursement under S.C. Code Section 42-9-410 because:
12. Other grounds for claim: SCPCIGA asserts all rights of the liquidated carrier pursuant to §38-31-60 of the S.C. Code (1976, as amended) and demands continuing reimbursement for benefits paid for the cervical spine in accordance with approved/signed Agreement to Reimburse Compensation per §42-7-310.

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to see attached certificate of service

Address see attached certificate of service on the 8th day of December 2016, by ☒ first class postage ☒ certified mail ☐ personal service.

A \$25.00 filing fee is required.

Preparer's Signature: [Signature] Attorney for SCPCIGA: huble@woodgroupinc.com Date: 12/08/16
Title: _____ Email: _____

Questions regarding this form should be directed to the Judicial Department at 803.737.5675, or judicial@wcc.sc.gov or mediation@wcc.sc.gov. Refer to Regulations 67-204 through 67-211 and Regulations 601 through 67-615 as well as Reg. 67-1801.



71870 WCC File #: 9928766

Carrier File #: 224CU199962

Carrier Code #:

Employer FEIN #:

Claimant's Name: Michael T. Quarles

SSN: [REDACTED]

Employer's Name: Cryovac Sealed Air Corporation

Address: #4 Hatteras Lane

Address: 803 W. Maple Street

City: Simpsonville State: SC Zip: 29680

City: Simpsonville State: SC Zip: 29681

Home Phone: () - Work Phone: () -

Carrier: Lumbermans Mutual Casualty Company in liquidation/SCPCIGA

Preparer's Name: Robert M. Cook II

Law Firm: The Robert Cook Law Firm, LLC

Preparer's Phone #: (803) 317-2171

The South Carolina Second Injury, in answer to the claim, respectfully shows:

1. It is ☒ acknowledged ☐ denied the employee sustained a compensable accident; Admitted per prior order(s) in underlying merits claim.
2. It is ☒ acknowledged ☐ denied the notice was given to the Second Injury Fund; Admitted only as to original presentation of claim by Lumbermans.
3. It is ☐ acknowledged ☒ denied the disability claim has been concluded. (SCSIF understands medicals, at least, to remain open).
4. It is ☒ acknowledged ☐ denied the impairment is: Per prior order(s) in underlying merits claim.
5. a. It is ☒ admitted ☐ denied the impairment pre-existed.
b. It is ☒ admitted ☐ denied the impairment was permanent.
c. It is ☒ admitted ☐ denied the impairment is physical.
6. It is ☒ admitted ☐ denied the impairment combined with or was aggravated by the subsequent injury.
7. It is ☒ admitted ☐ denied the combination/aggravation substantially increased the carrier's liability for
☐ disability ☐ medical or ☐ both: Per Fund's prior agreement with Lumbermans regarding reimbursement on this claim.
8. It is ☒ admitted ☐ denied the impairment was a hindrance or obstacle to employment or re-employment.
9. a. It is ☒ admitted ☐ denied the employer had knowledge of the impairment.
b. It is ☒ admitted ☐ denied the impairment was unknown to the employee and employer.
c. It is ☒ admitted ☐ denied the employee concealed the impairment.
10. It is ☐ admitted ☒ denied the subsequent injury would not have occurred "but for" the prior impairment.
11. It is ☐ admitted ☒ denied the claim qualifies for reimbursement under S.C. Code Section 42-9-410;
See special defenses raised in attachment to this F55. Basically, the SCPCIGA simply not entitled to reimbursement. Generally speaking, the Fund does not deny that the claim would otherwise be reimbursable.
12. The Carrier's claim is barred by the Statute of Limitations pursuant to S.C. Code Section 42-15-40;
Fund reserves right to raise this defense after full investigation by current legal counsel.
13. Other grounds for denial: See attachment.

SCWCC
JAN 10 2017
JUDICIAL

☐ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B. (**Legal issues only. Mediation not likely to be helpful.**)
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

Attorney for SCSIF

robcook1965@yahoo.com

1/5/2017

Preparer's Signature

Title

Email

Date

Signature on behalf of the Second Injury Fund

1/5/2017
Date (m/d/yyyy)

Questions about the use of this form should be directed to the Judicial Department at 803.737.5739 or judicial.wcc.sc.gov or mediation@wcc.sc.gov. Refer to Regulation 67-205 through 67-211 and Regulations 67-601 through 67-615; as well as Reg. 67-1801.

ATTACHMENT TO FORM 55 OF THE SC SECOND INJURY FUND
(OPERATIONS)

Michael Quarles v. Cryovac Sealed Air Corp.

(SCWCC No. 9928766)

(SIF No. 76870)

Additional and specific defenses asserted by the SC Second Injury Fund (Operations):

1. The South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA) is not an entity that is statutorily authorized to receive reimbursement from the Fund. This claim is barred as a result.
2. The SCPCIGA does not pay assessments to the Fund and therefore is barred from receiving reimbursement from the Fund. This claim is barred as a result.
3. The carrier from which the SCPCIGA purportedly asserts its rights, Lumbermens Mutual Ins. Co., is in liquidation and is (and has been) in default in payment of its statutory assessments to the Fund. Accordingly, there is no right to reimbursement so long as this default in payment of assessments remains uncured per the provisions of S.C. Code Section 42-7-310(d)(2). This claim is barred as a result.
4. The reimbursement claim of the SCPCIGA is barred by reason of a certain 2013 agreement and release between these parties. This is barred as a result. } 
5. Public policy precludes the reimbursement of these claims.
6. This claim for reimbursement is barred for failure to meet the notice/documentation provisions and deadlines found in S.C. Code Section 42-7-320. This claim is barred as a result.
7. The Fund's obligations, in the event reimbursement is not otherwise barred, are limited to reimbursement for items properly encompassed by the prior orders of the Circuit Court and Commission in the underlying workers' compensation claim. This claim (or portions thereof) may be barred as a result.
8. The Fund reserves the right to assert all second injury qualification related defenses that may become apparent or later arises with regard to the specific reimbursement items sought by the SCPCIGA. Counsel for the Fund received limited portions of this file on January 4th and investigation is ongoing.

PMB
1/5/2017

X Injury ☐ Illness ☐ Repetitive Trauma

1.	Compensation Rate:	<u>432.25</u>	2.	AWW:	<u>\$</u>	Date of Injury:	<u>12/17/1999</u>
3.	Type of injury and body part(s):	<u>Per Forms 54 and 55.</u>					
4.	Facts in controversy:	<u>Entitlement of the Guaranty Association to reimbursement from the Second Injury Fund, which Fund denies, and also the effect of a June 2013 release between these parties upon this claim.</u>					
5.	Legal issues involved:	<u>Is the Guaranty Association statutorily entitled to reimbursement from the Second Injury Fund at all? Is the Guaranty Association barred from reimbursement per the 2003 amendment for failure to pay statutory assessments to the Fund? Does the 2013 release between these parties bar these claims? These are the primary defenses raised by the Second Injury Fund, but the Fund continues to rely upon all defenses raised/asserted in its Form 55 filed 1/10/17.</u>					
6.	Unusual aspects:						
7.	Witnesses (designate if expert):*	<u>See Notice of Witnesses.</u>					
8.	Exhibits:	<u>See Notice of Exhibits.</u>					
9.	Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):	<u>See Notice of APA Submissions.</u>					
10.	Name, address, and specialty, if any, of the treating physician:	<u>N/a.</u>					
11.	Impairment rating(s); body part(s); physician and date of opinion:	<u>N/A.</u>					
12.	I am amending my Form 50/51 in the following manner:						

☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.

Address _____ on the _____ day of _____ 20____ by:

☐ first class postage ☐ certified mail ☐ personal service ☐ electronic service

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature:

Date of hearing: June 21, 2017

Email: robcook1965@yahoo.com

Time needed for hearing: 1.5 hours

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67- 1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Revised 7/15

58

PRE-HEARING BRIEF

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 9928766
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

78760
76870

Claimant's Name: Michael T. Quarles SSN: [REDACTED] Employer's Name: Cyrovac Sealed Air Corporation
Address: #4 Hatteras Lane Address: 803 W. Maple Street
City: Simpsonville State: SC Zip: 29680 City: Simpsonville State: SC Zip: 29681
Home Phone: () - Work Phone: () - Insurance Carrier: _____
Preparer's Name: Robert M. Cook II Law Firm: The Robert Cook Law Firm, LLC Preparer's Phone #: (803) 317-2171

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☐ Employer (check one) Date of Injury or Illness: 12/17/1999
☒ SCSIF

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to _____
address _____ on the _____ day of _____ 20____, by _____ first class postage _____ certified mail _____ personal service.

Robert M. Cook II
Preparer's Signature

Attorney for S.C. Second Injury
Title

robcook1965@yahoo.com
Email

October 16, 2017
Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

ATTACHMENT TO DEFENDANT'S FORM 30

South Carolina Property and Casualty Ins. Guaranty Fund v. Second Injury Fund Operations
(WCC No. 9928766)

The Second Injury Fund Operations (Fund) seeks Full Commission review of the order of the Single Commissioner dated October 2, 2017, for the reasons stated directly below:

1. Did the Single Commissioner err in ordering the Fund to provide reimbursement to the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty Association)?
2. Did the Single Commissioner err in ruling that the Guaranty Association was statutorily authorized to request/receive reimbursement from the Fund? (Conclusion of Law No. 3 and No. 10).
3. Did the Single Commissioner err in ruling that the Guaranty Association had a right to reimbursement from the Fund per the 11/23/2003 agreement the Fund had with Lumbermens, a now-liquidated insurance carrier? (Conclusion of Law No. 3).
4. Did the Single Commissioner err in ruling that the Guaranty Association was an insurance carrier for purposes of requesting/receiving reimbursement from the Fund? (Conclusion of Law No. 4).
5. Did the Single Commissioner err in ruling that the Guaranty Association was entitled to request/receive reimbursement from the Fund without having directly participated in the statutory assessment process? (Conclusion of Law No. 5 and No. 6).
6. Did the Single Commissioner err in ruling that the settlement agreement of 6/17/2103 did not bar this claim for reimbursement? (Conclusion of Law No. 8).
7. Did the Single Commissioner err in ruling that the Guaranty Association was not limited/barred by the language of South Carolina Code Sections 38-31-60, 38-31-90 and 38-31-100 from seeking/receiving reimbursement from the Fund? (Conclusion of Law No. 9).

Robert M. Coe
10-13-2017

SEWEE

OCT 18 2017

JUDICIAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

C.A. NO.:

SOUTH CAROLINA PROPERTY)
AND CASUALTY INSURANCE)
GUARANTY FUND,)

Respondent,

vs.

SECOND INJURY FUND)
OPERATIONS OF THE SOUTH)
CAROLINA INSURANCE)
RESERVE FUND f/k/a SOUTH)
CAROLINA SECOND INJURY)
FUND,)

Petitioner.

PETITION/NOTICE OF APPEAL OF THE SC SECOND INJURY FUND (Workers' Compensation Appeal)

The petitioner, the Second Injury Fund Operations of the South Carolina Insurance Reserve Fund (previously known as the Second Injury Fund), petitions the Circuit Court to reverse the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission filed March 29, 2018 and served electronically that same date, as follows:

1. This appeal involves a claim for statutory Second Injury Fund reimbursement by the Respondent, the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty Association) resulting from an underlying workers' compensation injury with a date of injury on March 7, 2000, while the employee (Michael T. Quarles) was working in Greenville County for Cryovac/Sealed Air Corp., which was insured at that time by Lumbermens Mutual Insurance Company.

2. This appeal to the Circuit Court is brought pursuant to the provisions of Section 1-23-80 and Section 42-17-60 as applicable to dates of injury prior to July 1, 2007, as held in Pee Dee Regional Transportation v. SC Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007).
3. That venue for the appeal is proper in Greenville County as the location where the underlying injury occurred per the allegations of the Form 50.
4. That on March 29, 2018, the Appellate Panel of the Full Commission issued its order denying the relief sought by the petitioner, which was that the Guaranty Association's request for reimbursement from the Second Injury Fund be denied. A copy of that March 29, 2018, order is attached to this Petition as Exhibit A and incorporated by reference herein.
5. That the petitioner states the following as it's grounds of appeal of that March 29, 2018, order of the Appellate Panel:
 - a. The Appellate Panel erred in ordering the Second Injury Fund to provide reimbursement to the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty Association) (Order; page 27).
 - b. The Appellate Panel erred in ruling that the Guaranty Association was statutorily authorized to request/receive reimbursement from the Fund. (Finding of Fact No. 14; page 24) and (Conclusions of Law No. 3 and 10; pages 24-26).
 - c. The Appellate Panel erred in ruling that the Guaranty Association had a right to reimbursement from the Fund per the 11/23/2003 agreement the Fund had with Lumbermens, a now-liquidated insurance carrier. (Conclusion of Law No. 3; pages 24-25).
 - d. The Appellate Panel erred in ruling that the Guaranty Association was an insurance carrier for purposes of requesting/receiving reimbursement from the Fund and in

rejecting the reasoning of the Brock decision. (Finding of Fact No. 6; page 23) and (Conclusion of Law No. 4; page 25).

- e. The Appellate Panel erred in ruling that the Guaranty Association was entitled to request/receive reimbursement from the Fund without having directly participated in the statutory assessment process. (Finding of Fact No. 8; page 23) and (Conclusions of Law No. 5, No. 6 and No. 12; page 25-27).
 - f. The Appellate Panel erred in ruling that the settlement agreement of 6/17/2013 did not bar this claim for reimbursement. (Finding of Fact No. 11; pages 23-24) and (Conclusion of Law No. 8; page 26).
 - g. The Appellate Panel erred in ruling that the Guaranty Association was not limited/barred by the language of South Carolina Code Sections 38-31-60, 38-31-90 and 38-31-100 from seeking/receiving reimbursement from the Fund. (Conclusions of Law No. 9 and No. 10; page 26).
6. Separately, the Second Injury Fund requests that any interim duty it may have to reimbursement of the Guaranty Association resulting from the Appellate Panel order dated March 29, 2018 be stayed in its entirety during the pendency of the this appeal, or in the alternative, that any amount paid to the Guaranty Association be ordered immediately repaid to the Second Injury Fund upon reversal or vacation of the March 29, 2018, Appellate Panel order appealed herein.

WHEREFORE, having fully petitioned the Court, the Petitioner/Second Injury Fund requests that the Court schedule a hearing in this matter, reverse the order dated March 29, 2018, of the Appellate Panel of the Full Commission, find that that the Second Injury Fund has no duty to reimburse the Guaranty Fund, and direct repayment to the Fund of any amount paid to the Guaranty Association arising from that order of the Appellate Panel.

The Robert Cook Law Firm, LLC

By: s: Robert M. Cook II _____
ROBERT M. COOK II
P.O. Box 3575
Batesburg-Leesville, SC 29070
803-317-2171 (phone)
803-317-2175 (fax)
robcook1965@yahoo.com

ATTORNEY FOR THE SECOND INJURY
FUND

April 26, 2018

**BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION**

(SCWCC NO. 9928766)
(SIF NO. 76870)

SEALED AIR CORP./CRYOVAC)
& LUMBERMENS MUTUAL)
CASUALTY CO.,)

Employer/Carrier,)

vs.)

SECOND INJURY FUND)
OPERATIONS OF THE SOUTH)
CAROLINA INSURANCE)
RESERVE FUND f/k/a SOUTH)
CAROLINA SECOND INJURY)
FUND,)

Defendant.)

**APPELLANT'S BRIEF OF THE
SC SECOND INJURY FUND**

(Oral argument set for 1/22/18 @ 2:30 pm)

STATEMENT OF THE CASE

This appeal arises from a reimbursement dispute between what used to be known as the South Carolina Second Injury Fund, which operations have been shifted to the South Carolina Insurance Reserve Fund per statute (hereinafter just "Fund") and the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty Association), as the limited statutory successor as to the covered claims of Lumbermens Mutual Casualty Co. (Lumbermens), a liquidated out of state carrier. The Fund asserts that the Guaranty Association is not statutorily entitled to reimbursement, as well as being barred from reimbursement as a result of a certain 2013 settlement and release agreement between these parties. The Guaranty Association takes the position that it is



entitled to reimbursement to same extent as Lumbermens would have been entitled had it not been liquidated. Commissioner Beck heard this matter on June 21, 2017 and issued his decision and order dated October 2, 2017, directing the Fund to make reimbursement to the Guaranty Association. The Fund requested full commission review of that ruling by way of its Form 30 dated October 16, 2017. Over the years the commission has heard a number of disputes arising from more or less similar situations between the Fund, the Guaranty Association and/or various carriers in liquidation asserting certain pre- and/or post-liquidation rights to reimbursement. Candor and respect for this tribunal compels counsel for the Fund to concede that he has been singularly, manifestly, and (with one exception) uniformly unsuccessful in defense of the Fund on this general issue. As it is often the case, however, hope springs ever eternal and, importantly, there has never been any reported decision on this legal issue from either the SC Court of Appeals or SC Supreme Court. Thus, the question is put before this particular appellate panel to address the purely legal issue of whether or not the Guaranty Association is statutorily authorized to recover reimbursement from the Fund (plus the release issue, which is original in context).

QUESTIONS PRESENTED

- I. DID COMMISSIONER BECK ERR IN RULING THAT THE GUARANTY ASSOCIATION WAS STATUTORILY AUTHORIZED TO SEEK REIMBURSEMENT?
- II. DID COMMISSIONER BECK ERR IN RULING THAT THE GUARANTY ASSOCIATION WAS ENTITLED TO REIMBURSEMENT EVENTHOUGH IT DOES NOT PARTICIPATE IN THE FUND'S ASSESSMENT PROCESS?

III. DID COMMISSIONER BECK ERR IN FAILING TO RULE THAT
THE 6/17/13 RELEASE BETWEEN THESE PARTIES BARRED
THE GUARANTY ASSOCIATION FROM REIMBURSEMENT?

ARGUMENT

1. The Guaranty Association is simply not statutorily authorized to seek/receive reimbursement from the Fund.

This argument pertains to specified appeal grounds 1, 2, 3, 4 and 7 contained within the Fund's Form 30 dated 10/16/17. There is no express language within the statutes setting up the Guaranty Association authorizing it to seek reimbursement from the Fund under any circumstances. In fact, the neither term "Second Injury Fund," nor its equivalent can be found anywhere within South Carolina Code Section 38-31-10 et. seq. Nor is there any reported appellate decision from the Court of Appeals or Supreme Court that authorizes such action or interprets Section 38-31-10 et. seq. as allowing for the same.

Essentially, the Guaranty Association argues that if the carrier was entitled to reimbursement, then it is also entitled to reimbursement under Section 38-31-60(b). That statutory subsection, it contends, means that the Guaranty Association steps completely into the shoes of the liquidated carrier in all respects, including entitlement to Second Injury Fund reimbursement. That argument fails for two reasons. First, Section 38-31-60(b) is limited to matters pertaining to the defense by the Guaranty Association of ongoing claims of the liquidated carrier. (emphasis added). In other words, it has no relevance or application to reimbursement claims against the Second Injury Fund. That particular subsection (b) of Section 38-31-60 states only that the Guaranty Association is

"considered the insurer to the extent of its obligation on the covered claims ..."
(emphasis added). Thus, by its own terms, that provision is limited to the claim defense obligations of the Guaranty Association. This point is further amplified by the second sentence of that subsection which addresses the right/obligation of the Guaranty Association to defend an out of state insured. Section 38-31-60(b) only provides that the Guaranty Association succeeds to all the claim defenses of the liquidated carrier, but nothing more.

Secondly, there are explicit provisions within the Guaranty Association statutes that address those limited circumstances when the Guaranty Association can seek to recover from another party. Those two statutes are Section 38-31-90 (recovery claims against high net worth insureds and affiliates of the same) and Section 38-31-100 (offset of claims against other available insurance, other guaranty associations and government insurance programs, among other things). Those two statutes cover a whole host of circumstances in which the Guaranty Association can make claims and/or seek recovery/offset against other parties, but nowhere is the Second Injury Fund mentioned by name or even by inference. The mention of other specific rights of recovery by the Guaranty Association in these two statutes, but not including claims against the Second Injury Fund, requires a finding, as a matter of law and proper statutory construction that no such right exists against the Second Injury Fund. Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) (utilizing the principle of "expressio unius est exclusion alterius," for you Latin fans out there). Simply put, and in essence, there is no statutory authorization for the Guaranty Association to make a reimbursement claim against the Fund.

Likewise, Commissioner Beck erred in ruling that the Guaranty Association was an insurer carrier for purposes of making a claim against the Second Injury Fund. (Finding of Fact No. 6 and Conclusion of Law No. 4). This particular ruling is important because only licensed carriers, authorized self-insurers and the State Accident Fund are entitled to reimbursement from the Fund per Sections 42-7-310 and 42-9-400. Of course, and obviously, there is no statute or case law directly on point (or else we would not be here). The Supreme Court has, however, explicitly found that the Guaranty Association is not an insurance company in a different context. See SCPCIGA v. Brock, 410 S.C. 361, 367, 764 S.E.2d 920 (2014) (“Guaranty is neither the wrongdoer nor the insurer of the wrongdoing, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies.”). The Guaranty Association does not issue policies of insurance, accept premiums to provide coverage, or advertise, all of which, among many other things, are activities normally associated with insurance companies. The Guaranty Association is not an insurance company and there is no rational, fact-based, compelling argument that can magically turn it into one.

2. The Guaranty Association is not entitled to reimbursement because it does not participate in the Fund’s assessment process.

In 2003 Section 42-7-310 was amended to provide that a carrier could not receive reimbursement unless it made assessment payments to the Fund. It is manifestly clear that the Guaranty Association makes no assessment payments to the Fund, nor is it assessed by the Fund. Commissioner Beck in Finding of Fact No. 8 and Conclusion of Law No. 6 determined that the Guaranty Association “effectively” made assessment payments to the Fund “via” the assessment payments made by its individual members.

This argument is more or less logical, and it seems to be basically fair at first glance. The problem, insofar as this appeal is concerned, is that this argument is irrelevant. The individual members of the Guaranty Association get what they pay for when assessments are paid to the Fund; they are permitted to make reimbursement claims against the Fund because their assessments have been paid. Assessment obligations are not a collective responsibility. Each one is individual as to that carrier. The right of reimbursement is not collective, either. That right is individual to each carrier that makes its assessment payments. The Guaranty Association cannot piggyback on what is an exclusive right individual to its members and Commissioner Beck erred in holding otherwise. This argument relates to ground for appeal No. 5 on the Fund's Form 30.

3. The Guaranty Association is barred from reimbursement by the terms of the 6/17/13 release between these parties.

Earlier this decade (and before) there were various claims for reimbursement brought by the Guaranty Association in connection with Legion and certain other liquidated carriers. Ultimately, there was a global release dated 6/17/13 in favor of the Fund from the Guaranty Association in exchange for a payment of \$2,900,000.00 from the Fund to the Guaranty Association. At the time of that settlement numerous individual reimbursement claims between these parties were actively being litigated before the Commission, in the Circuit Court and before the Court of Appeals. For almost \$3 million the Fund reasonably expected that it had purchased peace-of-mind-and-an-end-to-claims by the Guaranty Association. At the time of that settlement, and during the settlement negotiation process, and in connection with the approval of the settlement by the

Commission, both the Fund and the Guaranty Association were represented by (more or less) competent legal counsel and the settlement agreement was the result of negotiation and drafting input by both parties. The language within that release states that "The Parties intend this release to be general and comprehensive in nature," and to cover claims "whether known or unknown noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential" (Pages 5 and 6 of The Settlement Agreement and Release of Claims). Of greatest significance to the present dispute, that settlement agreement at article 7 (page 8) provides the following:

"Interpretation and Construction of Agreement. The language in all parts of this Settlement Agreement and Release shall in all cases be construed as a whole according to its meaning and not strictly for or against any Party. The Parties agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Settlement Agreement and Release. As to the matters released herein, as set forth in paragraph number "3" above, the Parties agree that the terms of this Settlement Agreement and Release are to be given the broadest meaning such that the interpretation and construction do substantial justice to the intent of the Parties."

The following facts are relevant to a determination of whether this release bars the Guaranty Association from seeking reimbursement as to the underlying claim of Michael T. Quarles:

1. The release itself is not to be construed or against either party. (Release, p. 8).
2. Any ambiguities are not to be construed against any particular party. (Release, p. 8).
3. The matters (i.e. claims) released are to be given the broadest understanding. (Release, p. 8).
4. The Fund paid \$2,900,000 for this release.

5. Lumbermens was ordered liquidated on 5/8/13. (G.A.'s APA, Order of liquidation).
6. The Guaranty Association set up a claim for Michael T. Quarles on 6/4/13 and set initial reserves of over \$100,000 for that claim on that same date. (G.A.'s APA, Combined Claim Report).
7. The global release between the Fund and the Guaranty Association was dated 6/17/13, which was after the Guaranty Association set up reserves on this claim.

Arguably, it is of at least some importance that at the time this global release was executed that the Guaranty Association not only knew of this claim, but had set up substantial loss reserves for this claim. The language of the release specifically provides that the scope of the claims that were released in exchange for payment of \$2,900,000 by the Fund was to be as broad as possible. All of this shows that this claim was covered by the terms of this 6/17/13 release and that this present claim for reimbursement is barred. Commissioner Beck was in error to rule otherwise. The above argument addresses appeal ground No. 6 on the Fund's Form 30.

CONCLUSION

For the reasons discussed above, and as may be made during oral argument or by way of reply brief, the Fund respectfully requests that the Full Commission reverse the order of the Single Commissioner and find and order that the Guaranty Association is barred from seeking reimbursement both as a matter of statutory authorization and as a matter of the application of the 6/17/13 release.

Respectfully submitted,

The Robert Cook Law Firm, LLC

By: 

ROBERT M. COOK II

P.O. Box 3575

Batesburg-Leesville, SC 29070

803-317-2171 (phone)

803-317-2175 (fax)

robcook1965@yahoo.com

ATTORNEY FOR THE SECOND INJURY FUND

December 18, 2017

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 9928766

South Carolina Property and Casualty Insurance Guaranty Association
v.
South Carolina Second Injury Fund

In Re:

Michael Quarles,)
)
Employee/Claimant,)
)
-vs-)
)
Cryovac Sealed Air Corporation,)
)
Employer, and)
)
Lumbermens Mutual Casualty)
Company in liquidation/SCPCIGA,))
)
Carrier,)
)
Defendants.)
_____)

SCPCIGA'S
RESPONDENT BRIEF

South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA) seeks affirmation of the Hearing Commissioner's Decision and Order dated October 2, 2017. SCPCIGA contends that the Hearing Commissioner's findings of fact, rulings of law and order are supported by the greater weight of the evidence in the record and applicable law. SCPCIGA further contends that the Hearing Commissioner made no reversible error of law and did not abuse his discretion.

STATEMENT OF CASE BEFORE HEARING COMMISSIONER

SCPCIGA and South Carolina Second Injury Fund (SCSIF) agreed that the sole issue for determination was whether SCPCIGA is entitled to reimbursement from SCSIF for benefits paid by SCPCIGA on the underlying claim.¹ SCPCIGA sought reimbursement from SCSIF in accordance with an Agreement to Reimburse Compensation entered between the liquidated carrier, Lumbermens Mutual Casualty Company (Lumbermens), and SCSIF dated October 14, 2003 and approved by the Workers' Compensation Commission (Commission) on November 21, 2003, pursuant to the terms and provisions of S.C. Code Ann. §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (1976, as amended) (SCPCIGA's Form 54 Hearing Request dated December 8, 2016). SCSIF disputed SCPCIGA's entitlement to reimbursement contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement; that SCPCIGA does not pay assessments to SCSIF; that the liquidated carrier pursuant to which SCPCIGA asserts its right to reimbursement, Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to SCSIF thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320; and that SCPCIGA's reimbursement claim is barred by reason of a certain Settlement Agreement and Release entered between SCSIF and SCPCIGA dated June 17, 2013 (SCSIF's Form 55 Answer dated January 5, 2017 and Form 58 Pre-Hearing Brief dated April 20, 2017).

¹ SCPCIGA and SCSIF are the only parties who have heretofore participated in the current litigation. Counsel for the Claimant, Kathryn Williams, Esquire, and the liquidated carrier, Jeff Jones, Esquire, have been appropriately served with all pleadings and notices from the Commission. SCPCIGA does not anticipate either of these parties will participate in proceedings before the Full Commission Appellate Panel.

BACKGROUND AND EVIDENCE SUMMARY

The Claimant sustained compensable injuries to his neck and back and a compensable psychological injury as a result of an accident arising out of and in the course of his employment on December 17, 1999 (SCPCIGA's Administrative Procedures Act (APA) Submission No. 10 at pages 200 - 205). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (SCPCIGA's APA Submission No. 8 at pages 195 - 198). The approved Agreement to Reimburse Compensation entered between Lumbermens and SCSIF provides that Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206) (emphasis added). There is no indication that the approved Agreement to Reimburse Compensation was appealed by any party. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (SCPCIGA's APA Submission No. 11 at pages 207 - 249; see also deposition testimony of David Stooksbury at page 58 and deposition testimony of Chris Lombard at pages 64 - 65).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (SCPCIGA's APA Submission No. 6 at pages 180 - 190). As a result, SCPCIGA became responsible for the claim pursuant to the terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2017) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of SCPCIGA's Executive Director, J. Smith Harrison, Jr., this matter is a covered

workers' compensation claim under the Guaranty Act for which SCPCIGA is fully responsible and paying (Harrison deposition at page 56).

SCPCIGA

SCPCIGA is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2017) (emphasis added). SCPCIGA consists of insurers defined as "member insurers" under S.C. Code Ann. §38-31-20(8) (2017) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in §42-7-310(d)(2) and §42-7-320(B)(3), SCPCIGA is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2017).²

Pursuant to §38-31-40, SCPCIGA is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the "workers' compensation insurance account." Pursuant to §38-31-60(c), SCPCIGA shall allocate claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). Accordingly, SCPCIGA's workers' compensation member insurers responsible for assessments necessary to fund its workers' compensation liabilities are also responsible for payment of assessments necessary to fund SCSIF on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). In addition, SCPCIGA is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an

² SCPCIGA acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to SCSIF by self-insurers and the State Accident Fund.

insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2017). Therefore, SCPCIGA asserts that it has a fiduciary responsibility to its member insurers, the receiver/liquidator of the assets of an insolvent insurer and certain insureds and affiliates of an insolvent insurer (Harrison deposition at pages 38 - 39, 49 - 50 and 52 - 53).

Pursuant to §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent (emphasis added). "Covered claim" is defined under S.C. Code Ann. §38-31-20(8) (2017) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA's liability in certain situations. However, §38-31-60(iv) expressly provides that SCPCIGA "...shall pay the full amount of any covered workers' compensation claim." (emphasis added) (Harrison deposition at pages 50 - 51).

SCSIF

§42-7-310 provided for the establishment, purpose, administration, funding and staff of SCSIF. A careful reading of §42-7-310(d)(2) reveals that it does not define the term "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). Reimbursements to an "employer" or "insurance carrier" are governed by, and made pursuant to, §42-9-400 and S.C. Code Ann. §42-9-410 (1976, as amended). In this particular case, the approved Agreement to Reimburse Compensation specifically provides that Lumbermens shall receive reimbursement in accordance with the provisions of §42-9-400 for the cervical spine only (emphasis added) (SCPCIGA's APA Submission No. 11 at page 206).

The July 1, 2007 amendments to the South Carolina Workers' Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers' Compensation Act) included the enactment of §42-7-320 providing for the termination of SCSIF and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability Authority (hereinafter referred to collectively as "SFAA") was required to provide for the efficient and expeditious closure of SCSIF with the orderly winding down of the affairs of SCSIF so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund (emphasis added). §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident Fund remain liable for SCSIF's assessments, as determined by SFAA, in order to pay accepted claims and SCSIF shall continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011 (emphasis added). §42-7-320 does not define the terms "carrier" or "insurer" nor does it exclude SCPCIGA as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of SCSIF's remaining liabilities and options for funding SCSIF's remaining liabilities. In that regard, KPMG produced its initial actuarial report in March 2013 (SCPCIGA's APA Submission No. 4 at pages 114 - 148). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (Exhibit No. 1 to Lombard deposition, Lombard deposition at pages 24 - 45 and Stooksbury deposition at pages 10 - 11 and 21). Concerning the administration of SCSIF's continuing operations, SFAA

assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF) which is part of SFAA. SCIRF's administrative responsibilities commenced in May 2013 shortly before termination of the SCSIF's programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (Lombard deposition at pages 8 - 16). Chris Lombard is the Assistant Director of Claims for SCIRF and in connection therewith, is responsible for the management of SCSIF's operations (Lombard deposition at pages 6 - 8). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of SCSIF's ongoing assessments under §42-7-320 (Lombard deposition at page 16 and Stooksbury deposition at pages 7 - 8).

Prior Litigation

Disputes involving SCPCIGA's entitlement to reimbursement from SCSIF are not new. SCPCIGA and SCSIF extensively litigated many of the same issues in connection with various reimbursement claims made by SCPCIGA for workers' compensation benefits it paid to injured employees as a result of the insolvency of Legion Insurance Company. That litigation resulted in various decisions and orders issued by the Commission and the Circuit Court. Those decisions and orders determined SCPCIGA to be eligible for, and entitled to, reimbursement. In so doing, the Commission and Circuit Court rejected the arguments that SCPCIGA is not an entity statutorily authorized to receive reimbursement and that SCPCIGA cannot be eligible for reimbursement because it does not pay assessments and/or as a result of the underlying insolvent carrier's default status with respect to payment of SCSIF assessments pursuant to the statutory amendment to §42-7-310(d)(2) effective June 25, 2003 (SCPCIGA's APA Submission Nos. 1, 2 and 3 at pages 1 - 113).

In particular, litigation of the reimbursement claim associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, resulted in these issues being presented to the South Carolina Court of Appeals on appeal by SCSIF. Prior to a ruling by the Court of Appeals, SCPCIGA and SCSIF entered into the June 17, 2003 Settlement Agreement and Release which resulted in dismissal of SCSIF's appeal (SCPCIGA's APA Submission No. 2 at pages 70 - 71). The settlement agreement, which was approved by a majority of the Commission, defined the terms "Legion" and "Reliance" and effectuated SCPCIGA's release of SCSIF on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any and all claims, on which SCSIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement approved by the Commission further states: "The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any "large deductible"

policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers" (emphasis added) (Exhibit No. 3 to Lombard deposition).

HEARING

SCPCIGA and SCSIF, by and through their respective counsel, appeared before Commissioner T. Scott Beck for the Forms 54/55 hearing on June 21, 2017 in Columbia, South Carolina. The record reflects that various documentary evidence was submitted and included in the record pursuant to the APA. In addition to the APA Submissions, the deposition of David Stooksbury dated April 26, 2017 with exhibits; the deposition of Christopher Lombard dated March 8, 2017 with exhibits; and the deposition of J. Smith Harrison, Jr. dated March 8, 2017 were submitted and included in the record. SCSIF's objection to SCPCIGA's APA Submissions Nos. 1 through 5 was overruled by the Hearing Commissioner. Stipulations were entered concerning jurisdiction, venue and the Commission's file becoming part of the record with the exception of self-serving declarations and unstipulated medical reports. The hearing proceeded in the form of oral argument by counsel.

HEARING COMMISSIONER'S DECISION AND ORDER

The Hearing Commissioner's Decision and Order was filed and served on October 2, 2017. It appropriately lists the documentary evidence included in the record; recites the stipulations entered by the appearing parties; and details the pertinent background and evidentiary facts. Following an exhaustive analysis of the evidentiary record and applicable law

concerning the issues in dispute, the Hearing Commissioner made the following findings of fact and conclusions of law:

Findings of Fact

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in

accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.
 8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
 9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
 10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
 11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.
 12. SCPCIGA was not paying this claim as of February 22, 2013.
-
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.

14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

Conclusions of Law

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.
3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act;

is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320.

5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.
6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this

matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter.

9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).
10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

Based on the foregoing findings and conclusions, the Hearing Commissioner ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Workers' Compensation Commission on November 21, 2003.

SCSIF'S REQUEST FOR FULL COMMISSION REVIEW

SCSIF timely filed and served its Form 30 Request for Commission Review of the Hearing Commissioner's Decision and Order on October 16, 2017. It presents seven specific questions of alleged error by the Hearing Commissioner. In its Appellant Brief timely filed and served on December 18, 2017, SCSIF makes three arguments. SCSIF asserts that the Hearing Commissioner erred in ruling that SCPCIGA is statutorily authorized to seek reimbursement; erred in ruling that SCPCIGA is entitled to reimbursement even though it does not participate in

SCSIF's assessment process; and erred in failing to rule that the Settlement Agreement and Release entered between the appearing parties dated June 17, 2013 does not bar SCPCIGA's reimbursement claim.

ARGUMENT

I. Statutory Authorization

SCSIF contends that application of §38-31-60(b) is limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated carrier and that SCPCIGA's rights of recoupment and offset are limited to those expressly provided for in §38-31-90 and S.C. Code Ann. §38-31-100 (2017) (emphasis added). This argument is based on a forced construction and overly narrow interpretation of those statutory provisions. The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987).

§38-31-60 provides for the powers and duties of SCPCIGA. It is a multi-faceted statute which contrary to SCSIF's contention, is not limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated carrier. Among its enumerated affirmative powers, §38-31-60(j) authorizes SCPCIGA to sue and §38-31-60(l) authorizes it to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act (emphasis added). There is no language in §38-31-60(b) or elsewhere in the statute which limits the liquidated carrier's rights assumed by SCPCIGA to those pertaining to the defense of ongoing claims. The fact that the second sentence in §38-31-60(b) provides that SCPCIGA has the right but not the obligation

to defend an insured that is not a resident of this State in no way suggests or provides that the rights assumed by SCPCIGA are limited to matters pertaining to the defense of covered claims. It merely distinguishes a specific situation where SCPCIGA has a right but not an obligation. SCSIF is essentially adding language not contained in §38-31-60(b) to limit the rights assumed by SCPCIGA and support its contention that SCPCIGA is not statutorily authorized to make a reimbursement claim. This is precisely the type of forced statutory construction that is prohibited.

Assuming *arguendo* that the forced construction of §38-31-60(b) advocated by SCSIF were to be accepted; such should not result in a determination that SCPCIGA is not statutorily authorized to seek/receive reimbursement. As set forth above, this matter involves a covered workers' compensation claim for which SCPCIGA is fully responsible pursuant to §38-31-60. As part of its defense of the claim, SCPCIGA is entitled to assert Lumbermens' existing right of reimbursement. It is self-evident that SCPCIGA would have no reason to assert the liquidated carrier's right to reimbursement but for its obligation to pay the claim imposed by §38-31-60(b). Accordingly, SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of the claim.

Similarly, there is no language in §38-31-90 or §38-31-100 which abrogates the liquidated carrier's rights under the Workers' Compensation Act which SCPCIGA assumes pursuant to §38-31-60(b). SCSIF's brief is devoid of reference to any language in the statutes to that effect. Instead, SCSIF references the statutory construction principle of "expressio unius est exclusio" to support its assertion that SCPCIGA's rights of recoupment and offset as provided in §38-31-90 and §38-31-100 are exclusive. This is a misguided argument. SCPCIGA's rights of recoupment and offset as provided for in §38-31-90 and §38-31-100 are not dispositive in

determining whether SCPCIGA is statutorily authorized to receive reimbursement from SCSIF. SCSIF's argument ignores the clear, unequivocal and broad language in §38-31-60(b) conferring upon SCPCIGA all rights of the liquidated carrier to the extent of its obligation on this covered workers' compensation claim. By way of illustration, the right to reimbursement pursuant to an approved agreement to reimburse compensation would be one of several recoupment/offset rights of a liquidated carrier that SCPCIGA would maintain under the Workers' Compensation Act in connection with its obligation on a covered workers' compensation claim. Others would include subrogation rights under S.C. Code Ann. §42-1-560 (1976, as amended) and the right to assert credit for payments made when not due and payable pursuant to S.C. Ann. §42-9-210 (1976, as amended).

SCSIF's argument that SCPCIGA is not an insurance company entitled to reimbursement pursuant to §42-7-310 and §42-9-400 misconstrues those statutes and continues to ignore S.C. Code Ann. §42-1-60 and §42-5-20 (1976, as amended). SCPCIGA does not purport to be an insurance company. However, SCPCIGA asserts that it is authorized to insure the Employer's workers' compensation liabilities in this claim and thereby meets the statutory definition of the terms "carrier" and "insurer" provided in §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

As indicated above, §42-7-310 provided for the establishment, purpose, administration, funding and staff of the SCSIF. It does not define the term "carrier" nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it merely provides that the term as used in §42-7-310(d)(2) includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). In this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of

§42-9-400 (emphasis added). §42-9-400(a) states in pertinent part that “...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310...” (emphasis added). §42-7-320(B)(3) requires SCSIF to continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011.

§42-1-60 defines the term “carrier” or “insurer” as “any person or fund authorized under §42-5-20 to insure under this title (Title 42) and includes self-insurers.” §42-5-20 states in pertinent part that “[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized...” The term “insure” is defined in Black’s Law Dictionary, Abridged Fifth Edition, as “[t]o make sure or secure, to guarantee, as to insure safety to anyone. To engage to indemnify a person against pecuniary loss from specified perils or possible liability.” Under §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and as set forth above, the uncontradicted record establishes that this matter involves a covered workers’ compensation claim for which SCPCIGA is responsible for paying the full amount under §38-31-60(iv).

Concerning whether SCPCIGA is authorized under §42-5-20 to insure liabilities under the Workers’ Compensation Act thereby meeting the statutory definition of the term “carrier” or “insurer” under §42-1-60 and as used in §42-9-400 and §42-7-320; it is self-evident that SCPCIGA would not be responsible for paying this claim and would have no reason to be seeking reimbursement if it was not so authorized. The evidentiary record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers’ Compensation Act and there is no evidence in the record to the contrary (see Harrison deposition at pages 54 -

56). In this regard, it is also appropriate for the Commission to take judicial notice of routine decisions and actions by the Commission with respect to SCPCIGA's data reporting obligations and benefit liabilities on covered workers' compensation claims in carrying out the Commission's administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers' Compensation Act. In short, the uncontradicted evidentiary record and applicable statutory provisions establish SCPCIGA as an association authorized to insure liabilities under the Workers' Compensation Act and in particular, authorized to insure the Employer's liabilities in this fully covered workers' compensation claim.³

II. Assessments

SCSIF now asserts that the Hearing Commissioner erred in ruling that SCPCIGA is entitled to request/receive reimbursement without having directly participated in the statutory assessment process (emphasis added). The term "directly" represents the latest shift in SCSIF's evolving position as it relates to this issue. Previously in its Form 55, SCSIF asserted that SCPCIGA was barred from reimbursement because it does not pay assessments and pursuant to §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of assessments.

³ Although not specifically addressed by its counsel during oral argument before the Hearing Commissioner, SCSIF cited the South Carolina Supreme Court's decision in South Carolina Property and Casualty Insurance Guaranty Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) in its pre-hearing and appellant brief filings. To the extent SCSIF relies on Brock for the proposition that SCPCIGA is not an "insurer" entitled to reimbursement from SCSIF; such reliance is misplaced. The Court's statement in Brock that SCPCIGA is "...neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies" was made in the context of its analysis of SCPCIGA's right to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. Brock did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which SCPCIGA would be responsible for paying the full amount and, therefore, is clearly distinguished from the current matter. More specifically, Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply. Similarly, the case of South Carolina Property and Casualty Insurance Guaranty Association v. Carolinas Roofing and Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991) cited in Brock involved SCPCIGA's liability to the Self-Insurers Fund under a policy of reinsurance maintained by the Self-Insurers Fund with a reinsurance carrier that became insolvent and whether jurisdiction to determine a declaratory judgment action filed in connection therewith by SCPCIGA in the Court of Common Pleas was within the jurisdiction of the Workers' Compensation Commission to determine and has no relevance to a covered workers' compensation claim involving an insolvent workers' compensation insurer for which SCPCIGA is directly liable to an injured employee for the entirety of the claim and to which §42-1-60 and §42-5-20 would apply.

Subsequent discovery in the way of the deposition testimony of David Stooksbury, SCIRF's business manager in charge of SCSIF's operations as it relates to assessments, testified clearly and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed (Stooksbury deposition at page 47). He also testified that if a carrier goes under and stops paying claims, the assessment goes to zero (Stooksbury deposition at page 47). SCSIF made no assertion of the claim being barred under §42-7-310(d)(2) as a result of Lumbermens purported default in payment of assessments during oral argument before the Hearing Commissioner and has effectively abandoned that position given its failure to include such in its Form 30 exceptions. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 841 (1940). During oral argument before the Hearing Commissioner, SCSIF re-asserted its position that SCPCIGA was barred from reimbursement because it does not pay assessments and also asserted that the reimbursement claim is barred under §42-7-310 and §42-7-320 as a result of Lumbermens non-participation in the assessment process subsequent to its liquidation.

The uncontradicted evidentiary record reflects that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68). Pursuant to §38-31-40, SCPCIGA is an unincorporated entity and its workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51). In connection therewith, it should also be noted that any theoretical assessment on SCPCIGA would not alter or affect the total sum of assessments raised on an annual basis by SCSIF under the pre-July 1, 2013 funding mechanism set forth in §42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by SFAA pursuant to §42-7-320. Rather, the only variable would be what entities were paying and in what amounts

(Lombard deposition at pages 80 - 84 and Stooksbury deposition at pages 75 - 76). The record further reflects that SCPCIGA's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included (SCPCIGA's APA Submission No. 4 at page 116 and Stooksbury deposition at pages 58 - 61, 64 and 66). There is no indication that any of SCPCIGA's workers' compensation insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51). SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim. The foregoing clearly establishes that SCPCIGA, as an unincorporated entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers. There is no delinquency in payment of those assessment including payment of the assessments associated with the five year \$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.

Remarkably, SCSIF now asserts that the foregoing evidence is not relevant despite raising the issue of SCPCIGA's non-participation in the assessment process as a defense to the reimbursement claim. SCSIF, confronted with the overwhelming evidence of participation in the assessment process by SCPCIGA's workers' compensation member insurers to include payment of assessments to fund SCSIF's liability on this particular claim, apparently bases this assertion on SCPCIGA not "directly" paying assessments notwithstanding the fact that it has never assessed SCPCIGA. The only statutory provision which conditions reimbursement upon payment of assessments is the amendment to §42-7-310(d)(2) which became effective June 25, 2003. In light of David Stooksbury's uncontradicted testimony that neither Lumbermens or any

of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, any argument that SCPCIGA's reimbursement claim is barred because of an issue connected to assessments is baseless and without merit.⁴

III. Prior Settlement Agreement

SCSIF asserts that the Settlement Agreement and Release entered between it and SCPCIGA dated June 17, 2013 bars SCPCIGA's claim for reimbursement or otherwise releases SCSIF from its liability for reimbursement on this claim (SCSIF's APA Submission No. 1 at pages 1 – 14). In this regard, SCSIF notes provisions in the Settlement Agreement and Release that the language therein should be construed as a whole and not strictly for or against any party and that the terms are to be given the broadest understanding. SCSIF also notes SCPCIGA's knowledge of the Lumbermens' claims to specifically include this claim as of June 17, 2013 and the fact that SCPCIGA had set up reserves and paid benefits on this particular claim prior to execution and Commission approval of the June 17, 2013 Settlement Agreement and Release (SCPCIGA APA Submission No. 7 at pages 191 – 194). SCSIF also argues that the amount of the monetary consideration paid by SCSIF to SCPCIGA for the Settlement Agreement and Release dated June 17, 2013 supports its contention in this regard.

The plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein; the settlement and release applied only to those claims on which SCSIF was paying SCPCIGA as of February 22, 2013. The uncontradicted evidentiary record reflects that Lumbermens was not liquidated until May 8, 2013; that SCPCIGA was not paying this claim as of February 22, 2013 and that at no time has SCSIF

⁴ As a result of the uncontradicted record establishing that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, it was not necessary for the Hearing Commissioner to address whether the pertinent statutory amendment to §42-7-310(d)(2) effective June 25, 2003 should be applied retroactively in this claim with an underlying date of accident/injury on December 17, 1999.

reimbursed SCPCIGA in connection with this claim (Lombard deposition at pages 39 – 42 and Harrison deposition at page 47). Based on the plain, clear and unequivocal language in the Settlement Agreement and Release, and any reasonable construction thereof; it does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim and the amount of the monetary consideration is of no consequence.

CONCLUSION

For the foregoing reasons, SCPCIGA respectfully requests that the Full Commission Appellate Panel affirm the Hearing Commissioner's Decision and Order dated October 2, 2017 in its entirety.

Respectfully submitted,

Wood Law Group, LLC
P. O. Box 20550
Charleston, SC 29413
Ph.: 843-577-5732

By: 

J. Hubert Wood, III
Attorneys for SCPCIGA

Date: January 2, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
<u>COUNTY OF GREENVILLE</u>	)	2018-CP-23-02580
SOUTH CAROLINA PROPERTY	)	
AND CASUALTY INSURANCE	)	
GUARANTY FUND,	)	
	)	
Respondent,	)	<u>APPELLANT'S BRIEF OF THE</u>
	)	<u>SC SECOND INJURY FUND</u>
vs.	)	
	)	(Hearing: 10/30/18 @ 11 am)
SECOND INJURY FUND	)	
OPERATIONS OF THE SOUTH	)	
CAROLINA INSURANCE	)	
RESERVE FUND f/k/a SOUTH	)	
CAROLINA SECOND INJURY	)	
FUND,	)	
	)	
Petitioner.	)	
	)	

STATEMENT OF THE CASE

This appeal arises from a reimbursement dispute between what used to be known as the South Carolina Second Injury Fund, which operations have been shifted to the South Carolina Insurance Reserve Fund per statute (hereinafter just "Fund") and the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty Association), as the limited statutory successor of the covered claims of Lumbermens Mutual Casualty Co. (Lumbermens), a liquidated out of state carrier. The Fund asserts that the Guaranty Association is not statutorily entitled to reimbursement, as well as being barred from reimbursement as a result of a certain 2013 settlement and release agreement between these parties. The Guaranty Association takes the position that it is entitled to reimbursement to the same extent as Lumbermens would have been entitled

had it not been liquidated. The single commissioner heard this matter on June 21, 2017 and issued his decision and order dated October 2, 2017, directing the Fund to make reimbursement to the Guaranty Association.

The Fund requested full commission review of that ruling by way of its Form 30 dated October 16, 2017. The full commission heard the Fund's appeal of the single commissioner and affirmed the single commissioner by its order dated March 29, 2018. The Fund's appeal to the circuit court was filed on April 26, 2018. This appeal from the full commission to the circuit court is proper under the prior statutory appeal procedure as the date of the underlying injury by accident pre-dates 2007. By cover of letter dated August 20, 2018, the commission provided the circuit court with its file, which constitutes the record on appeal in this matter.

There is no reported decision on the statutory authorization issue from either the court of appeals or the supreme court. There is no factual dispute in this appeal; this is strictly a matter of law on what is a novel issue. The task, therefore, is put squarely before this court, which is to address the purely legal issue of whether or not the Guaranty Association is statutorily authorized to recover reimbursement from the Fund. There is also the release issue, which is original in context, as well.

QUESTIONS PRESENTED

- I. WAS IT ERROR TO HOLD THAT THE GUARANTY ASSOCIATION WAS STATUTORILY AUTHORIZED TO SEEK REIMBURSEMENT?

- II. WAS IT ERROR TO HOLD THAT THE GUARANTY ASSOCIATION WAS ENTITLED TO REIBURSEMENT EVENTHOUGH IT DOES NOT PARTICIPATE IN THE FUND'S ASSESSMENT PROCESS?

III. WAS IT ERROR TO HOLD THAT THE 6/17/13 RELEASE BETWEEN THESE PARTIES DID NOT BAR THE GUARANTY ASSOCIATION FROM REIMBURSEMENT?

ARGUMENT

This matter involves a worker's compensation appeal to the circuit court. As noted above, there is no meaningful dispute of fact. In light of that, the standard of review for this matter relates to the correction of errors of law upon any of the grounds noted in South Carolina Code Section 1-23-380(5), which are (broadly speaking) as follows: (a) violation of statutory provisions; (b) in excess of the commission's statutory authority; (c) made upon unlawful procedure; (d) effected by other error of law; and (e) clearly erroneous in light of the record as a whole. Generally speaking, the Fund maintains that the commission committed manifest errors of law in ruling that: (1) the Guaranty Association was statutorily authorized to seek reimbursement from the Fund; (2) the Guaranty Association was allowed to seek reimbursement from the Fund even though it does not directly participate in funding the Fund; and (3) a 2013 release between these parties did not bar this claim for reimbursement.

1. The Guaranty Association is simply not statutorily authorized to seek/receive reimbursement from the Fund.

This argument pertains to the specific appeal grounds stated within the Fund's Petition/Notice of Appeal paragraphs 5(a)-(d) and (g) (pages 2-3). There is no express language within the statutes setting up the Guaranty Association authorizing it to seek reimbursement from the Fund under any circumstances. In fact, neither the term "Second Injury Fund," nor its equivalent can be found anywhere within South Carolina Code Section 38-31-10 et. seq. Nor is there any reported appellate decision from the court of

appeals or the supreme court that authorizes such action or interprets Section 38-31-10 et. seq. as allowing for the same. The Guaranty Association may assert that it has a fiduciary or other similar duty to its members to seek reimbursement from the Fund, but whether or not such a fiduciary duty to its members exists, that does not change the complete absence of statutory authority for making such a claim against the Fund. Likewise, it is irrelevant whether or not the Fund will likely be able to meet its future reimbursement payment obligations to other claimants in the event this claim of the Guaranty Association is ordered paid.

The Guaranty Association has asserted throughout this litigation that if the underlying insolvent carrier was entitled to reimbursement, then it is also entitled to reimbursement under Section 38-31-60(b). That statutory subsection, it contends, means that the Guaranty Association steps completely into the shoes of the liquidated carrier in all respects, including entitlement to reimbursement from the Fund. That argument fails for two reasons. First, Section 38-31-60(b) is limited to matters pertaining to the defense by the Guaranty Association of ongoing claims of the liquidated carrier. (emphasis added). In other words, it has no relevance or application to reimbursement claims against the Second Injury Fund. That particular subsection (b) of Section 38-31-60 states only that the Guaranty Association is “considered the insurer to the extent of its obligation on the covered claims ...” (emphasis added). Thus, by its own terms, that provision is limited to the claim defense obligations of the Guaranty Association. This point is further amplified by the second sentence of that subsection which addresses the right/obligation of the Guaranty Association to defend an out of state insured. Section 38-31-60(b) only provides that the Guaranty Association succeeds to all the claim defenses

of the liquidated carrier and nothing more. This is not the result of an overly narrow construction of that language by the Fund, it is simply applying that statutory language as it was written.

Secondly, there are explicit provisions within the Guaranty Association statutes that address those limited circumstances when the Guaranty Association can seek to recover from another party. Those two statutes are Section 38-31-90 (recovery claims against high net worth insureds and affiliates of the same) and Section 38-31-100 (offset of claims against other available insurance, other guaranty associations and government insurance programs, among other things). Those two statutes cover a whole host of circumstances in which the Guaranty Association can make claims and/or seek recovery/offset against other parties, but nowhere is the Fund mentioned by name or even by inference. The mention of other specific rights of recovery by the Guaranty Association in these two statutes, but not including claims against the Fund, requires a finding, as a matter of law and proper statutory construction that no such right exists at all against the Fund. Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) (utilizing the statutory construction principle of “expressio unius est exclusion alterius”). Simply put, and in essence, there is no statutory authorization for the Guaranty Association to make a reimbursement claim against the Fund.

Likewise, the commission erred in ruling that the Guaranty Association was an insurer carrier for purposes of making a claim against the Fund. (Finding of Fact No. 6 and Conclusion of Law No. 4). This particular ruling is important because only licensed carriers, authorized self-insurers and the State Accident Fund are entitled to reimbursement from the Fund per Sections 42-7-310 and 42-9-400. Of course, and

obviously, there is no statute or case law directly on point (otherwise, this appeal would be unnecessary). The supreme court has, however, explicitly found that the Guaranty Association is not an insurance company in a different context. See SCPCIGA v. Brock, 410 S.C. 361, 367, 764 S.E.2d 920 (2014) (“Guaranty is neither the wrongdoer nor the insurer of the wrongdoing, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies.”). The Guaranty Association does not issue policies of insurance, accept premiums to provide coverage, or advertise, all of which, among many other things, are activities normally associated with insurance companies.

At various points in this litigation, the Guaranty Association has conceded that it does not purport to be an insurance carrier. That is well and truly dispositive. The Guaranty Association is clearly not a qualified self-insured nor is it the State Accident Fund. If it is not an insurance carrier, either, then it is not entitled to reimbursement per the language of Sections 42-7-320 and 42-9-400. The Guaranty Association is manifestly not an insurance carrier and there is no rational, fact-based, compelling argument that can magically turn it into one. It is legal error, and a contortion of the statute and logic, to hold (as the commission did) that it is the functional equivalent of an insurance carrier for purposes of making a reimbursement claim against the Fund. That holding should be reversed and this reimbursement claim barred.

2. The Guaranty Association is not entitled to reimbursement because it does not participate in the Fund's assessment process.

In 2003 Section 42-7-310 was amended to provide that a carrier could not receive reimbursement unless it made assessment payments to the Fund. The Guaranty

Association makes no assessment payments to the Fund, nor is it assessed by the Fund. In Finding of Fact No. 8 and Conclusions of Law No. 5, 6 and 12 the commission ruled that the Guaranty Association “effectively” made assessment payments to the Fund “via” the assessment payments made by its individual members. This argument is more or less logical, and it seems to be basically fair at first glance. The problem, insofar as this appeal is concerned, is that this argument is irrelevant. The individual members of the Guaranty Association get what they pay for when assessments are paid to the Fund; they are permitted to make reimbursement claims against the Fund because their assessments have been paid. Assessment obligations are not a collective responsibility. Each one is individual as to that carrier. The right of reimbursement is not collective, either. That right is individual to each carrier that makes its assessment payments. The Guaranty Association cannot piggyback upon what is an exclusive right that is individual to its members and the commission erred in holding otherwise.

During this litigation the Guaranty Association had expended much energy attempting to counter an argument the Fund did not make at the single commissioner hearing or before the full commission on appeal, which is the issue of whether or not there had been a default in the required statutory assessment payments. This case does not turn on whether or not the Guaranty Association (or the carrier to whom it purports to succeed) had a payment obligation and did not honor it. The pertinent question is the statutory authorization of the Guaranty Association to receive reimbursement. The Guaranty Association’s contention in this context is a classic straw man argument as the argument really presented by the Fund (that the Guaranty Association does not actually participate in the funding process) is completely different in import as it goes directly to

the Guaranty Association's statutory authority. In other words, if the legislature intended for the Guaranty Association to be allowed to receive reimbursement from the Fund, it surely would have clearly provided for the Guaranty Association to also directly participate in the financing of the Fund. This is just common sense. This argument No. 2 relates to grounds for appeal (d) and (e) in the Fund's Petition/Notice of Appeal.

3. The Guaranty Association is barred from reimbursement by the terms of the 6/17/13 release between these parties.

Earlier this decade (and before) there were various claims for reimbursement brought by the Guaranty Association in connection with certain other liquidated carriers. Ultimately, there was a global release dated 6/17/13 in favor of the Fund from the Guaranty Association in exchange for a payment of \$2,900,000.00 from the Fund to the Guaranty Association. At the time of that settlement numerous individual reimbursement claims between these parties were actively being litigated before the commission, in the circuit court and before the court of appeals. For almost \$3 million the Fund reasonably expected that it had purchased peace of mind and an end to claims brought by the Guaranty Association. At the time of that settlement, and during the settlement negotiation process, and in connection with the approval of the settlement by the Commission, both the Fund and the Guaranty Association were represented by legal counsel and the settlement agreement was the result of negotiation and drafting input by both parties. The language within that release states that "The Parties intend this release to be general and comprehensive in nature," and to cover claims "whether known or unknown noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential" (Pages 5 and 6 of The Settlement Agreement and Release of

Claims). Of greatest significance to the present dispute, that settlement agreement at article 7 (page 8) provides the following:

“Interpretation and Construction of Agreement. The language in all parts of this Settlement Agreement and Release shall in all cases be construed as a whole according to its meaning and not strictly for or against any Party. The Parties agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Settlement Agreement and Release. As to the matters released herein, as set forth in paragraph number “3” above, the Parties agree that the terms of this Settlement Agreement and Release are to be given the broadest meaning such that the interpretation and construction do substantial justice to the intent of the Parties.”

The following facts are relevant to a determination of whether this release bars the Guaranty Association from seeking reimbursement as to the underlying claim of Michael T. Quarles in the case at bar:

1. The release itself is not to be construed or against either party. (Release, p. 8).
2. Any ambiguities are not to be construed against any particular party. (Release, p. 8).
3. The matters (i.e. claims) released are to be given the broadest understanding. (Release, p. 8).
4. The Fund paid \$2,900,000 for this release.
5. Lumbermens was ordered liquidated on 5/8/13. (Order of liquidation submitted by the Guaranty Association at the hearing before the single commissioner).
6. The Guaranty Association set up a claim for Michael T. Quarles on 6/4/13 and set initial reserves of over \$100,000 for that claim on that same date. (Combined Claim Report submitted by the Guaranty Association at the hearing before the single commissioner).

7. The global release between the Fund and the Guaranty Association was dated 6/17/13, which was after the Guaranty Association set up reserves on this claim. Arguably, it is of at least some importance that at the time this global release was executed that the Guaranty Association not only knew of this claim, but had set up substantial loss reserves for this claim. The language of the release specifically provides that the scope of the claims that were released in exchange for payment of \$2,900,000 by the Fund was to be as broad as possible. All of this shows that this claim was covered by the terms of this 6/17/13 release and that this present claim for reimbursement is barred. The commission was in error to rule otherwise. The above argument addresses appeal ground (f) on the Fund's Petition/Notice of Appeal.

CONCLUSION

For the reasons discussed above, and as may be made during oral argument or by way of reply brief, the Fund respectfully requests that the circuit court reverse the order of the full commission and order that the Guaranty Association is barred from seeking reimbursement as a matter of lack of statutory authorization, barred by its failure to contribute to the funding of the Fund, and barred by the 6/17/13 release.

Respectfully submitted,

The Robert Cook Law Firm, LLC

By: s/Robert M. Cook II
ROBERT M. COOK II
P.O. Box 3575
Batesburg-Leesville, SC 29070
803-317-2171 (phone)
803-317-2175 (fax)
robcook1965@yahoo.com

ATTORNEY FOR THE SECOND INJURY FUND
(OPERATIONS)

October 23, 2018

IN THE COURT OF COMMON PLEAS

GREENVILLE COUNTY

2018-CP-2302580

W.C.C. FILE NO.: 9928766

South Carolina Property and Casualty Insurance Guaranty Association

v.

South Carolina Second Injury Fund

In Re:

Michael Quarles,)
)
Employee/Claimant,)
)
-vs-)
)
Cryovac Sealed Air Corporation,)
)
Employer, and)
)
Lumbermens Mutual Casualty)
Company in liquidation/SCPCIGA,))
)
Carrier,)
)
Defendants.)
_____)

SCPCIGA'S
RESPONDENT BRIEF

This matter is before the Court pursuant to a Petition/Notice of Appeal filed on behalf of the South Carolina Second Injury Fund (SCSIF) seeking judicial review of the Decision and Order of the South Carolina Workers' Compensation Commission (Commission) filed March 29, 2018 in accordance with S.C. Code Ann. §1-23-380 and §42-17-60 (1976, as amended).¹

¹ §42-17-60 was amended effective July 1, 2007 so as to provide that appeals from the Commission are directly to the South Carolina Court of Appeals. However, the date of accident/loss in the underlying claim for workers' compensation benefits pre-dates the statutory amendment. Therefore, the appeal in this matter is directly to the Court of Common Pleas pursuant to the South Carolina Supreme Court's holding in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) and venue is proper in Greenville

South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA) seeks affirmation of the Commission's Decision and Order awarding it reimbursement from SCSIF. SCPCIGA contends that the Commission's findings of fact, rulings of law and order are supported by substantial evidence in the record and applicable law. SCPCIGA further contends that the Commission made no reversible error of law and did not abuse its discretion.

BACKGROUND AND EVIDENCE SUMMARY

The Claimant sustained compensable injuries to his neck and back and a compensable psychological injury as a result of an accident arising out of and in the course of his employment on December 17, 1999 (SCPCIGA's Administrative Procedures Act (APA) Submission No. 10 at pages 200 - 205). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (SCPCIGA's APA Submission No. 8 at pages 195 - 198). An Agreement to Reimburse Compensation entered between Lumbermens Mutual Casualty Company (Lumbermens) and SCSIF dated October 14, 2003 and approved by the Commission on November 21, 2003 provided that Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (SCPCIGA's APA Submission No. 11 at page 206) (emphasis added). There is no indication that the approved Agreement to Reimburse Compensation was appealed by any party. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (SCPCIGA's APA

County in light of the injury by accident in the underlying claim occurring in Greenville County and the Employer's residence being in Greenville County.

Submission No. 11 at pages 207 - 249; see also deposition testimony of David Stooksbury at page 58 and deposition testimony of Chris Lombard at pages 64 - 65).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (SCPCIGA's APA Submission No. 6 at pages 180 - 190). As a result, SCPCIGA became responsible for the claim pursuant to the terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2017) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of SCPCIGA's Executive Director, J. Smith Harrison, Jr., this matter is a covered workers' compensation claim under the Guaranty Act for which SCPCIGA is fully responsible and paying (Harrison deposition at page 56).

SCPCIGA

SCPCIGA is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2017) (emphasis added). SCPCIGA consists of insurers defined as "member insurers" under S.C. Code Ann. §38-31-20(8) (2017) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of SCSIF as set forth in S.C. Code Ann. §42-7-310(d)(2) and §42-7-320(B)(3) (1976, as amended). SCPCIGA is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2017).²

Pursuant to §38-31-40, SCPCIGA is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the "workers' compensation insurance account." Pursuant to §38-31-60(c), SCPCIGA shall allocate

² SCPCIGA acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to SCSIF by self-insurers and the State Accident Fund.

claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). Accordingly, SCPCIGA's workers' compensation member insurers responsible for assessments necessary to fund its workers' compensation liabilities are also responsible for payment of assessments necessary to fund SCSIF on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). In addition, SCPCIGA is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2017). Therefore, SCPCIGA asserts that it has a fiduciary responsibility to its member insurers, the receiver/liquidator of the assets of an insolvent insurer and certain insureds and affiliates of an insolvent insurer (Harrison deposition at pages 38 - 39, 49 - 50 and 52 - 53).

Pursuant to §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent (emphasis added). "Covered claim" is defined under S.C. Code Ann. §38-31-20(8) (2017) which along with §38-31-60, places various limitations on what is considered a covered claim and SCPCIGA's liability in certain situations. However, §38-31-60(iv) expressly provides that SCPCIGA "...shall pay the full amount of any covered workers' compensation claim." (emphasis added) (Harrison deposition at pages 50 - 51).

SCSIF

S.C. Code Ann. §42-7-310 (1976, as amended) provided for the establishment, purpose, administration, funding and staff of SCSIF. A careful reading of §42-7-310(d)(2) reveals that it does not define the term “carrier” or “insurer” nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). Reimbursements to an “employer” or “insurance carrier” are governed by, and made pursuant to, S.C. Code Ann. §42-9-400 and §42-9-410 (1976, as amended). In this particular case, the approved Agreement to Reimburse Compensation specifically provides that Lumbermens shall receive reimbursement in accordance with the provisions of §42-9-400 for the cervical spine only (emphasis added) (SCPCIGA’s APA Submission No. 11 at page 206).

The July 1, 2007 amendments to the South Carolina Workers’ Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers’ Compensation Act) included the enactment of S.C. Code Ann. §42-7-320 (1976, as amended) providing for the termination of SCSIF and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability Authority (hereinafter referred to collectively as “SFAA”) was required to provide for the efficient and expeditious closure of SCSIF with the orderly winding down of the affairs of SCSIF so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms ~~as are reasonably determined necessary to fund any remaining liabilities of the fund~~ (emphasis added). §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident Fund remain liable for SCSIF’s assessments, as determined by SFAA, in order to pay accepted claims and SCSIF shall continue reimbursing employers and insurance carriers for claims

accepted by SCSIF on or before December 31, 2011 (emphasis added). §42-7-320 does not define the terms “carrier” or “insurer” nor does it exclude SCPCIGA as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of SCSIF’s remaining liabilities and options for funding SCSIF’s remaining liabilities. In that regard, KPMG produced its initial actuarial report in March 2013 (SCPCIGA’s APA Submission No. 4 at pages 114 - 148). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (Exhibit No. 1 to Lombard deposition, Lombard deposition at pages 24 - 45 and Stooksbury deposition at pages 10 - 11 and 21). Concerning the administration of SCSIF’s continuing operations, SFAA assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF) which is part of SFAA. SCIRF’s administrative responsibilities commenced in May 2013 shortly before termination of the SCSIF’s programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (Lombard deposition at pages 8 - 16). Chris Lombard is the Assistant Director of Claims for SCIRF and in connection therewith, is responsible for the management of SCSIF’s operations (Lombard deposition at pages 6 - 8). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of SCSIF’s ongoing assessments under §42-7-320 (Lombard deposition at page 16 and Stooksbury deposition at pages 7 - 8).

Prior Litigation

Disputes involving SCPCIGA's entitlement to reimbursement from SCSIF are not new. SCPCIGA and SCSIF extensively litigated many of the same issues in connection with various reimbursement claims made by SCPCIGA for workers' compensation benefits it paid to injured employees as a result of the insolvency of Legion Insurance Company. That litigation resulted in various decisions and orders issued by the Commission and the Circuit Court. Those decisions and orders determined SCPCIGA to be eligible for, and entitled to, reimbursement. In so doing, the Commission and Circuit Court rejected the arguments that SCPCIGA is not an entity statutorily authorized to receive reimbursement and that SCPCIGA cannot be eligible for reimbursement because it does not pay assessments and/or as a result of the underlying insolvent carrier's default status with respect to payment of SCSIF assessments pursuant to the statutory amendment to §42-7-310(d)(2) effective June 25, 2003 (SCPCIGA's APA Submission Nos. 1, 2 and 3 at pages 1 - 113).

In particular, litigation of the reimbursement claim associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, resulted in these issues being presented to the South Carolina Court of Appeals on appeal by SCSIF. Prior to a ruling by the Court of Appeals, SCPCIGA and SCSIF entered into the June 17, 2003 Settlement Agreement and Release which resulted in dismissal of SCSIF's appeal (SCPCIGA's APA Submission No. 2 at pages 70 - 71). The settlement agreement, which was approved by a majority of the Commission, defined the terms "Legion" and "Reliance" and effectuated SCPCIGA's release of SCSIF on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or:

(B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any and all claims, on which SCSIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement approved by the Commission further states: "The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any "large deductible" policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers" (emphasis added) (Exhibit No. 3 to Lombard deposition).

STATEMENT OF CASE

SCPCIGA sought reimbursement from SCSIF in accordance with the Agreement to Reimburse Compensation entered between Lumbermens and SCSIF pursuant to the terms and provisions of §38-31-60(b), §42-7-310, §42-7-320 and §42-9-400 (SCPCIGA's Form 54 Hearing Request dated December 8, 2016). SCSIF disputed SCPCIGA's entitlement to reimbursement contending that SCPCIGA is not an entity statutorily authorized to receive reimbursement; that SCPCIGA does not pay assessments to SCSIF; that the liquidated carrier pursuant to which SCPCIGA asserts its right to reimbursement, Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to SCSIF thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320; and that SCPCIGA's reimbursement claim is barred by reason of a certain Settlement Agreement and Release entered between SCSIF and SCPCIGA dated June 17, 2013 (SCSIF's Form 55 Answer dated January 5, 2017 and Form 58 Pre-Hearing Brief dated April 20, 2017).³

SCPCIGA and SCSIF, by and through their respective counsel, appeared before Commissioner T. Scott Beck for the Forms 54/55 hearing on June 21, 2017 in Columbia, South Carolina. The record reflects that various documentary evidence was submitted and included in the record pursuant to the Administrative Procedures Act (APA). In addition to the APA Submissions, the deposition of David Stooksbury dated April 26, 2017 with exhibits; the deposition of Christopher Lombard dated March 8, 2017 with exhibits; and the deposition of J. Smith Harrison, Jr. dated March 8, 2017 were submitted and included in the record. SCSIF's

³ SCPCIGA and SCSIF are the only parties who have heretofore participated in the current litigation. Counsel for the Claimant, Kathryn Williams, Esquire, and the liquidated carrier, Jeff Jones, Esquire, have been appropriately served with all pleadings. SCPCIGA does not anticipate either of these parties will participate in proceedings before the Court.

objection to SCPCIGA's APA Submissions Nos. 1 through 5 was overruled by the Single Commissioner. Stipulations were entered concerning jurisdiction, venue and the Commission's file becoming part of the record with the exception of self-serving declarations and unstipulated medical reports. The hearing proceeded in the form of oral argument by counsel.

The Single Commissioner's Decision and Order was filed and served on October 2, 2017. It appropriately listed the documentary evidence included in the record; recited the stipulations entered by the appearing parties; and detailed the pertinent background and evidentiary facts. Following an exhaustive analysis of the evidentiary record and applicable law concerning the issues in dispute, the Single Commissioner made various findings of fact and conclusions of law and ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the approved Agreement to Reimburse Compensation.

SCSIF timely filed and served its Form 30 Request for Commission Review of the Single Commissioner's Decision and Order on October 16, 2017 presenting seven specific questions of alleged error by the Single Commissioner. The Commission issued a Form 31 Briefing Schedule and Notice of Appellate Hearing assigning the matter to a Full Commission Appellate Panel which consisted of Commissioners Aisha Taylor, Susan S. Barden and Gene McCaskill. In its Appellant Brief timely filed and served on December 18, 2017, SCSIF made three arguments. SCSIF asserted that the Single Commissioner erred in ruling that SCPCIGA is statutorily authorized to seek reimbursement; erred in ruling that SCPCIGA is entitled to reimbursement even though it does not participate in SCSIF's assessment process; and erred in failing to rule that the Settlement Agreement and Release entered between the appearing parties dated June 17, 2013 does not bar SCPCIGA's reimbursement claim. SCPCIGA timely filed/served its

Respondent Brief following which SCSIF filed/served a Reply Brief. Oral argument was held before the Appellate Panel on January 22, 2018 in Columbia, South Carolina per notices timely and properly served upon all parties of interest. Thereafter, the Appellate Panel issued its Decision and Order dated March 29, 2018 wherein it made the following findings of fact and conclusions of law:

Findings of Fact

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. SCSIF and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which SCPCIGA is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. SCPCIGA has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. SCSIF made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. SCPCIGA is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to the Claimant in this claim thereby meeting the statutory definition of the terms "carrier" or "insurer" in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.
7. SCPCIGA has never been assessed by SCSIF and is not delinquent or in default with respect to any SCSIF assessments.

8. SCPCIGA, as an unincorporated legal entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to SCSIF.
9. Lumbermens is not delinquent or in default with respect to any assessments payable to SCSIF and has paid all assessments owed to SCSIF.
10. SCSIF's liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which SCPCIGA's workers compensation member insurers have paid assessments to SCSIF to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to claims on which SCSIF was paying SCPCIGA as of February 22, 2013 and does not bar this reimbursement claim or release SCSIF from its liability for reimbursement on this claim.
12. SCPCIGA was not paying this claim as of February 22, 2013.
13. At no time has SCSIF reimbursed SCPCIGA in connection with this claim and specifically, SCSIF was not paying SCPCIGA on this claim as of February 22, 2013.
14. SCPCIGA is statutorily authorized to make a reimbursement claim against SCSIF and receive reimbursement from SCSIF for workers' compensation benefits paid by SCPCIGA in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

Conclusions of Law

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between SCPCIGA and SCSIF concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers' compensation benefits in connection with which SCPCIGA is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers' Compensation Act for, or on behalf of, the Claimant in accordance with Commission's approved Order dated January 6, 2005.

3. Under §38-31-60(b), SCPCIGA is considered the insurer on this covered workers' compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from SCSIF in accordance with the terms and provisions of the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
4. Under §38-31-40, §42-1-60 and §42-5-20, SCPCIGA is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320. Moreover, the South Carolina Supreme Court's decisions in Brock v. South Carolina Property and Casualty Insurance Guaranty Association, 410 S.C. 361, 764 S.E.2d 920 (2014) (involving a policy of liability insurance rather than a policy of workers' compensation insurance under which SCPCIGA is fully responsible for covered claims) is not applicable to this matter.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to SCSIF and is not delinquent or in default with respect to payment of any assessments to SCSIF; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by SCPCIGA's member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included.
6. Under §42-7-310 and §42-7-320, SCPCIGA, as an unincorporated association, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by SCSIF in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of SCPCIGA's workers' compensation member insurers are delinquent or in default with respect to assessments payable to SCSIF.
8. Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between SCPCIGA and SCSIF dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter and the amount of the monetary consideration is of no consequence.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to SCPCIGA's rights of recoupment and setoff and do not abrogate

or limit the rights of Lumbermens under the Workers' Compensation Act which SCPCIGA maintains pursuant to §38-31-60(b).

10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; SCPCIGA is an entity statutorily authorized to make a reimbursement claim against SCSIF in this matter and to receive reimbursement from SCSIF for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from SCSIF in accordance with the terms and provisions of the unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.
11. Under §38-31-60(b), the rights of the liquidated carrier under the Workers' Compensation Act which SCPCIGA maintains are not limited exclusively to matters pertaining to the defense by SCPCIGA of ongoing claims. Alternatively, SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of this fully covered workers' compensation claim and as such, is part and parcel of SCPCIGA's obligation for payment of this covered claim and its defense thereof.
12. Under §42-7-310 and §42-7-320 and in light of the foregoing Findings of Fact Nos. 7 – 10 and Conclusions of Law Nos. 5 – 8; any assertion that SCPCIGA's reimbursement claim is barred due to a failure to pay assessments, directly or otherwise, is without merit.

Based on the foregoing findings and conclusions, the Appellate Panel affirmed the Decision and Order of the Single Commissioner dated October 2, 2017 in its entirety and ordered that SCSIF shall make reimbursement to SCPCIGA for workers' compensation benefits paid by SCPCIGA in this matter in accordance with the terms and provisions of the approved Agreement to Reimburse Compensation. From that Order, SCSIF appeals to this Court presenting essentially the same grounds of appeal that were presented to the Appellate Panel.

STANDARD OF REVIEW

The standard of review in an appeal from a final decision of an administrative agency is governed by §1-23-380(b) of the South Carolina Code of Laws (1986, as amended) (commonly known as the Administrative Procedures Act). See Pringle v. Builders Transport, Inc., 381 S.E. 2d 731 (1989). See Lark v. Bi Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). The Appellate

Court can reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” See Gray v. Club Group, Ltd., 528 S.E. 2d 435 (Ct.App.2000), citing S. C. Code Ann. §1-23-380(g) (1986, as amended). In considering an appeal from a Decision and Order of the South Carolina Workers’ Compensation Commission, the Court’s role is appellate and is limited to deciding whether the Commission’s decision is supported by substantial evidence or is controlled by some error of law. See Rogers v. Kunja Knitting Mills Co., 440 S.E.2d 401, re-hearing denied (Ct. App. 1994). In an appeal from the Workers’ Compensation Commission, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(6) (1976), *construed in* Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A decision of the Workers’ Compensation Commission must be affirmed if factual findings are supported by substantial evidence. See Stokes v. First National Bank, 410 S.E.2d 248 (1991). Substantial evidence is that evidence which would require refusal to direct a verdict if the matter were before a jury and is something less than the weight of the evidence. See Hoxit v. Michelin Tire Corporation, 405 S.E.2d 407, 304 S.C. 461 (1991). The possibility of drawing two inconsistent conclusions from the evidence does not prevent administrative findings from being supported by substantial evidence. Id. If the factual findings of the Workers’ Compensation Commission are supported by substantial evidence, the Commissions’ conclusions must be affirmed. See Ross v. American Red Cross, 381 S.E. 2d 728, 298 S.C. 490 (1989).

ARGUMENT

I. Statutory Authorization

SCSIF contends that application of §38-31-60(b) is limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated carrier and that SCPCIGA's rights of recoupment and offset are limited to those expressly provided for in §38-31-90 and S.C. Code Ann. §38-31-100 (2017) (emphasis added). In this regard, SCSIF relies on the statutory construction principle of "expressio unius est exclusio alterius." This argument is based on a forced construction and overly narrow interpretation of those statutory provisions.

The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). Statutes dealing with same subject matter are *in pari materia* and must be construed together if possible to produce a single harmonious result. Beaufort County v. S.C. State Election Commission, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) *citing* Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

✓ (§38-31-60 provides for the powers and duties of SCPCIGA.) It is a multi-faceted statute which contrary to SCSIF's contention, is not limited to matters pertaining to the defense by SCPCIGA of ongoing claims of a liquidated carrier. Among its enumerated affirmative powers, §38-31-60(j) authorizes SCPCIGA to sue and §38-31-60(l) authorizes it to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act (emphasis added). There is no language in §38-31-60(b) or elsewhere in the statute which limits the liquidated carrier's

rights assumed by SCPCIGA to those pertaining to the defense of ongoing claims. The fact that the second sentence in §38-31-60(b) provides that SCPCIGA has the right but not the obligation to defend an insured that is not a resident of this State in no way suggests or provides that the rights assumed by SCPCIGA are limited to matters pertaining to the defense of covered claims. It merely distinguishes a specific situation where SCPCIGA has a right but not an obligation. SCSIF is essentially adding language not contained in §38-31-60(b) to limit the rights assumed by SCPCIGA and support its contention that SCPCIGA is not statutorily authorized to make a reimbursement claim. This is precisely the type of forced statutory construction that is prohibited.⁴

Assuming *arguendo* that the forced construction of §38-31-60(b) advocated by SCSIF were to be accepted; such should not result in a determination that SCPCIGA is not statutorily authorized to seek/receive reimbursement. As set forth above, this matter involves a covered workers' compensation claim for which SCPCIGA is fully responsible pursuant to §38-31-60. As part of its defense of the claim, SCPCIGA is entitled to assert Lumbermens' existing right of reimbursement. It is self-evident that SCPCIGA would have no reason to assert the liquidated carrier's right to reimbursement but for its obligation to pay the claim imposed by §38-31-60(b). Accordingly, SCPCIGA's reimbursement claim is inextricably linked to its obligation for payment of the claim and is part and parcel of SCPCIGA's defense of the claim.

Similarly, there is no language in §38-31-90 or §38-31-100 which abrogates the liquidated carrier's rights under the Workers' Compensation Act which SCPCIGA assumes

⁴ See also Farmer v. CAGC Insurance Company, Opinion No. 5562 (S.C. Ct. App. May 23, 2018) (rehearing denied October 18, 2018) *holding* the statutory directive under §38-31-60(d) (2018) requiring that SCPCIGA "shall investigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and deny all other claims..." and §38-31-60(1) authorizing SCPCIGA to "perform any other acts necessary or proper to effectuate the purpose of [the Guaranty Act]," allows SCPCIGA to take an affirmative/offensive action not specifically enumerated under the Guaranty Act with respect to its handling and payment of a covered claim.

pursuant to §38-31-60(b). SCSIF's fails to reference any language to that effect. Instead, SCSIF references the statutory construction principle of "expressio unius est exclusio" to support its assertion that SCPCIGA's rights of recoupment and offset as provided in §38-31-90 and §38-31-100 are exclusive. This is a misguided argument. SCPCIGA's rights of recoupment and offset as provided for in §38-31-90 and §38-31-100 are not dispositive in determining whether SCPCIGA is statutorily authorized to receive reimbursement from SCSIF. SCSIF's argument ignores the clear, unequivocal and broad language in §38-31-60(b) conferring upon SCPCIGA all rights of the liquidated carrier to the extent of its obligation on this covered workers' compensation claim. By way of illustration, the right to reimbursement pursuant to an approved agreement to reimburse compensation would be one of several recoupment/offset rights of a liquidated carrier that SCPCIGA would maintain under the Workers' Compensation Act in connection with its obligation on a covered workers' compensation claim. Others would include subrogation rights under S.C. Code Ann. §42-1-560 (1976, as amended) and the right to assert credit for payments made when not due and payable pursuant to S.C. Ann. §42-9-210 (1976, as amended).

SCSIF's argument that SCPCIGA is not an insurance company entitled to reimbursement pursuant to §42-7-310 and §42-9-400 misconstrues those statutes and continues to ignore S.C. Code Ann. §42-1-60 and §42-5-20 (1976, as amended). SCSIF uses the terms "insurance company" and "insurance carrier" interchangeably. SCPCIGA does not purport to be an insurance company. However, SCPCIGA asserts that it is authorized to insure the Employer's workers' compensation liabilities in this claim and thereby meets the statutory definition of the

terms “carrier” and “insurer” provided in §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.⁵

As indicated above, §42-7-310 provided for the establishment, purpose, administration, funding and staff of the SCSIF. It does not define the term “carrier” nor does it exclude SCPCIGA as an entity entitled to reimbursement. Rather, it merely provides that the term as used in §42-7-310(d)(2) includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). In this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of §42-9-400 (emphasis added). §42-9-400(a) states in pertinent part that “...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310...” (emphasis added). §42-7-320(B)(3) requires SCSIF to continue reimbursing employers and insurance carriers for claims accepted by SCSIF on or before December 31, 2011.

§42-1-60 defines the term “carrier” or “insurer” as “any person or fund authorized under §42-5-20 to insure under this title (Title 42) and includes self-insurers.” §42-5-20 states in pertinent part that “[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized...” The term “insure” is defined in Black’s Law Dictionary, Abridged Fifth Edition, as “[t]o make sure or secure, to guarantee, as to insure safety to anyone. To engage to indemnify a person against pecuniary loss from specified perils or possible liability.”

Under §38-31-60(b), SCPCIGA is considered the insurer to the extent of its obligation on the covered claims and as set forth above, the uncontradicted record establishes that this matter

⁵ In its Appellant Brief filed with this Court, SCSIF erroneously asserts that SCPCIGA has conceded it is not an “insurance carrier.” SCPCIGA has only conceded that it is not an “insurance company” and maintains, as was held by the Commission, that it is the Employer’s “insurance carrier” as the term is used in §42-9-400 and §42-7-320.

involves a covered workers' compensation claim for which SCPCIGA is responsible for paying the full amount under §38-31-60(iv).

Concerning whether SCPCIGA is authorized under §42-5-20 to insure liabilities under the Workers' Compensation Act thereby meeting the statutory definition of the term "carrier" or "insurer" under §42-1-60 and as used in §42-9-400 and §42-7-320; it is self-evident that SCPCIGA would not be responsible for paying this claim and would have no reason to be seeking reimbursement if it was not so authorized. Substantial evidence in the record establishes that the Commission has authorized SCPCIGA to insure liabilities under the Workers' Compensation Act and there is no evidence in the record to the contrary (see Harrison deposition at pages 54 - 56). In this regard, it was also appropriate for the Commission to take judicial notice of routine decisions and actions by the Commission with respect to SCPCIGA's data reporting obligations and benefit liabilities on covered workers' compensation claims in carrying out the Commission's administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers' Compensation Act. In short, the uncontradicted and substantial evidentiary record and applicable statutory provisions establish SCPCIGA as an association authorized to insure liabilities under the Workers' Compensation Act and in particular, authorized to insure the Employer's liabilities in this fully covered workers' compensation claim.

In connection with its argument that SCPCIGA is not an insurance carrier authorized to receive reimbursement, SCSIF cites the South Carolina Supreme Court's decision in South Carolina Property and Casualty Insurance Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) for the proposition that SCPCIGA is not an insurance company/carrier entitled to reimbursement. Notably, SCSIF concedes in its Appellant Briefs to the Full Commission and this Court that Brock was decided in a different context. SCPCIGA asserts that any reliance on

Brock is misplaced. The Court's statement in Brock that SCPCIGA is "...neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies" was made in the context of its analysis of SCPCIGA's rights to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. Brock did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which SCPCIGA would be responsible for paying the full amount and, therefore, is clearly distinguished from the current matter. More specifically, Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply.⁶

II. Assessments

SCSIF asserts that the Commission erred in ruling that SCPCIGA is entitled to request/receive reimbursement without having directly participated in the statutory assessment process (emphasis added). The term "directly" represents a shift in SCSIF's evolving position as it relates to this issue. Previously in its Form 55, SCSIF asserted that SCPCIGA was barred from reimbursement because it does not pay assessments and pursuant to §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of assessments. Subsequent discovery in the way of the deposition testimony of David Stooksbury, SCIRF's business manager in charge of SCSIF's operations as it relates to assessments, testified clearly and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed. (Stooksbury deposition at page 47). He also testified that if a carrier goes under and stops paying claims, the assessment goes to zero (Stooksbury deposition at page

⁶ To the extent SCSIF also relies on the South Carolina Supreme Court's recent holding in Buchanan v. South Carolina Insurance Guaranty Association, Opinion No. 27840 (September 5, 2018) for the same proposition, SCPCIGA contends that it is distinguishable and inapplicable to the current matter for the same reasons.

47). SCSIF made no assertion of the claim being barred under §42-7-310(d)(2) as a result of Lumbermens purported default in payment of assessments during oral argument before the Hearing Commissioner and has effectively abandoned that position given its failure to include such in its Form 30 exceptions from the Single Commissioner's Decision and Order. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 841 (1940). During oral argument before the Single Commissioner, SCSIF re-asserted its position that SCPCIGA was barred from reimbursement because it does not pay assessments and also asserted that the reimbursement claim is barred under §42-7-310 and §42-7-320 as a result of Lumbermens non-participation in the assessment process subsequent to its liquidation. It was not until the proceedings before the Full Commission that SCSIF modified its position on the issue by asserting that SCPCIGA's failure to "directly" participate in the assessment process barred the reimbursement claim.

The uncontradicted and substantial evidentiary record reflects that SCSIF has never assessed SCPCIGA (Lombard deposition at pages 80 - 81; Harrison deposition at page 23 and Stooksbury deposition at page 68). Pursuant to §38-31-40, SCPCIGA is an unincorporated entity and its workers' compensation member insurers pay assessments to SCSIF (Harrison deposition at page 50 and Stooksbury deposition at pages 50 - 51). In connection therewith, it should also be noted that any theoretical assessment on SCPCIGA would not alter or affect the total sum of assessments raised on an annual basis by SCSIF under the pre-July 1, 2013 funding mechanism set forth in §42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by SFAA pursuant to §42-7-320. Rather, the only variable would be what entities were paying and in what amounts (Lombard deposition at pages 80 - 84 and Stooksbury deposition at pages 75 - 76). The record further reflects that SCPCIGA's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan

adopted by SFAA in connection with which SCSIF's liability for reimbursement on this claim was considered and included (SCPCIGA's APA Submission No. 4 at page 116 and Stooksbury deposition at pages 58 - 61, 64 and 66). There is no indication that any of SCPCIGA's workers' compensation insurers are delinquent in payment of assessments to SCSIF (Stooksbury deposition at pages 49 - 51). SCSIF has assessed, and will continue to assess, SCPCIGA's workers' compensation member insurers for its obligations on this claim. The foregoing clearly establishes that SCPCIGA, as an unincorporated entity, effectively pays assessments to SCSIF via the assessments paid by its workers' compensation member insurers. There is no delinquency in payment of those assessment including payment of the assessments associated with the five year \$60,000,000 per year funding plan adopted by SFAA which considered and included SCSIF's liability for reimbursement on this particular claim.

Remarkably, SCSIF now asserts that the foregoing substantial evidence is not relevant despite raising the issue of SCPCIGA's non-participation in the assessment process as a defense to the reimbursement claim. SCSIF, confronted with the overwhelming evidence of participation in the assessment process by SCPCIGA's workers' compensation member insurers to include payment of assessments to fund SCSIF's liability on this particular claim, apparently bases this assertion on SCPCIGA not "directly" paying assessments notwithstanding the fact that it has never assessed SCPCIGA. The only statutory provision which conditions reimbursement upon payment of assessments is the amendment to §42-7-310(d)(2) which became effective June 25, 2003. In light of David Stooksbury's uncontradicted testimony that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect

to payment of assessments, any argument that SCPCIGA's reimbursement claim is barred because of an issue connected to assessments is baseless and without merit.⁷

III. Prior Settlement Agreement

SCSIF asserts that the Settlement Agreement and Release entered between it and SCPCIGA dated June 17, 2013 bars SCPCIGA's claim for reimbursement or otherwise releases SCSIF from its liability for reimbursement on this claim (SCSIF's APA Submission No. 1 at pages 1 – 14). In this regard, SCSIF notes provisions in the Settlement Agreement and Release that the language therein should be construed as a whole and not strictly for or against any party and that the terms are to be given the broadest understanding. SCSIF also notes SCPCIGA's knowledge of the Lumbermens' claims to specifically include this claim as of June 17, 2013 and the fact that SCPCIGA had set up reserves and paid benefits on this particular claim prior to execution and Commission approval of the June 17, 2013 Settlement Agreement and Release (SCPCIGA APA Submission No. 7 at pages 191 – 194). SCSIF also argues that the amount of the monetary consideration paid by SCSIF to SCPCIGA for the Settlement Agreement and Release dated June 17, 2013 supports its contention in this regard.

The plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein; the settlement and release applied only to those claims on which SCSIF was paying SCPCIGA as of February 22, 2013. The uncontradicted evidentiary record reflects that Lumbermens was not liquidated until May 8, 2013; that SCPCIGA was not paying this claim as of February 22, 2013 and that at no time has SCSIF

⁷ As a result of the uncontradicted record establishing that neither Lumbermens or any of SCPCIGA's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, it was not necessary for the Commission to address whether the pertinent statutory amendment to §42-7-310(d)(2) effective June 25, 2003 should be applied retroactively in this claim with an underlying date of accident/injury on December 17, 1999. Moreover, SCSIF has abandoned any position in that regard inasmuch as such was not included in its Form 30 exceptions. Ham, supra, and Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993).

reimbursed SCPCIGA in connection with this claim (Lombard deposition at pages 39 – 42 and Harrison deposition at page 47). Based on the plain, clear and unequivocal language in the Settlement Agreement and Release, and any reasonable construction thereof; it does not effectuate a bar to SCPCIGA's reimbursement claim in this matter or release SCSIF from its liability for reimbursement on this claim and the amount of the monetary consideration is of no consequence.

CONCLUSION

For the foregoing reasons, SCPCIGA respectfully requests that the South Carolina Workers' Compensation Commission's Decision and Order dated March 29, 2018 be affirmed in its entirety.

Respectfully submitted,

Wood Law Group, LLC
P. O. Box 20550
Charleston, SC 29413
Ph.: 843-577-5732

By: s/J. Hubert Wood, III
J. Hubert Wood, III
Attorneys for SCPCIGA

Date: October 25, 2018
Charleston, South Carolina

1 BEFORE THE SOUTH CAROLINA
2 WORKERS' COMPENSATION COMMISSION

3
4 MICHAEL T. QUARLES,
5 Employee,
6 Claimant,

7 vs. WCC FILE NO.: 9928766

8 SEALED AIR CORPORATION/CRYOVAC,
9 Employer,

10 and

11 LUMBERMEN'S MUTUAL CASUALTY COMPANY,
12 Carrier,
13 Defendants.

14
15
16
17
18
19
20
21
22
23
24
25

COPY

H E A R I N G

DATE: Wednesday, June 21, 2017

TIME: 2:28 p.m.

LOCATION: Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, South Carolina

BEFORE: Commissioner T. Scott Beck

REPORTED BY: Cheryl A. Wiszowaty
South Carolina Court Reporter

ABC REPORTING SERVICE
257 Summerland Avenue
Batesburg, South Carolina 29006
1-803-532-5255
1-803-730-3015 (cell)

1 APPEARANCES:

2

3

ATTORNEY FOR
SOUTH CAROLINA PROPERTY AND
CASUALTY INSURANCE GUARANTY ASSOCIATION:

4

5

WOOD LAW GROUP
BY: J. HUBERT WOOD, III, ESQUIRE
1 Wesley Drive
Post Office Box 20550 (29413)
Charleston, South Carolina 29407

6

7

8

9

ATTORNEY FOR
SOUTH CAROLINA SECOND INJURY FUND:

10

11

THE ROBERT COOK LAW FIRM, LLC
BY: ROBERT M. COOK, II, ESQUIRE
128 North Oak Street
Post Office Box 3575 (29070)
Batesburg, South Carolina 29006

12

13

14

15

16

17

18

19

20

21

22

23

24

25

* * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(SCPCIGA EXH. 1, Transcript of
W. David Stooksbury Dated 4-26-2017, was premarked
for identification and admitted into evidence.)

(SCPCIGA EXH. 2, Transcript of
Christopher M. Lombard Dated 3-8-2017, was
premarked for identification and admitted into
evidence.)

(SC-SIF EXH. 1, Transcript of
J. Smith Harrison, Jr., CPCU, Dated 3-8-2017, was
premarked for identification and admitted into
evidence.)

THE COURT: All right. Today's date
is June 21, 2017. This is Workers' Compensation
File No. 9928766. The claimant in this matter was
Michael Quarles, who was represented by Attorney
Katherine Williams. The carrier in this matter
was Lumbermen's Mutual Casualty Company. They
were originally represented by
Attorney Jeff Jones.

The matter before me today is a 54/55
hearing. The South Carolina Property and Casualty
Insurance Guarantee Association has filed a 54.
They are represented today by Attorney Hubie Wood.

The South Carolina Second Injury Fund

1 is present today and is represented today by
2 Attorney Robert Cook.

3 While Ms. Williams and Mr. Jones were
4 noticed of this proceeding, their presence was not
5 required at this hearing today, and as a result,
6 they are not present today in the courtroom.

7 The date of accident in this matter
8 was December 17, 1999. I've received APAs from
9 the Guaranty Association and the Second Injury
10 Fund. I've also received a memorandum on behalf
11 of the Guaranty Association as well as the
12 deposition of Mr. David Stooksbury, which has been
13 marked as SCPCIGA No. 1, and the deposition
14 testimony of Mr. Lombard, Christopher Lombard, and
15 that has been marked as SCPCIGA No. 2.

16 Finally, I have the deposition
17 testimony of Mr. Smith Harrison. That has been
18 marked as SC-SIF No. 1.

19 Prior to going on the record, I
20 addressed objections by the parties. The Second
21 Injury Fund objected to the Guaranty Association's
22 ~~Exhibits 1, 2, 3, 4 and 5. I'm overruling those~~
23 objections. I will apply the applicable weight
24 and relevancy of each of those particular
25 documents in my deliberations.

1 Other than those objections, are
2 there any other objections to APAs, jurisdiction,
3 venue or any other item? Mr. Wood?

4 MR. WOOD: No, sir.

5 THE COURT: Mr. Cook?

6 MR. COOK: No, Your Honor.

7 THE COURT: Without further objection
8 the Commission file becomes a part of the record
9 with the exception of self-serving declarations
10 and unstipulated medical reports.

11 Also during the hearing conference in
12 this matter, the respective positions of both the
13 parties was discussed. It is my understanding
14 from that prehearing conference that the sole
15 issue before me today is to determine whether or
16 not the Guaranty Association is entitled to
17 reimbursement from the Second Injury Fund.

18 Mr. Wood, is that your understanding
19 of why we are here today?

20 MR. WOOD: Yes, sir.

21 THE COURT: Is there anything else
22 you would like to get on the record or is there
23 any other matter you are here to litigate?

24 MR. WOOD: No, sir. I just wanted to
25 point out that we had also noticed Mr. Smith

1 Harrison's deposition as a -- presenting as a
2 witness on our behalf. We didn't want to hand you
3 two copies, and Mr. Cook had taken that
4 deposition, so he handed up the original. I just
5 wanted to make that known.

6 THE COURT: All right. Thank you,
7 sir.

8 MR. WOOD: Yes, sir.

9 THE COURT: Mr. Cook, is that your
10 understanding of why we are here today?

11 MR. COOK: Yes, sir, with one caveat.

12 THE COURT: Yes, sir.

13 MR. COOK: There is also the issue of
14 whether a certain June 17, 2013, release signed by
15 the Guaranty Association bars these claims. The
16 way that you worded it, I wasn't sure if you were
17 just speaking just as to statutory authority to
18 recover or --

19 THE COURT: No, sir, I'm not.

20 MR. COOK: -- just general. Okay.

21 THE COURT: Just general.

22 ~~MR. COOK: Yes, sir.~~

23 THE COURT: All right. Any other
24 matter you're here to litigate or anything else
25 you want to get on the record?

1 MR. COOK: No, sir.

2 THE COURT: All right. As we
3 discussed before going on the record, I'm going to
4 allow each attorney to place their legal arguments
5 on the record. I will start with Mr. Wood. At
6 the conclusion of each of your presentations, I
7 will give each of you a second bite at the
8 apple.

9 Are we in agreement proceeding that
10 way? Mr. Wood?

11 MR. WOOD: Yes, sir.

12 MR. COOK: Yes, sir.

13 THE COURT: All right. The other
14 thing that we discussed before going on the record
15 is that I could make a decision in this matter;
16 that this is purely a legal decision and I could
17 make a decision based on the submissions before me
18 and your oral arguments.

19 Is that your understanding,
20 Mr. Wood?

21 MR. WOOD: Yes, sir.

22 THE COURT: Mr. Cook?

23 MR. COOK: Yes.

24 THE COURT: All right. Mr. Wood, be
25 happy to hear from you, sir.

1 MR. WOOD: Thank you, Commissioner.
2 Appreciate your time, and thank you very much for
3 getting us back in in an expeditious fashion after
4 the Supreme Court's ruling.

5 THE COURT: Yes, sir.

6 MR. WOOD: And I also appreciate you
7 holding the hearing here in Columbia today as
8 opposed to the extra hour and a half from
9 Charleston up the road to Greenville.

10 THE COURT: Absolutely.

11 MR. WOOD: I think we've touched on a
12 number of the topics in the prehearing conference,
13 and I've handed up a hearing memorandum which I
14 think lays out the matter in detail and cites the
15 relevant issues.

16 As you indicated, Mr. Quarles had an
17 injury back in 1999 that involved the neck, back,
18 as well as a psychological component. There was a
19 Full Commission Appellate Panel order that
20 affirmed that.

21 Thereafter, the parties settled the
22 ~~case from an indemnity standpoint and the medical~~
23 remained open, and that's -- essentially all the
24 indemnity has been paid by way of that settlement
25 agreement. Lifetime -- effectively lifetime

1 medical for these causally-related conditions
2 continues.

3 The Guaranty Association has accepted
4 this as a covered claim under the Guaranty Act.
5 Under the Guaranty Act, and this is important,
6 I'll circle back to it momentarily, but under the
7 Guaranty Act workers' compensation has a special
8 place. With respect to workers' compensation
9 claims, there is no limitations on the Guaranty
10 Association's liability.

11 Dealing with a liability claim,
12 property loss, along those lines, there are
13 certain limitations on the Guaranty Association's
14 liability. That is not the case in a workers'
15 compensation case.

16 38-31-60 specifically provides that
17 the Guaranty Association is responsible for paying
18 the entire amount, the covered workers'
19 compensation claim, which this is.

20 Why is the Guaranty Association
21 involved in paying it as a covered claim? Because
22 Lumbermen's, the original carrier, or the carrier
23 for Cryovac Sealed Air Corporation, was liquidated
24 by order of the State of Illinois on May 8 of
25 2013. And that's an important date. It is a

1 benchmarked for a number of issues, but the
2 liquidation date is significant.

3 Since that time, the Guaranty
4 Association has been paying benefits. We
5 requested the Second Injury Fund to make
6 reimbursement in accordance with the prior
7 agreement to reimburse compensation, which was
8 entered in I believe 2005, and I don't think there
9 is any dispute on that.

10 But the agreement to reimburse
11 compensation, the Second Injury Fund accepted the
12 claim for the cervical spine, agreed to make
13 reimbursement -- reimbursement in accordance with
14 Section 42-9-400. That was approved by the
15 Workers' Compensation Commission. It was
16 unappealed.

17 Under 42-7-310 an unappealed approved
18 agreement to reimburse compensation is as binding
19 as -- you know, just like an unappealed order,
20 just like a filed settlement agreement. It's it.
21 That's it. You can't -- you know, you've got to
22 ~~live with it.~~

23 So reimbursements continued to
24 Lumbermen's actually beyond the liquidation date,
25 up until early 2014. That's significant. Again,

1 we've talked about some of this. We've talked
2 about some of these issues in the prehearing
3 dealing with the ongoing funding of the Second
4 Injury Fund, the assessments issue and so forth,
5 and I'll come back to that momentarily, but that's
6 an important thing to remember, that
7 reimbursements on this claim were continuing to
8 Lumbermen's into early of 2014 despite the
9 liquidation that had occurred on May 8 of 2013.

10 So under 38-31-60, which is the
11 primary statute we rely on, the Guaranty
12 Association on the covered claims, again, this is
13 a covered workers' compensation claim, to the
14 extent of its liability on the covered claims, has
15 all the rights, duties and obligations of the
16 liquidated carrier.

17 So we think that statute,
18 Commissioner, which is -- which is really the
19 cornerstone of where our rights are devolved from,
20 we basically step in the shoes of Lumbermen's in
21 all respects in a workers' compensation cases.

22 We are over here defending any claim
23 that comes up, filing Form 18s. Whatever needs to
24 be dealt with from the standpoint of this claim,
25 the Guaranty Association is totally in the shoes

1 of the liquidated carrier.

2 42-7-320, that's the statute that was
3 part of our 2007 Reform Act and it provided for
4 the closure of the Second Injury Fund, the
5 schedule for the same, the deadline for submitting
6 claims and so forth. That is significant because,
7 as we discussed in the prehearing conference, the
8 Second Injury Fund, effective July 1, 2013, ceased
9 to exist as a separate state agency. It was moved
10 under the management and direction of the -- it
11 was continuing operations, were moved under the
12 direction of the Budget and Control Board.

13 I know you're very familiar with the
14 happenings in state government. The Budget and
15 Control Board has since become the State Fiscal
16 Accountability Authority, so those terms can kind
17 of get used interchangeably, or those names can
18 kind of get used interchangeably in some of the
19 testimony and discussion about the case.

20 The record reflects that the Budget
21 and Control Board assigned, which -- assigned
22 ~~operations for the run-off of the Second Injury~~
23 Fund to the Insurance Reserve Fund. The Insurance
24 Reserve Fund became involved in starting up on
25 that endeavor in May of 2013, a month, month and a

1 half, two months before the official closure of
2 the Second Injury Fund on July 1, 2013.

3 As I indicated in the prehearing, the
4 Budget and Control Board also retained KPMG, a
5 consulting firm, to provide an actuarial
6 assessment of the Second Injury Fund's remaining
7 liabilities. They also presented to the Budget
8 and Control Board funding options, plans,
9 different -- you know, a buffet of ways to kind of
10 consider how to fund the Second Injury Fund's
11 remaining liabilities.

12 Again, as we discussed in the
13 prehearing, we think the evidentiary record in
14 this case, and in particular Mr. Stooksbury's
15 testimony, and he was referred to us as the point
16 person as far as the ongoing assessment situation
17 that the Second Injury Fund's operations is
18 concerned and I understand him to be the finance
19 manager for the Insurance Reserve Fund, we think
20 it's pretty clear from his testimony that the
21 Second Injury Fund's liability on this case, and
22 remember that I told you that the reimbursements
23 were still being made as late -- as early as 2014
24 on this case, that at the time KPMG did its
25 initial analysis, presented the Budget and Control

1 Board with the funding options for the run-off of
2 the Second Injury Fund, including the one that was
3 adopted by the Budget and Control Board, which is
4 the we're going to assess 60 million dollars a
5 year for five years, KPMG thought, based on its
6 actuarial analysis, that that would be sufficient
7 to fund the Second Injury Fund's liabilities until
8 the last claimant dies. Okay?

9 This claim, based on Mr. Stooksbury's
10 testimony, was considered a liability of the
11 Second Injury Fund in KPMG's analysis, so we
12 believe that the assessments that are continuing
13 to be paid, pursuant to 42-7-320, beginning with
14 fiscal year 2013, that this liability of the
15 Second Injury Fund has been considered and
16 accounted for in the assessment plan that is
17 currently in place and is being paid along with
18 self-insurers in the State Accident Fund by the
19 Guaranty Association's member workers'
20 compensation insurers.

21 As I indicated in the prehearing, the
22 ~~Guaranty Association is essentially divided into~~
23 four categories in terms of its membership.
24 Workers' compensation, a category, is one of
25 those, and the workers' compensation members are

1 assessed to pay the claims of liquidated insurance
2 companies.

3 To some extent, that may be recouped
4 from the estate of an insurance -- a liquidated
5 insurance company. Other situations, you may not
6 get any money back. It takes many years, the
7 testimony of Mr. Harrison goes into detail on
8 this, but it takes many years for that to play
9 out.

10 Up front, immediately, the member
11 workers' compensation insurers in this state, or
12 the Guaranty Association, you have to
13 participate. It's a condition of their ability to
14 transact business in the state, write workers'
15 compensation insurance.

16 They are funding these liquidated
17 claims, or liquidated carriers, through
18 assessments to the Guaranty Association. They are
19 also the same Property and Casualty workers'
20 compensation insurers that are paying assessments
21 into the Second Injury Fund.

22 The Guaranty Association is an
23 unincorporated association, so it's basically a
24 flow-through, and in that -- in that respect, we
25 want to make the point that our member workers'

1 compensation insurers are, in fact, paying
2 assessments into the Second Injury Fund.

3 Part of the assessments they are
4 paying are based on a funding plan which included
5 liability for this case, reimbursement on the
6 Michael Quarles claim. We think that testimony
7 from Mr. Stooksbury is essentially
8 uncontradicted.

9 We acknowledge that the self-insurers
10 and the State Accident Fund are also paying
11 assessments, but they're getting reimbursed on
12 their claims, and the member workers' compensation
13 insurers of the Guaranty Association feel like
14 they should be reimbursed through the Guaranty
15 Association to effectively reduce or offset what
16 it's costing in the way of assessments to pay the
17 liquidated claims.

18 In other words, if you have a
19 liquidated claim that was accepted for Second
20 Injury Fund reimbursement, if we get the Second
21 Injury Fund reimbursement, then they -- which
22 ~~they're paying for through the way of assessments,~~
23 then they're not having to pay for at least that
24 claim again by way of assessments to the Guaranty
25 Association.

1 That's a significant issue, as I
2 indicated in the prehearing, because the Second
3 Injury Fund has asserted as a defense to the claim
4 that the Guaranty Association doesn't pay
5 assessments; therefore, it can't be reimbursed
6 from the Second Injury Fund.

7 We think that's a simplistic
8 argument. When you really scratch beneath the
9 surface, you see that this is just a -- there is
10 really more to it than that.

11 I also want to point out that both
12 under the old method, under 42-7-310, the
13 assessment formula there, as well as what was
14 adopted by the Budget and Control Board with the
15 five-year, 60-million-a-year plan under 42-7-320,
16 that the amount of money doesn't change. Okay?
17 It's going to be the same amount of money.

18 The only thing that would change,
19 even if you brought the Guaranty Association in as
20 a separate payor of assessments, it would just
21 change the proportion of the money. It wouldn't
22 put more money in the Second Injury Fund, and that
23 would have been true under the old assessment
24 formula as well as the -- as well as the current
25 assessment formula.

1 I would also point out that it's
2 uncontradicted; everybody who has testified on the
3 subject concedes that the Second Injury Fund has
4 never sent the Guaranty Association an
5 assessment. So to the extent they're saying,
6 well, you don't pay assessments, you know, we've
7 talked about the members paying assessments, but
8 you can't pay an assessment if you don't get
9 assessed, so, again, we really think the
10 assessment issue and the assessment defense and
11 the red herring, as I spoke in the prehearing,
12 also integral to the -- to the Second Injury
13 Fund's defense, is the assertion in their
14 pleadings that Lumbermen's was delinquent on its
15 assessments and that that somehow bars the claim
16 under the 2003 Statutory Amendment 42-7-310.

17 First of all, Mr. Stooksbury, in his
18 testimony, absolutely confirmed that Lumbermen's
19 was not delinquent on its assessments, so I don't
20 know whether that is continuing to be asserted,
21 but to the extent it is, we don't think it has any
22 merit.

23 Even if they were delinquent in the
24 assessments, there is a question that's -- there's
25 a question as to the retroactive effect of the

1 statutory amendment under 42-7-310 effective in
2 June of 2003 and whether that can be applicable to
3 a date -- a claim with an underlying date of loss
4 or date of accident that predates that.

5 We think all the case law without
6 specific legislative language intending a
7 retroactive effect of that statute, that it can't
8 apply retroactively, and that was an integral part
9 of the prior litigation involving the Legion and
10 Reliance cases and that legal analysis, and you've
11 indicated you would -- you would afford it
12 whatever weight is appropriate, but that's another
13 key component of the prior litigation and the case
14 documents that are in our APAs of 1 through 3.

15 So we have the Guaranty Association
16 with a statutory right to all of the liquidated
17 carriers' rights, duties and obligations; we have
18 a covered claim, no question about that; we've got
19 an approved agreement to reimburse compensation,
20 and I don't think they dispute the situation on
21 anything to do with that or the substance of the
22 Second Injury Fund claim.

23 The next argument is, well, they say,
24 well, the Guaranty Association is not a
25 statutorily authorized entity, or a statutory

1 entity authorized to receive reimbursement. Well,
2 there is nothing in 42-7-310, which is the statute
3 they apparently rely on, or 42-7-320, there is
4 nothing that excludes the Guaranty Association as
5 a entity authorized to receive reimbursement.

6 Those sections, 42-7-310 deals with
7 the creation of the Second Injury Fund and its
8 original funding plan. Reimbursements, of course,
9 are made pursuant to Section 42-9-400 or
10 42-9-410. The reimbursement -- the agreement
11 to -- unappealed agreement to reimburse
12 compensation in this case provides that
13 reimbursements were to be made to Lumbermen's in
14 according with 42-9-400.

15 So throughout we have the term
16 "carrier" or "insurance carrier." In making this
17 argument that the Guaranty Association is not a
18 carrier, not a statutory -- a statutory entity
19 authorized to receive reimbursement, the Second
20 Injury Fund essentially ignores the definition of
21 "carrier" under our workers' compensation law.

22 ~~Commissioner, I'm sure you're~~
23 familiar with 42-1-60. If you'll bear with me a
24 minute, it's very short. It's a one-sentence
25 section, but I'm going to read it to you, if that

1 suits.

2 Section 42-1-60 of the South Carolina
3 Code: The term "carrier" or "insured" means any
4 person or fund authorized under Section 42-5-20 to
5 insure under this title and includes
6 self-insurers.

7 Section 42-5 -- the cross-reference
8 to Section 42-5-20 makes reference to a
9 impertinent part: Every employer has to keep
10 insured his liability thereunder and any
11 corporation, association, organization or mutual
12 insurance association formed by a group of
13 employers.

14 Commissioner, the notion that the
15 Guaranty Association does not meet the definition
16 of a carrier as defined under 42-1-60 with the
17 cross-reference to 42-5-20, we would submit to you
18 is absurd. They are responsible for the claim in
19 its entirety under the -- under 40 -- under
20 38-31-60 as a covered workers' compensation
21 claim.

22 I think that you can take judicial
23 notice in all respects that the Guaranty
24 Association, when it steps in the shoes of a
25 liquidated carrier on a claim, is treated in all

1 respects by this commission as the insurer in that
2 instance. Whether it be timely filing Form 18s,
3 whether it be appearing over here to defend on a
4 Form 50, responding to a Form 12-A request,
5 whatever the case may be, in all respects as it
6 relates to workers' compensation, the Guaranty
7 Association, we submit to you, is authorized to
8 ensure liabilities under Title 42, that being the
9 Workers' Compensation Act.

10 And, frankly, if that was not the
11 case, we wouldn't be responsible for this claim
12 and we wouldn't be here asking you to award
13 reimbursement pursuant to the agreement to
14 reimburse compensation that was entered between
15 the Second Injury Fund and the liquidating
16 carrier.

17 The next issue -- we've touched on
18 the assessments. We've touched on this question
19 of whether it was an authorized -- or whether the
20 Guaranty Association is authorized to be
21 reimbursed from the Second Injury Fund.

22 ~~The next issue that I anticipate the~~
23 Second Injury Fund relying on is this settlement
24 agreement, and the settlement agreement is -- it
25 may be in Mr. Cook's APA submissions. It is

1 definitely an exhibit to Mr. Lombard's deposition
2 testimony.

3 MR. COOK: It is in my APAs, Your
4 Honor.

5 THE COURT: Yes, sir.

6 MR. WOOD: And let me -- certainly
7 you can read the release yourself, Commissioner.
8 It's Exhibit 3 as well to Mr. Lombard's deposition
9 testimony. We questioned him on this in his
10 deposition, tried to ascertain exactly what they
11 are relying on.

12 Mr. Cook, of course, is, I'm certain,
13 going to make some arguments about it from a legal
14 standpoint, but if you read the settlement
15 agreement, the pertinent pages here are pages 5
16 through -- 5 and 6, I think.

17 The Legion and Reliance cases were
18 being litigated, and there was a mediation that
19 was held on February -- as I understand it, on
20 February 22 of 2013. Mr. Harrison has testified
21 on that subject. That's important because when
22 you read this settlement release, they talk about
23 the Legion and Reliance cases, and no question
24 those were settled. It was a macro settlement
25 that extinguished any claim against the Second

1 Injury Fund on the Legion or Reliance claims. No
2 question about that.

3 If you read on, "whether related or
4 unrelated to Legion and/or Reliance and/or
5 American Mutual Insurance." Now, let me make a
6 reference to American Mutual Insurance. That is a
7 carrier that was liquidated several decades ago,
8 and I believe, based on Mr. Harrison's testimony,
9 there were some old, very old, cases that the
10 Second Injury Fund had been reimbursing to the
11 Guaranty Association on American Mutual claims, a
12 few in number.

13 Those were being reimbursed at the
14 time that the dispute arose with respect to the
15 Legion and Reliance cases, and the Second Injury
16 Fund declined to make reimbursement on those
17 cases. So those were expressly included in the
18 settlement. No question about that.

19 "And any and all claims on which the
20 Second Injury Fund is currently paying to the
21 Guaranty Association as of February 22, 2013."

22 ~~The next page -- or at the bottom of that page,~~
23 continuing, "The parties intend this release to be
24 general and comprehensive in nature and release
25 all claims related to Legion and/or Reliance and

1 any and all claims, whether related or unrelated,
2 to Legion and/or Reliance on which the SIF is
3 currently paying the Guaranty Association as of
4 February 22, 2013, whether known or unknown,
5 noticed or unnoticed, asserted or not asserted,
6 accepted or not accepted, existing or potential."

7 There is zero evidence, and, in fact,
8 all of the evidence specifically confirms this
9 case in particular, and for that matter, no
10 Lumbermen's cases was the Guaranty -- was the
11 Second Injury Fund paying the Guaranty Association
12 on February 22 of 2013.

13 And think about the timeline I laid
14 out for you a little while ago. It couldn't have
15 been. The Guaranty Association didn't even have
16 these claims on February 22 of 2013. Mr. Harrison
17 has testified on this subject. We questioned
18 Mr. Lombard on it, his knowledge of it. That was
19 four months before the May 8, 2013, liquidation.

20 So, respectfully, we don't think that
21 this settlement agreement that was entered in
22 connection with the Legion and Reliance cases has
23 any bearing whatsoever on these cases, the
24 Lumbermen's case that we're here on today, for the
25 reason that it doesn't -- it clearly doesn't meet

1 the criteria that is set forth in the settlement
2 release pertinent to the Legion and Reliance
3 cases, so we don't think that has any merit.

4 I think that's basically the sum and
5 substance of our argument. I'll be glad to turn
6 it over to Mr. Cook and respond to anything he has
7 to say.

8 THE COURT: All right.

9 MR. WOOD: Thank you.

10 THE COURT: Mr. Cook?

11 MR. WOOD: Oh, I'm sorry. I wanted
12 to make one point about the -- the Second Injury
13 Fund has submitted with its APA submissions a
14 South Carolina Supreme Court case, and I've
15 addressed this in my brief, which you can
16 obviously review at your convenience and in your
17 deliberations, but they have cited this case,
18 South Carolina Property and Casualty Insurance
19 Guaranty Association versus Brock, some language
20 in there that the Supreme Court suggests that the
21 Guaranty Association is not a carrier.

22 ~~I'd like to respectfully remind the~~
23 Commissioner that that case dealt with a liability
24 policy. As you might recall in my introduction a
25 while back, I made the point of distinguishing the

1 special treatment that workers' compensation
2 liabilities get under the Guaranty Association Act
3 that is different from, say, a property loss claim
4 or a liability claim.

5 In liability claims, property loss,
6 there are limitations on the Guaranty
7 Association's liability. In workers' compensation
8 there is no limitation on the Guaranty
9 Association's liability beyond what the workers'
10 compensation law imposes.

11 In other words, whatever is to be
12 paid on a covered workers' compensation claim, the
13 Guaranty Act requires that the Guaranty
14 Association pay the full amount of any workers'
15 compensation case, and I think that is a critical
16 point of distinction to the extent you're studying
17 the Brock case and its potential impact on the
18 argument that the Guaranty Association is not an
19 insurance carrier for purposes of workers' comp.

20 And, again, I would circle back to,
21 what we think is operative here is, the Guaranty
22 Association Act, you pay the full amount of any
23 workers' comp claim and the statutory definition
24 of the term "carrier" and "insurance carrier" or
25 "insured" that I've cited to you in the workers'

1 compensation law.

2 THE COURT: All right. Thank you,
3 sir.

4 MR. WOOD: Thank you.

5 THE COURT: Mr. Cook?

6 MR. COOK: May it please the
7 Commission. Your Honor, I'm Robert Cook and I'm
8 here today on behalf of the Second Injury Fund
9 Operations, which are under the statutory control
10 now of the State Fiscal Accountability.

11 With your permission, I would like
12 to -- I'm going to, in my presentation, reverse
13 the order in which Mr. Wood handled his issues and
14 start with the release, if that doesn't --

15 THE COURT: Certainly.

16 MR. COOK: -- throw you too far out
17 of a way to make sense out of all this.

18 The release, Your Honor, that has
19 been referred to is a release dated June 17,
20 2013. It's the very first document in the APAs
21 submitted by the Second Injury Fund. Obviously,
22 ~~if these claims have been released, the question~~
23 as to whether or not there is ultimate statutory
24 authority to bring these claims is -- doesn't
25 matter.

1 I think, Your Honor, it was probably
2 part of some of the cases going on back in 2012
3 and 2011. There was a substantial amount of
4 litigation previously, primarily involving Legion
5 and Reliance but also involving some tag-along
6 claims of the Guaranty Association.

7 At some point after -- and there were
8 cases, some were still at the Single Commission
9 level, some were at the Full Commission, there
10 were one or two that reached the Circuit Court
11 stage and there was an unbriefed appeal at the
12 Court of Appeals stage, but, of course, one of the
13 reasons why we're here today is, there never has
14 been a authoritative-held position about these
15 issues.

16 But in any event, there was an effort
17 made to resolve these liabilities by way of
18 settlement, and there were two releases entered;
19 one involving Legion and Reliance and the other
20 involving the Guaranty Association.

21 The one that you have is just the one
22 related to the Guaranty Association, and the Fund
23 paid 2.9 million dollars to release claims held by
24 the Guaranty Association. Obviously, that amount
25 of money isn't paid without the expectation that

1 something is being given in return for that
2 payment, and, of course, what's being given is the
3 relinquishment of claims.

4 The language in the release is
5 confusing, Your Honor, confusing beyond that which
6 you normally see in legal documents, but it states
7 specifically some things that are being released
8 and then it speaks of other things that are also
9 being released.

10 There are certain claims specifically
11 mentioned, and those involve the Legion and
12 Reliance claims to the extent the Guaranty
13 Association has some obligation on those.

14 It involved three specific claims
15 that, for whatever reason, the Second Injury Fund
16 had been paying to the Guaranty Association.
17 Those all have a back history that was -- I've
18 covered some in the previous litigation.

19 And then the question is, what else
20 does it include and does it include this,
21 particular claim. The language that I -- and I'm
22 ~~going to be very frank with you. I'm~~
23 cherry-picking the language on this because it's a
24 14-page release.

25 On the first page in what's being

1 released in the recitals, it talks about that
2 there are potential claims that are not currently
3 pending. On Page 5 of the release, and this is
4 where Mr. Wood picked up things, it talks about,
5 in describing what's being released, which -- the
6 claims which the Guaranty now or in the future may
7 have or claim to have against the Second Injury
8 Fund based upon arising out of facts, and then
9 legalese, and then it goes on to --

10 THE COURT: Tell me where you're
11 reading.

12 MR. COOK: I'm sorry. I apologize,
13 Your Honor. It's about six -- it starts about six
14 lines down on Page 5.

15 THE COURT: Yeah, I see it. Thank
16 you. Yes, sir.

17 MR. COOK: And then if you skip a
18 little bit down to about four lines after that, it
19 goes to the phrase "Matters or things of any
20 conceivable kind or character existing or
21 occurring or claim to exist or to have occurred at
22 any time on or before the date of the execution of
23 this settlement agreement and release."

24 Now I'm going to refer you back. The
25 date of the settlement agreement and release is

1 June 17, 2013. Then it jumps forward and lists
2 three specific claims, and then it goes to the
3 language that Mr. Wood stated, and I'm near the
4 very bottom of Page 5 now, Your Honor.

5 THE COURT: Yes, sir.

6 MR. COOK: "The parties intend this
7 release to be general and comprehensive in
8 nature." That's important. What did they intend
9 it to be? Broad. The very last sentence states,
10 at the -- in that clause offset by both commas,
11 "Whether related or unrelated to Legion or
12 Reliance."

13 And then it states, "On which the
14 Second Injury Fund" -- now I'm flipping over to
15 the very top of Page 6 now, Your Honor. "On which
16 the Second Injury Fund is currently paying the
17 Guaranty Association as of June 22, 2013." And
18 that was what was pointed out by Mr. Wood, and if
19 his argument was just on that, I would say that's
20 a very logical thing to say; that we obviously
21 weren't paying on this claim because this claim
22 ~~didn't even come in to Guaranty Association's,~~
23 their purview, until after the liquidation, which
24 was after that date.

25 But that very next line states,

1 "Whether known or unknown, noticed or unnoticed,
2 asserted or not asserted, accepted or not
3 accepted, existing or potential, including but not
4 limited to any claims which may arise pursuant to
5 large deductible policies."

6 The point being, that when you
7 include language like "whether known or unknown,
8 noticed or unnoticed," that's different from the
9 language that is being used where it specifies
10 three particular claims and it also specifies
11 claims that the Fund is paying up to February 22,
12 2013. It's hard to reconcile, all that language.
13 It truly is.

14 When you have a question about if
15 there is an ambiguity or confusion within a
16 document, in a contract, and a release is a
17 contract, you go back to, what was the intention
18 of the parties, and in the release itself it
19 specifically states that the intention was that it
20 be general. That was one of the first things that
21 I read to Your Honor.

22 But in this particular case, we've
23 actually got the testimony of Mr. Harrison, who is
24 the director, I believe that's the correct
25 terminology, the director of the Guaranty

1 Association, and his deposition was handed up to
2 you as part of what we were submitting.

3 And, Your Honor, if you'll give me
4 just a second to locate that. Your Honor, I would
5 ask that you look, or I'm going to read from, if
6 you wish to look.

7 THE COURT: Yes, sir.

8 MR. COOK: On Page 28 of
9 Mr. Harrison's deposition.

10 THE COURT: All right.

11 MR. COOK: And I'm asking him
12 questions about what is covered by the claim -- by
13 the release. I apologize.

14 And I'm starting -- I'm going to
15 start in on my question on line 17.

16 "Well, and that's what -- I guess
17 that's what I'm asking, though. I mean, if you --
18 if you had a claim as of the date of the
19 settlement conference, what was your expectation
20 about whatever you got paid was going to be" --
21 excuse me. " ...that whatever you got paid was
22 going to be paid to extinguish those claims?"

23 Answer: "I believe that's correct,
24 yes."

25 And then I said, "Okay. All right.

1 But I believe you testified earlier that it was
2 your understanding, in discussions with
3 Randy Mason --"

4 Answer: "Yes."

5 And I'm on the top of Page 29 now.

6 THE COURT: Right.

7 MR. COOK: I'm now on line 3.

8 "That it would not include future
9 claims; is that right?"

10 Answer: "Correct."

11 Question: When you use the phrase
12 "future claims," tell me what you meant when you
13 said the phrase "future claims." Okay?

14 Answer: "Claims that we received
15 after that settlement."

16 All right. Now, Your Honor, if you
17 would go to page 31, and I'm going to begin at
18 line 13 where we're following up on this.

19 It says: "But as I understand your
20 position today, although -- although the
21 liquidating -- the liquidation of Lumbermen's
22 occurred in May of 2013 and the final agreement of
23 the settlement with the Second Injury Fund was in
24 June 2013, your position today is that those
25 claims for Lumbermen's were not included in the

1 settlement. Is that correct?"

2 Answer: "That's because we didn't
3 know about it back in February."

4 "All right."

5 That's my question.

6 "All right. That's the explanation,
7 you didn't know about them then; is that
8 accurate?"

9 Answer: "Yes."

10 But, Your Honor, the settlement --
11 the settlement conference is irrelevant because
12 what was agreed to was put into a document that
13 everybody signed at a later date.

14 That date is June 17, 2013. And,
15 obviously, what Mr. Harrison is saying is that if
16 we knew about claims when the settlement was
17 reached, those were to be covered; if we didn't
18 know about them, then it was not to be covered. I
19 mean, I think that's a fair reading.

20 But here is the thing. Within the
21 submissions of the Guaranty Association there is a
22 ~~document that is basically a four-page transaction~~
23 guide, and it is Exhibit -- I guess it's
24 Exhibit 7, Your Honor. It states, "SC Property
25 and Casualty Insurance Guaranty Association," and

1 then the date 10-25-16, four pages.

2 THE COURT: Yes, sir.

3 MR. COOK: Your Honor, that is
4 obviously an internal accounting of when certain
5 transactions occurred on this claim once it was
6 received by the Guaranty Association, and the
7 significance of it is, is you look at the very top
8 and it shows when the claim was opened. The claim
9 was opened on June 4, 2013. Do you see that very
10 first entry?

11 THE COURT: Yes.

12 MR. COOK: "Open claim" and then it
13 says "Sealed Air loss," and then to the very far
14 right it says "6-4-2013," and if you look down
15 just underneath that, they established a \$10,000
16 expense reserve on that same date, 6-4-2013.

17 And there were -- and down at the
18 bottom, towards probably about the bottom fifth or
19 sixth of the page, there is an entry that says
20 "Initial claimant coverage setup," and there are
21 two entries; Change Loss Reserve and -- there is
22 two for Change Loss Reserve, all of which -- one
23 has \$7,689.69 and the other \$14,231.31 and the
24 bottom one \$128,079, all of which show entries as
25 of June 4, 2013.

1 So the point being this: In relation
2 to the release, as of June 4, 2013, Lumbermen's
3 knew about this claim. Their own records show
4 that they knew it to the extent that they had set
5 up loss reserves for it. The settlement agreement
6 between the Guaranty Association and the Second
7 Injury Fund is dated about two weeks after that.

8 The settlement agreement, the
9 language about unknown claims, known and unknown
10 and that type thing, we submit that as regards to
11 this Lumbermen's claim, this is the only one
12 that currently is in litigation before the
13 Commission.

14 I don't know when the setup dates
15 were on any other claims, but as regards to this
16 particular claim, because the reserves had been
17 set up before the signing of the settlement
18 agreement, it was released as part of the 2.9
19 million dollars, and, I mean, that's my argument
20 as regards to how the release applies to this.

21 All right. Your Honor, now I would
22 like to address the statutory authorization
23 questions. Your Honor, you know, I guess the
24 issue really is, what is it about the liquidation
25 of Lumbermen's that makes a difference in this

1 matter.

2 The claim is getting paid. You made
3 this point when we were up before you in
4 Greenville, that the claimant was getting paid
5 regardless of whether you heard this thing before
6 or after the Supreme Court made a decision on it,
7 and that's true, and that's true regardless of how
8 you rule today.

9 And quite frankly, you've got two
10 statutory entities that have no general authority
11 to do anything. They only have the authority to
12 do what the statutes say they can do. You've got
13 the Second Injury Fund and you've got the Guaranty
14 Association, and if the language of either set of
15 statutes specifically permitted Second Injury Fund
16 reimbursement by the Guaranty Association or
17 specifically denied it, we wouldn't be here today
18 but for the release issue, so that's not what you
19 have in front of you.

20 The question is, when you look at the
21 statutory scheme for both of those entities, does
22 it make sense to allow for Second Injury Fund
23 reimbursement, and I'm going to go through that,
24 Your Honor.

25 At the end of the day, it almost

1 doesn't make a difference in terms of the net
2 effect on the participants. If you deny Second
3 Injury Fund reimbursement, all of the carriers in
4 the state who pay assessments to the Guaranty
5 Association will presumably contribute towards
6 payment of this claim as it goes on.

7 If you allow Second Injury Fund
8 reimbursement, those same carriers are part of the
9 Second Injury Fund scheme, that word has such a
10 derogatory meaning, but I think you know what I
11 mean by it, and this point has been made by
12 opposing counsel, that they're part of that, but
13 there is more than just them which are a part of
14 it.

15 The State Accident Fund is part of
16 who pays into the Second Injury Fund, and all of
17 the self-insured associations that are approved by
18 the Workers' Comp Commission pay into the Second
19 Injury Fund.

20 So this claim is going to get paid
21 one way or the other. If it is paid just by the
22 Guaranty Association, a certain set of insurance
23 companies are going to ultimately be responsible
24 for it. If the Second Injury Fund reimburses,
25 then those same people are paying a little bit

1 less, I guess, if you prorate everything out,
2 that's my assumption, but you've got people who
3 never had any dealings on behalf of liquidated
4 carriers also being responsible for this. That's
5 the State Accident Fund and the self-insurers.

6 And I guess the question is, what
7 makes the most sense and what is the most fair.
8 When you apply to write insurance in South
9 Carolina, by force of law you are required to
10 become part of the Guaranty Association, so at
11 least you know what you're signing up for; that if
12 a carrier goes belly-up, you're going to be
13 obligated on those claims.

14 Given the way the Second Injury Fund
15 statute is worded, I think it would be difficult
16 to say that the self-insureds and the State
17 Accident Fund were aware that they might be
18 obligated to participate in payment of claims that
19 were paid to the Guaranty Association, because
20 nowhere is the Guaranty Association mentioned by
21 name in any of the Second Injury Fund statutes.

22 So, you know, I stand by what I said,
23 and, really, it's just a question of which pot the
24 money is going to come out, but obviously people
25 are interested in which pot it comes out of, which

1 is why we're here today.

2 So you look at both statutory
3 structures, and I think for the most part, Hubie
4 identified correctly, you've got really three
5 groups of people who are stated. This is who is
6 obligated to pay into the Second Injury Fund:
7 Carriers, which are sometimes referred to as
8 insurers, the State Accident Fund, and
9 self-insurers.

10 Then you've got -- now, and I think
11 it's undisputed as a fact, that the Guaranty
12 Association has never paid into the Second Injury
13 Fund as the Guaranty Association, nor have they
14 ever been asked to, which I would submit is some
15 proof that they were -- that the parties assumed
16 they never were intended to be but -- and I
17 mentioned earlier that both of these are statutory
18 entities that are limited in what they can do
19 because -- you know, it's like the Commission.

20 You can do what you're allowed to do
21 but you can't go beyond that. You don't have
22 general jurisdiction. You've got -- it's
23 specified. And that's true of how these two
24 entities work, and that's the problem that my
25 client has with paying this claim, is a legitimate

1 concern that it is not authorized to reimburse
2 claims of the Guaranty Association because they
3 are not specified.

4 And it matters at the end of the
5 day. This is not simply a case of, well, what
6 difference does it make, because the way the
7 closing plan of the Second Injury Fund in sunset
8 has been set up, and that closure plan is -- it
9 was an exhibit to either Mr. Lombard's deposition,
10 but I think it was Mr. Stooksbury's deposition,
11 there is a specific provision that any amount left
12 over once the claims have been paid, is going to
13 be rebated back to the participants of the Second
14 Injury Fund.

15 So there is some fiduciary duty on
16 the part of the Second Injury Fund to try to
17 preserve that money to pay it back, which is why
18 if they think there is a situation that there is
19 an unauthorized person making a claim, that's why
20 they don't want -- I mean, there's money to pay
21 it. I don't think there is any question about
22 that. That's not the issue. The issue is, if
23 they pay a claim they're not supposed to, that's
24 less money at the end of the day to rebate back to
25 the people who have been paying into the Second

1 Injury Fund.

2 So is the Guaranty Association
3 authorized to make this claim? Their belief is
4 that they stand directly in the shoes of the
5 insurance company, and that comes from -- it's
6 38 -- Title 38-31-60, which is sort of the general
7 language of the powers and duties of the Guaranty
8 Association.

9 There are more specific statutes that
10 follow, specifically 38-13 -- 38-31-90 and
11 38-31-100. And if I may, Your Honor, -90 was part
12 of my APA. I'd also like to hand you a copy
13 of -100, if I might, and I have a copy for counsel
14 too.

15 THE COURT: That's fine.

16 MR. COOK: Okay. And all three of
17 those statutes, -60, -90, and -100 do different
18 things, but they are important because they lay
19 out what the Guaranty Association is authorized to
20 do.

21 Up to this point, and in his
22 ~~presentation today, Mr. Wood indicated that he's~~
23 relied upon -60 where it says you all -- basically
24 you get all the rights, duties and obligations of
25 the carrier that has gone liquidated, but when you

1 look at the full language of that, the next
2 sentence states this:

3 "However, the Association has the
4 right, but not the obligation, to defend an
5 insured who is not a resident of this state at the
6 time of the insured event unless the property from
7 which the claim arises is permanently located."

8 And it talks about the defense of the
9 claim. That right, duty and obligation refers
10 specifically to defense of a claim. That's why
11 it's consistent with what Mr. Wood said. They
12 come in here and they file 51s and they do all of
13 the things that a carrier normally does because
14 that is part of the overall defense of the claim
15 and that's what they're statutorily obligated to
16 do for a covered claim.

17 That doesn't answer the question of
18 what right do they have to reach out of the
19 Guaranty Association and summon assets from
20 somebody else to try to recoup money, because
21 unless they're given the right to do that, they
22 don't have the right to do that.

23 -90, which was part of my APA,
24 specifically states who they are allowed to
25 recover money from if they pay a claim, and

1 essentially it is assets or people connected with
2 the now liquidated carrier. In other words, you
3 know, I guess it's like feasting on a carcass, for
4 lack of a better phrase; that you can -- we pay
5 out on this claim, there is a process by which
6 they submit proofs of claim, sort of like in
7 bankruptcy, and then if there are assets left,
8 that can be used to help defer some of the expense
9 of the Guaranty Association.

10 Also, if there are people who are
11 high-dollar, net-worth people, I think it's like
12 25 million dollars, who were affiliates of the
13 liquidated carrier, the Guaranty Association is
14 authorized to bring a claim to offset losses paid
15 for that carrier against those type people.

16 And the significance of that is, is
17 that that is where the legislature is saying this
18 is the group of people that we're going to, or
19 entities, that we're going to let you recover from
20 when you pay a claim. That doesn't include the
21 Second Injury Fund.

22 ~~Now, the other only statute -- and I~~
23 think that's significant because, you know, it's
24 a -- it is a Black Letter Law that when things are
25 enumerated within a statute, that things that

1 aren't enumerated are considered prohibited, so if
2 the legislature said you can go against the assets
3 of the now liquidated carrier, you can go against
4 these high net-worth people who were associated
5 with the liquidated carrier, but it doesn't say
6 you can also go and make a Second Injury Fund
7 claim. The statutory construction presumption is
8 that they're not entitled to go against the Second
9 Injury Fund.

10 The following statute, -100, deals
11 with something that's related but a little bit
12 different, which is, when are they allowed to
13 offset something so that what they pay on a claim
14 is less than it otherwise would be, and it covers
15 things like if there's a valid policy -- another
16 valid policy in force, you have to exhaust that
17 one first.

18 If you're entitled to a government
19 assistance thing, which I'm assuming is like
20 Medicaid, Medicare, that type thing, you have to
21 show that you've done that before, and they're
22 able to offset what they pay against that, and I'm
23 not even sure that that has applicability in the
24 workers' comp context because of what Mr. Wood
25 noted is the unlimited liability of the carrier --

1 of the Guaranty Association.

2 But there were two separate instances
3 where the legislature saw fit to specifically
4 detail who the Guaranty Association can go against
5 to recover or situations where the Guaranty
6 Association is allowed to pay less than a full
7 covered claim, and in neither one of those
8 situations is it even inferable that a claim
9 against the Second Injury Fund is permitted.

10 Then you go back to -60, which is
11 that general language about you step into the
12 rights, duties, etcetera, etcetera, and when you
13 read the whole section, it clearly relates to how
14 a claim is defended, not that you get every claim
15 that the carrier may have had and you can bring it
16 against some third party, because that's the role
17 of the insolvency estate. I believe this one is
18 in Illinois, if I'm not mistaken.

19 THE COURT: It is.

20 MR. COOK: There is an estate set up
21 and there is people who are in charge. Usually
22 ~~it's the Department of Insurance nominates someone~~
23 to be the trustee, liquidator, what have you, and
24 it's that person's job to say, oh, well, there is
25 claim -- there are claims that are the insurance

1 company's that's now liquidated and to pull those
2 into the estate so that there are assets available
3 to do things, like pay these people to liquidate
4 the carrier, or possibly if there have been claims
5 made by Guaranty Associations, to do that.

6 You know, it might have made perfect
7 sense for the legislature to allow them to do
8 this. You know, I don't think it makes much
9 difference ultimately. It certainly doesn't to
10 the -- to the injured workers, but they didn't
11 allow them to do that, and that sort of is the
12 overall, and because -- and that is why, if you're
13 looking for a subsection of a statute, that you
14 can say, oh, okay, this is exactly where I see the
15 Guaranty Association is authorized to do what
16 they're doing.

17 It doesn't exist. In fact, what is
18 stated would lead you to believe the contrary,
19 which is that some things were permitted, but this
20 was, for whatever reason, decided not to be
21 permitted. And then you're going back to the
22 overall structure of both of these entities.

23 And it's true that I don't think, in
24 terms of delinquent, that Lumbermen's was ever
25 delinquent on payment of assessments. I think

1 they paid what they were assessed. Once the
2 Second Injury Fund got notification that they were
3 liquidated, they no longer assessed. I think
4 that's true.

5 But I think it's also true to say
6 that when you look at the overall structure, I'm
7 trying to avoid saying scheme again when it comes
8 to money, the overall structure of the Fund and
9 how the finances of the Fund are handled, that it
10 presupposes that there are actively producing
11 insurance companies that are part of the Fund and
12 that assessments are being paid, and that's why I
13 think Lumbermen's and now the Guaranty
14 Association, another reason why they're not
15 permitted, is because when you look at the
16 structure of the Fund, there is no question that
17 the Guaranty Association itself is not paying any
18 kind of assessment.

19 And their composite carriers might be
20 paying assessments. I don't -- I don't -- I'm
21 sure most of them are. I mean, just logic would
22 ~~dictate that that would be the case.~~

23 But, ultimately, the language of the
24 Second Injury Fund statute doesn't allow them to
25 reach as far as they want to. They're not an

1 insurance company. They don't write policies of
2 insurance. They don't take premiums. They
3 don't -- if they were an insurance company, if the
4 Guaranty Association was an insurance company,
5 they would be assessed and they would pay
6 assessments to the Second Injury Fund, because by
7 law they would have to and by law the Second
8 Injury Fund would have to assess them.

9 They don't because they're not an
10 insurance -- and in many ways they act like an
11 insurance company. That's not the question. The
12 question really is a very discrete one. Where is
13 the authority for them to make a Second Injury
14 Fund claim, because if it's not authorized, they
15 can't do it.

16 We think they're not authorized.
17 They tried to do it. We denied it. And that's
18 really the statutory argument, Your Honor. Thank
19 you.

20 THE COURT: All right. Thank you,
21 sir.

22 Any brief response, Mr. Wood?

23 MR. WOOD: Yes, sir, briefly. You
24 know, they want to make up their own definition of
25 what an insurance carrier is. They want to call

1 us an insurance company. That's not what is in
2 the statutes, any of them. It's insurer and
3 carrier, and our workers' compensation law defines
4 that, so they want to add in there that you have
5 to be issuing policies.

6 The only thing that's required is
7 that you're authorized to insure liabilities under
8 Title 42, and I don't know how in the world that
9 any -- anybody who is in the workers' compensation
10 system, who sees the Guaranty Association paying
11 these workers' compensation claims, making all the
12 regulatory filings with the Workers' Compensation
13 Commission, associated with those claims, we're
14 clearly paying and insuring the liabilities of the
15 employers.

16 And under the definition of
17 "insurance carrier" or "insurer" and "carrier,"
18 under the workers' compensation law, which is what
19 I think we should be looking at, I think we meet
20 that definition. And I've also cited in my -- in
21 my memorandum I handed up to you in a hearing
22 memorandum, you know, the concept of "insurer."

23 You're going to agree to indemnify
24 somebody against a certain loss. Well, that's
25 what we're doing. We're stepping into the role of

1 the liquidated carrier and we're indemnifying, or
2 paying on behalf of an employer, its workers' comp
3 insured employer, its workers' compensation claim
4 that's covered under the Guaranty Act, the full
5 amount of it.

6 Under Mr. Cook's theory of limited,
7 you know, that only -- you can only recover from
8 what's specified in the Guaranty Act, first of
9 all, to buy that argument, you really have to
10 essentially ignore -- I mean, why would they put
11 in here, in 38-31-60, that we have all the rights,
12 duties and obligations of the liquidated carrier
13 on the extent of the covered claims?

14 If they were going to limit those
15 rights or duties or obligations, why not just list
16 what they are in the Guaranty Act? It's not
17 there.

18 By his theory, we wouldn't be able to
19 enforce a subrogation lien under Section
20 42-1-560. Is the Commission going to say that the
21 Guaranty Association is not entitled to collect a
22 third-party lien? Is the Commission going to say,
23 Commissioner, that if the claimant doesn't want to
24 pursue a third-party claim, that the Guaranty
25 Association, in its role as a -- as the --

1 covering the covered workers' compensation claim
2 can't bring that third-party action under the
3 assignment provisions of Section 42-1-560?

4 Is the Commission going to say that
5 if we overpay somebody temporary disability
6 compensation after the date of maximum medical
7 improvement, that we're not entitled to claim and
8 recoup a credit for overpayment? My goodness.

9 The statute says that we are -- have
10 all the rights, duties and obligations on the
11 covered claims. We are responsible for a hundred
12 percent of the workers' compensation claim, and I
13 would submit to you that every right that the
14 liquidated carrier would have under Title 42, that
15 the Guaranty Association has in its place under
16 Title 42, and one of those would be, in addition
17 to the others I just mentioned, the right to seek
18 Second Injury Fund reimbursement or enforce an
19 agreement to reimburse compensation under -- an
20 unappealed agreement to reimburse compensation
21 under 42-9-400, which is what we have in this
22 case.

23 Now, Mr. Cook, very creative with
24 respect to this settlement release, but I'm a
25 little bit -- he, on one hand, starts pointing out

1 all these ambiguities and wants you to rely on
2 those ambiguities to hold and rule that this claim
3 is barred by the settlement document, but my
4 understanding of construction of contracts is, any
5 ambiguity should be construed against the drafter
6 of the -- of the settlement release, not in their
7 favor.

8 And so that's the first time I've
9 ever heard anybody come in and argue that
10 ambiguity in a contract or ambiguity in a
11 settlement agreement ought to favor the party who
12 drafted it. That's a new one to me.

13 But I don't think you need to get
14 into that, Commissioner. You're familiar with the
15 Parole Evidence Rule. You know how it works: you
16 look at the four corners of the agreement.

17 And they want to just ignore this
18 language about claims being paid by the Second
19 Injury Fund to the Guaranty Association as of
20 February 22, 2013. That's what the agreement
21 says. It's unknown, noticed or unnoticed.

22 Obviously, they're -- on February 22
23 of 2013 the Guaranty Association has got a full
24 stack of covered workers' compensation claims and
25 it's paying on them, okay, on February 22, 2013.

1 This wasn't one of them, okay, and
2 the Guaranty -- and everybody who has testified,
3 Mr. Lombard, Mr. Harrison, there is no dispute
4 that the Guaranty Association has never been
5 reimbursed on this claim, has never been
6 reimbursed on Lumbermen's claims and was not being
7 reimbursed by the Guaranty -- or by the Second
8 Injury Fund on February 22 of 2013. There is no
9 dispute about that.

10 If you look at Mr. Harrison's
11 testimony, and instead of picking one word off, if
12 you read it in its entirety, what he's referring
13 to is the date of the conference, the settlement
14 conference.

15 That's the whole point of February 22
16 of 2013. That's the settlement conference.
17 That's what Mr. Harrison was referring to when you
18 read his -- when you read his deposition testimony
19 in the full context, as I just did while Mr. Cook
20 was making his argument.

21 Unknown claims, unnoticed, all those
22 ~~claims that are sitting at the Guaranty~~
23 Association, that the Guaranty Association is
24 responsible for paying as of February 22, 2013,
25 what this release was designed to do is go back --

1 you can't go back and look through those files and
2 say, well, here is an agreement to reimburse
3 compensation on a -- what's another liquidated
4 carrier that we've had? You know. Ullico, or
5 whatever the case may be.

6 Whatever they had over there, you
7 couldn't go back and pull any more out. In other
8 words, as of February 22, 2013, if the Guaranty
9 Association was being paid on it by the Second
10 Injury Fund, it's over. Okay? That doesn't fit
11 the criteria on this case whatsoever.

12 And, you know, this expectation and
13 the throwing out of the figure of 2.9 million
14 dollars, I don't -- you just can't come in here
15 with no testimony, and I don't think you can do it
16 anyway under the Parole Evidence Rule, come in
17 here with no testimony to that effect and say,
18 well, we paid 2.9 million. We were -- that surely
19 included more than just the Legion and Reliance
20 cases.

21 How do we know that? Legion or
22 Reliance cases could have been valued at a hell of
23 a lot more than 2.9 million dollars. Who knows?
24 But you can't come in here and bring parole
25 evidence in to try to make a settlement document

1 work in your favor, and you can't cite ambiguities
2 as the drafter of the settlement document and come
3 in here allowing the ambiguities to try to say
4 that it bars a claim.

5 This point about the assessments and
6 the Second Injury Fund -- I mean the State
7 Accident Fund and the self-insurers, their claims
8 are being reimbursed. Okay? Not all of the
9 claims, the members Workers' Compensation
10 insurers, this one in particular, are being
11 reimbursed.

12 I think that the Second Injury Fund,
13 you pay into it and you get out of it what --
14 basically what you're entitled to, but just
15 because the Second Injury -- just because the
16 self-insurers and the State Accident Fund are also
17 responsible for assessments into the Second Injury
18 Fund, I don't think that has anything to do with
19 whether the Guaranty Association should be
20 entitled to -- to reimbursement.

21 Again, 38-31-60, all rights, duties
22 ~~and obligations. We meet the workers' comp~~
23 statutory definition of an insurance carrier, I
24 think, without question, and we've got the Second
25 Injury Fund coming in here and arguing that

1 ambiguities and a release it drafted should --
2 should work to its favor in barring this claim.

3 And I think most importantly is the
4 fact -- going back to the assessment question, the
5 point I failed to make a minute ago, I made it in
6 the prehearing and I think I made it in my first
7 presentation, but they have assessed this claim,
8 this claim, the liabilities that the Second Injury
9 Fund has on this claim, they have assessed
10 everybody for, not only the State Accident Fund
11 and the self-insurers, but they've also assessed
12 the Guaranty Association member workers'
13 compensation insurers.

14 This claim has been paid into the
15 Fund. The liabilities for this claim are covered
16 by what's been assessed since 2013. Not a single
17 solitary member of the Guaranty Association's
18 workers' compensation section, according to
19 Mr. Lombard's testimony and Mr. Stooksbury's
20 testimony, are delinquent on their assessments.

21 According to Mr. Stooksbury, the full
22 60 million dollars per year, every year this
23 five-year plan has been in effect, has been
24 collected. That 60 million dollars being
25 collected every year for five years included

1 paying the liability that is this claim, among
2 other claims, but it included the liability for
3 this claim, and they don't want to pay it, and we
4 think we're entitled to it and we're asking you to
5 order them to do it.

6 THE COURT: All right. Mr. Cook, do
7 you have anything further, sir?

8 MR. COOK: Yes, sir. May it please
9 the Court. By way of reply, first with regard to
10 the issue raised of parole evidence and the
11 settlement agreement. The settlement agreement,
12 which is in evidence without objection, states two
13 things; one, that the amount of the settlement was
14 2.9 million dollars, and, two, that the settlement
15 was between the Second Injury Fund and the
16 Guaranty Association.

17 So to the extent that an argument was
18 attempted to say that that amount might have
19 included other things, the document itself states
20 what it's for. There was a separate settlement
21 agreement pertaining to Legion and Reliance. This
22 settlement agreement included certain Legion and
23 Reliance claims that the Guaranty Association had
24 assumed after they went into liquidation, but they
25 were all Guaranty Association claims.

1 Secondly, if you look on the last
2 page of that settlement agreement, you'll notice
3 two things. One is that it was signed by two --
4 well, actually, on behalf of the Guaranty
5 Association it was signed by the director,
6 Mr. Harrison, and on behalf of the Fund, it was
7 signed by Michael Harrison, who I -- you might
8 have known Mike Harrison. He at one time was --
9 he kind of became the director of the thing.

10 But both sides were represented by
11 counsel during this. I mean, you were -- you sat
12 through some of the arguments of these. This was
13 a mutually negotiated settlement agreement. It's
14 not like, you know, your cable contract, where if
15 a court is looking at it, they may construe it
16 against, you know, Comcast because you weren't
17 a -- well, you are a lawyer but, you know, other
18 people aren't.

19 So if there are ambiguities, that's
20 when you look to see, well, what did the parties
21 think they were getting. And it's not a matter of
22 it being drafted by one side or the other. It was
23 drafted by both sides.

24 Now, with regard to a point that
25 Mr. Wood made about that they're able to come in

1 and assert subrogation claims and that type thing
2 and that clearly means that basically they have
3 every right that the insurance company has, the
4 fact of the matter is, the legislature
5 specifically allows them to assert subrogation
6 claims. 38-31-100, paragraph 4, specifically
7 provides for subrogation by the Guaranty
8 Association.

9 So to the extent they assert that
10 claim, it's only because they are permitted to do
11 that by the legislature, not because it's some
12 inherent right that they have.

13 And with regard to the issue of the
14 assessments, well, there was a point in time that
15 this claim was being paid under an agreement
16 between Lumbermen's and the Second Injury Fund,
17 and to the extent payments were made by the Second
18 Injury Fund on that claim, of course, it was
19 included in the assessments that went out.

20 Now, so those were -- that paid for
21 what had been paid. The situation is a little bit
22 different since the sun is setting because rather
23 than pay -- rather than assess based upon losses,
24 they're choosing to go on just a certain dollar
25 amount under the belief that it will cover

1 everything, but it doesn't change the final
2 equation, which is this; which is, if there is
3 money left over, it will go back to the people who
4 paid into it.

5 And it's interesting because the
6 Guaranty Association has no such provision. They
7 are -- they have an assessment provision with no
8 information about what happens if there is monies
9 left over at the end of the day, assuming there
10 ever is an end of the day.

11 But the Second Injury Fund sunset
12 closure plan specifically states that if there is
13 money left over, we're going to pay it out in a
14 prorated fashion, so I don't think that changes
15 anything, Your Honor.

16 They're simply not allowed to do this
17 because they have to -- they can only do what the
18 legislature tells them to do. The legislature
19 didn't tell them to do this. They're not allowed
20 to do it. Thank you.

21 THE COURT: All right. Let me deal
22 with a couple of administrative issues.
23 Transcript, does anybody need the transcript on
24 this thing?

25 MR. COOK: I'm not sure what you

1 mean. Do you mean ultimately or right away?

2 THE COURT: Do you all want to order
3 a transcript on this thing today?

4 MR. COOK: I would, yes, sir.

5 MR. WOOD: Yes, sir.

6 THE COURT: Mr. Wood?

7 MR. WOOD: Yes, sir. I think we'll
8 probably need it at some point.

9 THE COURT: All right. Second, APAs,
10 you're going to need to upload anything I didn't
11 mark as an exhibit, so the depositions that you
12 handed up independently, we'll take care of. In
13 other words, the things that I said had exhibit
14 stickers on them, we'll take care of getting those
15 uploaded in our system, so the only thing you all
16 are going to need are the APAs that you
17 submitted. You'll need to upload those to
18 Shawnee.

19 MR. WOOD: What about the exhibits
20 that are attached to the depositions?

21 THE COURT: We'll take care of those.

22 ~~MR. WOOD: Okay. So just the APAs.~~

23 THE COURT: Just the APAs.

24 MR. WOOD: Okay.

25 THE COURT: If it's inside that

1 binder in that depo, we'll take care of it.

2 MR. COOK: Your Honor, I'm not trying
3 to be hyper-technical. I handed up a statute. Do
4 I need -- do I need to do anything different with
5 regard to that or...

6 THE COURT: No, because that's -- I'm
7 not going to mark that as an exhibit.

8 MR. COOK: To me, I didn't think you
9 would, but I want to make sure. Okay. All right.

10 THE COURT: No. We'll just use that
11 for reference.

12 MR. COOK: All right.

13 THE COURT: All right. Next item,
14 how long is it going to take me to get you all
15 something back. I don't know. This is somewhat
16 convoluted. There is a lot of data up here. Here
17 is what I will commit to you. As soon as I can.

18 That being said, we have an internal
19 policy here that we try -- our goal is to get
20 instructions to counsel no greater than 90 days.
21 I am hopeful that I can and will exceed that 90
22 days, but it may take the full 90.

23 MR. WOOD: I think I speak on behalf
24 of Mr. Cook. We'd rather you take your time and
25 just make a thorough assessment of it, however

1 long, you know.

2 THE COURT: Well, and that gets me to
3 my next point. This issue isn't quite as
4 simplistic as one would think by just reading the
5 briefs. It's a complicated situation. It's one
6 of first impression. There are a lot of moving
7 parts to it, and I think it deserves the attention
8 and time to hopefully get it right.

9 Now, obviously, whatever I decide,
10 one of you is going to disagree, but I want to
11 give it our best effort here out of the shoot.

12 The last thing I want to say,
13 Mr. Cook, Mr. Wood, this isn't your typical
14 workers' comp argument in here. I've got to
15 commend both of you for the amount of effort that
16 you put into this, the amount of preparation you
17 put into this.

18 This could have been like watching
19 paint dry. It was not. You were informative, you
20 were articulate, you were well-reasoned, you both
21 stayed positive in here, and most importantly were
22 well-prepared in here to make these arguments, and
23 I commend both of you. That being said, that will
24 conclude this proceeding. Thank you, gentlemen.

25 MR. WOOD: Thank you, Commissioner.

1 MR. COOK: Thank you.

2 (The hearing concluded at
3 approximately 3:44 p.m.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS

2018-CP-23-02580

SECOND INJURY FUND OPERATIONS)
OF SC INS., ET AL)

PLAINTIFFS)

vs.)

TRANSCRIPT OF RECORD

SC PROPERTY AND CASUALTY)
INSURANCE GUARANTY FUND)

DEFENDANT)

ORIGINAL

October 30, 2018
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

ROBERT M. COOK, II, ESQ.
Attorney for the Plaintiffs

JOSEPH H. WOOD, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

1 There were no witnesses.

2 There were no exhibits.

3 » > o < «

4 Certificate of Reporter 35

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: Let's call to bar the case of Second
2 Injury Fund Operations of South Carolina vs. The
3 South Carolina Property and Casualty Insurance
4 Guaranty Fund and that is case number
5 2018-CP-23-02580. And I will be happy to hear from
6 the moving party.

7 MR. COOK: Your Honor, may it please the Court?

8 THE COURT: Yes, sir.

9 MR. COOK: My name is Robert Cook and I
10 represent what's left of The Second Injury Fund which
11 is, I think, technically styled as Second Injury Fund
12 Operations. It's under the immediate control of the
13 Insurance Reserve Fund, which is part of this kind of
14 new agency that took place of The State Budget and
15 Control Board, The State Financial Accountability
16 Authority.

17 THE COURT: Yes, sir.

18 MR. COOK: It use to be sort of more of a stand
19 alone agency but back in 2013, the legislature passed
20 some sunseting legislation and we're in the midst of
21 trying to, I guess, run out liabilities as a way

22 people tend to refer to it. And, Your Honor, I
23 appreciate you letting me start that you didn't ask
24 me if I was under any mental infirmity or alcohol or
25 drugs. That's a very kind thing do.

1 THE COURT: Generally, the licenses to practice
2 law, I assume you're suffering from some type of
3 mental infirmity.

4 MR. COOK: That's probably the assumption I
5 would have made if the roles were reversed. I was
6 mentioning to opposing counsel, Mr. Wood, that it use
7 to be years ago, when you would come up to Greenville
8 or Spartanburg and see these Circuit Court motions
9 roster, half or two thirds of the cases would be
10 workers' comp appeals. Of course, in 2007 the
11 legislature changed the process of appeals so that it
12 goes directly from the full commission to the Court
13 of Appeals now. The reason why, you noted just a
14 minute ago, this was a 1999 date of injury. Which is
15 why the appeal is appropriate to the Circuit Court
16 because the Supreme Court has said anything that
17 predates 2007 has to follow that old appellate
18 procedure.

19 The parties that are involved in these are not
20 what I think typically judges are hearing from. You
21 got the Second Injury Fund who I represent, then The
22 Property and Casualty Insurance Property Insurance
23 Guaranty Association that Mr. Wood represents. And
24 if you'll give me just a minute, Your Honor, I'd like
25 to mention a little bit about what those are.

1 Because I think it's pertinent to the appeal. One
2 thing that I would say, Your Honor, is in connection
3 with why you're hearing this case, when these claims
4 that -- when this claim and they're other claims
5 involved, that are not in litigation, one other one
6 that is in litigation and on appeal in Spartanburg
7 County.

8 When it first became clear that these were going
9 to reach litigation with Mr. Wood, my client, through
10 different legal counsel, requested that The State
11 Supreme Court hear it -- hear these issues in its
12 original jurisdiction. Filed a position which was
13 opposed. Ultimately, the Supreme Court issued a
14 ruling stating that they did not want to hear it in
15 its original jurisdiction, just kind of have it
16 percolate up through the commission, you and beyond
17 possibly. So, that was tried and ultimately
18 rejected.

19 The underlining case involved a workers' comp
20 injury to a gentleman back on December 17, 1999. And
21 his employer was insured by a company called

22 Lumberman's Mutual Insurance Company. Use to write a
23 bunch of workers' comp insurance. He had a injury to
24 his back, his neck and then psychological injury.
25 Five or six years after that the parties reached what

1 they called a clincher settlement where they paid all
2 indemnities. In other words, all of the weekly
3 payments. He got paid in a lump sum. But the -- the
4 context of that settlement was the carrier agreed to
5 continue to pay for the medical care for the rest of
6 his life. Which is not unusual in permanent and
7 total injury cases.

8 Everything rocked along fine. The workers' comp
9 carrier, Lumberman's was paid. The medical care had
10 paid out -- already paid out the lump sum. And
11 during that whole process, Lumberman's then seeks to
12 have my client, The Second Injury Fund, reimburse
13 them a portion of what they're paying. And that's
14 normal and proper. The parties actually reached an
15 agreement that there would be a method of
16 reimbursement. And reimbursement was made up to a
17 certain point. That up to a certain point was when
18 Lumberman's became insolvent. And the
19 responsibilities for payment of the -- the direct
20 payment of things to the injured work then was
21 assumed by the Guaranty Association, who is
22 Mr. Wood's client.

23 His client then sought reimbursement, basically,
24 saying look, we took over this obligation of
25 Lumberman's, you need to reimburse use the same way

1 you were reimbursing Lumberman's before. And we
2 called halt to that for this reason. It is the
3 position of my client, and I believe it based on the
4 statutory language, that the Guaranty Association is
5 not entitled statutorily, to seek reimbursement from
6 the Second Injury Fund. And it's for this reason.
7 The law that provides for the Second Injury Fund,
8 which is found Title 42-7-310.

9 And, Your Honor, I'm trying to not so much just
10 track my brief but kind of go beyond it to give you
11 more of a flavor. I know you read the brief.

12 THE COURT: I gotcha.

13 MR. COOK: That's got the exact citations and
14 all of that. But in any event, the language -- the
15 statutory language that provides for The Second
16 Injury Fund says they're only three classes of people
17 who can make claims against the Second Injury Fund.
18 That's what the legislature intended. Insurance
19 companies, qualified self insured. It's like saying
20 if BMW wanted to not have to buy insurance but become
21 a self insured, there's a process that they can do
22 that. And so long as that's been approved by the
23 Workers' Comp Commission there are qualified self
24 insured.

25 So, you got insurance companies, qualified

1 self-insures and The State Accident Fund. Which is
2 another legislative entity that was set up to
3 basically, I think, be an insurance company for
4 government entities. Those are the only three that
5 are listed in the language of whose allowed to make a
6 claim against The Second Injury Fund.

7 And the reason why it's important to this case
8 is that group of people are also the ones who are
9 responsible for the funding of The Second Injury
10 Fund. The money that Second Injury Fund has doesn't
11 come from the general funding or the legislature
12 through taxes that we all pay. It comes from
13 statutory assessments upon all the insurance -- all
14 the workers' comp insurance companies in South
15 Carolina. All the qualified self-insures in South
16 Carolina. And the State Accident Fund. And years
17 ago the assessments at times was well over a hundred
18 million dollars to pay these claims. And, as you can
19 imagine, that seemed like a lot of money to a lot of
20 people. Which is why some changes were made. And
21 right now, as The Second Injury Fund is trying to try
22 to sunset out, there's a plan that's been put in
23 place where I believe right now they're assessing
24 about 60 million dollars a year. Which is a lot of
25 money but significantly less than what it use to be.

1 The Guaranty Association does not pay any
2 assessment. We don't send them assessment bills,
3 they don't pay money into The Second Injury Fund.
4 What I anticipate Mr. Wood's argument is going to be
5 is, yeah but our members did. And we should get to
6 piggyback on that. It's not a bad argument. I mean,
7 it's logical. But as you know, the circuit courts
8 are funny. They're, of course, general jurisdiction.
9 You can hear criminal cases, you can hear like minor
10 settlements like you were just hearing, very broad
11 jurisdiction, that's the way it's set up. But say
12 something like Family Court, they can't hear anything
13 about real estate, you know, unless it's in terms of
14 is a contract enforceable, those type of things.

15 Well, that's what you have here is two entities.
16 The Guaranty Association and my client, The Second
17 Injury Fund. They have -- the legislature years ago,
18 more than 30, 40 years ago have set these up and said
19 this is what you can do, this is what you can't do.
20 No where in either of the sets of statutory language
21 is there anything that would indicate that the
22 Guaranty Association is allowed to seek Second Injury
23 Fund reimbursement from my client. All right. And
24 the reason why that's important to my client is it's
25 a state agency, trust me, they're glad to write a

1 check to the Guaranty Association if they're ordered
2 to do it. That's not the issue. The issue is, the
3 fear of going beyond what they're statutorily allowed
4 to do.

5 THE COURT: Right.

6 MR. COOK: Your Honor, if you'll give me just a
7 moment. The -- another thing that is -- that I think
8 is vital to understand in connection with this case
9 is however you rule, however anybody else rules, it's
10 not going to effect one bit what the injured worker
11 receives. The Guaranty Association is responsible by
12 law to make that direct payment. And what they're
13 trying to do is then seek from us. So, if you rule
14 in our favor, that injured worker is not going to get
15 any less medical care. If you rule in their favor,
16 he's not going to get any more medical care. It just
17 is not going to effect it. It's going to effect this
18 statutory entity versus my client which is also a
19 statutory entity.

20 The -- there are no -- there's no statute
21 directly on point. Obviously, if there was we
22 wouldn't be arguing. Most likely we wouldn't be
23 arguing over this. There is no regulation under the
24 worker's comp, which is the regulations that begins
25 67-whatever, that's the Workers' Comp Commission

1 regulation --

2 THE COURT: Right.

3 MR. COOK: None of those regulations address
4 this. There is no decision from the Court of Appeals
5 or The State Supreme Court addressing this issue. At
6 one prior time, about six, seven years ago, there was
7 some similar litigation. And at that time there was,
8 I don't know, a dozen to 50 to 20 cases in different
9 levels. Some at the single commissioner levels, some
10 at full commission, some at circuit court, one on
11 appeal to The Court of Appeals. And at that time my
12 client entered into what he thought was a global
13 resolution of all these claims just to avoid having
14 to deal with them. And that's the last basis of my
15 appeal dealt with the effect of the release.

16 And with your permission, Your Honor, I would
17 just rest on what I wrote with regard to that.
18 Because while that -- it applies and we believe it is
19 a real issue that falls in our favor. This case is
20 really about statutory authority. Does Mr. Wood's
21 client have the authority to make the claim that
22 they're making? And even if they did, why, if that's
23 so, why aren't they also then required to make
24 payments to my client? It sort of a pay or play type
25 thing.

1 Back in, I believe, maybe 2013, the legislature
2 changed it to say that if the carrier was self
3 insured or State Accident Fund, was not current in
4 its payments to my client. They could not
5 participate in the funding anymore. Because it
6 wasn't explicit. That that was the case and they
7 decided to make it explicit.

8 So, you got no case law on point, no statute on
9 point, no regulation on point. I noticed in
10 Mr. Wood's brief, that, I think, on Page 16 or 17,
11 that he makes mentioned -- and you have both our
12 brief or I understood you to say, Your Honor.

13 THE COURT: Yes.

14 MR. COOK: I don't think there's really a
15 factual dispute in this. And Mr. Wood, The Guaranty
16 Association can speak for themselves on that. My
17 point, this is I believe strictly a matter of law. I
18 mean, I would discourage you from going through the
19 record, not because I'm concerned with what's in the
20 record, I don't think it's going to make any
21 difference to your decision. But I'm glad to know
22 that you have it.

23 He made reference to a very recent decision of
24 the Court of Appeals. It's Farmer vs., I think, it's
25 the AGC or Comp Trust. Which was -- if you think

1 this is convoluted, we should talk about what that
2 case is about. Essentially, there was, I believe, a
3 North Carolina grouping of general contractors, then
4 they tried to shift workers' comp responsibility to a
5 second entity. And somehow, on some of these claims,
6 the Guaranty Association ended up getting stuck on
7 them. And went to court in Richland County to say,
8 look we should not be responsible, this was a fraud,
9 they were trying to trick us with this. And I
10 believe the Circuit Court ruled against them but then
11 on appeal, they said, Yeah, you can look into that.

12 The point is, Mr. Wood, in his brief, implies
13 that the decision in that case means that the
14 Guaranty Association has real broad ability to go
15 beyond what it statutorily authorized to do that
16 there's a part of that statute that's 38-31-60
17 Sub(1). Basically, says necessary that the fund, the
18 Guaranty Association, can do what's necessary and
19 proper to effectuate the purpose of the act, okay.

20 And then he kind of extrapolates from that that
21 means they can make Second Injury Fund claims. My
22 point is this, if the legislature wanted them to be
23 allowed to make Second Injury Fund claims, that would
24 have been super easy. Because they could have said
25 in the Second Injury Fund Statute, they could have

1 added the Guaranty Association by name. And those
2 people who are allowed to make claims against the
3 Second Injury Fund.

4 They could have said in the Guaranty Association
5 Act, that the association has the same rights of
6 recovery as the insolvent insurance company. They
7 have could have said the Guaranty Association
8 succeeds to rights of reimbursements against The
9 Second Injury Fund. Just like the -- just like the
10 insolvent insurance company. They could have said in
11 The Second Injury Fund Statute, even if the Guaranty
12 Association does not pay assessments, so long as the
13 underlining insurance company did, they can make
14 claims against The Second Injury Fund. I'm not
15 particularly clever in how I'm wording things today
16 but my point is, in several places in several
17 different relevant statutes, one sentence could have
18 handled this. Had it specified that the Guaranty
19 Association was allowed to make these claims. And
20 they're not.

21 And, Your Honor, I'll conclude this way. There
22 are probably 20 cases from the appellate courts in
23 South Carolina that state what the purpose of The
24 Second Injury Fund is. And it's to promote the
25 hiring of the handicapped and disabled. The thinking

1 was that if I hire somebody who has already got a
2 preexisting disability, I'm not going to be inclined
3 to do that unless I know that if they get hurt at
4 work and their injuries are made worse because of the
5 preexisting disability, I'm going to have a huge
6 worker's comp liability. And then the thinking was,
7 well we'll allow them to then make claims against the
8 Second Injury Fund for that preexisting condition and
9 kind of soften that blow. And the thinking was that
10 would encourage people. Literally, there are cases
11 from both the Court of Appeals and Supreme Court that
12 say that's the purpose of The Second Injury Fund.

13 What's relevant to this case, Your Honor, is
14 what is the purpose of the Guaranty Association? And
15 there's a case that came out last month, I believe it
16 called Bucannon. Give me just a moment, Your Honor.
17 Janette Bucannon vs. The Property and Casualty
18 Insurance Guaranty Association, it is a decision of
19 the -- a certiorari from the Court of Appeals to the
20 Supreme Court and the opinion was filed in September
21 of this year.

22 And this is what the Supreme Court says the
23 Guaranty Association is all about. Created by the
24 act, the Guaranty is a non-profit, unincorporated
25 association of which all property and casualty

1 insures conducting business in South Carolina are
2 members. Then there's a cite to the statute. The
3 Guarantee's quote, purpose is to provide some
4 protection to insures who insurance companies have
5 become insolvent.

6 So, their purpose is to basically -- if your
7 insurance company goes belly up, they're going to
8 step into its place so if you're hurt you can still
9 make a claim. The whole purpose of the Guaranty
10 Association is directed to make sure that injured
11 people have a chance to keep their claims going if
12 the insurance company goes insolvent. Allowing them
13 to make Second Injury Fund reimbursement claims does
14 nothing to further that purpose whatsoever. All that
15 does is enrich the insurance companies. I'm not even
16 suggesting that's wrong. But the legislature should
17 have been more explicit about it if that's what they
18 intended to do.

19 So, Your Honor, I hope that was relatively brief
20 and relatively clear.

21 THE COURT: Yes, sir, I understand entirely.

22 Mr. Wood.

23 MR. WOOD: Thank you, Judge, great to see you
24 today.

25 THE COURT: Yes, sir, you too.

1 MR. WOOD: Pleasure. Thank you for hearing us.
2 I generally agree with Mr. Cook's posture of the
3 case, one housekeeping item, as opposed to Guaranty
4 Fund, it's the Guaranty Association. So, the court
5 documents could reflect that proper name of the
6 entity. I also wanted to acknowledge for porpesses
7 of assessing what the standard of review is for this
8 court, acknowledge Mr. Cook's comments on the
9 original jurisdiction petition that was filed and
10 rejected by the Second Injury Fund. The position we
11 took in response to that is while, yes, these issues
12 are largely questions of law, they depend on a
13 factual record and factual findings.

14 And just to sort of run down the three areas of
15 his appeal, you got a statutory authorization, you
16 got the assessment question and you got the
17 settlement agreement. The commission, based on the
18 evidentiary record that we submitted, which included
19 depositions of their associate claims manager, IRF,
20 who's in charge of The Second Injury Fund claims,
21 their finance guy, Stukesberry, who is in charge of
22 the assessments. As well as our executive director,
23 Smitty Harelson. That testimony as well as some of
24 the documentary evidence is critical to the
25 commissions findings that lay the framework for the

1 decisions on the question of law.

2 Therefore, I think you need to look at the case
3 in the context of the substantial evidence as it
4 relates to the factual findings, then, of course, the
5 court's assessment of the questions of law. But
6 again, I think the factual findings, and I'll touch
7 on them as I go through each of the areas of the
8 appeal as to why I think that's significant.

9 Mr. Cook's outline of the underlining case is
10 correct. There was an approved agreement to
11 reimburse compensation between Lumberman's and The
12 Second Injury Fund. That was unappealed from,
13 there's no dispute over that. Lumberman's was
14 liquidated and the date of the liquidation was May 8
15 of 2013. That, of course, triggers the Guaranty Act
16 to take effect and that's why we're paying the
17 underlining claim.

18 Now, Mr. Cook just made reference to the
19 Bucannon case and he quoted from that case. It's
20 important for The Court, I think -- all this is dealt
21 with in the briefs, to not only with respect to the
22 Bucannon case but the Brock case, both of which are
23 Supreme Court cases. Both of those cases deal with a
24 policy of liability insurance. Here, in this case,
25 we're dealing with a policy of workers' compensation

1 insurance. Now, why is that important? That's
2 important because under the Guaranty Act, the
3 Guaranty Association is 100 percent responsible for
4 workers' compensation case. In Brock -- in Bucannon
5 you were dealing with liability policies where
6 there's a limit and certain offsets that apply to the
7 Guaranty Association's liability.

8 Here, we're 100 percent responsible for the case
9 and I'm going to circle back around to that
10 momentarily. The other distinguishing feature, as it
11 relates to the Brock and Bucannon cases, is the fact
12 that in the Workers' Compensation Act, we have
13 definitions, statutory definitions of the term
14 insurer and carrier. Basically, any association that
15 is authorized by the Workers' Compensation Commission
16 to ensure liabilities under the Worker's Compensation
17 Act, is considered a carrier meets the statutory
18 definition of a carrier under the Worker's
19 Compensation Act. The uncontradicted evidence,
20 Mr. Harelson's testimony as well as the commission
21 taking a judicial notice of the fact that the

22 Guaranty Association is without question an
23 association authorized to ensure, in this particular
24 case, the employers liability to this workers'
25 compensation case.

1 Mr. Cook says, well there's no statutory
2 authority for the Guaranty Association of seeking
3 reimbursement. The key statute in this entire case
4 from our perspective is Section 38-31-60. One other
5 point, Your Honor, let me back up. There's no
6 question, no issue whatsoever that the underlining
7 claim in this case, is a cover workers' compensation
8 claim under the Guaranty Act. So, there's no dispute
9 that were responsible or paying it and we are paying
10 it.

11 As you know, the association, as Mr. Cook
12 referenced, is divided into categories. The member
13 of various -- you have liability, you have workers'
14 compensation, assessments for funded on all workers'
15 compensation carries doing business in this state,
16 Guaranty Association is funded to pay workers'
17 compensation claims by assessments on those carries.
18 Those are the same carries who are paying assessments
19 to the Second Injury Fund. I'm going to circle back
20 to that in a minute but just a little bit of
21 background information I want you to consider in the
22 context of making a decision on this case.

23 Back to 38-31-60. Under that statute, the
24 Guaranty Association is the insurer to the extent of
25 its liabilities on the covered claims. Again, this

1 is a covered workers' compensation claim, we're
2 100 percent responsible for it. So, effectively
3 under the Guaranty Act and 38-31-60, we are the
4 employers insures in this case. Under 38-31-60, we
5 also have all rights, duties and obligations of the
6 liquidated carrier.

7 One of the rights of the liquidated carrier in
8 this case, that we assert and really the basis of our
9 claim for reimbursement is the right to reimbursement
10 from the Second Injury Fund pursuant to the approved
11 agreement to reimburse compensation that was entered
12 in this case between Lumberman's and The Second
13 Injury Fund.

14 Mr. Cook referenced the creating statute with
15 respect to The Second Injury Fund, Section 42-73-10.
16 And he said well, that doesn't include the Guaranty
17 Association. Really, that statute talks about who is
18 liable for assessments. And it says, as he pointed
19 out, The State Accident Fund authorize self-insures
20 as well as insurance carries. Reimbursements are not
21 made pursuant to Section 42-73-10. In this case and

22 in other cases, the reimbursement is made pursuant to
23 Section 42-9-400. That statute is specifically
24 referenced in the agreement reimbursement
25 compensation. And it makes reference -- it provides

1 that employers and insurance carries shall be
2 reimbursed.

3 The sunset legislation that Mr. Cook referenced
4 is 42-73-20. That statute specifically provides that
5 The Second Injury Fund shall continue to make
6 reimbursement to employers and their insurance
7 carriers, notwithstanding the fact that The Second
8 Injury Fund is over time is shutting down, requires
9 reimbursement on the claims they breached accepted on
10 or before a certain date. This claim clearly meets
11 that requirement.

12 So, the agreement to reimburse compensation is
13 the right to reimbursement pursuant to that
14 unappealed agreement. Lumberman's had a right to
15 reimbursement when it goes into liquidation under the
16 Guaranty Act. We assume all the rights of
17 Lumberman's, one of which was The Second Injury Fund
18 reimbursement. Mr. Cook says, well, if they had said
19 reimbursement -- if the legislature had intended to
20 reimbursement to the Guaranty Association would have
21 said so. I would respectfully submit to, Your Honor,
22 that it would be impossible for the legislature to
23 itemize every right that the Guaranty Association may
24 assume for the liquidated carrier.

25 In particular workers' compensation context, a

1 couple of examples. The right to assert the
2 subrogation lien under Section 42-15-60. That's not
3 specifically provided for in the Guaranty act. But
4 we would submit to you on a routine basis, the
5 Guaranty Association has the right to assert
6 subrogation lien when there's third party liability.
7 Asserting a credit, a overpayment credit in a
8 workers' compensation case. But there's been a
9 overpayment of compensation by the liquidated
10 carrier, the Guaranty Association would have the
11 right to claim that credit in it's handling of the
12 covered claim.

13 Mr. Cook says, well, 38-31-60 only applies to
14 defensive action by the Guaranty Association. In
15 defending its obligations on other claims. We know
16 from the Farmer case and the reason that the Farmer
17 case is significant to this matter is because it
18 cites the necessary and proper clause in the -- in
19 38-31-60, which essentially authorizes the Guaranty
20 Association to take whatever actions are necessary to
21 effectuate the purposes of the Guaranty Act.

22 Mr. Cook correctly states that the purpose of
23 the Guaranty Act is to pay the claims of liquidated
24 insurance company, well that's right but that money
25 has got to come from somewhere. So, seeking

1 reimbursement from the Second Injury Fund to assist
2 in the funding of these liquated claims, we think is
3 clearly permitted for the context of 38-31-60 and the
4 broad range. It's a multi-faceted statute. He just
5 wants to pick out one section and say, well, it's
6 only defensive.

7 If you read the entire statute, it gives broad
8 authority to the Guaranty Association. Even if it is
9 limited, even if it is limited, as Mr. Cook says and
10 how he argues in favor of the construction of that
11 statute, even if it is limited to our defensive
12 actions, in the context of paying obligations on
13 covered claims, we would submit to you that in
14 workers' compensation context, reimbursement from the
15 Second Injury Fund is inextricably linked to the
16 defense. It's part and partial of the defense of the
17 claim. And that's exactly what the full commission
18 of appellate panel found, in addition the single
19 commissioner's finding, it made that additional
20 finding that the -- that the -- that even if it is
21 defensive in nature, you construe the statue as
22 Mr. Cook wants you to construe 38-31-60, then it's
23 still part and parcel of defensive action dealing
24 with the covered claim.

25 As it relates to the statutory assessment,

1 again, going back to the statutory provisions,
2 construing the agreement to reimbursement
3 compensation, again, I would refer you to 42-1-60,
4 which is the definition of insurance carrier, insurer
5 under the workers' compensation law, the cross
6 reference to 42-5-20. Again, if you look at the
7 context of how the term carrier is used 42-9-400,
8 42-9-320 and the agreement to reimburse compensation.
9 We submit to you the commission found that the
10 Guaranty Association meets the statutory definition
11 of the term carrier as it used in the -- provisions
12 and the agreement as to reimburse compensation. And
13 there's no evidence to the contrary on that point.
14 They didn't context that from a factual standpoint in
15 any way.

16 The assessments. This is an interesting issue.
17 And I learned a lot, you know, doing the discovery in
18 this case, particular Mr. Stukesberry deposition. I
19 think it's instructive here to go back and look at
20 their original pleadings and there were two issues
21 that they raised in their initial pleadings relative
22 to the question of assessments and how that precluded
23 a reimbursement claim. First, they said Lumberman's
24 was delinquent in its reimbursement. They cited the
25 June 2003 Amendment Section 42-73-10, which

1 essentially provided that if a carrier was delinquent
2 in its assessments, it would bar any reimbursement on
3 the claim.

4 And there was a sub issues in some of the prior
5 litigation that's referenced in the record, there's a
6 question as to whether that statute applied
7 retroactively to a workers' compensation claim with
8 an underlining date of loss or accident that predated
9 that statutory limit. You don't need to go there in
10 this case. The commission didn't need to go there in
11 this case. Reason being because Mr. Stukesberry,
12 their own finance guy in charge of assessments,
13 testified unequivocally that Lumberman's has never
14 been delinquent in its assessments. It was fully
15 paid up. It went into liquidation.

16 By operation of a liquidation, when you stop
17 paying claims, your assessments goes to zero. So,
18 it's uncontradicted and the commission found that
19 Lumberman's was fully paid up in its assessments.
20 So, that kind of does away with that argument. And
21 they've essentially abandoned that, I believe.

22 The other issue they say the Guaranty
23 Association doesn't pay assessments. I really think
24 this is a key element of the case to consider. They
25 say well the Guaranty Association doesn't pay

1 assessments. We discussed, both sides agree, we are
2 a unincorporated association. There's absolutely no
3 question that all of your member ensures who are
4 paying assessments to fund the Guaranty Association,
5 they pay the liquidated claims, are also paying
6 assessments to The Second Injury Fund. None of those
7 carries are delinquent according to Mr. Stukesberry.
8 All were paid up.

9 Another important feature of the assessment
10 formula is if the end number, whether under the
11 original funding formula prior to the 2007 amendments
12 or the sunset statute and the plan they enacted, the
13 total dollar amount doesn't change. If you add it in
14 the Guaranty Association as a payor of assessments,
15 which again, if you calculated any assessment on the
16 Guaranty Association, it wouldn't work because it
17 doesn't fit into the normalize premiums. We don't
18 collect premiums, our members do. They're paid a
19 percentage. It wouldn't -- my point is it wouldn't
20 change the number of the dollar figure going into the
21 Second Injury Fund. That's going to stay static.

22 It's just a matter it could slightly be allocated
23 slightly different among all the payor. So the money
24 doesn't change.

25 Here's the most interesting part. And Mr. Cook

1 made reference to the Physical Accountability
2 Authority, formally the Budget and Control Board.
3 Under the sunset provision, the sunset statute,
4 42-73-20, it was charged with commoving up with a
5 finance plan for the runoff. To fund the runoff with
6 the remaining Second Injury Fund claims. And the
7 record is replete, it's uncontradicted, they did that
8 by bringing in KPMG, which is a consulting firm or
9 some type of accounting consulting firm. KPMG made
10 several proposals. The one that was adopted by the
11 Physical Accountability Authority and implemented,
12 was a five year 60 million dollar a year funding
13 plan.

14 When they did that in 2013, to come up with that
15 figure, all of what goes into the analysis to come up
16 with that plan to fund the runoff, all of the claims
17 in The Second Injury Fund was responsible for in
18 paying, at the time, including this one. And that,
19 Mr. Stukesberry concedes that point. Were factored
20 in. So, the liability on the cases including this
21 case, was factored in to the assessment plan to raise
22 60 million dollars over five years.

23 So, what does that tell us? That tells us that
24 The Second Injury Fund factors in liability for
25 reimbursement on this claim. And it's charged our

1 members assessments accordingly. Our members, along
2 with the State Accident Fund, authorize self insures,
3 who by the way I presume are getting their claims
4 reimbursed. Have paid and are continuing to pay
5 assessments to fund this claim. So again, if they
6 don't have to fund this claim, they're basically
7 collecting assessments that were intended to include
8 the liability on this claim. So, I they that's an
9 important factor for The Court to consider and the
10 commission certainly could consider that factor in
11 reaching its decision.

12 The bottom line is we just -- they said, well
13 you don't pay assessments, you don't participate.
14 Overwhelming evidence of participation in the
15 assessment process. No question about it. And now
16 so they get to the full commission and now before
17 this court they say, well, you don't directly pay
18 assessments. It's hard to directly pay assessments
19 when you never receive an assessment notice from The
20 Second Injury Fund. Which has never happened. They
21 admitted that and that's uncontradicted to the case.

22 So, they now say, well, you don't directly pay
23 assessments, but by the way we've never sent you a
24 Second Injury Fund assessment notice. We think the
25 assessment issue is a red herring. We think we

1 completely disposed of any defense. The fact of the
2 matter is is that the 2003 amendment 42-73-10, is the
3 only statutory provision that ties assessments to
4 reimbursements to assessments. And it's
5 uncontradicted that Lumberman's was not delinquent on
6 its assessments. So, we think that's the end of that
7 argument.

8 As far as the settlement agreement, that focused
9 primarily on the liquidations of Legion Insurance
10 Company and Reliance National Indemnity Company.
11 They were subsidiaries or affiliates of Legion. I
12 think Belanova [ph] insurance was one of them. There
13 were some old cases. America Manufactures and these
14 liquidations go back to like the 1960's and early
15 1970's where The Second Injury Fund had been
16 reimbursing the Guaranty Association o these cases.
17 It was a hand full.

18 The settlement agreement that Mr. Cook
19 referenced that took place in 2013, between the
20 parties, dealt with the Legion and Reliance cases.
21 It said any other claims on which The Second Injury
22 Fund was paying the Guaranty Association, as of a
23 date in February of 2013, February 22, 2013, the
24 uncontradicted record, Mr. Lumberman's testimony
25 their claims director, Mr. Harelson, our executive

1 director, The Second Injury Fund was not paying the
2 Guaranty Association on these claims as of that date
3 in February 22 of 2013. That's what the settlement.
4 Agreement says.

5 So, I don't see any way a commission concluded
6 that -- included, you know, based on the clear and
7 unequivocal language in the settlement agreement and
8 any reasonable construction thereof, that there's no
9 way that this case could fit in that -- in the
10 release on that settlement agreement. Because they
11 weren't paying us on the claim. In fact, the
12 Guaranty Association wasn't even paying the claim at
13 that time. So, we think the settlement agreement is
14 a nonstarter for them in terms of barring our
15 reimbursement claim.

16 Again, 38-31-60, and the fact that this is a
17 fully overred workers' compensation claim for which
18 we are entirely responsible provides the statutory
19 obligation. Thank you, Your Honor.

20 THE COURT: All right, thank you.

21 Mr. Cook, you like to reply, sir?

22 MR. COOK: To few a items if I might, Your
23 Honor.

24 THE COURT: Yeah, I'm going to give you five
25 minutes because I'm getting backed up.

1 MR. COOK: I can do that, Your Honor.

2 THE COURT: Okay, good. Thank you.

3 MR. COOK: The Guaranty Association is not an
4 insurer. They don't issue insurance policies, they
5 never issued an insurance policy. That's what
6 insurers do, that's one point. Second point is this,
7 we've mentioned two separate state agencies in
8 addition to the State Accident Fund and the Guaranty
9 Association. Which isn't a agency, is a funding
10 type. The statute that authorized the creation of
11 the State Accident Fund, which is basically the
12 insurance company for state agencies -- they can
13 participate in that.

14 Specifically says, and this is Section 42-7-10.
15 That the State Accident Fund says that this fund
16 consists of annual premium charges, recoveries from
17 The Second Injury Fund and some other things. My
18 point being this. That when they created that
19 entity, they -- the legislature specifically said, we
20 are going to address by name your right to Second
21 Injury Fund reimbursement, which they did. They did
22 not do that when they issued the legislation setting
23 up the Guaranty Association. And I think that's
24 pertinent. And it might be it was an oversight, it
25 might be that it was stupid for them not to do that.

1 But as the courts are limited to looking at what
2 the statutes actually permit. And when they permit
3 it with regard to the State Accident Fund but they
4 say nothing about with regard to the Guaranty
5 Association, that's an important point, I believe,
6 Your Honor.

7 This case is not about whether my client can pay
8 this to the Guaranty Association or whether the
9 Guaranty Association is going to be able to pay it to
10 the injured worker. It's just not. This is about
11 whether there's statutory authorization. But I would
12 note, because I think it's a good point that opposing
13 counsel makes about whether that claim was factored
14 into the runoff financing and all of that. I'll just
15 point this out to you. The first financing plan for
16 my client, as it sun setted out.

17 Is says, Audit and advisory March 2013. The
18 carrier in question didn't even go into liquidation
19 until two months after that in May of 2013. So, the
20 liquidation of that -- well that claim was existing
21 in the workers' comp system, the liquidation of that
22 carrier had not even occurred. There's no way that
23 the funding mechanism they could have anticipated
24 that that was going to occur. That is to address the
25 point raised.

1 The significance is that poor fella is going to
2 get paid. You just got to make a decision on can you
3 look at the statutes and say, his clients allowed to
4 ask my client for that money. We don't think they
5 are. Thank you.

6 THE COURT: Okay. All right. I understand the
7 distinction that each of you draw. And I appreciate
8 it. Interestingly enough, I find that the issue is
9 kind of interesting. I'm looking forward to looking
10 into a little bit more closely. So, I'll take it
11 under advisement but I'll send y'all probably a
12 letter with the ruling by the end of week. That's my
13 anticipation, okay.

14 MR. COOK: Thank you, Your Honor.

15 MR. WOOD: Thank you, Your Honor.

16 THE COURT: Thank you, I appreciate it.

17 (WHEREUPON, the proceedings were concluded.)
18
19
20
21
22
23
24
25

Settlement Agreement and Release of Claims

This Settlement Agreement and Release of Claims (the "Settlement Agreement and Release") is made and entered into on this the 17th day of JUNE 2013 by and between the South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "Guaranty Association") and the South Carolina Second Injury Fund (hereinafter "SIF") (collectively, the "Parties").

Recitals

WHEREAS the Guaranty Association has asserted legal claims against the SIF, some of which are currently pending before the South Carolina Workers' Compensation Commission, the South Carolina circuit courts, and the South Carolina Court of Appeals, as well as claims and/or potential claims which are not currently pending before any tribunal (collectively "Guaranty Association's claims");

WHEREAS, the Guaranty Association's claims against the SIF originate from its position that it is entitled to reimbursement from the SIF for monies it paid on behalf of certain insureds of Legion Insurance Company, in Liquidation and its subsidiaries, including, but not limited to, Villanova Insurance Company which were liquidated by the Commonwealth Court of Pennsylvania as of July 25, 2003 (hereinafter collectively "Legion") and Reliance Insurance Company in liquidation, and its subsidiaries, including, but not limited to, Reliance National Indemnity Company, Reliance National



Insurance Company, and United Pacific Insurance which were liquidated by the Commonwealth Court of Pennsylvania as of October 3, 2001 (hereinafter collectively "Reliance") whose claims, the Guaranty Association asserts, qualify for reimbursement from the SIF as a result of the liquidations of Legion and Reliance;

WHEREAS, the SIF denies any liability to the Guaranty Association for any and all of its claims against the SIF;

WHEREAS, the Parties, through negotiations by and between their respective counsel, have agreed to enter into this Settlement Agreement and Release in order to avoid further time, expenses, and uncertainty associated with litigation;

WHEREAS, the Parties have informed the pertinent tribunals, including the South Carolina Workers' Compensation Commission, the South Carolina Fifth, Eighth, and Eleventh Circuit Courts, and the South Carolina Court of Appeals, that the Parties have reached a settlement and that no further hearing or determination by any tribunal is necessary, with the exception of the approval of this Settlement Agreement and Release by the South Carolina Workers' Compensation Commission.

Agreement

In consideration of the above-stated recitals, the promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Payment to Guaranty Association.** Within fifteen (15) days of the receipt of (1) orders from the South Carolina Workers' Compensation Commission, the

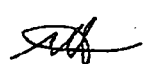


South Carolina circuit courts, and the South Carolina Court of Appeals dismissing fully, finally, and with prejudice, any and all of the Guaranty Association's claims pending before those tribunals against the SIF related to Legion and/or Reliance ("the Court Actions") and any and all Guaranty Association claims related to Legion and Reliance subject to the jurisdiction of the Workers' Compensation Commission, (2) an order of the Workers' Compensation Commission approving this Settlement Agreement and Release; and (3) the Guaranty Association's delivery of this Settlement Agreement and Release executed by it and its counsel to SIF's counsel, the SIF shall pay the Guaranty Association the total sum of two million nine hundred thousand dollars (\$2,900,000) (the "Payment") by issuing and delivering a check in said amount to the trust account of the Guaranty Association's counsel, Peter P. Leventis, IV and Mark D. Cauthen, Esq., McKay, Cauthen, Settana & Stubley, P.A. The Guaranty Association agrees that it shall immediately notify SIF's counsel in writing of the receipt of the Payment. The SIF makes no representations or warranties regarding the taxability of the Payment provided under this Settlement Agreement and Release, and the Guaranty Association shall be solely responsible for the payment of any tax on any portion of the Payment provided under this Settlement Agreement and Release. The Guaranty Association further agrees to indemnify and hold harmless the SIF for any and all fees, fines, penalties, interest payments, or surcharges, or any other liability that may be incurred by the Guaranty Association based on receipt of such Payment relating to the tax treatment of the Payment provided under this Settlement Agreement and Release.



2. **Dismissals with Prejudice of Court Actions.** Simultaneously with the execution of this Settlement Agreement and Release, counsel for the Parties shall fully execute the Stipulations of Dismissal of Court Actions (the "Stipulations of Dismissal"), (attached hereto as Exhibits A, B, C, D, and E). Thereafter, within three (3) business days, counsel for the SIF shall file the Stipulations of Dismissal with the appropriate courts and the Parties agree to take all other actions necessary to dismiss with prejudice the Court Actions.

3. **Release.** As a material inducement to SIF to enter into this agreement, to the fullest extent permitted by law, the Guaranty Association, as well as its administrators, trustees, legal representatives, and successors and assigns, hereby agree to accept from SIF the consideration specified in paragraph 1 of this Agreement entitled "Payment to Guaranty Association," in full resolution and satisfaction of, and hereby irrevocably and unconditionally waive, release, and forever discharge the SIF and its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns, including, but not limited to, the State of South Carolina and its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns, from, any and all claims, counterclaims, damages, charges, demands, sums of money, actions, rights, promises, agreements, causes of action, costs and expenses, obligations and liabilities of any kind or nature whatsoever, at law or in equity, including, but not limited to, any common law claim, whether intentional or negligent, or any



violation of any federal, state, municipal, or other governmental constitution, statute, regulation, or ordinance, of any nature whatsoever, including, but not limited to exemplary or punitive damages or any penalties, liquidated damages, equitable relief, injunctive relief, declaratory relief, pre- or post-judgment interest, whether these claims are known or unknown, noticed or unnoticed, existing or contingent, suspected or unsuspected, apparent or concealed, direct or contingent which the Guaranty Association now or in the future may have or claim to have against SIF based upon or arising out of any facts, acts, conduct, omissions, transactions, payments, lack of payments, occurrences, contracts, events, causes, matters or things of any conceivable kind or character existing or occurring or claimed to exist or to have occurred at any time on or before the date of the execution of this Settlement Agreement and Release that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance, any and all claims, on which the SIF is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey & Sons, (Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance). The Parties intend this release to be general and comprehensive in nature and to release : (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on



which the SIF is currently paying the Guaranty Association as of February 22, 2013, (whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims which may arise pursuant to any "large deductible" policies issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (The Guaranty Association Act) subsequent to the respective liquidations of the underlying carrier or carriers. It is the intent of the Guaranty Association that the SIF and its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns, including, but not limited to, the State of South Carolina and its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns shall never be liable to any other person or party, whether a private or governmental entity, asserting any claim for any additional sums of money, including any reimbursements, attorneys' fees and/or other costs and expenses of litigation, with respect to the claims released herein.

4. **Indemnification.** The Guaranty Association agrees to indemnify and hold the SIF, as well as its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns, including, but not limited to, the South Carolina Budget & Control Board and its past,

present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns, and any other successors and their past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns which may assume responsibility for claims made against the SIF harmless from and against any claim, demand, damage, debt, liability, expense (including payment of attorneys' fees and costs actually incurred whether or not litigation is commenced), action, and cause of action, including for reimbursement, that is released pursuant to this Settlement Agreement and Release.

5. **Covenant Not to Sue and Limitation on Relief.** The Guaranty Association further covenants that it will not initiate, participate in, file or assert any action, proceeding, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against the SIF, as well as its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns, including, but not limited to, the State of South Carolina and its past, present or future officers, directors, trustees, fiduciaries, administrators, employees, agents, representatives, predecessors, successors and assigns for any event, transaction, or occurrence related to or arising from the matters released herein as provided for in paragraph numbered "3" above.

6. **Binding Effect.** This Settlement Agreement and Release shall inure to the benefit of and shall be binding upon the Parties and their respective directors, officers, shareholders, members, principals, administrators, trustees, successors, and assigns.

7. **Interpretation and Construction of Agreement.** The language in all parts of this Settlement Agreement and Release shall in all cases be construed as a whole according to its meaning and not strictly for or against any Party. The Parties agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Settlement Agreement and Release. As to the matters released herein, as set forth in paragraph numbered "3" above, the Parties agree that the terms of this Settlement Agreement and Release are to be given the broadest meaning such that the interpretation and construction do substantial justice to the intent of the Parties.

8. **Voluntary Agreement.** Each of the Parties acknowledges that this Settlement Agreement and Release has been executed freely and voluntarily, without economic compulsion and with full knowledge of its legal significance and consequences.

9. **Counterparts.** This Settlement Agreement and Release may be executed in multiple counterparts (including by means of facsimile or other electronic signature), each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

10. **Headings.** The headings used in this Settlement Agreement and Release are intended solely for convenience of reference and should not in any manner amplify, limit, modify or otherwise be used in the interpretation of any of the provisions of the Settlement Agreement and Release.

11. **Authority and Capacity.** Each person executing this Settlement Agreement and Release as an agent or in a representative capacity warrants that he or she is duly authorized to execute this Settlement Agreement and Release and such execution shall be binding upon the entity which the person represents.

12. **Survival.** All representations and warranties contained herein and no others shall survive the execution and delivery of this Settlement Agreement and Release and the execution and delivery of any other document or instrument referred to herein.

13. **Further Assurances.** In addition to the acts recited in this Settlement Agreement and Release, the Parties agree to perform or cause to be performed on the date of this Settlement Agreement and Release or thereafter any and all such further acts as may be reasonably necessary to consummate the transactions contemplated hereby.

14. **Governing Law.** This Settlement Agreement and Release shall be construed in accordance with, and governed in all respects by, the laws of the State of South Carolina (without giving effect to principles of conflicts of laws).

15. **No Admission.** The Guaranty Association agrees and understands that the SIF denies any wrongdoing or liability to the Guaranty Association and that this Settlement Agreement and Release does not constitute, and should not be construed as



constituting, an admission by the SIF that it took any action with respect to the Guaranty Association that was unlawful or wrongful, or violated any contractual obligation, or federal or state law, order, policy, rule or regulation. This Settlement Agreement and Release effects the compromise and settlement of disputed and contested claims and nothing contained herein shall be construed as either an admission by the SIF of any liability of any kind to the Guaranty Association or as a valuation of any claim(s) that have been or could have been asserted by the Guaranty Association against the SIF.

16. **Costs.** Each Party to this Settlement Agreement and Release will bear his/her own costs, expenses, and attorney's fees, whether taxable or otherwise, incurred or arising out of or in any way related to this Settlement Agreement and Release and the subject thereof.

17. **No Assignment or Transfer.** The Guaranty Association warrants and represents that it is the sole and lawful owner of all rights, title, and interest in and to all matters released pursuant to this Settlement Agreement and Release, and warrants and represents that it has not heretofore assigned or transferred, or purported to assign or transfer, to any person or organization any matter released herein, and agrees to indemnify and hold the SIF harmless from and against any claim, demand, damage, debt, liability, account, reckoning, obligation, cost, expense (including payment of attorneys' fees and costs actually incurred whether or not litigation is commenced), lien, action, and cause of action, based on, in connection with, or arising out of any such assignment or transfer.



18. Integration and Modification Clause; Waiver. This Settlement Agreement and Release is intended by the Parties as a final expression of their agreement and as a complete and exclusive expression of its terms. This Settlement Agreement and Release contains the complete agreement between the Parties, and supersedes any and all prior and contemporaneous communications, agreements, warranties, representations, and/or understandings, written or oral, express or implied, except as expressly provided herein. All prior and contemporaneous conversations, negotiations, possible and alleged agreements, representations, covenants and warranties concerning the subject matter hereof are merged herein. This Settlement Agreement and Release is an integrated agreement and it constitutes the sole agreement between the Parties.

The Settlement Agreement and Release may not be modified, amended, annulled, rescinded or otherwise changed unless in writing signed by all Parties, which writing expressly refers to this Settlement Agreement and Release. No failure to exercise and no delay in exercising any right, remedy or power under this Settlement Agreement and Release shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy or power under this Settlement Agreement and Release preclude any other or further exercise thereof, or the exercise of any other right, remedy or power provided herein or by law or in equity.

19. Severability. In the event that any one or more of the provisions of this Settlement Agreement and Release is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not be affected or



impaired thereby and shall be construed, performed and enforced as if the invalidated or unenforceable provision had not been included in the text of the agreement. This Settlement Agreement and Release shall survive the performance of the specific arrangements contained herein.

20. **Counsel.** The Parties acknowledge that they have had the opportunity to obtain, and have obtained, advice on the terms of this Settlement Agreement and Release from independent legal counsel retained to represent them in this matter.

The Parties further acknowledge that they have consulted with their counsel with respect to the meaning and effect of this Settlement Agreement and Release as to both their rights and obligations. The Parties represent that they are fully competent to decide whether to enter into this Settlement Agreement and Release; that they have had adequate time to review this Settlement Agreement and Release and decide whether to enter into it; that they have read it and fully understand the rights, obligations, remedies and consequences herein; and that they knowingly and voluntarily enter into this Settlement

21. **Inducement.** The Parties declare and represent that no promise, inducement, or agreement not herein expressed has been made to any of them and that this Settlement Agreement and Release contains the entire arrangement between them. The Parties are not relying upon any representation, understanding, promise, undertaking or agreement not set forth in this Settlement Agreement and Release and each party expressly disclaims any reliance on any such representation, understanding, promise, undertaking or agreement.



22. **Burdens and Benefits.** This Settlement Agreement and Release, including all covenants and agreements contained herein, shall be binding upon and inure to the benefit of the Parties and to their respective legal representatives, heirs, executors, administrators, trustees, beneficiaries, successors, assigns, employees and agents of the Parties, as well as the State of South Carolina and its legal representatives, heirs, executors, administrators, trustees, beneficiaries, successors, assigns, employees and agents, hereto to the extent permitted by law.

NOW THEREFORE as evidence of their full and complete agreement to the terms and conditions set forth above, the Parties have caused their duly authorized representatives to execute this Settlement Agreement and Release and intend it to be binding and effective on and after the date set forth in the first paragraph above.

Notices

Any notices required or permitted under this Settlement Agreement and Release shall be in writing and directed to:

For South Carolina Property and Casualty Insurance Guaranty Association:

Mark D. Cauthen, Esquire
Peter P. Leventis, Esquire
McKay, Cauthen, Settana & Stublely, P.A.
P. O. Box 7217
Columbia, SC 29202

plevendis@mckayfirm.com
mcauthen@mckayfirm.com

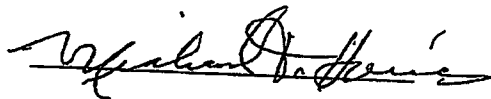


For SIF:

Mitchell Willoughby, Esquire
Elizabeth Ann Loadholt Carroll, Esquire
WILLOUGHBY & HOEFER, P.A.
930 Richland Street
Post Office Box 8416
Columbia, SC 29202-8416
mwilloughby@willoughbyhoefer.com
ecarroll@willoughbyhoefer.com

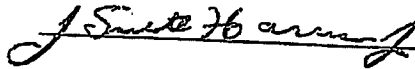
IN WITNESS WHEREOF, the undersigned have executed this Settlement Agreement
and Release as of the day and year first above written.

**SOUTH CAROLINA SECOND
INJURY FUND**



BY: Michael T. Harris
ITS: Deputy Director

**SOUTH CAROLINA PROPERTY AND
CASUALTY INSURANCE
GUARANTY ASSOCIATION**



BY: J. Smith Harris, Jr.
ITS: Executive Director / Secretary

**DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 9916207**

Subrogation Partners on behalf of Legion
Insurance Company in Liquidation,

Carrier,

And

South Carolina Property and Casualty
Insurance Guaranty Association,

Carrier,

vs.

South Carolina Second Injury Fund,

Defendant.

In Re:

Leslie Dominick,

Claimant,

vs.

William Oliver Dominick,

Employer,

And

Legion Insurance Co. in Liquidation,
through the S.C. Property & Casualty
Insurance Guaranty Association,

Carriers.

DECISION AND ORDER

HEARING:

Held on March 14, 2008, in Columbia, South Carolina

APPEARANCE:

Subrogation Partners on behalf of Legion Insurance Company in
Liquidation was represented by R. Daniel Addison and Lakesha

Jeffries of Hedrick Gardner Kincheloe & Garofalo of Columbia, South Carolina.

The South Carolina Property & Casualty Insurance Guaranty Association was represented by Mark Cauthen of McKay, Cauthen, Settana & Stublely, P.A. Columbia, South Carolina.

The South Carolina Second Injury Fund was represented by Latonya Edwards of Columbia, South Carolina

PURPOSE OF HEARING: To determine the issues as set forth on the Forms 54 and 55.

OPINION AND AWARD: Susan S. Barden, Commissioner.

FILED: _____, 2008

STIPULATIONS

1. That the purpose of the hearing was to determine all issues in dispute as set forth in the Forms 54 and 55.
2. That the parties were subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
3. That notice of the hearing was timely and properly served upon all parties of interest.
4. All parties agreed upon venue as set in Newberry County, South Carolina.
5. That the South Carolina Workers' Compensation Commission has jurisdiction to determine the issues in dispute.
6. The Workers' Compensation Commission's file, with the exception of unstipulated medicals and self-serving declarations, was made part of the record.
7. That the purpose of the hearing was to determine whether the carriers are entitled to reimbursement from the Second Injury Fund for all qualifying benefits paid to the claimant in the underlying workers' compensation claim pursuant to S.C. Code Ann. § 42-9-400.
8. That the Claimant in this case did suffer from the condition of diabetes prior to the date of injury which gave rise to the above referenced claim.
9. That the Claimant and the employer both had knowledge of the Claimant's pre-existing diabetes prior to the injury of September 13, 1999.
10. That Legion Insurance Co. was current on its Second Injury Fund assessment payments as of the date of injury in September of 1999.
11. That, some time prior to July of 2003, Legion Insurance Co. became delinquent in its assessments to the Second Injury Fund.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act, the following medical and expert witness reports submitted into evidence.

Legion's Exhibits

APA No.1.	County Side Family Practice	08/22/00-09/03/04	1-43
APA No.2	U.S.C. School of Medicine	03/10/00-06/07/02	44-53
APA No.3	S.C. Neurologic Clinic	09/10/01-09/27/01	54-59
APA No.4	Lexington Medical Center	09/23/99-10/26/99	60-66
APA No.5	Palmetto Richland Memorial	1/20/00-02/04/00	67-85
APA No.6	Piedmont Phys. Med/Rehab	06/06/02	86-87
APA No.7	Health South	07/03/00-10/02/00	88-105
APA No.8	Newberry County Mem. Hos.	02/19/03-02/04/04	106-114
APA No.9	Oakwood Orthopaedic Clinic	10/14/04	115-116
APA No.10	Midlands Orthopaedics	09/20/99-10/18/99	117-124
APA No.11	Laurens County Orthopaedics	03/05/03-02/04/04	125-135
APA No.12	Orthopaedic Specialists of Chas	11/17/99	136-137
APA No.13	Dr. Corey D. Hunt	05/17/01	138-139
APA No. 14	Chapin Family Practice	09/13/99	140
APA No. 15	Condition and Knowledge Affidavit		141-145
APA No. 16	Petition for Judicial Review		146-147
APA No. 17	Appellate Panel Decision and Order		148-151
APA No. 18	Decision and Order dated 03/08/05		152-158
APA No.19	Form 18		159
APA No. 20	Form 19		160

Relying on entire WCC file from underlying claim

SCPCIGA's Exhibits

- Exhibit 1 Payment Sheets of SCPCIGA
- Exhibit 2 Decision and Order of the S.C.W.C.C., March 8, 2005
- Exhibit 3 Decision and Order of the S.C.W.C.C. Appellate Panel, August 2, 2005
- Exhibit 4 Form 4 and Order of the Newberry Court of Common Pleas, January 9, 2006

Also relies on the WCC file and APA submissions of Legion in liquidation.

SIF'S Exhibits

None

STATEMENT OF THE CASE

The instant case comes before the Commission through the consolidation of two separate Form 54s, properly and timely filed with the Commission, by successive Carriers: Subrogation Partners, on behalf of Legion Insurance Company in liquidation, "Legion"; and South Carolina Property and Casualty Insurance Guaranty Association, "SCPCIGA", respectively against the South Carolina Second Injury Fund, "SIF." The SIF properly and timely filed a Form 55 in response.

The underlying workers' compensation claim involves an admitted injury to the Claimant's right lower extremity that occurred on September 13, 1999. By Order dated March 8, 2005, the Hearing Commissioner awarded permanent and total disability based on the injury to the Claimant's right leg as well as fibromyalgia, depression, reflex sympathetic dystrophy and skin loss from multiple surgeries. The Commissioner also found that the Claimant suffered from pre-existing diabetes that was affected by the work related accident and this required additional

medical care and monitoring. This Order was subsequently affirmed by the Full Commission and the Circuit Court. As a result, SCPCIGA is responsible for lifetime medical benefits to the Claimant for causally related medical treatment. It should be noted that Mr. Dominick was the employee of his father, Mr. Oliver Dominick, at the time of the accident and had been so employed for well over a decade up until the accident and therefore "knowledge," of the pre-existing condition of diabetes, as it pertains to the Second Injury Fund statutes in the Workers' Compensation Act is not in dispute.

At the time of the Claimant's initial injury in September of 1999 the Employer's workers' compensation carrier was Legion Insurance Company. It is uncontested by the Defendants that as of the date of injury, September 13, 1999, Legion Insurance company was up to date on its assessment payments. Furthermore, it is also uncontested by either party that at some time after September of 1999 but before July of 2003, Legion Insurance Company was no longer current, and ultimately became delinquent, on its SIF assessments; However, the record is unclear as to the specific dates of those events.

In March of 2002 Legion Insurance Company was placed in rehabilitation status by the Commonwealth Court of Pennsylvania. In July 2003 Legion was declared insolvent and an Order of Liquidation was issued by the Commonwealth Court of Pennsylvania. At that time, SCPCIGA, took over responsibility for Legion Insurance Company's continuing workers' compensation obligations. Legion's interests in this particular matter are represented by Subrogation Partners on behalf of Legion Insurance Company in liquidation, hereinafter referred to as "Legion." Of consequence, for the purposes of this claim against SIF, is that from the date of injury until July 2003, Legion was responsible for all workers' compensation claims, and from July 2003 to present and continuing, SCPCIGA is responsible for all of the workers'

compensation benefits owed to the Claimant, to include any outstanding obligations not paid prior to July 2003.

The joint Plaintiffs, Legion and SCPCIGA, bring action against the SIF via their Form 54s asserting that they are entitled to reimbursement from the SIF pursuant to S.C. Code Ann. §§ 42-7-310, and 42-9-400, for the pre-existing condition of diabetes. Plaintiffs argue that these injuries meet the threshold and requirements for reimbursement set forth in § 42-9-400, in that the pre-existing condition was permanent, serious enough in nature to be a hindrance or obstacle to employment and that such preconditions substantially increased liability for medical costs and indemnity in the underlying workers' compensation claim. Also, the Plaintiffs assert the "knowledge," requirement of § 42-9-400 was met in this case by the fact that the Employee knew of the pre-existing diabetes prior to the date of injury, and that the Employer (who were immediate family members of the Claimant) also knew of the pre-existing condition and retained him in employment.

The Plaintiffs jointly argue that the Carrier was current on its assessments as of the date of injury, which is undisputed by the Defendant; and that by virtue of payment of such assessments, the Plaintiffs assert they are entitled to SIF reimbursement pursuant to the provisions of the Act, for the consequence of the injuries that took place on September 13, 1999, and also met the requirements of § 42-9-400. In addition, Plaintiffs assert that the 2003 statutory changes to § 42-7-310, which bar from SIF recovery employers or carriers that fail to pay assessments or subsequent fines, as a matter of proper statutory interpretation, should be applied prospectively, and not retroactively to bar coverage and reimbursement. Plaintiffs jointly contend that a prospective application of the statutory amendments to § 42-7-310 should also not bar this claim, as a matter of public policy and as a proper interpretation of SIF assessments being tantamount to insurance premiums. That is, 'coverage,' or here reimbursement from SIF,

should properly be allocated for claims arising during time periods for which premiums or assessment were properly paid.

Lastly, Plaintiff SCPCIGA individually argues that they are entitled to reimbursement from the SIF in the instant case in accordance to the aforementioned arguments and in conjunction with the fact SCPCIGA, while not an insurance company per se, is entitled to, all rights, duties and obligations of the insolvent insurer pursuant to S.C. Code Ann. § 38-31-60(b).

The Defendant, SIF, contends they should not be liable for reimbursement to Legion or SCPCIGA on several grounds. The Defendant first bases this contention on the argument that no previously existing injury existed that would have satisfied § 42-9-400 requirements of permanency, hindrance or obstacle to employment or of such severity that would substantially increase the liability for medical costs and indemnity. Furthermore, while stipulating that the Plaintiffs were current on their assessments as of the date of injury in 1999, the Defendant contends that the Plaintiffs were at some later date delinquent on assessment payments and resultant fines. The SIF argues that changes to § 42-7-310(d)(2) of the Act, which effectively preclude SIF reimbursement to insurers who fail to stay current on such payments, should be applied retroactively to bar reimbursement to the Plaintiffs. The Defendant alternatively contends that this claim should be barred via a prospective or retroactive reading of the 2003 amendments to § 42-7-310.

The Defendant also asserts, particularly against the Plaintiff SCPCIGA, that because SCPCIGA is not an insurance company or self insured, per se, under § 42-1-60, it is not entitled to reimbursement under the Act, specifically §§ 42-7-310, and 42-9-400. Furthermore, the Defendant argues that S.C. Code Ann. § 38-31-10 et seq. is inapplicable.

EVIDENCE OF THE CASE

Both Plaintiffs have submitted APA's or Exhibits, which include medical records, affidavits, a payment history, medical bills, two previous Orders of the W.C.C., a Circuit Court Order and a memorandum of law regarding the application of the statutory amendments to S.C. Code Ann. § 42-7-310(d)(2). The Defendant has submitted no APA's or exhibits in this case but relies primarily on the APA's and other submissions of the Plaintiffs. No witnesses testified in this hearing on behalf of either party.

The parties have stipulated to the fact that the Claimant suffered an admitted work related injury on September 13, 1999, when he fell several feet off a ladder sustaining injury to the bones of his right ankle/leg (Hearing Trans., p 4). and this fact has been established by a previously appealed and upheld Order by the Commission (APA 18, p. 156 – Finding of Fact No. "2"). There is an abundance of medical evidence to establish the Plaintiff did suffer from a pre-existing condition of Type I diabetes and this appeared to be undisputed by the Defendant at oral argument. The Plaintiffs have provided an affidavit from the Employee that he was aware, prior to the date this accident, that he suffered from diabetes. (APA 15, p. 141). The Plaintiffs have also provided affidavits that the Employer was aware, prior the date of the accident, of the Claimant's pre-existing diabetes (APA 15, p. 142-3).

The Plaintiffs also have submitted an affidavit from one of the treating physicians for the Claimant, Dr. Robert Smith, wherein he indicates in the affirmative that the diabetic condition of the Claimant existed prior to the date of injury; that it combined with or aggravated the work-related injury causing more lost time from work than the injury alone would have caused; and a substantially higher percentage of disability than the injury alone would have caused; that the diabetic condition was a hindrance or obstacle to employment; and that the costs for medical treatment of the injury sustained from this accident have been substantially increased due to the pre-existing diabetes. (APA 15, pp. 144-5). It should be noted that the Defendant offered no

evidentiary records to rebut this affidavit, and that § 42-9-400 (d) (2) lists "diabetes" as a prior impairment that is entitled to a statutory presumption of being a hindrance or obstacle to employment. The SIF argued that this is a statutory presumption that is rebuttable. (Hearing Trans., pp. 17-18).

In regards to exacerbation or aggravation of the injury, the Plaintiffs offer the previously referenced affidavit by Dr. Smith stating that the diabetes did combine with the injury. (APA 15, 144-5). Also, it should be noted from the submitted medical records that the Claimant's wound became infected, and medical evidence by one physician states that, "indeed we were in a position of attempting to salvage a lower extremity in a diabetic." (APA 4, p. 66; APA 5, p. 81). "It was also [the belief of Dr. Corey Hunt] that this wound would not have healed without the intense monitoring and treatment of his diabetes that he has received on the insulin pump." (APA 13, p. 139). Furthermore, because of this work related injury, the Claimant underwent four surgeries. (APA 4, pp. 64, 66; APA 5, pp. 70-72, 74-5; APA 8, pp. 107-9). The Claimant's nerve conduction studies showed diabetic neuropathy (APA 3, pp. 56, 59; APA 5, p. 81; APA 6, p. 86). Medical records also indicate there was "fair control" (as opposed to good or excellent control) of Claimant's diabetes in the hospital. (APA p. 62.) In addition, the Claimant reported that his symptoms of weakness and numbness worsened after the accident, (*Id.* and APA 7, pp. 88; APA 8, pp. 93, 111; APA 9, p. 116; APA 11, pp. 125, 127, 133). As previously noted, the Plaintiffs have offered compelling documentation of the medical conditions, and the fact that had the condition been known to a potential employer, it would be an obstacle to employment vis a vis an otherwise healthy employee candidate.

The SIF offered no evidentiary record to rebut the doctor's affidavit and other medical records that indicate aggravation or exacerbation of the work injury by the condition of diabetes, but did point out in oral argument at the hearing certain APA's that do not specifically state the

diabetes were an aggravating/exacerbating factor (Hearing Trans., pp. 18-19). The SIF also argued that in the single Commissioner Order dated March 8, 2005, Finding of Fact No. "6," which determined the Claimant to be PTD, was not predicated on his pre-existing diabetes (Hearing Trans., pp. 18, 19; APA 18, p. 156). However, the single Commissioner did find that the Claimant's diabetes was temporarily worsened by the accident and this required additional medical care and monitoring. Moreover, it should be noted that the existence of records whereby diabetes is *not referenced or listed* as an aggravating/exacerbating factor is wholly and inherently different from finding a record that *states diabetes was not* an aggravating or exacerbating factor.

In regards to whether or not the 2003 amendments to S.C. Code Ann. § 42-7-310 apply prospectively, as argued by the Plaintiffs, or retroactively, as argued by the Defendant, the Plaintiffs have provided a copy of the original Senate Bill, as well as an authoritative legal memorandum in support of their position. The 2003 amendment to § 42-7-310(d)(2) effectively took away the provision giving employers 30 days to pay all assessments to the Second Injury Fund, and added the language to sub-section (d)(2) stating "If the employer fails to pay the assessment and penalty, they shall be barred from any recovery from the fund on all claims without exception until the assessment and penalty are paid in full."

Plaintiffs argue that the clear language of § 42-7-310, as amended, makes no clear indication and evidences no manifestation of intent by the legislature for it to be applied retroactively. In addition, the Plaintiffs assert that S.C. case law stands for the presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary. (See: *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000); *Hercules Incorporated v. The South Carolina Tax Commission*, 274 S.C. 137,

262 S.E.2d 45 (1980); *Hyder v. Johnes*, 2171 S.C. 85, 245 S.E.2d 123 (1978); *Jefferson Standard Life Ins. Co. v. King*, 165 S.C. 219, 163 S.E. 653 (1932)).

The legislature's intent should be ascertained primarily from the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); *Morgan*, 352 S.C. at 366, 574 S.E.2d at 206; *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

S.C. § 42-7-310(d)(2), (1976, as amended), sets forth the following:

"... In the event of failure to pay any assessment upon the date determined by the fund, the employer or insurance carrier may immediately be assessed a penalty in an amount not exceeding ten percent of the unpaid assessment. If the employer or insurance carrier fails to pay the assessment and penalty, they shall be barred from any recovery from the fund on all claims without exception until the assessment and penalty are paid in full."

There is no language mandating that this amendment shall be given retroactive application; accordingly, the presumption stands that it must be given prospective application. See *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982).

Likewise, the legislative intent of the statute is not such that would mandate a retroactive application. In ascertaining legislative intent, words must be given their plain and ordinary meanings. See *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000) citing *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988). Statutes are not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. *Id.* citing *Hyder, supra*. Because the legislative intent behind the

amendments to S.C. Code Ann. § 42-7-310(d)(2) is not discernible from the plain language of the Act, and there is no indication the Amendment is to be given retroactive application it *must* be applied prospectively. *Id.*

A principal exception to the presumption that statutory enactments are to be given prospective rather than retroactive application is that remedial or procedural statutory amendments are generally held to operate retrospectively. *See South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000) citing *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982); *Hercules Incorporated v. The South Carolina Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980) (statutes affecting the remedy, not the right, are generally retrospective). Statutes are remedial and retroactive in the absence of directions to the contrary, when they create new remedies for existing rights...enlarge the rights of persons under disability, and the like, unless [they]... violate some contract obligation. *Smith v. Eagle Construction Co., Inc.*, 282 S.C. 140, 318 S.E.2d 8 (1984) *citing* *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843, 846 (1941). Statutes are procedural and retroactive in the absence of directions to the contrary, when they affect the method or system governing the handling of a case. *See McGann v. Mungo*, 340 S.E.2d 154 (1986) (retrospective application of Rule 18(a) of the S.C. Rules of Civil Procedure permitted by the Court).

The 2003 Amendments to S.C. Code Ann. § 42-7-310(d)(2), does not enlarge the employer/carrier's rights, in fact, it places a new restriction which limits the their *right* to reimbursement from the Fund and thus is not remedial and should not be given retroactive application. *Smith v. Eagle Construction Co., Inc.*, 282 S.C. 140, 318 S.E.2d 8 (1984) *citing* *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843, 846 (1941). Likewise, the amendments to S.C. Code Ann. § 42-7-310(d)(2) do not alter or change the procedure or method for which the

employer/carrier must request reimbursement from the fund. Accordingly, the amendments are not procedural in nature and cannot be given retroactive application.

Particularly, the most relevant case for this point of contention between the Plaintiffs and Defendants in regards to prospective versus retroactive application of the statutory changes in question, appears to be *Merchants Mutual Ins. Co. v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982). In *Merchants* South Carolina Supreme Court addressed the issue of whether an insurance carrier/employer was entitled to reimbursement from the Second Injury Fund when it had filed a claim for reimbursement with the Fund prior to the enactment of statutory changes establishing conditions which must be met before the right to reimbursement attached. An employee of Merchants' insured was injured on March 13, 1975. On January 14, 1977, notice of a possible claim was filed with the Second Injury Fund and on May 24, 1977, Merchants filed a claim for reimbursement with the Fund. On May 4, 1976, the legislature amended 1962 Code § 72-601, which affected the requirements that must be met before reimbursement from the Second Injury Fund by the employer/insurance carrier attached. The *Merchants* Court reasoned that the 1976 amendments were not remedial or procedural, but rather, created a condition which must be met before the *right* to reimbursement attached. *Id.* at 608. Accordingly, the Court found the statute could not be given retroactive application. *Id.* at 608.

Similarly, the 2003 Amendment to S.C. Code Ann. § 42-7-310(d)(2), changed the conditions which must be met before the right to reimbursement from the Second Injury Fund attaches. The Amendment provides that an insurance carrier/employer can not be reimbursed from the Fund until all assessments and penalties are paid in full. Clearly, this change affects the carrier's *right* to reimbursement and does not affect its remedy or the procedure for it to obtain the reimbursement; thus, it should not be given retroactive application.

South Carolina Courts have already addressed the issue of whether an assessment or fee provision to a statute, which is amended, will be given prospective or retroactive application. In *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000), the South Carolina Supreme Court provided that the amendment to the license fee provision of S.C. Code Ann. § 12-21-2720, (so as to require separate licenses for each station of a multi-player machine) was prospective and not retroactive in its application. *Id.* 528 S.E.2d at 418. The amendments to S.C. Code Ann. § 12-21-2720 as discussed in *Rosemary* are similar to the 2003 amendments to S.C. Code Ann. § 42-7-310(d)(2), inasmuch as both amendments contain *assessment* provisions which adversely affect an entity's *right*. Essentially, the amendments to S.C. Code Ann. § 12-21-2720, required gaming machine lessors to pay an assessment or license fee for every machine owned before their right to operate within the State attached. Likewise, the amendments to S.C. Code Ann. § 42-7-310(d)(2), require employers/insurance carriers to pay assessments and penalties before their right to reimbursement from the Second Injury Fund attaches. The *Rosemary* Court held that the amendment to S.C. Code Ann. § 12-21-2720 was not remedial or procedural and thus did not fit into any recognized exception. *Id.* 528 S.E. at 418. The Court rationalized that "finding nothing in [the] enactment beyond a statement of its 'effective date,' [it] must follow the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary. *Id.* citing *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735(1983).

Our Courts have consistently held that statutes affecting an entity's rights are to be given prospective application *only*. Thus, the 2003 Amendments to S.C. Code Ann. 42-7-310(d)(2) shall be given prospective application.

Also, Plaintiffs put forward the argument from a public policy prospective, that application of the 2003 Amendments to S.C. Code Ann. 42-7-310(d)(2) advances the purpose and premise of the Second Injury Fund. The purpose of the Second Injury Fund, as established in 1972, is two fold. First, the Fund operates to remove an employer's fear of increased workers' compensation premiums as a result of hiring disabled workers. Secondly, the Fund enhances employment opportunities to those disabled workers. *Reports and Resolutions of the Industrial Commission*, 1974 Vol. I; see also *Boone's Masonry Construction Co., Inc. and Allstate Insurance Company v. South Carolina Second Injury Fund*, 267 S.C. 277, 277 S.E.2d 659 (1976). The Fund accomplishes this goal by absorbing some of the risk that such a worker will become injured in the workplace by allowing the employer or its insurance carrier to seek compensation from the Fund when an employee with a prior permanent physical impairment incurs a subsequent disability in the workplace. See *Liberty Mutual Insurance Company v. South Carolina Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (2005) citing S.C. Code Ann. § 42-9-400 (a).

A reading that the 2003 Amendments to the S.C. Code Ann. § 42-7-310(d)(2) is retroactive in its application appears to abrogate the meaning, intent and purpose of the Second Injury Fund's statutory scheme. To find that the amendment has retroactive application would be to disregard the assessments that were paid by the carrier in this case prior to its liquidation. Such construction is against the public policy driving the Second Injury Fund, because the equitable assessments applied to insurance carriers who pay into the Fund are akin to premiums paid by consumers to insurance carriers for the protection and assurances that insurance coverage affords.

The operative date giving rise to a claim against the SIF is the date of injury in the underlying workers' compensation claim (*Sellers v. Daniel Constr. Co.*, 285 S.C. 484, 486; 330

S.B.2d 305, 306 (S.C. 1985)). In this case, that injury was in September of 1999, well before the legislative changes in the statute. SIF conceded at the hearing that Legion Insurance paid its assessment requirement for the year 1999 (Hearing Trans., p. 16).

The Defendant, SIF, also argued against the Plaintiff SCPCIGA individually, that SCPCIGA is not an insurance company or a self insured under § 42-1-60 and that SCPCIGA never made assessment payments to the SIF. (Hearing Trans., p. 16). Therefore SCPCIGA should not be entitled to reimbursement from the SIF, even if all other criteria are met. However, the Defendant provided no support for their argument as to the inapplicability of Chapter 31 of Title 38. SCPCIGA offered in rebuttal the plain language of S.C. Code Ann. § 38-31-60(b) and submitted a copy of the statute at the hearing (Hearing Trans., p. 15). S.C. Code Ann. § 38-31-60(b) provides in relevant part that the SCPCIGA is:

"considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." (emphasis added).

This statutory language is clear and unambiguous, and no legal authority to the contrary was presented by the SIF during the oral argument or by any submission or legal memorandum submitted by the Defendant.

FINDINGS OF FACT

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. That Claimant, Leslie Dominick, was an employee of William Oliver Dominick, on the date of this accident September 13, 1999.
3. That the Claimant suffered a compensable and admitted work related injury under the Act on September 13, 1999, to his right foot/ankle. The accident also resulted in fibromyalgia in both arms, depression, RSD and skin loss from multiple surgeries, all of which rendered the

claimant permanently and totally disabled. (Order of single Commissioner, 3/8/05, Findings of Fact #2 and 6).

4. That William Oliver Dominick was the employer and Legion Insurance Company was the Insurer on the date of injury.

5. That venue for the hearing is proper in Newberry, South Carolina.

6. That notice of the hearing was timely and properly served upon all parties of interest.

7. That notice of the accident was given to the employer in a timely fashion.

8. That a notice of a potential claim for reimbursement was given to the South Carolina Second Injury Fund within 78 weeks of the accident by the carrier.

9. Claimant had pre-existing Type 1 diabetes, an insulin-dependent condition.

10. That the Claimant had knowledge, prior to the date of his accident, that he suffered from the pre-existing condition of Type I diabetes (APA 15, p. 141).

11. That prior to the accident, the Claimant's employer was aware the Claimant had diabetes (APA 15, pp. 142-3).

12. That the greater weight of the evidence shows the pre-existing medical condition of the claimant, Type I diabetes:

(a) Was permanent and serious enough in nature to be a hindrance or obstacle to employment. Diabetes is listed in §42-9-400 as a condition that is presumptively a hindrance or obstacle to employment, and it is incumbent upon the SIF to rebut that presumption. The undersigned finds that the SIF failed to rebut this presumption by the greater weight of the evidence;

(b) That the injury of September 13, 1999 did combine with or aggravate the pre-existing condition of diabetes. The Claimant's wound became infected, and medical

evidence by one physician states that, "indeed we were in a position of attempting to salvage a lower extremity in a diabetic." (APA 4, p. 66; APA 5, p. 81). "It was also [the belief of Dr. Corey Hunt] that this wound would not have healed without the intense monitoring and treatment of his diabetes that he has received on the insulin pump." (APA 13, p. 139);

(c) That the combination of the pre-existing condition along with the subject injury caused the Claimant to miss more time from work than he would have from the September 1999 accident alone. Because of this work related injury, the Claimant underwent four surgeries. (APA 4, pp. 64, 66; APA 5, pp. 70-72, 74-5; APA 8, pp. 107-9). ;

(d) That the combination of the pre-existing condition along with this injury caused the Claimant to have a substantially higher percentage of disability than he would have had from the September 1999 injury alone. Claimant's nerve conduction studies showed diabetic neuropathy (APA 3, pp. 56, 59; APA 5, p. 81; APA 6, p. 86). In addition, the Claimant reported that his symptoms of weakness and numbness worsened after the accident, (*Id.* and APA 7, pp. 88; APA 8, pp. 93, 111; APA 9, p. 116; APA 11, pp. 125, 127, 133).

(e) That the combination of the pre-existing condition along with this injury caused the Claimant's medical costs for treatment to be substantially higher than they would have been from the September 1999 injury alone. Also, there was only "fair control," (as opposed to good or excellent control) of the Claimant's diabetes in the hospital. (APA 4, p. 62).

13. The Plaintiffs submitted a Doctor's Questionnaire whose answers satisfied the requirements of reimbursement. (APA 15, pp. 144-5).

14. That the Claimant's AWW was \$425.00 yielding a compensation rate of \$283.34. (SCWCC Order March 8, 2005, Finding of Fact No. "3;" Affirmed by Full Commission, August 2, 2005; Affirmed by Circuit Court, January 5, 2006).

15. That the carrier, Legion Insurance Company, was current on its assessment payments as of the date of accident/injury in 1999.

16. That in July 2003, Legion Insurance Company went into liquidation, and the South Carolina Property and Casualty Insurance Guaranty Association assumed all rights duties and obligations in this case for Legion from that time forward, and for any outstanding obligations not yet paid by Legion up to that point.

17. That the undersigned interprets the plain language and literal meaning of §38-31-60(b) and hereby find that the Plaintiff SCPCIGA steps into the shoes of Legion for purposes of reimbursement. The referenced statute clearly states that, "[The Association] has all rights...of the insolvent insurer as if the insurer had not become insolvent." Among these rights would be the right to pursue reimbursement from the Second Injury Fund.

18. That the undersigned declines to interpret § 42-7-310 as precluding Legion/SCPCIGA from seeking or receiving reimbursement from the SIF in this case. I agree with Plaintiffs that application of this statute, as amended, must be prospective.

19. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to Legion Insurance Company or their representative in liquidation, for all medical and indemnity payments made by Legion from the date of injury until July of 2003, when Legion was liquidated.

20. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to the South Carolina Property and Casualty Insurance Guaranty Association for all benefits paid in relation to this claim from July 2003 to present, and continuing, as well as for medical treatment, or compensation benefits that were incurred or owed, before July 2003 for which the SCPCIGA paid the obligation of Legion Insurance Company, to include all medical and indemnity payments made, and that will be made

in the future, as well as awards for permanent disability made in accordance with the Act and approved by the Commission.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner that:

1. Under §42-3-20 and §42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under §42-1-130, Leslie Dominick was a covered employee.
3. Under §42-1-140, William Oliver Dominick was a covered employer.
4. Under §42-3-150, there was an employer/employee relationship between the parties.
5. Under §42-17-20, venue in Newberry County, South Carolina, was proper and agreed to by the parties.
6. Under §-1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.
7. Under §42-1-160, the claimant, Leslie Dominick, sustained a compensable injury by accident arising out of and in the course of his employment.
8. Under §42-1-40, the Claimant's average weekly wage is \$425.00 yielding a compensation rate of \$283.34.
9. Under § 42-9-400(f), the carrier provided written notice of the claim to the Second Injury Fund within 78 weeks of the date of injury.
10. The Claimant's pre-existing condition satisfied the requirements for reimbursement from the Fund pursuant to the subsections of § 42-9-400.

11. The provisions of § 42-9-400(c) as they existed on the date of accident are the controlling provisions applicable to this case.

12. Under § 42-9-400(c), the Claimant's pre-existing medical condition of diabetes was known to the Employee and to the Employer prior to the date of injury.

13. That *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982), is relevant and controlling as to the application of the 2003 statutory amendments to § 42-7-310(d)(2). These amendments will be applied prospectively instead of retroactively. Therefore, the controlling statutory language in this case is § 42-7-310(d)(2) as it existed in March of 2000, prior to the 2003 amendments.

13. Under § 42-7-310 (2000), Legion Insurance Company was in compliance with its assessment payments on the date of injury, and is entitled to reimbursement under the Act from the Second Injury Fund for claims that meet the other requirements of the Act.

14. Under §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "Legion," from the date of injury until July of 2003, for benefits paid by "Legion," during that time period in relation to the claim of Mr. Dominick, for medical treatment and indemnity payments made.

15. Under §§ 38-31-10 et seq., particularly § 38-31-60(b), Plaintiff SCPCIGA, steps into the shoes of "Legion" with all rights duties and obligations thereto, as if it were the insurer/carrier for this claim, from the date of liquidation of Legion in July 2003 onward.

16. Under §§ 38-31-10 et seq., § 38-31-60(b), §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "SCPCIGA," from the date of liquidation of Legion in July of 2003 to the present date and ongoing, for any benefits paid on behalf of "Legion," during that time period in relation to the claim of Mr. Dominick, and for any delinquent obligations of Legion that existed prior to

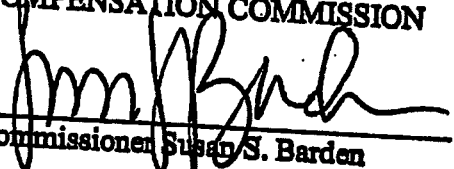
liquidation in July of 2003 that were paid by SCPCIGA. This includes medical treatment already rendered, and in the future, indemnity payments already made, as well as for any award for permanency made by the Commission or agreed to by the parties.

ORDER

IT IS THEREFORE ORDERED THAT, The South Carolina Second Injury Fund is obligated to reimburse Legion and SCPCIGA in accordance with the Act, and pursuant to the findings and conclusions herein.

AND IT IS SO ORDERED.

**SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION**


Commissioner Susan S. Barden

June 19, 2008

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 20th day of June, 2008

By Kristi Love
Administrative Assistant to the Commissioner

WE
MC
DA
SS
LE

**BEFORE THE APPELLATE PANEL
OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO.: 9916207**

Subrogation Partners on behalf of Legion
Insurance Company in Liquidation,

Carrier,

And

South Carolina Property and Casualty
Insurance Guaranty Association,

Carrier,

vs.

South Carolina Second Injury Fund,

Defendant.

In Re:

Leslie Dominick,

Claimant,

vs.

William Oliver Dominick,

Employer,

And

Legion Insurance Co. in Liquidation,
through the S.C. Property & Casualty
Insurance Guaranty Association,

Carriers.

DECISION AND ORDER

HEARING:

May 23, 2012, in Columbia, South Carolina

APPEARANCES:

The Defendant/Appellant, South Carolina Second Injury Fund, was represented by attorney Robert M. Cook, II, Esquire of Robert Cook Law Firm, 128 N. Oak Street, Batesburg, SC 29006.

The Plaintiff/Respondent South Carolina Property & Casualty Insurance Guaranty Association was represented by Mark D. Cauthen, Esquire, and Peter P. Leventis IV, Esquire, of McKay, Cauthen, Settana & Stublely, P.A., P.O. Box 7217, Columbia, SC 29202.

The Plaintiff Legion Insurance Company through Subrogation Partners, was represented by R. Dan Addison, Esquire and Margaret H. Donahue, of Hedrick Gardner Kincheloe & Garofalo, L.L.P., P.O. Box 11267, Columbia, SC 29211.

PURPOSE OF HEARING: To determine the issues as set forth on the Form 30 raised for exception by the Appellant S.C. Second Injury Fund.

OPINION BY:

Avery B. Wilkerson, Jr.,
Andrea C. Roche,
Derrick L. Williams,

Commissioner
Commissioner
Commissioner, Panel Chair

FILED:

_____, 2012

STATEMENT OF THE CASE

The instant case comes before the Commission through the consolidation of two separate Form 54s, properly and timely filed with the Commission, by successive Carriers: Subrogation Partners, on behalf of Legion Insurance Company in liquidation, "Legion"; and South Carolina Property and Casualty Insurance Guaranty Association, "SCPCIGA", respectively against the South Carolina Second Injury Fund, "SIF." The SIF properly and timely filed a Form 55 in response.

The underlying workers' compensation claim involves an admitted injury to the Claimant's right lower extremity that occurred on September 13, 1999. By Order dated March 8, 2005, the hearing Commissioner for the underlying claim awarded permanent and total disability

based on the injury to the Claimant's right leg as well as fibromyalgia, depression, reflex sympathetic dystrophy and skin loss from multiple surgeries. That hearing Commissioner also found that the Claimant suffered from pre-existing diabetes that was affected by the work related accident and this required additional medical care and monitoring. This Order was subsequently affirmed by the Full Commission and the Circuit Court. As a result, SCPCIGA is responsible for lifetime medical benefits to the Claimant for causally related medical treatment. It should be noted that Mr. Dominick was the employee of his father, Mr. Oliver Dominick, at the time of the accident and had been so employed for well over a decade up until the accident and therefore "knowledge," of the pre-existing condition of diabetes, as it pertains to the Second Injury Fund statutes in the Workers' Compensation Act was not in dispute at the original Form 54/55 hearing between the parties to this appeal.

At the time of the Claimant's initial injury in September of 1999 the Employer's workers' compensation carrier was Legion Insurance Company. It is uncontested by the Defendants that as of the date of injury, September 13, 1999, Legion Insurance company was up to date on its assessment payments. Furthermore, it is also uncontested by either party that at some time after September of 1999 but before July of 2003, Legion Insurance Company was no longer current, and ultimately became delinquent, on its SIF assessments; However, the record is unclear as to the specific dates of those events.

In March of 2002 Legion Insurance Company was placed in rehabilitation status by the Commonwealth Court of Pennsylvania. In July 2003 Legion was declared insolvent and an Order of Liquidation was issued by the Commonwealth Court of Pennsylvania. At that time, SCPCIGA, took over responsibility for Legion Insurance Company's continuing workers' compensation obligations. Legion's interests in this particular matter are represented by

Subrogation Partners on behalf of Legion Insurance Company in liquidation, hereinafter referred to as "Legion." Of consequence, for the purposes of this claim against SIF, is that from the date of injury until July 2003, Legion was responsible for all workers' compensation claims, and from July 2003 to present and continuing, SCPCIGA is responsible for all of the workers' compensation benefits owed to the Claimant, to include any outstanding obligations not paid prior to July 2003.

The joint Plaintiffs/Respondents, Legion and SCPCIGA, brought action against the SIF via their Forms 54 asserting that they were entitled to reimbursement from the SIF pursuant to S.C. Code Ann. §§ 42-7-310, and 42-9-400, for the pre-existing condition of diabetes. Plaintiffs argue that these injuries meet the threshold and requirements for reimbursement set forth in § 42-9-400, in that the pre-existing condition was permanent, serious enough in nature to be a hindrance or obstacle to employment and that such preconditions substantially increased liability for medical costs and indemnity in the underlying workers' compensation claim. Also, the Plaintiffs asserted the "knowledge," requirement of §42-9-400 was met in this case by the fact that the Employee knew of the pre-existing diabetes prior to the date of injury, and that the Employer (who was an immediate family members of the Claimant) also knew of the pre-existing condition and retained him in employment.

The Plaintiffs/Respondents jointly argued that the Carrier was current on its assessments as of the date of injury. Again, this was undisputed by the Defendant before the trial Commissioner. Respondents further contended that by virtue of payment of such assessments through date of this accident, the Plaintiffs were entitled to SIF reimbursement pursuant to the provisions of the Act, for the consequence of the injuries that took place on September 13, 1999, which also meet the threshold requirements of §42-9-400.

In addition, Plaintiffs/Respondents asserted that the 2003 statutory changes to § 42-7-310 - which bar from SIF recovery employers or carriers that fail to pay assessments or subsequent fines - as a matter of proper statutory interpretation, should be applied prospectively, and not retroactively. Therefore, such statutory amendment cannot stand as a bar coverage and reimbursement to the Respondents in this matter. Plaintiffs jointly contend that a prospective application of the statutory amendments to §42-7-310 would bar this claim for statutory reimbursement, as a matter of public policy and as a proper interpretation of SIF assessments being tantamount to insurance premiums. That is, 'coverage,' or here reimbursement from SIF, should properly be allocated for claims arising during time periods for which premiums or assessment were properly paid.

Lastly, Plaintiff/Respondent SCPCIGA individually argued that they were entitled to reimbursement from the SIF in the instant case in accordance to the aforementioned arguments and in conjunction with the fact SCPCIGA, while not an insurance company *per se*, is entitled to, all rights, duties and obligations of the insolvent insurer pursuant to S.C. Code Ann. § 38-31-60(b). However, this issue - whether or not the SCPCIGA is entitled to recovery reimbursement benefits from the SCSIF by its status as such - was not raised in the Form 30 appeal of the Appellant SCSIF. Therefore, this is not currently before this Appellate Panel on consideration of the appeal single Commissioner's Order by the SCSIF.

The Defendant/Appellant, SIF, contended they should not be liable for reimbursement to Legion or SCPCIGA on several grounds. The Appellant originally based this contention on the argument that no previously existing injury existed that would have satisfied §42-9-400 requirements of permanency, hindrance or obstacle to employment or of such severity that would substantially increase the liability for medical costs and indemnity. Furthermore, while

stipulating that the Plaintiffs/Respondents were current on their assessments as of the date of injury in 1999, the Respondent SIF contended that the Plaintiffs/Respondents were at some later date delinquent on assessment payments and resultant fines. The SIF argues that 2003 amendments to §42-7-310(d)(2) of the Act, which effectively preclude SIF reimbursement to insurers who fail to stay current on such payments, should have been applied retroactively to bar reimbursement to the Plaintiffs. The Defendant/Appellant alternatively contended that this claim should be barred via a prospective or retroactive reading of the 2003 amendments to § 42-7-310.

The SIF also asserted, particularly against the Respondent SCPCIGA, that because SCPCIGA is not an insurance company or self insured, per se, under § 42-1-60, it is not entitled to reimbursement under the Act, specifically §§ 42-7-310, and 42-9-400. Furthermore, the Defendant argues that S.C. Code Ann. § 38-31-10 et seq. is inapplicable. Again, this particularly issue was not timely raised in the Form 30 appeal of the SCSIF, and therefore is not properly before the Appellate review panel on appeal.

The single Commissioner ruled in favor of the Respondents SCPCIGA and Legion in Liquidation on all grounds, and as to the applicability, qualifications and contested legal issues in this matter, and ordering the Appellant SCSIF to provide reimbursement for this accident to the Plaintiffs/Respondents in accordance with the Act. This Order was issued on June 26, 2008 by Commissioner Susan S. Barden. The SCSIF filed a timely Form 30 appeal of that Order. During the pendency of the scheduling of this appeal two separate motions were filed by the parties. First the SCSIF filed a motion to stay further proceedings in this and all similarly situated claims. Secondly, Plaintiff/Respondent Legion, filed a motion to the Appellate Panel for the Form 30 appeal of the SCSIF to be heard by the Commission *en banc*. The Commission granted the stay request of the SCSIF, and after further litigation, that stay was subsequently lifted.

The Commission also denied the motion of the Plaintiff/Respondent Legion to hear the Form 30 appeal *en banc*. Legion appealed this ruling of the full Commission to the Circuit Court of Lexington County. By consent agreement of the parties, the appeal by Legion, of the decision of the full Commission not to hear this appeal *en banc*, was withdrawn and the case was remanded from the Circuit Court of Lexington to the South Carolina Workers' Compensation Commission. Plaintiff/Appellant Legion also withdrew its motion for the Form 30 appeal of the SCSIF to be heard in bank. Also by consent agreement of the parties, it was stipulated and agreed upon that this matter is no longer subject to any stay of litigation previously ordered by this Commission. The stay itself has previously been lifted by a separate Order of this Commission.

The purpose of the this Order and related proceedings, is to determine the issues raised in the Form 30 appeal of the SCSIF filed in 2008, within the applicable time period prescribed by law, setting forth its grounds for exception and request for judicial review of the Order of Commissioner Susan S. Barden issued on June 26, 2008. The Defendant/Respondent SCSIF sets forth three grounds for exception and judicial error in its Form 30 appeal as follows:

ISSUES ON APPEAL

1. Did the hearing Commissioner err in finding as a fact (Finding of Fact No. 12 (a)) that Claimant's Type I diabetes was permanent and serious enough in nature to be a hindrance or obstacle to employment when such finding is against the greater weight of the reliable, probative and substantial evidence in the record?
2. Did the hearing Commissioner err in finding as a fact (Finding of Fact No. 12 (b)) that the injury of September 13, 1999 did combine with or aggravate the pre-existing condition of diabetes when such finding is against the greater weight of the reliable, probative and substantial evidence in the record?
3. Did the hearing Commissioner err in declining (at Finding of Fact No. 18) to interpret §42-7-310 as precluding the Respondents, Legion/SCPCIGA from seeking or receiving reimbursement from the SIF in this case when such finding is against the greater weight of the reliable, probative and substantial evidence in the record?

In appellate brief of the Appellant SCSIF filed with the full Commission panel on September 4, 2008, it argues a fourth ground for appeal:

IV. The South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA) is not entitled to reimbursement because it is not a carrier pursuant to S.C. Code Ann. §42-1-60.

See Appellate Brief of the SCPCIGA, Sept. 4, 2008, at p. 5

However, as this fourth grounds for review was not timely raised to the full Commission within the statutory or regulator period prescribed by law, and therefore is not preserved for review by this appellate panel. (See Gen. S.C. Code Ann. §42-17-50 et seq.; S.C. Code of Regs. §67-701 (A); and *Allison v. W.L. Gore and Associates* 394 S.C. 185, 714 S.E.2d 547 (2011)).

The single Commissioner for the Form 54/55 hearing between these parties, the Honorable Susan S. Barden, in a rather lengthy and detailed opinion summarized her analysis of the evidence and the legal and factual position of the parties, which she issued the following findings of fact and conclusions of law in her Order issued June 26, 2008:

Single Commissioner's Findings of Fact

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. That Claimant, Lealie Dominick, was an employee of William Oliver Dominick, on the date of this accident September 13, 1999.
3. That the Claimant suffered a compensable and admitted work related injury under the Act on September 13, 1999, to his right foot/ankle. The accident also resulted in fibromyalgia in both arms, depression, RSD and skin loss from multiple surgeries, all of which rendered the claimant permanently and totally disabled. (Order of single Commissioner, 3/8/05, Findings of Fact #2 and 6).
4. That William Oliver Dominick was the employer and Legion Insurance Company was the Insurer on the date of injury.
5. That venue for the hearing is proper in Newberry, South Carolina.
6. That notice of the hearing was timely and properly served upon all parties of interest.
7. That notice of the accident was given to the employer in a timely fashion.
8. That a notice of a potential claim for reimbursement was given to the South Carolina Second Injury Fund within 78 weeks of the accident by the carrier.
9. Claimant had pre-existing Type 1 diabetes, an insulin-dependent condition.
10. That the Claimant had knowledge, prior to the date of his accident, that he suffered from the pre-existing condition of Type I diabetes (APA 15, p. 141).
11. That the prior to the accident, the Claimant's employer was aware the Claimant had diabetes (APA 15, pp. 142-3).
12. That the greater weight of the evidence shows the pre-existing medical condition of the claimant, Type I diabetes:
 - (a) Was permanent and serious enough in nature to be a hindrance or obstacle to employment. Diabetes is listed in §42-9-400 as a condition that is presumptively a hindrance or obstacle to employment, and it is incumbent upon the SIF to rebut that presumption. The undersigned finds that the SIF failed to rebut this presumption by the greater weight of the evidence;
 - (b) That the injury of September 13, 1999 did combine with or aggravate the pre-existing condition of diabetes. The Claimant's wound became infected, and medical evidence by one physician states that, "indeed we were in a position of attempting to salvage a lower extremity in a diabetic." (APA 4, p. 66; APA 5, p. 81). "It was also [the belief of Dr. Corey Hunt] that this wound would not have healed without the intense monitoring and treatment of his diabetes that he has received on the insulin pump." (APA 13, p. 139);
 - (c) That the combination of the pre-existing condition along with the subject injury caused the Claimant to miss more time from work than he would have from the September 1999 accident alone. Because of this work

related injury, the Claimant underwent four surgeries. (APA 4, pp. 64, 66; APA 5, pp. 70-72, 74-5; APA 8, pp. 107-9). ;

(d) That the combination of the pre-existing condition along with this injury caused the Claimant to have a substantially higher percentage of disability than he would have had from the September 1999 injury alone. Claimant's nerve conduction studies showed diabetic neuropathy (APA 3, pp. 56, 59; APA 5, p. 81; APA 6, p. 86). In addition, the Claimant reported that his symptoms of weakness and numbness worsened after the accident, (*Id.* and APA 7, pp. 88; APA 8, pp. 93, 111; APA 9, p. 116; APA 11, pp. 125, 127, 133).

(e) That the combination of the pre-existing condition along with this injury caused the Claimant's medical costs for treatment to be substantially higher than they would have been from the September 1999 injury alone. Also, there was only "fair control," (as opposed to good or excellent control) of the Claimant's diabetes in the hospital. (APA 4, p. 62).

13. The Plaintiffs submitted a Doctor's Questionnaire whose answers satisfied the requirements of reimbursement. (APA 15, pp. 144-5).

14. That the Claimant's AWW was \$425.00 yielding a compensation rate of \$283.34. (SCWCC Order March 8, 2005, Finding of Fact No. "3;" Affirmed by Full Commission, August 2, 2005; Affirmed by Circuit Court, January 5, 2006).

15. That the carrier, Legion Insurance Company, was current on its assessment payments as of the date of accident/injury in 1999.

16. That in July 2003, Legion Insurance Company went into liquidation, and the South Carolina Property and Casualty Insurance Guaranty Association assumed all rights duties and obligations in this case for Legion from that time forward, and for any outstanding obligations not yet paid by Legion up to that point.

17. That the undersigned interprets the plain language and literal meaning of §38-31-60(b) and hereby find that the Plaintiff SCPCIGA steps into the shoes of Legion for purposes of reimbursement. The referenced statute clearly states that, "[The Association] has all rights...of the insolvent insurer as if the insurer had not become insolvent." Among these rights would be the right to pursue reimbursement from the Second Injury Fund.

18. That the undersigned declines to interpret § 42-7-310 as precluding Legion/SCPCIGA from seeking or receiving reimbursement from the SIF in this case. I agree with Plaintiffs that application of this statute, as amended, must be prospective.

19. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to Legion Insurance Company or their representative in liquidation, for all medical and indemnity payments made by Legion from the date of injury until July of 2003, when Legion was liquidated.

20. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to the South Carolina Property and Casualty Insurance Guaranty Association for all benefits paid in relation to this claim from July 2003 to present, and continuing, as

well as for medical treatment, or compensation benefits that were incurred or owed, before July 2003 for which the SCPCIGA paid the obligation of Legion Insurance Company, to include all medical and indemnity payments made, and that will be made in the future, as well as awards for permanent disability made in accordance with the Act and approved by the Commission.

Single Commissioner's Conclusions of Law

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner that:

1. Under §42-3-20 and §42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under §42-1-130, Leslie Dominick was a covered employee.
3. Under §42-1-140, William Oliver Dominick was a covered employer.
4. Under §42-3-150, there was an employer/employee relationship between the parties.
5. Under §42-17-20, venue in Newberry County, South Carolina, was proper and agreed to by the parties.
6. Under §1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.
7. Under §42-1-160, the claimant, Leslie Dominick, sustained a compensable injury by accident arising out of and in the course of his employment.
8. Under §42-1-40, the Claimant's average weekly wage is \$425.00 yielding a compensation rate of \$283.34.
9. Under § 42-9-400(f), the carrier provided written notice of the claim to the Second Injury Fund within 78 weeks of the date of injury.
10. The Claimant's pre-existing condition satisfied the requirements for reimbursement from the Fund pursuant to the subsections of § 42-9-400.
11. The provisions of § 42-9-400(c) as they existed on the date of accident are the controlling provisions applicable to this case.
12. Under § 42-9-400(c), the Claimant's pre-existing medical condition of diabetes was known to the Employee and to the Employer prior to the date of injury.
13. That *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982), is relevant and controlling as to the application of the 2003 statutory amendments to § 42-7-310(d)(2). These amendments will be applied prospectively instead of retroactively. Therefore, the controlling statutory language in this case is § 42-7-310(d)(2) as it existed in March of 2000, prior to the 2003 amendments.
13. Under § 42-7-310 (2000), Legion Insurance Company was in compliance with its assessment payments on the date of injury, and is entitled to reimbursement under the Act from the Second Injury Fund for claims that meet the other requirements of the Act.
14. Under §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff

"Legion," from the date of injury until July of 2003, for benefits paid by "Legion," during that time period in relation to the claim of Mr. Dominick, for medical treatment and indemnity payments made.

15. Under §§ 38-31-10 et seq., particularly § 38-31-60(b), Plaintiff SCPCIGA, steps into the shoes of "Legion" with all rights duties and obligations thereto, as if it were the insurer/carrier for this claim, from the date of liquidation of Legion in July 2003 onward.

16. Under §§ 38-31-10 et seq., § 38-31-60(b), §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "SCPCIGA," from the date of liquidation of Legion in July of 2003 to the present date and ongoing, for any benefits paid on behalf of "Legion," during that time period in relation to the claim of Mr. Dominick, and for any delinquent obligations of Legion that existed prior to liquidation in July of 2003 that were paid by SCPCIGA. This includes medical treatment already rendered, and in the future, indemnity payments already made, as well as for any award for permanency made by the Commission or agreed to by the parties. (See Order of Commissioner Barden, issued June 26, 2008, at pp. 17-22).

In conjunction with her analysis of the evidence of the case and the above findings, Commissioner Barden awarded that the Plaintiffs/Respondents should be reimbursed by the Second Injury Fund, pursuant to the Act and specifically as outlined under §42-9-400 et seq.

This full Commission Panel has considered the arguments of the parties, which were outlined extensively in the record, the hearing transcript before the single Commissioner, as well as at oral argument before this appellate panel. Based on the evidence in the record including voluminous APA submissions and exhibits, and in consideration of the arguments of the parties both in their written appellate briefs and at oral argument, the Appellate Panel finds there was no reversible error in the single Commissioner's Order and findings as outlined above.

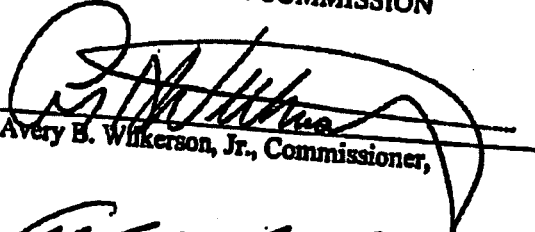
Therefore, this review panel herein adopts those findings and conclusion, and the accompanying legal reasoning and analysis of the evidence of the case listed and outlined in the single Commissioner's Order, verbatim, as its own findings and conclusions.

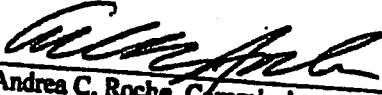
ORDER

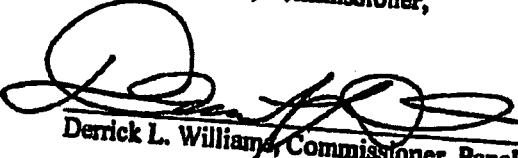
IT IS THEREFORE ORDERED the Order of the Single Commissioner, filed in the above captioned mater on June 26, 2008, is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of this Appellate Panel, and that the Defendant/Respondent, SCSIF is liable to pay reimbursement proceeds to the Plaintiffs/Respondents in conjunction therewith and under S.C. Code Ann. §§42-9-400 et seq.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION


Avery B. Wilkerson, Jr., Commissioner,


Andrea C. Roche, Commissioner,


Derrick L. Williams, Commissioner, Panel Chair

Columbia, SC
6-29, 2012

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy thereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 29 day of June, 2012
By Valerie D. Miller
Administrative Assistant to the Commissioner

E. Wesley Graves
M. Stephen Stubbley
R. Daniel Addison
Mark S. Cauthers
Robert M. Cook II

COUNTY OF RICHLAND

STATE OF SOUTH CAROLINA

SUBROGATION PARTNERS, ON BEHALF
OF LEGION INSURANCE CO., IN
LIQUIDATION,

Respondent,

AND

SOUTH CAROLINA PROPERTY &
CAUSALTY INSURANCE GUARANTY
ASSOCIATION,

Respondent,

vs.

SOUTH CAROLINA SECOND INJURY
FUND,

Appellant,

IN RE:

HERMAN WEBSTER,

Claimant,

vs.

WEBSTER PLUMBING & GAS,

Employer,

and

SUBROGATION PARTNERS ON BEHALF
OF LEGION INSURANCE IN LIQUIDATION
AND SOUTH CAROLINA PROPERTY &
CASUALTY INSURANCE GUARANTY
ASSOCIATION,

Carriers.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

RICHLAND COUNTY
FILED

2012 SEP 26 PM 3:45

JEANETTE W. McBRIDE
C.C.P. & G.S.

CIVIL ACTION NO. 2009-CP-40-00484
WCC FILE NO. 0000776

ORDER

cw
1/22

STATEMENT OF THE CASE

This appeal involves whether the Workers' Compensation Commission (Commission) correctly concluded that Subrogation Partners, on behalf of Legion Insurance in liquidation, and the South Carolina Property & Casualty Insurance Guaranty Association ("SCPCIGA") are entitled to reimbursement from the South Carolina Second Injury Fund (the Fund) for monies paid out on a workers' compensation claim involving Herman Webster (Claimant). By way of background, Claimant sustained admittedly compensable injuries arising out of a work-related accident on January 27, 2000. At the time, Legion Insurance Company ("Legion") provided workers' compensation insurance for his Employer. In order to do business in South Carolina, insurance companies writing workers' compensation coverage were required to pay assessments into the Fund. There is no dispute that as of January 27, 2000, Legion was current in its assessment payments with the Fund. The parties stipulate that some time after 2001, Legion ceased paying its assessments.

In July 2003, Legion was declared insolvent and liquidated by the Commonwealth Court of Pennsylvania. At that time, SCPCIGA became responsible for Legion's continuing workers' compensation obligations. From the date of Mr. Webster's injury until July of 2003, Legion was the responsible Carrier for all workers' compensation claims filed against the Employer; since July 2003, SCPCIGA is responsible for all workers' compensation claims against the Employer, including any outstanding obligations not paid prior to July 2003. Mr. Webster settled his claim with the SCPCIGA circa December 2004.

Following the settlement, Legion in liquidation through Subrogation Partners and SCPCIGA (collectively "Respondents") filed joint Form 54s seeking reimbursement from the Fund pursuant to S.C. Code Ann. §§42-7-310 and 42-9-400, based on Claimant's pre-existing injuries/conditions of diabetes, ruptured/herniated disc, bulging discs, and degenerative disc

disease of the lumbar spine, as well as osteoarthritis of the left shoulder. Respondents argue these pre-existing injuries/conditions satisfy the requirements for reimbursement set forth in §42-9-400, in that Claimant's pre-existing injuries/conditions were permanent, serious enough in nature to be a hindrance or obstacle to employment, and that such preconditions substantially increased liability for medical costs, lost time from work and permanent impairment/disability, by combining with or being aggravated by the subsequent injuries arising in this claim. Respondents also assert that Claimant and Employer knew of the above listed pre-existing injuries/conditions prior to Mr. Webster's January 27, 2000 injury such that the knowledge requirements of §42-9-400 are also met. Initially, the Fund contended that that this claim does not otherwise satisfy the threshold requirements for reimbursement from the Fund pursuant to §42-9-400. Alternatively, the Fund contended that a 2003 amendment to §42-7-310(d)(2) relieves it of liability for this claim.

Commissioner Lyndon heard the claim in Columbia, South Carolina, on February 4, 2008. Following the hearing, Commissioner Lyndon issued a May 20, 2008 Decision and Order holding "that the [Fund] is responsible for reimbursement of this claim in accordance with the provisions of the Act, to [Legion] or their representative in liquidation, for all medical and indemnity payments made by Legion, from the date of injury on January 27, 2000 to July of 2003 when Legion was liquidated." Commissioner Lyndon further held that the Fund is responsible for reimbursement SCPCGIA of "all benefits paid in relation to this claim from July 2003 to present, and continuing, as well as for medical treatment or compensation benefits that were incurred or owned before July 2003 for which the SCPCIGA paid the obligation of Legion Insurance Company."

The Fund timely appealed Commissioner Lyndon's ruling to the Full Commission. Specifically, the Fund argued that the Commission erred (1) in finding Claimant's pre-existing

injuries/conditions serious enough to be a hindrance or obstacle to employment; (2) in finding Claimant's pre-existing conditions combined with or were aggravated by his January 27, 2000 injuries thereby causing him greater impairment; and (3) in finding the SCPCIGA is a Carrier for purposes of §42-1-160. The Appellate Panel of the Full Commission conducted its review hearing on October 1, 2008, and issued its Decision and Order on December 18, 2008, sustaining Commissioner Lyndon's Order in its entirety.

Thereafter, on January 5, 2009, the Fund filed its Notice of Appeal to the Circuit Court on the grounds that (1) the Commission erred in determining that Claimant's pre-existing medical issues were permanent and serious enough to be a hindrance or obstacle to employment and that his pre-existing conditions were aggravated by the January 27, 2000 work injury to create substantially greater medical costs and permanent disability than would have resulted from Claimant's disability alone; and that (2) the Commission erred in finding that the Fund must reimburse Legion and the SCPCIGA for all medical and indemnity benefits paid regarding the claim. This case was heard on appeal before the Circuit Court on January 19, 2012.

At the January 19, 2012 Circuit Court hearing, the Fund's legal issues evolved from its prior arguments raised at the lower tribunals. Instead of focusing on the evidence in the case and arguing that Claimant's pre-existing medical issues were insufficient to satisfy the requirements of S.C. Code §42-9-400, the Fund instead argued that the Commission's Order did not contain adequate findings of fact to support its conclusions. The Fund also argued for the first time that the Full Commission erred by not conducting a numerical analysis of Claimant's increased medical costs, taking the position that such an analysis is required by *City of Greenville v. S.C. Second Injury Fund*, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000). Additionally, the Fund raised new arguments aimed toward the SCPCIGA that it had not previously raised—specifically that the SCPCIGA was never intended to have access to reimbursements from the Fund based on the

language of S.C. Code §42-7-310. Legion and the SCPCIGA contend that the Full Commission's Order is supported by substantial evidence and should be affirmed in its entirety. Further, Legion and the SCPCIGA contend that the Fund's legal arguments involving sufficiency of the Full Commission's Order is without merit.

STANDARD OF REVIEW

A reviewing court will not overturn a decision by the Workers' Compensation Commissioner unless the determination is unsupported by substantial evidence or is affected by an error of law. *Dukes v. Rural Metro Corp.*, 356 S.C. 107, 109, 587 S.E.2d 687, 688 (2003). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Accordingly, a reviewing court can only reverse or modify the Full Commission's decision if the Appellant's "substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Id.* at 454-55, 535 S.E.2d at 442 (citing S.C. Code Ann. § 1-23-380(A)(6)(d), (e) (Supp.1997)). When reviewing the Full Commission's interpretation of a statute, the reviewing court reviews the question de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citation omitted). However, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling

CW
5722

reasons." *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted).

QUESTIONS PRESENTED

1. Does the substantial evidence of record support the Commission's finding that this claim qualifies for reimbursement from the Fund pursuant to S.C. Code §42-9-400?
2. Is the Full Commission's Order supported by sufficient findings of fact to allow this Court to uphold the Commission's decision?
3. Does the Court of Appeals' decision in *City of Greenville v. S.C. Second Injury Fund*, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000) mandate reversal of the Full Commission's decision?
4. Did the Commission correctly interpret the 2003 Amendments to S.C. Code §42-7-310(d)(2) such that it correctly concluded that Legion and the SCPCIGA is entitled to reimbursement from the Fund?

LAW AND ANALYSIS

1. The Full Commission's determination that Claimant's pre-existing conditions satisfied the requirements of S.C. Code §42-9-400 is supported by substantial evidence.

After reviewing the evidence in this case, this Court concludes that substantial evidence supports the Commission's conclusion that that this claim is reimbursable pursuant to S.C. Code §42-9-400. In reviewing the background information of this case, it is clear to this Court that the purpose of the Second Injury Fund, as established in 1972, is two-fold. First, the Fund operates to remove an Employer's fear of increased workers' compensation premiums as a result of hiring disabled workers. Secondly, the Fund enhances employment opportunities to those very same disabled workers. *Reports and Resolutions of the Ind. Comm'n*, 1974 Vol. I; see also *Boone's Masonry Const. Co., Inc. and Allstate Ins. Co. v. South Carolina Second Injury Fund*, 267 S.C. 277, 277 S.E.2d 659 (1976). The Fund accomplishes this goal by absorbing some of the risk that such a worker will become injured in the workplace by allowing the Employer or its insurance

W
bgt

Carrier to seek compensation from the Fund when an employee with a prior permanent physical impairment incurs a subsequent disability in the workplace. *See Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (2005) citing S.C. Code Ann. § 42-9-400 (a). Section 42-9-400 provides that an employer or its carrier shall be reimbursed by for certain benefits paid pursuant to a workers' compensation claim in the situation where "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 . . ." Thus, S.C. Code §42-9-400 creates a two-fold question to determine a carrier's entitlement to reimbursement. It must be determined that Claimant has a preexisting condition that was a hindrance to employment, and that the disability following the work injury was significantly worse than it would have been from the work injury alone, without the existence of the pre-existing condition.

The first prong of the test for reimbursement is met in this case because there is substantial evidence to support the Commission's conclusion that Claimant's preexisting conditions were permanent and were a hindrance or obstacle to employment. Pursuant to South Carolina Code Ann. §42-9-400(d), "...[T]here shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or re-employment exists when the condition is one of the following impairments:...(2) Diabetes...(4) Arthritis¹...[and](25) ruptured intervertebral disc." S.C. Code Ann. §42-9-400(d). In the present case, Claimant suffers from diabetes, osteoarthritis of the shoulder, a prior ruptured disc of the lumbar spine, and degenerative disc disease of the lumbar spine. Thus, pursuant to the statute, once Respondents

¹ For injuries occurring after July 1, 2007, arthritis has been removed from this list.

show that these conditions pre-existed Claimant's January 27, 2000 injury. Respondents are entitled to a rebuttable presumption that Claimant's pre-existing conditions are "permanent and a hindrance or obstacle to employment or re-employment."

At the hearing, Respondents provided substantial evidence that Claimant's diabetes and arthritis pre-existed the date of Claimant's injury. Specifically, Dr. Stephen E. Rawe, M.D., Ph.D., testified during his deposition that Claimant suffered from, "pre-existing degenerative arthritis at all levels" in his spine. Similarly, Dr. Earl B. McFadden, M.D., stated in a questionnaire that Claimant had arthritis in his left shoulder prior to January 27, 2000. Dr. Jeffrey K. Wingate, M.D., also stated in his questionnaire that Claimant had degenerative disc disease prior to January 27, 2000. Turning to Claimant's diabetes, Dr. Roger Rowe, M.D. stated in his questionnaire that Claimant suffered from diabetes prior to January 27, 2000. Not only were Claimant's physicians aware of his pre-existing conditions, Mary A. Rickards, general manager of Claimant's Employer, Webster Plumbing & Gas, stated in various affidavits that she also knew Claimant had osteoarthritis of the left shoulder, diabetes and ruptured intervertebral disc/herniated disc prior to his injury of January 27, 2000. These submissions overwhelmingly show that Claimant suffered from several preexisting conditions set forth in S.C. Code Ann. §42-9-400(d). Accordingly, Respondents are entitled to the statutory presumption that Claimant's diabetes and arthritis are permanent and a hindrance or obstacle to employment or re-employment.

Though Respondents in this case are clearly entitled to the statutory presumption set forth above, this presumption is rebuttable. However, pursuant to the Workers' Compensation Act the burden of rebutting this presumption falls upon the Fund. See S.C. Code Ann. §42-9-400 (d). At the prior hearing and subsequent appeals in this matter, the Fund has put on very little evidence aimed towards rebutting this presumption. First, Appellant argued that several of Claimant's

treating physician(s) indicated that Claimant's preexisting conditions were not a hindrance or obstacle to his employment. At first, it should be noted that these cited physician affidavits refer solely to Claimant's pre-existing diabetes and osteoarthritis of the shoulder. The Fund has provided no evidence rebutting the statutory presumption that Claimant's degenerative arthritis of the spine was permanent and/or a hindrance or obstacle to employment. On this basis alone, the Full Commission can hold that Claimant had a permanent pre-existing condition that was a hindrance or obstacle to employment. However, as set forth above, Respondents also provided the questionnaire of Dr. McFadden, who stated that the fact that Claimant had preexisting osteoarthritis in his left shoulder was a hindrance or obstacle in employment. Additionally, the questionnaires of Dr. Wingate and Dr. Rowe state that Claimant's preexisting conditions (specifically degenerative disc disease and diabetes, respectively) constituted a hindrance or obstacle in employment. In fact, Dr. Wingate produced two questionnaires, one dated 6/12/07 and one dated 1/28/08. Dr. Wingate's statements in both questionnaires were consistent: that Claimant had a hindrance or obstacle in employment due to preexisting conditions.

Viewing the evidence in light of the standard of review before the Circuit Court, the Full Commission's decision is clearly supported by the substantial evidence of record. Considering the Fund did not present any evidence refuting that Claimant's degenerative arthritis of the spine was a hindrance or obstacle in employment, the Fund's arguments that the Full Commission erred in determining Claimant's preexisting conditions were a hindrance or obstacle to employment lacks merit. There is ample evidence in the record that "would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action."

Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987).

With the first part of the criteria for reimbursement met, we move on to the second essential factor. "Once the Employer establishes that an employee suffered from a prior

cw
9/22

permanent physical impairment, it must prove that the compensation and medical liability resulting from the employee's compensable injury is 'substantially greater' because of the preexisting condition." Grady L. Beard, Shannon Till Poteat, Marcy Johnson Lamar & Vernon R. Sumwalt, Jr., *The Law of Workers' Compensation Insurance in South Carolina* 9-10 (4th ed., South Carolina Bar 2005).

Here, Respondents have clearly satisfied this burden. Respondents submitted the questionnaire of Dr. McFadden who stated that Claimant's preexisting arthritis in his left shoulder caused him to have a substantially higher percentage of permanent disability than he would have had from the January 27, 2000, injury alone. Dr. McFadden also stated that the medical costs in this case were substantially increased due to the existence of the arthritis. Respondents also submitted the questionnaire of Dr. Wingate who stated that Claimant's preexisting degenerative disc disease caused him to have a substantially higher percentage of permanent disability than he would have had from the January 27, 2000, injury alone. Dr. Wingate also agreed that the medical costs in this case were substantially increased due to the existence of the degenerative disc disease. Additionally, Respondents submitted the questionnaire of Dr. Rowe who stated that Claimant's preexisting diabetes caused him to have a substantially higher percentage of permanent disability than he would have had from the January 27, 2000, injury alone. Dr. Rowe agreed with the other medical providers and also stated that the medical costs in this case were substantially increased due to the existence of the diabetes. These questionnaires from three independent, licensed medical professionals alone constitute "substantial evidence" sufficient to support the Full Commission's decision that Claimant's preexisting conditions caused Claimant to have a substantially higher percentage of permanent disability than he would have had from the work injury alone, and that the medical costs were substantially increased due to the existence of these preexisting conditions. However, in addition

to submitting these questionnaires, Respondents also submitted medical reports and narratives that corroborate these doctors' questionnaires.

At the prior hearing and appellate proceedings in this matter, the Fund argued that Claimant's medical costs and disability were solely caused by the January 27, 2000, work injury. However, this argument is contrary to the overwhelming weight of the evidence presented in this matter. In addition to the questionnaires and medical reports and narratives submitted by Respondents, the physician questionnaires submitted by Appellant also support Respondents' position. While Appellant submitted these questionnaires because the treating physicians stated that Claimant's preexisting osteoarthritis of the shoulder and diabetes were not a hindrance or obstacle to employment, some of these questionnaires also stated that Claimant's osteoarthritis caused Claimant to have a substantially higher percentage of disability than he would have had from the January 27, 2000 injury alone. These same questionnaires submitted by Appellant also stated that Claimant's medical costs were substantially increased as a result of the preexisting osteoarthritis.

In summary, the Appellant has produced no persuasive evidence to show that Claimant's preexisting conditions did not cause a substantially higher percentage of disability that he would have had from the January 27, 2000 work injury alone or that Claimant's medical costs were not substantially higher because of these conditions. In fact, some of Appellant's own submitted evidence supports Respondent's position. The substantial evidence of record clearly supports the Commission's finding that Claimant's preexisting conditions increased his overall disability and medical costs stemming from the January 27, 200 injury. The Commission's determination that this case qualifies for reimbursement under §42-9-400 can only be affirmed based on the substantial evidence in the record.

2. The Full Commission's findings of fact are adequate to justify its decision.

At the January 19, 2012 hearing, the Fund asked this Court to determine whether the Full Commission's Order contains adequate findings of fact to support its decision and order. The Fund cited *Pugh v. Piedmont Mechanical*, 396 S.C. 31, 719 S.E.2d 676 (S.C.App. 2011), for the proposition that a reviewing court should remand certain decisions where the findings of fact are insufficient for the reviewing court to determine the basis for the administrative tribunal's decision. As argued, the Fund implies that *Pugh* creates an updated standard; however, in reviewing the *Pugh* Court's findings, this Court finds that *Pugh* simply restates the general requirements of decisions from administrative agencies. Specifically, the administrative decision must be supported by substantial evidence.

Here, the Fund argues that the findings of fact are insufficient to explain the basis for the Full Commission's Order and further argues that the Findings of Fact contain only conclusory statements that do not satisfy the Court of Appeals' holding in *Pugh*. *Id.* This Court finds that *Pugh* is factually distinguishable from the case at bar. While the Full Commission's findings of fact do not make detailed findings regarding its thought process in weighing the evidence, the Full Commission sets forth a lengthy explanation of the evidence and its impressions based on the evidence in the "Evidence of the Case" portion. When viewed in light of the Order in its entirety, the Full Commission's explanation of its decision is clearly supported by substantial evidence of record.

3. The Fund's reliance on *City of Greenville v. S.C. Second Injury Fund*, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000), is misplaced.

The Fund also argued that the Full Commission's decision did not satisfy the requirements of *City of Greenville v. S.C. Second Injury Fund*, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000). As a threshold matter, this Court deems this argument abandoned on appeal because there was no assignment of error based on *City of Greenville*. In reviewing the record, it appears

the Fund first made this argument before the Circuit Court. This Court may only consider arguments raised before the lower tribunals as this Court's function is to ascertain whether the Full Commission's decision is supported by substantial evidence.

However, assuming for the sake of argument that the *City of Greenville* argument is preserved on appeal, this Court does not accept the Fund's interpretation of the case. In *City of Greenville*, the Full Commission found that the Employer was not entitled to reimbursement from the Fund. *Id.* at 144, 528 S.E.2d at 92. In that case, the claimant had preexisting degenerative disc disease, as well as pre-existing arthritis in the knee. *Id.* However, the claimant fell and suffered a significant fall resulting in significant paralysis. *Id.* In that case, the parties presented evidence that the claimant's total medical expenses resulting from the fall was approximately \$150,000.00, while the costs related to his pre-existing medical expenses was roughly \$500.00 - \$600.00. *Id.* at 147, 528 S.E.2d at 94. In this case, neither party submitted evidence related to the exact breakdown of Claimant's medical expenses attributable to the workers' compensation injury versus the likely cost of medical expenses related to Claimant's underlying medical conditions. However, there is evidence in the record that Claimant's overall medical expenses were increased due to the underlying impairments. Respondents provided medical questionnaires from Dr. McFadden, Dr. Rowe, and Dr. Wingate that state Claimant's medical costs were substantially increased due to his degenerative disc disease and/or diabetes. This evidence is sufficient to satisfy the substantial evidence standard of review.

To the extent the Fund argues that *City of Greenville* requires the Commission and/or this Court to perform a numerical analysis of the medical costs, this Court disagrees. *City of Greenville* dealt with whether the evidence in that case was sufficient to satisfy the requisite "substantial evidence" standard and the reviewing Court determined that the Full Commission's conclusion was adequately supported by the evidence in that case. This Court finds that the Full

W
13922

Commission's conclusion that Claimant's pre-existing conditions substantially increased his overall medical costs is supported by substantial evidence and is affirmed on appeal.

4. S.C. Code §42-7-310(d)(2) applies prospectively only.

The next question presented to this Court is whether the Commission correctly concluded that the 2003 amendment to S.C. Code §42-7-310(d)(2) was not intended to apply retroactively. This Court believes that it was not and, accordingly, the Commission correctly concluded that Respondents are entitled to reimbursement from Appellant. As noted above, reviewing courts review questions of statutory interpretation *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citation omitted). However, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted). Here, the pertinent case law, as well as public policy concerns, clearly indicate that the Commission correctly concluded that the 2003 amendment to S.C. Code §42-7-310(d)(2) was not intended to be retroactive and that Respondents are entitled to reimbursement from Appellant with regards to this claim. Further, Appellant has not submitted any "compelling reasons" why retroactive application is more prudent in these circumstances.

When the Legislature enacted the 2003 amendment to S.C. Code §42-7-310(d)(2) that forms the basis of the parties' dispute, the amendment was never intended to apply retroactively. Looking to the language of the statute, prior to June 25, 2003, the language of §42-7-310(d)(2), in pertinent part, read as follows:

If the Employer of insurance Carrier fails to pay the assessment and penalty within thirty days the director may file a complaint for collection against the Employer or insurance Carrier in a court of competent jurisdiction for the assessment, penalty, and interest at the legal rate, and the Employer/Carrier is responsible for attorney's fees and costs (emphasis added).

CW

14922

The June 25, 2003 amendment, pursuant to 2003 Act No. 73, §21, amended the language to read:

If the Employer of insurance Carrier fails to pay the assessment and penalty, they shall be barred from any recovery from the fund on all claims without exception until the assessment and penalty are paid in full. The director may file a complaint for collection against the Employer or insurance Carrier in a court of competent jurisdiction for the assessment, penalty, and interest at the legal rate, and the Employer/Carrier is responsible for attorney's fees and costs (emphasis added).

At the prior hearing and appellate proceedings, Appellant took the position that this amendment was intended to be retroactive, thus preventing Respondent Legion from being able to recover any of the monies paid in to the Fund prior to its liquidation that was not already recovered. This legislative change must be given prospective application only for the following reasons: (1) there is neither a specific provision in the 2003 Amendment nor a clear legislative intent indicating that the 2003 Amendment shall be given retroactive application; (2) the 2003 Amendment is not remedial or procedural in nature; and, (3) public policy does not support a retroactive application of the 2003 Amendment.

a. There is no specific provision in the 2003 amendment or other manifestation of legislative intent that the statute should apply retroactively, which undermines Appellant's contention that the amendment should have retroactive application.

In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary. *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000); *Hercules Incorporated v. The South Carolina Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980); *Hyder v. Johnes*, 2171 S.C. 85, 245 S.E.2d 123 (1978); *Jefferson Standard Life Ins. Co. v. King*, 165 S.C. 219, 163 S.E. 653 (1932). In discerning legislative intent, courts primarily look to the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Cl. App. 2004);

CW
15/22

Morgan, 352 S.C. at 366, 574 S.E.2d at 206; *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

S.C. § 42-7-310(d)(2), (1976, as amended), sets forth the following:

... In the event of failure to pay any assessment upon the date determined by the fund, the Employer or insurance Carrier may immediately be assessed a penalty in an amount not exceeding ten percent of the unpaid assessment. If the Employer or insurance Carrier fails to pay the assessment and penalty, they shall be barred from any recovery from the fund on all claims without exception until the assessment and penalty are paid in full.

(emphasis added). There is nothing in the plain language of the statute mandating that the 2003 amendment shall be given retroactive application; accordingly, the presumption stands that it must be given prospective application. See *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982).

Likewise, the legislative intent of the statute is not such that it would mandate a retroactive application. In ascertaining legislative intent, words must be given their plain and ordinary meanings. See *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000) citing *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988). Statutes are not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. *Id.* citing *Hyder, supra*. Because the legislative intent behind the amendments to S.C. Code Ann. § 42-7-310(d)(2) is not discernible from the plain language of the Act, and there is no indication that the Amendment is to be given retroactive application, it must have only prospective application. *Id.* Further, considering the standard of

CW
16922

review, Appellant has not submitted any compelling reasons why this Court should overturn the Commission's construction of the statute.

b. Additionally, this Court finds that the 2003 amendment is not remedial or procedural in nature, which further undermines Appellant's contention that the amendment should have retroactive application.

A principal exception to the presumption that statutory enactments are to be given prospective rather than retroactive application is that remedial or procedural statutory amendments are generally held to operate retrospectively. *See South Carolina Dept. of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000) citing *Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982); *Hercules Inc. v. The South Carolina Tax Comm'n*, 274 S.C. 137, 262 S.E.2d 43 (1980) (statutes affecting the remedy, not the right, are generally given retroactive application). "Statutes are remedial and retroactive in the absence of directions to the contrary, when they create new remedies for existing rights... enlarge the rights of persons under disability, and the like, unless [they]... violate some contract obligation." *Smith v. Eagle Const. Co., Inc.*, 282 S.C. 140, 318 S.E.2d 8 (1984) citing *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843, 846 (1941). Statutes are procedural and retroactive in the absence of directions to the contrary, when they affect the method or system governing the handling of a case. *See McGann v. Mungo*, 340 S.E.2d 154 (1986) (retrospective application of Rule 18(a) of the S.C. Rules of Civil Procedure permitted by the Court).

Here, the 2003 Amendments to S.C. Code Ann. § 42-7-310(d)(2) do not enlarge the Employer/Carrier's rights, in fact, it places a new restriction which limits their right to reimbursement from the Fund and thus is not remedial and should not be given retroactive application. *Smith v. Eagle Const. Co., Inc.*, 282 S.C. 140, 318 S.E.2d 8 (1984) citing *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843, 846 (1941). Likewise, the amendments to S.C. Code

W
17722

Ann. § 42-7-310(d)(2) do not alter or change the procedure or method for which the Employer/Carrier must request reimbursement from the Fund. Thus, the amendments are not procedural in nature and cannot be given retroactive application.

In *Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982), the South Carolina Supreme Court addressed the issue of whether an insurance Carrier/Employer was entitled to reimbursement from the Fund when it had filed a claim for reimbursement with the Fund prior to the enactment of statutory changes establishing conditions which must be met before the right to reimbursement attached. An employee of Merchants' insured was injured on March 13, 1975. On January 14, 1977, notice of a possible claim was filed with the Second Injury Fund and on May 24, 1977, Merchants filed a claim for reimbursement with the Fund. On May 4, 1976, the legislature amended 1962 Code § 72-601, which affected the requirements that must be met before reimbursement from the Second Injury Fund by the Employer/insurance Carrier attached. The *Merchants* Court reasoned that the 1976 amendments were not remedial or procedural, but rather, created a condition which must be met before the right to reimbursement attached. *Id.* at 608. Accordingly, the Court found the statute could not be given retroactive application. *Id.* at 608.

Similarly, the 2003 Amendment to S.C. Code Ann. § 42-7-310(d)(2), changed the conditions which must be met before the right to reimbursement from the Second Injury Fund attaches. The Amendment provides that an insurance Carrier/Employer can not be reimbursed from the Fund until all assessments and penalties are paid in full. Clearly, this change affects the Carrier's right to reimbursement and does not affect its remedy or the procedure for it to obtain the reimbursement thus; it cannot be given retroactive application.

The South Carolina Courts have already addressed the issue of whether an assessment or fee provision to a statute, which is amended, will be give prospective or retroactive application.

In *South Carolina Dept. of Rev. v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000), the South Carolina Supreme Court provided that the amendment to the license fee provision of S.C. Code Ann. § 12-21-2720, so as to require separate licenses for each station of a multi-player machine was prospective and not retroactive in its application. *Id.* 528 S.E.2d at 418. The amendments to S.C. Code Ann. § 12-21-2720 as discussed in *Rosemary* are similar to the 2003 amendments to S.C. Code Ann. § 42-7-310(d)(2), inasmuch as both amendments contain assessment provisions which adversely affect an entity's right. Essentially, the amendments to S.C. Code Ann. § 12-21-2720, required gaming machine lessors to pay an assessment or license fee for every machine owned before their right to operate within the State attached. Likewise, the amendments to S.C. Code Ann. § 42-7-310(d)(2) require Employers/Carriers to pay assessments and penalties before their right to reimbursement from the Fund attaches. The *Rosemary* Court held that the amendment to S.C. Code Ann. § 12-21-2720 was not remedial or procedural and thus did not fit into any recognized exception. *Id.* 528 S.E. at 418. The Court rationalized that "finding nothing in [the] enactment beyond a statement of its 'effective date,' [it] must follow the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary." *Id.* citing *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735(1983). Simply put, this amendment is clearly procedural in nature such that the Commission's ruling that it should not have retroactive application should be affirmed. Further, considering the standard of review, Appellant has not submitted any compelling reasons why this Court should overturn the Commission's construction of the statute.

- c. Public policy dictates that the Commission's decision that the 2003 amendments are not retroactive in application should be upheld.

6W
19722

Public policy considerations also support the Commission's ruling that the 2003 amendments should have only prospective application. Specifically, prospective application of the 2003 amendments to S.C. Code Ann. 42-7-310(d)(2) advances the purpose and premise of the Fund. As discussed previously, the purpose of the Fund is to provide incentive for employers to hire workers' with preexisting conditions or injuries by providing employers with relief should those workers be further injured in the course of their employment. If this Court were to overturn the Commission's conclusion that the statute should have only prospective application, the decision would undermine the meaning, intent, and purpose of the Fund's statutory scheme, which would be beyond this Court's discretion. To construe the amendment as having retroactive application would be to disregard the assessments that were paid by the Carrier in this case prior to its liquidation. Such construction is contrary to the public policy driving the Fund because the equitable assessments applied to insurance Carriers who pay into the Fund are akin to premiums paid by consumers to insurance Carriers for the protection and assurances that insurance coverage affords.

Another major concern in this case centers around the fact that the Fund denied reimbursement on this claim *before* the 2003 amendments took effect. For purposes of reimbursement from the Fund, the operative date giving rise to a claim is the date of injury in the underlying workers' compensation claim—here, January 27, 2000—almost 3 years prior to the amendments becoming law. Further, as set forth in the Commission's Order, no party disputes that Respondent Legion paid its assessment requirement for the year 2000. It would be patently unfair to disallow a claim that arose prior to the change in the statute. An Employer, such as Webster Plumbing & Gas, pays premium to a Carrier, part of which is forwarded to the Fund to be held in trust should a second injury situation occur. Reimbursement benefits the Employer by a reduction in future premiums over what would be required without the reimbursement, or in

W
2012

this case, a potential corrective premium reimbursement. An unfair and inequitable result would rest with the Employer and the Carrier if this Court were to reverse the Commission's decision, thereby giving retroactive application to the 2003 amendment. The Employer/Carrier is entitled to be reimbursed from the Fund as set forth under S.C. Code Ann. § 42-9-400 for claims that were filed during years when the assessments were paid into the Fund. Simply put, the Fund is premised on balancing the equities to both Employers who hire disabled workers and face higher insurance premiums and workers who might be discriminated against by providing assurances of gainful employment to the employee and assurances to the Employer that it will be reimbursed for claims that are properly filed.

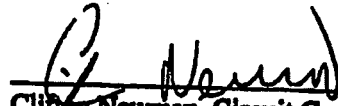
Further, Appellant cannot argue that its' substantial rights are prejudiced as a result of the Commission's determination that the 2003 legislative amendments to S.C. Code Ann. 42-7-310 must be applied prospectively, as Appellant does not have clean hands to seek such equitable relief. Appellant is unfairly holding assessments already paid into the system by Respondent Legion. These assessments are not Appellant's property to be used for furtherance of its own goals. Instead, these assessments belong to the Carriers who have paid in to the system and anticipate reimbursement by the Fund according to the provisions established under S.C. Code Ann. § 42-9-400. So long as the requirements for reimbursement have been met under S.C. Code Ann. § 42-9-400, the Fund must reimburse the Carrier as required under the laws of this State. As Appellant is wrongfully withholding reimbursements that rightfully belong to this Carrier and other similarly situated Carriers, it cannot in good faith argue that it has been prejudiced by the Commission's finding that S.C. Code Ann. § 42-7-310(d)(2) applies prospectively. Further, considering the standard of review, Appellant has not submitted any compelling reasons why this Court should overturn the Commission's construction of the statute.

W
2/7/22

ORDER OF THE COURT

Based on the evidence presented, oral arguments conducted on January 19, 2012, this Court's review of the applicable statutes and case law, and the discussion herein, it is hereby ordered that the decision of the Commission is affirmed, and Appellant's appeal is dismissed with prejudice.

IT IS SO ORDERED.



Clifford Newman, Circuit Court Judge
Richland County

September 24, 2012

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0000776**

**SUBROGATION PARTNERS, ON BEHALF OF LEGION INSURANCE COMPANY, IN
LIQUIDATION,**

RESPONDENT/CARRIER,

AND

**SOUTH CAROLINA PROPERTY & CASUALTY INSURANCE GUARANTY
ASSOCIATION,**

RESPONDENT/CARRIER,

- V -

SOUTH CAROLINA SECOND INJURY FUND,

APPELLANT/DEFENDANT.

*In re:
Herman Webster, Claimant v. Webster Plumbing & Gas, Employer, and Legion Insurance Co. In
liquidation through S.C. Property & Casualty Insurance Guaranty Association.*

**Appellate Panel Review held in Columbia,
South Carolina on October 28 2008 per notices
timely and properly served on all parties of
interest.**

**Appellate Panel Decision and Order filed
Dec 18, 2008.**

APPEARANCES:

**Respondent/Subrogation Partners, on behalf of
Legion Insurance Co. in liquidation represented
by R. Daniel Addison, Esquire, of Columbia,
South Carolina.**

**Respondent/South Carolina Property &
Casualty Insurance Guaranty Association
represented by Mark D. Cauthen, Esquire, of
Columbia, South Carolina.**

**Appellant/Defendant/South Carolina Second
Injury Fund represented by Latonya D.
Edwards, Esquire, of Columbia, South
Carolina.**

STATEMENT OF CASE

The parties were heard by Commissioner G. Bryan Lyndon on February 4, 2008 in Columbia, South Carolina. On May 20, 2008, he issued the following Order:

IT IS THEREFORE ORDERED THAT, the South Carolina Second Injury Fund is obligated to reimburse Legion and SCPCIGA in accordance with the Act, and pursuant to the findings of fact and conclusions of law herein.

Within the statutory period, counsel for the Second Injury Fund filed an Application for Review in the case setting forth her reasons, copies of which were furnished to all interested parties, prior to being heard on the record before the Appellate Panel on October 1, 2008. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, the Second Injury Fund respectfully submits the following:

1. Did the hearing commissioner err in finding as a fact that Claimant's pre-existing diabetes, herniated/ruptured and bulging discs, and arthritis of the back and shoulder were permanent and serious enough to be a hindrance or obstacle to employment when such finding is against the greater weight of the reliable, probative, and substantial evidence in the record?

2. Did the hearing commissioner err in finding as a fact that Claimant's pre-existing conditions were aggravated by the injury of January 27, 2000 causing Claimant to have a substantially higher percentage of disability to his back and shoulder than would have resulted from the January 27, 2000 work injury alone when such finding is against the greater weight of the reliable, probative, and substantial evidence in the record?

3. Did the hearing commissioner err in finding as a fact the Second Injury Fund is required to provide reimbursement to the South Carolina Property & Casualty Insurance Guaranty Association (SCPCIGA) for all benefits paid when SCPCIGA is not a carrier as defined by § 42-1-60 and is therefore not entitled to reimbursement?

4. Did the hearing commissioner err in failing to find that § 42-7-310(d)(2) barred Employer/Carrier from reimbursement recovery because Employer/Carrier failed to pay its assessment?

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Commission, by unanimous vote, has determined all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case, and; therefore, the Order is sustained in its entirety.

FINDINGS OF FACT

1. All parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. Claimant was an employee of Webster Plumbing & Gas on January 27, 2000.
3. Claimant suffered a compensable injury under the Act on January 27, 2000.
4. Webster Plumbing & Gas was the employer and Legion Insurance Company was the insurer on the date of the injury.
5. The venue for the hearing is proper in Columbia, South Carolina.
6. Notice of the hearing was timely and properly served on all parties of interest.

7. Notice of the accident was given to the employer in a timely fashion.

8. Notice for a potential claim for reimbursement was given to the South Carolina Second Injury Fund within 78 weeks of the accident by the carrier.

9. Claimant had knowledge of pre-existing injuries or conditions of diabetes, ruptured/herniated disc of the lumbar spine and osteoarthritis of the left shoulder.

10. The Employer, at the time Claimant was hired, had knowledge of Claimant's pre-existing injuries or medical conditions of diabetes, ruptured/herniated disc of the lumbar spine, degenerative disc disease of the lumbar spine, and arthritis of the left shoulder.

11. The greater weight of the evidence shows these pre-existing medical conditions of the Claimant, in the form of diabetes, herniated/ruptured and bulging discs of the lumbar spine, and arthritis of the back and left shoulder:

a) Were permanent and serious enough in nature to be a hindrance or obstacle to employment;

b) The injury of January 27, 2000 did combine with or aggravate the pre-existing conditions to the back and left shoulder;

c) The combination of these pre-existing conditions along with this injury caused Claimant to miss more time from work than he would have from the January 27, 2000 injury alone;

d) The combination of these pre-existing conditions along with this injury caused Claimant to have a substantially higher percentage of disability to the back and shoulder than he would have from the January 27, 2000 injury alone; and

e) The combination of these pre-existing conditions along with this injury caused Claimant's medical costs for treatment to his back and shoulder to be substantially higher than they would have been from the January 27, 2000 injury alone.

12. The carrier, Legion Insurance Company, was current on its assessment payments to the Second Injury Fund as of the date of injury in January 2000.

13. In July 2003, Legion Insurance Company went into liquidation, and the South Carolina Property & Casualty Insurance Guaranty Association took over all obligations in this case for Legion Insurance from that time forward, and for any outstanding obligations not yet paid by Legion up to that point.

14. The South Carolina second injury fund is responsible for reimbursement of this claim in accordance with the provisions of the Act to Legion Insurance Company or their representative in liquidation, for all medical and indemnity payments made by Legion, from the date of injury on January 27, 2000 to July 2003 when Legion was liquidated.

15. The South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to the South Carolina Property & Casualty Insurance Guaranty Association for all benefits paid in relation to this claim from July 2003 to present, and continuing, as well as for medical treatment or compensation benefits incurred or owed before July 2003 for which the

SCPCIGA paid the obligation of Legion Insurance Company, to include all medical and indemnity payments made, permanent disability compensation, and ongoing medical treatment to be provided in the future.

Based upon the findings of fact are the following:

CONCLUSIONS OF LAW

1. Under S.C. Code Ann. § 42-3-20 and § 42-3-180 (1985), the Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under S.C. Code Ann. § 42-1-130 (1985), Claimant is a covered employee.
3. Under S.C. Code Ann. § 42-140 (1985), Webster Plumbing & Gas is a covered employer.
4. Under § 42-1-150 (1985), there was an employer/employee relationship between the parties.
5. Under S.C. Code Ann. § 42-17-20 (1985), venue in Columbia, South Carolina was proper and agreed upon by the parties.
6. Under S.C. Code Ann. § 1-23-320(b) (1985) and 25A S.C. Code Ann. Regs. 67-807 (Supp. 2007), notice of the hearing was timely and properly served upon all of the parties in interest.
7. Under S.C. Code Ann. § 42-9-400(f), the carrier provided the SIF with written notice of the claim within 78 weeks of the date of injury.
8. Claimant's pre-existing conditions to his left shoulder, lumbar spine and diabetes satisfy the requirements for reimbursement from the Fund pursuant to the subsections of S.C. Code Ann. § 42-9-400 (1985).

9. The provisions of S.C. Code Ann. § 42-9-400(c) (1985) as they existed at the date of the accident are the controlling provisions applicable to this case.

10. Under S.C. Code Ann. § 42-9-400(c), Claimant's pre-existing conditions of the lumbar spine, left shoulder, and diabetes were known to the employee prior to the date of injury.

11. Under S.C. Code Ann. § 42-9-400(c)(1985), the Employer was aware of Claimant's pre-existing conditions of the lumbar spine, left shoulder and diabetes, prior to or at the time Claimant was hired.

12. *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982), is relevant and controlling as to the application of the 2003 statutory amendments to S.C. Code Ann. § 42-7-310(d)(2) (1985). These amendments will be applied prospectively instead of retroactively. Therefore, the controlling statutory language in this case is S.C. Code Ann. § 42-7-310(d)(2) (1985) as it existed in January 2000, prior to the 2003 amendments.

13. Under S.C. Code Ann. § 42-7-310 (1985), Legion Insurance Company was in compliance with its assessment payments as of January 27, 2000 and is entitled to reimbursement under the Act from the Second Injury Fund for claims that meet the other requirements of the Act.

14. Under S.C. Code Ann. § 42-7-310 and § 42-9-400 (1985), the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "Legion" from the date of injury until July 2003 for obligations met by "Legion" during that time period in relation to this claim for medical treatment and indemnity payments made.

666

15. Under S.C. Code Ann. §§ 38-31-10, *et seq.*, particularly § 38-31-60(b), Plaintiff/SCPCIGA steps into the shoes of "Legion" with all rights, duties and obligations thereto, as if it were the insurer/carrier for this claim, from the date of liquidation in July 2003 onward.

16. Under S.C. Code Ann. §§ 38-31-10, *et seq.*, particularly § 38-31-60(b), and § 42-7-310 and § 42-9-400 (1985), the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff/SCPCIGA from July 2003 to the present date and ongoing for all benefits paid on behalf of "Legion" during that time period in relation to Claimant's claim and for any delinquent obligations of Legion that existed prior to liquidation that were paid by SCPCIGA. This includes medical treatment already rendered, indemnity payments made, permanent disability awarded and future medical treatment to the Claimant.

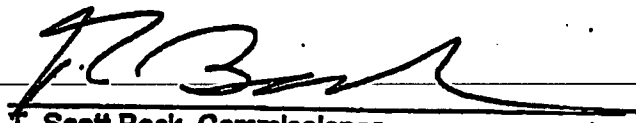
ORDER

IT IS, THEREFORE, ORDERED the Order of the Single Commissioner filed in the above-captioned matter on May 20, 2008 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

IT IS FURTHER ORDERED the S. C. Second Injury Fund is obligated to reimburse Legion and SCPCIGA in accordance with the Act and pursuant to the findings of fact and conclusions of law herein.

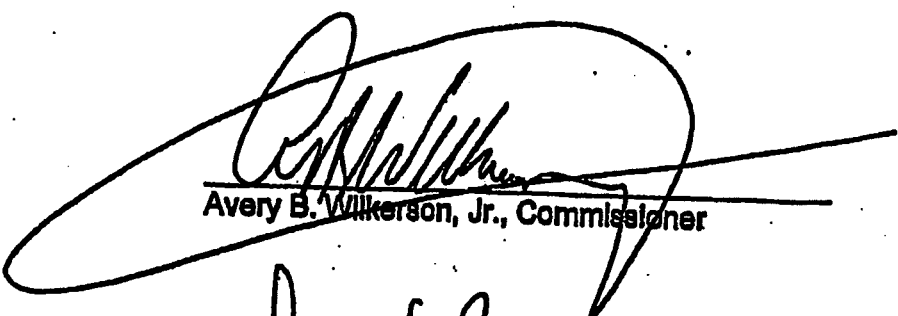
AND IT IS SO ORDERED.

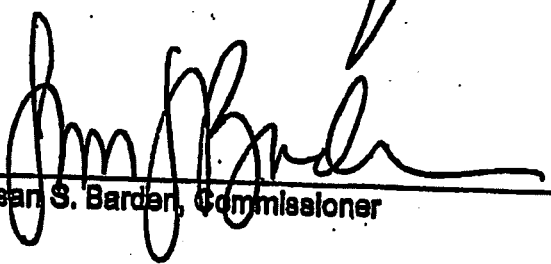
S. C. WORKERS' COMPENSATION COMMISSION


T. Scott Beck, Commissioner

FULL AFFIRMATION

CONCUR:


Avery B. Wilkerson, Jr., Commissioner


Susan S. Barden, Commissioner

(a:LC000778.app.tsb)

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof,
postage paid, in the United States Mail addressed to
the attorney or attorneys for said parties.
This 18th day of Dec, 2008
By Burroughs
Administrative Assistant to the Commissioner

LDE
MDC Box #6
RDA



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11828
COLUMBIA, SOUTH CAROLINA 29211
1016 SUMNER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1839
FAX: (803) 734-1838
www.sccourts.org

July 02, 2013

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: Subrogation Partners v. SC Second Injury Fund.
Lower Court Case No. 2009CP4000484
Appellate Case No. 2010-181727

Dear Clerk of Court:

The above referenced matter is hereby remitted to the Workers' Compensation Commission. A copy of the judgment of this Court is enclosed.

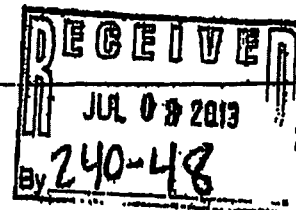
Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Robert Merrel Cook, II
Richard Daniel Addison
Mark Davis Cauthen
Mitchell Willoughby
Elizabeth Ann Loadholt Carroll
Hon. Virginia L. Crocker



The South Carolina Court of Appeals

**Subrogation Partners, on behalf of Legion Insurance Co.,
in Liquidation, and South Carolina Property & Casualty
Insurance Guaranty Association, Respondents,**

v.

South Carolina Second Injury Fund, Appellant,

**In Re:
Herrman Webster, Claimant,**

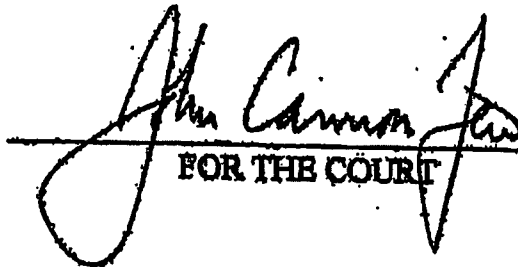
v.

**Webster Plumbing & Gas, Employer, and Subrogation
Partners on Behalf of Legion Insurance in Liquidation
and South Carolina Property & Casualty Insurance
Guaranty Association, Carriers.**

Appellate Case No. 2010-181727

ORDER

The parties have informed the Court that they have reached a settlement agreement. Accordingly, the appeal is dismissed and remanded to the Workers' Compensation Commission for approval. If the Commission does not approve the settlement, the Court will upon request reinstate the appeal. If the Commission approves the settlement, the parties shall promptly notify this Court. Until such notice is given or a request is made to reinstate the appeal, Appellant shall update this Court as to the status of the settlement 30 days from the date of this order and every 30 days thereafter.


FOR THE COURT C.J.

Columbia, South Carolina

FILED

3-27-13 AS

cc:

Robert Merrel Cook, II
Richard Daniel Addison
Mark Davis Canthen
Mitchell Willoughby
Elizabeth Ann Loadholt Carroll

STATE OF SOUTH CAROLINA

Subrogation Partners, on behalf of
Legion Insurance Co. in liquidation,

Carrier,

and

SC Property and Casualty Insurance
Guaranty Association,

Carrier,

Plaintiffs,

vs.

South Carolina Second Injury Fund

Defendant.

In Re: Walder Woodard,

Claimant,

vs.

Woodard & Associates, Inc.,

Employer,

and

Legion Insurance Co. in liquidation,
through SC Property and Casualty
Insurance Guaranty Association,

Carriers.

BEFORE THE SOUTH CAROLINA

WORKERS' COMPENSATION

COMMISSION

WCC FILE NO.:0013231

DECISION AND ORDER

HEARING:

Held on February 4, 2008 in
Columbia, South Carolina.

APPEARANCES:

Plaintiff, Subrogation Partners on behalf of
Legion Insurance Company, represented by
Dan Addison of Hedrick, Gardner,
Kincheloe & Garofalo LLP, P.O. Box
11267, Columbia, SC 29211

Plaintiff, SCPCIGA, represented by Mark D.
Cauthen of McKay, Cauthen, Settana &
Stubley, P.A., Post Office Box 7217,
Columbia, South Carolina, 29202-7217.

Defendant, South Carolina Second Injury
Fund, represented by Latonya Edwards,
South Carolina Second Injury Fund,
Winthrop Building, Suite 119, 220
Executive Center Drive, Columbia, SC
29210.

PURPOSE OF THE HEARING:

To determine issues raised by the Forms 54
and 55:

OPINION AND AWARD:

The Honorable G. Bryan Lyndon,
Commissioner.

FILED:

March 11, 2008

STIPULATIONS

At the call of the case the parties agreed to the following stipulations:

1. The purpose of the hearing was to determine all issues in dispute as set forth in Forms 54 and 55, and pursuant to Regulation 67-601.
2. That notice of the hearing was timely and properly served upon all parties of interest.
3. All parties agreed upon venue as set in Richland County, South Carolina.
4. That there was an employer/employee relationship between the Claimant and Employer and, therefore, the South Carolina Workers' Compensation Commission has jurisdiction to determine the issues in dispute.
5. The Workers' Compensation Commission's file, with the exception of unstipulated medicals and self-serving declarations, was made part of the record.
6. That notice of injury by accident was properly and timely given to the Employer.
7. That the Second Injury Fund was timely placed on notice of the potential claim by the Carrier/Plaintiffs in this case within seventy-eight weeks of March 31, 2000, the date of the Claimant's injury.
8. That the Claimant did not have knowledge, at the time of his March 31, 2000 injury, that he previously was suffering from the medical conditions of arthritis of his left shoulder as well as degenerative disc disease of his lumbar spine, as this condition was an unknown condition.

9. That the employer did not have knowledge of the employee's prior medical conditions of arthritis of the left shoulder as well as degenerative disc disease of the lumbar spine, as this condition was an unknown condition.

10. That the Claimant did have knowledge, at the time of his March 31, 2000 injury, that he had a previously herniated disc.

11. That the Employer did have knowledge of the employee's prior medical condition of a herniated disc.

12. The parties also specifically stipulated that the "knowledge requirement" of §42-9-400 was met.

13. That on the date of injury the carrier, Legion Insurance Company, was current on its SIF assessment payments.

APA SUBMISSIONS

Plaintiffs' Exhibits

Subrogation Partners on behalf of Legion Insurance Company

APA 1 Orthocarlina	8/13/2002-1/20/2003
APA 2 Baptist Medical Center	7/18/2001
APA 3 Providence Hospital	12/5/2000
APA 4 Midlands Orthopaedics	8/3/2000-4/8/2002
APA 5 Health South/FCE	2/1/2002
APA 6 Affidavit of Dr. William Felmy	Undated
APA 7 Affidavit of Dr. Michael Green	5/3/2007
APA 8 Affidavit of Walder Woodard	4/3/2007
APA 9 Memo. of Law on Statutory Application	Undated/Unpaginated

South Carolina Property and Casualty Guaranty Association

APA 10 St. Andrew Chiropractic Clinic	10/6/1999-4/20/2000
APA 11 Baptist Medical Center	7/18/2001
APA 12 Lexington Open MRI	4/27/2000
APA 13 Carolina Neuro Specialists	5/27/200-9/14/2000
APA 14 Lexington Medical Center	6/28/2000-7/14/2000
APA 15 Midlands Orthopaedics, P.A.	8/23/2000-4/8/2002
APA 16 The Moore Orthopaedic Clinic	8/23/2000-1/11/2001
APA 17 Palmetto Richland Memorial Hospital	9/8/2000
APA 18 Providence Hospital Diagnostic Imaging	12/5/2000-12/7/2000
APA 19 Providence Hospital	12/5/2000
APA 20 Billing Documentation of Payments Hist.	Undated/Unpaginated

- SCPCIGA is also relying on all APA's of Legion in liquidation.

Defendant's Exhibits

South Carolina Second Injury Fund

NONE

STATEMENT OF THE CASE

The instant case comes before the Commission through the consolidation of two separate Form 54s, properly and timely filed with the Commission, by successive Carriers: Subrogation Partners, on behalf of Legion Insurance Company in liquidation, "Legion"; and South Carolina Property and Casualty Insurance Guaranty Association, "SCPCIGA", respectively against the South Carolina Second Injury Fund, "SIF." The SIF properly and timely filed a Form 55 in response.

The underlying workers' compensation claim is from an admitted back and shoulder injury, with the initial date of injury being March 31, 2000. This claim has not reached final resolution and is still ongoing with the Commission, and the Claimant; Mr. Woodard, is also still receiving medical treatment and TTD benefits. It should be noted that Mr. Woodard was the president of Woodard & Associates Inc., and therefore is the Claimant and the Employer for purposes of "knowledge," under the Second Injury Fund statutes in the Workers' Compensation Act.

At the time of the Claimant's initial injury in March of 2000 the Employer's workers' compensation carrier was Legion Insurance Company. It is uncontested by the Defendants that as of the date of injury, March 31, 2000, that Legion Insurance company was up to date on its assessment payments. Furthermore, it is also uncontested by either party that at some time after March 2000 Legion Insurance Company was no longer current and ultimately became delinquent on its SIF assessments; However, the record is unclear as to the specific dates of those events.

In March of 2002 Legion Insurance Company was placed in rehabilitation status by the Commonwealth Court of Pennsylvania. In July 2003 Legion was declared insolvent and an Order of Liquidation was issued by the Commonwealth Court of Pennsylvania. At that time, SCPCIGA, took over responsibility for Legion Insurance Company's workers' compensation claims and other obligations. After liquidation, SCPCIGA also took responsibility for, and made payment of, some of the obligations incurred by Legion Insurance Company while in rehabilitation prior to July 2003. This included medical treatment rendered to the Claimant for dates of service prior to July

2003 that were not paid until SCPCIGA took over responsibility for Legion's formerly unpaid, as well as current and future, liabilities for Mr. Woodard's claim.

Legion's interests in this particular matter are represented by Subrogation Partners on behalf of Legion Insurance Company in liquidation, hereinafter referred to as "Legion." Of consequence, for the purposes of this claim against SIF, is that from the date of injury to July 2003, Legion was responsible for all workers' compensation claims, and from July 2003 to present and continuing, SCPCIGA is responsible for all of the workers' compensation benefits owed to the Claimant, to include any unpaid compensation or medical expenses for dates of service prior to July 2003.

The joint Plaintiffs, Legion and SCPCIGA, bring action against the SIF via their Form 54s arguing that they are entitled to reimbursement from the SIF pursuant to S.C. Code Ann. §§ 42-7-310, and 42-9-400, for pre-existing injuries or conditions of arthritis/degenerative disc disease and a previously herniated disc of the lumbar spine, particularly degenerative disc disease, and arthritis to the left shoulder, specifically to the left AC joint. Plaintiffs argue that these injuries meet the threshold and requirements for reimbursement set forth in § 42-9-400, in that the pre-existing conditions were permanent, serious enough in nature to be a hindrance or obstacle to employment and that such preconditions substantially increased liability for medical costs and indemnity. Also, the Plaintiffs assert the "knowledge," requirement of § 42-9-400 was met in this case by the fact that the Employee did not know of these pre-existing conditions of arthritis prior to the date of injury, and that the Employer (who was also the Employee) did not know of these pre-existing conditions either. It should be noted that this injury occurred prior to June 25, 2003, that is, prior to the amendment to the statute that

disallowed the "knowledge" requirement of the Employer to be satisfied when the injury was unknown to the Employee and unknown to the Employer. The Plaintiffs also assert that the Employee did know of his previously herniated disc and subsequent surgery to his lumbar spine and that the Employer was also aware of this.

The Plaintiffs jointly contend that the Carrier was current on its assessments as of the date of injury, which is undisputed by the Defendant, and that by virtue of payment of the assessments, the Plaintiffs assert they are entitled to SIF reimbursement pursuant to the provision of the Act, for injuries that took place on March 31, 2000, and also met the requirements of § 42-9-400. In addition Plaintiffs assert that the 2003 statutory changes to § 42-7-310, which bar from SIF recovery employers or carriers that fail to pay assessments or subsequent fines, as a matter of proper statutory interpretation, should be applied prospectively, and not retroactively to bar coverage and reimbursement.

Lastly, Plaintiff SCPCIGA argues that they are entitled to reimbursement from the SIF in the instant case in accordance to the aforementioned arguments and in conjunction with the fact SCPCIGA, while not an insurance company per se, is entitled to, "all rights, duties and obligations of the insolvent," insurer pursuant to S.C. Code Ann. § 38-31-60(b).

The Defendant, SIF, contends they should not be liable for reimbursement to Legion or SCPCIGA on several grounds. The Defendant first bases this contention on the argument that no previously existing injury existed that would have satisfied § 42-9-400 requirements of permanency, hindrance or obstacle to employment and severity would substantially increase the liability for medical costs and indemnity. Furthermore, while stipulating that the Plaintiffs were current on their assessments as of the date of

injury in 2000, the Defendant contends that the Plaintiffs were at some later date delinquent on assessment payments and resultant fines. The SIF argues that changes to § 42-7-310(d)(2) of the Act, which effectively preclude SIF reimbursement to insurers who fail to stay current on such payments, should be applied retroactively to bar reimbursement to the Plaintiffs.

The Defendant also asserts, particularly against the Plaintiff SCPCIGA, that because SCPCIGA is not an insurance company or self insured, it is not entitled to reimbursement under the Act, specifically §§ 42-7-310, and 42-9-400. Furthermore, the Defendant argues that S.C. Code Ann. § 38-31-10 et seq. is inapplicable.

EVIDENCE OF THE CASE

Both Plaintiffs have submitted APA's, which include medical records, affidavits, a payment history, medical bills and a memorandum of law regarding the application of the statutory amendments to S.C. Code Ann. § 42-7-310(d)(2). The Defendant has submitted no APA's, and no witnesses testified in this hearing on behalf of either party.

The parties have stipulated to the fact that the Claimant suffered an admitted work related injury on March 31, 2000. There is an abundance of evidence to provide the Plaintiff did suffer from a pre-existing condition to the lumbar spine and left shoulder as well as the level of severity of these injuries. The record by the Defendant refuting such claims is devoid of such information. The Plaintiffs have provided medical records indicating that the Claimant did have a laminectomy in 1966 (APA 12, p. 67). A medical record from April, 27 2000, less than a month after the date of injury shows "near complete spinal stenosis." (APA 12, p. 68), "post surgical changes of laminectomy" of the lumbar spine, "superimposed on congenital central canal stenosis." *Id.* Also, the

Claimant did seek chiropractic help for low back problems numerous times prior to March of 2000 (APA 10, pp. 58-60). In addition, medical records indicate that the Claimant had a "lumbar discectomy in 1967 for radiculopathy. Over the years he has had episodic back pain which," he, "typically resolves with chiropractic care." (APA 13, p. 71). The MRI reviewed by Dr. Randall Drye on May 26, 2000 indicated it was "most consistent with a recurrent disk herniation." (APA 13, p. 72). On August 23, 2000, the narrative medical note from Orthopaedic physician Dr. William Felmly states in part, "I think this patient's case is somewhat difficult because of the evidence of preexisting surgery." (APA 16, p. 112). On September 20, 2000, Dr. Felmly notes, "markedly degenerative changes at L5-1." (APA 16, p. 114). The discogram performed on the Claimant in September of 2000 also shows degenerative changes to the lumbar spine. (APA 17, pp. 123-4). Furthermore, the Plaintiffs have provided an affidavit from treating physician, Dr. William Felmly, wherein he indicates in the affirmative that the plaintiff had degenerative disc disease prior to the date of injury; that his condition was arthritic; that this injury combined with and aggravated those conditions; caused the Claimant more lost time than the injury of March 31, 2000 would by itself; and that the degenerative changes to the Claimants back caused substantial increase in the medical cost and higher percentage of permanent disability than the March 31, 2000 accident alone would have caused (APA 6, p. 55).

The Plaintiffs have also provided medical records for the arthritic condition to the Claimant's left shoulder. On August 23, 2000, Dr. Michael Ugino noted that the radiographs of the Claimant's shoulder indicated "significant AC joint arthritis." (APA 15, p. 89). Also, in his assessment of the Claimant, Dr. Ugino states in his 'impression,'

"evidence of relative severe impingement due to degenerative type arthropathy at the AC joint level." (APA 15, p. 93). Again on October of 2000, the Claimant's diagnosis included, "severe AC joint degenerative changes." (APA 15, p. 98). There are several other indications in the record through both Plaintiffs' submitted APA's denoting arthritis to the Claimant's left shoulder. The Plaintiffs also have submitted an affidavit from one of the treating physicians for the Claimant's left shoulder, Dr. Michael S. Green, wherein he indicates in the affirmative that the arthritic conditions to the left shoulder existed prior to the date of injury; that the arthritis combined with or aggravated the work related injury causing more lost time from work than the injury alone would have caused; and a substantially higher percentage of disability than the injury alone would have caused. (APA 7, p. 56). There is also an affidavit by the Claimant wherein he responds in the negative, or that he was not aware, of the arthritic condition of his shoulder prior to the date of injury. (APA 8, p. 57). The Claimant and the Employer being the same person, this amounts to lack of knowledge by the Employer as well.

The SIF offers no documentation in response to these records, but relies on the fact that Claimant did work for several years after his disc operations, and was working up until the time of accident despite these pre-existing medical conditions. The Defendant points to this as evidence that these pre-existing conditions were not a hindrance or obstacle to employment. In rebuttal, as previously noted, the Plaintiffs have offered substantial documentation of the medical conditions, their severity, and the fact that had these conditions been known to a potential employer, they would be an obstacle to employment vis a vis an otherwise healthy employee candidate. Furthermore, if the status of the Claimant as a working employee at the time of a subsequent injury were

alone enough to rebut the presumption of qualifying the seriousness pre-existing injuries under § 42-9-400 for hindrance/obstacle to employment, the SIF would have this argument to 'rebut,' the qualification of any pre-existing injury against anyone who worked after being injured.

In regards to whether or not the 2003 amendments to S.C. Code Ann. § 42-7-310 applied prospectively, as argued by the Plaintiffs, or retroactively, as argued by the Defendant, the Plaintiffs have provided a copy of the original Senate Bill, as well as an authoritative legal memorandum in support of their position. (APA 9, Non-paginated). The 2003 amendment to § 42-7-310(d)(2) effectively took away the provision giving employers 30 days to pay all assessments to the Second Injury Fund, and added the language to sub-section (d)(2) stating "If the employer fails to pay the assessment and penalty, they shall be barred from any recovery from the fund on all claims without exception until the assessment and penalty are paid in full."

Plaintiffs argue that clear language of § 42-7-310, as amended, makes no clear indication and evidences no manifestation of intent by the legislature for it to be applied retroactively. In addition, the Plaintiffs assert that S.C. case law stands for the presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary. (See: *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000); *Hercules Incorporated v. The South Carolina Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980); *Hyder v. Johnes*, 2171 S.C. 85, 245 S.E.2d 123 (1978); *Jefferson Standard Life Ins. Co. v. King*, 165 S.C. 219, 163 S.E. 653 (1932)).

The legislature's intent should be ascertained primarily from the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); *Morgan*, 352 S.C. at 366, 574 S.E.2d at 206; *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

S.C. § 42-7-310(d)(2), (1976, as amended), sets forth the following:

"... In the event of failure to pay any assessment upon the date determined by the fund, the employer or insurance carrier may immediately be assessed a penalty in an amount not exceeding ten percent of the unpaid assessment. If the employer or insurance carrier fails to pay the assessment and penalty, they shall be barred from any recovery from the fund on all claims without exception until the assessment and penalty are paid in full."

There is no language mandating that this amendment shall be given retroactive application; accordingly, the presumption stands that it must be given prospective application. See *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982).

Likewise, the legislative intent of the statute is not such that would mandate a retroactive application. In ascertaining legislative intent, words must be given their plain and ordinary meanings. See *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000) citing *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988). Statutes are not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. *Id.* citing *Hyder, supra*.

Because the legislative intent behind the amendments to S.C. Code Ann. § 42-7-310(d)(2) is not discernible from the plain language of the Act, and there is no indication the Amendment is to be given retroactive application it *must* be applied prospectively. *Id.*

A principal exception to the presumption that statutory enactments are to be given prospective rather than retroactive application is that remedial or procedural statutory amendments are generally held to operate retrospectively. *See South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000) *citing* *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982); *Hercules Incorporated v. The South Carolina Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980) (statutes affecting the remedy, not the right, are generally retrospective). Statutes are remedial and retroactive in the absence of directions to the contrary, when they create new remedies for existing rights...enlarge the rights of persons under disability, and the like, unless [they]... violate some contract obligation. *Smith v. Eagle Construction Co., Inc.*, 282 S.C. 140, 318 S.E.2d 8 (1984) *citing* *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843, 846 (1941). Statutes are procedural and retroactive in the absence of directions to the contrary, when they affect the method or system governing the handling of a case. *See McGann v. Mungo*, 340 S.E.2d 154 (1986) (retrospective application of Rule 18(a) of the S.C. Rules of Civil Procedure permitted by the Court).

The 2003 Amendments to S.C. Code Ann. § 42-7-310(d)(2), does not enlarge the employer/carrier's rights, in fact, it places a new restriction which limits the their *right* to reimbursement from the Fund and thus is not remedial and should not be given

retroactive application. *Smith v. Eagle Construction Co., Inc.*, 282 S.C. 140, 318 S.E.2d 8 (1984) citing *Byrd v. Johnson*, 220 N.C. 184, 16 S.E. 2d 843, 846 (1941). Likewise, the amendments to S.C. Code Ann. § 42-7-310(d)(2) do not alter or change the procedure or method for which the employer/carrier must request reimbursement from the fund. Accordingly, the amendments are not procedural in nature and cannot be given retroactive application.

Particularly, the most relevant case for this point of contention between the Plaintiffs and Defendants in regards to prospective versus retroactive application of the statutory changes in question, appears to be *Merchants Mutual Ins. Co. v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982). In *Merchants* South Carolina Supreme Court addressed the issue of whether an insurance carrier/employer was entitled to reimbursement from the Second Injury Fund when it had filed a claim for reimbursement with the Fund prior to the enactment of statutory changes establishing conditions which must be met before the right to reimbursement attached. An employee of Merchants' insured was injured on March 13, 1975. On January 14, 1977, notice of a possible claim was filed with the Second Injury Fund and on May 24, 1977, Merchants filed a claim for reimbursement with the Fund. On May 4, 1976, the legislature amended 1962 Code § 72-601, which affected the requirements that must be met before reimbursement from the Second Injury Fund by the employer/insurance carrier attached. The *Merchants* Court reasoned that the 1976 amendments were not remedial or procedural, but rather, created a condition which must be met before the right to reimbursement attached. *Id.* at 608. Accordingly, the Court found the statute could not be given retroactive application. *Id.* at 608.

Similarly, the 2003 Amendment to S.C. Code Ann. § 42-7-310(d)(2), changed the conditions which must be met before the right to reimbursement from the Second Injury Fund attaches. The Amendment provides that an insurance carrier/employer can not be reimbursed from the Fund until all assessments and penalties are paid in full. Clearly, this change affects the carrier's *right* to reimbursement and does not affect its remedy or the procedure for it to obtain the reimbursement; thus, it should not be given retroactive application.

South Carolina Courts have already addressed the issue of whether an assessment or fee provision to a statute, which is amended, will be give prospective or retroactive application. In *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000), the South Carolina Supreme Court provided that the amendment to the license fee provision of S.C. Code Ann. § 12-21-2720, so as to require separate licenses for each station of a multi-player machine was prospective and not retroactive in its application. *Id.* 528 S.E.2d at 418. The amendments to S.C. Code Ann. § 12-21-2720 as discussed in *Rosemary* are similar to the 2003 amendments to S.C. Code Ann. § 42-7-310(d)(2), inasmuch as both amendments contain *assessment* provisions which adversely affect an entity's *right*. Essentially, the amendments to S.C. Code Ann. § 12-21-2720, required gaming machine lessors to pay an assessment or license fee for every machine owned before their right to operate within the State attached. Likewise, the amendments to S.C. Code Ann. § 42-7-310(d)(2), require employers/insurance carriers to pay assessments and penalties before their right to reimbursement from the Second Injury Fund attaches. The *Rosemary* Court held that the amendment to S.C. Code Ann. § 12-21-2720 was not remedial or procedural and thus did

not fit into any recognized exception. *Id.* 528 S.E. at 418. The Court rationalized that "finding nothing in [the] enactment beyond a statement of its 'effective date,' [it] must follow the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary. *Id.* citing *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735(1983).

Our Courts have consistently held that statutes affecting an entity's rights are to be given prospective application *only*. Thus, the 2003 Amendments to S.C. Code Ann. 42-7-310(d)(2) shall be given prospective application.

Also, Plaintiffs put forward the argument from a public policy prospective, that application of the 2003 Amendments to S.C. Code Ann. 42-7-310(d)(2) advances the purpose and premise of the Second Injury Fund. The purpose of the Second Injury Fund, as established in 1972, is two fold. First, the Fund operates to remove an employer's fear of increased workers' compensation premiums as a result of hiring disabled workers. Secondly, the Fund enhances employment opportunities to those very disabled workers. *Reports and Resolutions of the Industrial Commission*, 1974 Vol. I; see also *Boone's Masonry Construction Co., Inc. and Allstate Insurance Company v. South Carolina Second Injury Fund*, 267 S.C. 277, 277 S.E.2d 659 (1976). The Fund accomplishes this goal by absorbing some of the risk that such a worker will become injured in the workplace by allowing the employer or its insurance carrier to seek compensation from the Fund when an employee with a prior permanent physical impairment incurs a subsequent disability in the workplace. See *Liberty Mutual Insurance Company v. South Carolina Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (2005) citing S.C. Code Ann. § 42-9-400 (a).

A reading that the 2003 Amendments to the S.C. Code Ann. § 42-7-310(d)(2) is retroactive in its application appears to abrogate the meaning, intent and purpose of the Second Injury Fund's statutory scheme. To find that the amendment has retroactive application would be to disregard the assessments that were paid by the carrier in this case prior to its liquidation. Such construction is against the public policy driving the Second Injury Fund, because the equitable assessments applied to insurance carriers who pay into the Fund are akin to premiums paid by consumers to insurance carriers for the protection and assurances that insurance coverage affords.

The operative date giving rise to a claim against the SIF is the date of injury in the underlying workers' compensation claim (*Sellers v. Daniel Constr. Co.*, 285 S.C. 484, 486; 330 S.E.2d 305, 306 (S.C. 1985)). In this case, that date was in March 2000, well before the legislative changes in the statute. SIF conceded at the hearing that Legion Insurance paid its assessment requirement for the year 2000 (Hearing Trans., p. 9).

In the SIF's Form 58, it argued against the Plaintiff SCPCIGA individually, that SCPCIGA is not an insurance company or a self insured and therefore not entitled to reimbursement from the SIF, even if all other criteria are met, and that the provisions of S.C. Code Ann. § 38-31-10 et seq. are inapplicable. However, the Defendant provided no support for their argument as to the inapplicability of Chapter 31 of Title 38. SCPCIGA offered in rebuttal the plain language of S.C. Code Ann. § 38-31-60(b) and submitted a copy of the statute at the hearing (Hearing Trans., p. 18). S.C. Code Ann. § 38-31-60(b)

provides in relevant part that the SCPCIGA is:

"considered the insurer to the extent of its obligation on the covered claims and, to this extent, has *all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.*" (emphasis added).

This statutory language is clear and unambiguous, and no compelling legal authority to the contrary was presented by the SIF during the oral argument or by any submission or legal memorandum submitted by the Defendant.

FINDINGS OF FACT

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. That Claimant, Walder Woodard, was an employee of Woodard & Associates, Inc..
3. That the Claimant suffered a compensable injury under the Act on March 31, 2000.
4. That Woodard & Associates, Inc. was the employer and Legion Insurance Company was the Insurer on the date of injury.
5. That venue for the hearing is proper in Columbia, South Carolina.
6. That notice of the hearing was timely and properly served upon all parties of interest.
7. That notice of the accident was given to the employer in a timely fashion.
8. That a notice for a potential claim for reimbursement was given to the South Carolina Second Injury Fund within 78 weeks of the accident by the carrier.
9. That the Claimant had knowledge of a previous medical condition of a herniated disc and subsequent surgery to his lumbar spine.
10. That the Employer had knowledge of a previous medical condition of a herniated disc and subsequent surgery to his lumbar spine.

11. That the Claimant had no knowledge of previous medical conditions of arthritis of his lumbar spine in the form of degenerative disc disease nor severe arthritis of the AC joint of his left shoulder.

12. That the Employer had no knowledge of the Claimant's previous medical conditions of arthritis or his lumbar spine in the form of degenerative disc disease nor severe arthritis of the AC joint of his left shoulder.

13. That the greater weight of the evidence shows these pre-existing medical conditions of the claimant, both known and unknown, in the form of arthritis/degenerative disc disease of the back and left shoulder as well as a previously herniated disc were:

(a) Permanent and serious enough in nature to be a hindrance or obstacle to employment;

(b) That the injury of March 31, 2000 did combine with or aggravate the pre-existing conditions to the back and left shoulder;

(c) That the combination of these pre-existing conditions along with the subject injury caused the Claimant to miss more time from work than he would have from the March 31, 2000 injury alone;

(d) That the combination of these pre-existing conditions along with this injury caused the Claimant to have a substantially higher percentage of disability to the back and shoulder than he would have from the March 31, 2000 injury alone; and

(e) That the combination of these pre-existing conditions along with this injury caused the Claimant's medical costs for treatment of his back and shoulder to be substantially higher than they would have been from the March 31, 2000 injury alone.

14. That the carrier, Legion Insurance Company, was current on its assessment payments as of the date of injury in 2000.
15. That in July 2003, Legion Insurance Company went into liquidation, and the South Carolina Property and Casualty Insurance Guaranty Association assumed all rights duties and obligations in this case for Legion from that time forward, and for any outstanding obligations not yet paid by Legion up to that point.
16. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to Legion Insurance Company or their representative in liquidation, for all medical and indemnity payments made by Legion from the date of injury to July of 2003, when Legion was liquidated.
17. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to the South Carolina Property and Casualty Insurance Guaranty Association for all benefits paid in relation to this claim from July 2003 to present, and continuing, as well as for medical treatment, or compensation benefits that were incurred or owed, before July 2003 for which the SCPCIGA paid the obligation of Legion Insurance Company, to include all medical and indemnity payments made, and that will be made in the future, as well as awards for permanent disability made in accordance with the Act and approved by the Commission.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-40, it is the determination of this Commissioner that:

92

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under § 42-1-130, Claimant, Walder Woodard, is a covered employee.
3. Under § 42-1-140, Woodard & Associates, Inc. is a covered employer.
4. Under § 42-1-150, there was an employer/employee relationship between the parties.
5. Under § 42-17-20, venue in Columbia, South Carolina was proper and agreed upon by the parties.
6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.
7. Under § 42-9-400(f), the carrier provided written notice of the claim to the Second Injury Fund within 78 weeks of the date of injury.
8. The Claimant's pre-existing conditions satisfy the requisite requirements for reimbursement from the Fund pursuant to the subsections of § 42-9-400.
9. The provisions of § 42-9-400(c) as they existed on the date of accident are the controlling provisions applicable to this case.
10. Under § 42-9-400(c), the Claimant's pre-existing herniated disc of the lumbar spine was known to the Employee and to the Employer prior to the date of injury.
11. Under § 42-9-400(c)(2000), the Claimant's arthritic/degenerative condition of the lumbar spine and arthritic condition of the left shoulder were not known to the Claimant, and were not known to the Employer.
12. *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982), is relevant and controlling as to the

application of the 2003 statutory amendments to § 42-7-310(d)(2). These amendments will be applied prospectively instead of retroactively. Therefore, the controlling statutory language in this case is § 42-7-310(d)(2) as it existed in March of 2000, prior to the 2003 amendments.

13. Under § 42-7-310 (2000), Legion Insurance Company was in compliance with its assessment payments, and is entitled to reimbursement under the Act from the Second Injury Fund for claims that meet the other requirements of the Act.

14. Under §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "Legion," from the date of injury until July of 2003, for benefits paid by "Legion," during that time period in relation to the claim of Mr. Woodard, for medical treatment and indemnity payments made.

15. Under §§ 38-31-10 et seq., particularly § 38-31-60(b), Plaintiff SCPCIGA, steps into the shoes of "Legion" with all rights duties and obligations thereto, as if it were the insurer/carrier for this claim, from the date of liquidation of Legion in July 2003 onward.

16. Under §§ 38-31-10 et seq., § 38-31-60(b), §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "SCPCIGA," from the date of liquidation of Legion in July of 2003 to the present date and ongoing, for any benefits paid on behalf of "Legion," during that time period in relation to the claim of Mr. Woodard, and for any delinquent obligations of Legion that existed prior to liquidation in July of 2003 that were paid by SCPCIGA. This includes medical treatment already rendered, and in the future, indemnity payments

already made, and in the future, as well as for any award for permanency to the Claimant should an award be made, and approved by the Commission, or agreed to by the parties.

ORDER

IT IS THEREFORE ORDERED THAT, The South Carolina Second Injury Fund is obligated to reimburse Legion and SCPCIGA in accordance with the Act, and pursuant to the findings and conclusions herein.

AND IT IS SO ORDERED.

STOP Typing-

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Imuel Lyndon
Commissioner G. Bryan Lyndon

3/10/ 2008

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.
This 11 day of MARCH, 2008
By Kim Williams
Administrative Assistant to the Commissioner

DA
MC
LE
WS
LJ

**FULL COMMISSION ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

W.C.C. FILES NO. 9916207 & 0013231

**SUBROGATION PARTNERS, ON BEHALF OF LEGION INSURANCE COMPANY IN
LIQUIDATION,**

AND

CLAIMANT,

S.C. PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION,

- V -

CARRIER,

S.C. SECOND INJURY FUND,

DEFENDANT,

**IN RE:
WALDER F. WOODWARD,
V.
WOODWARD AND ASSOCIATES,
AND**

CLAIMANT,

EMPLOYER,

**LEGION INSURANCE CO. IN LIQUIDATION, THROUGH S.C. PROPERTY
& CASUALTY INSURANCE GUARANTY ASSOCIATION,**

CARRIER.

ORDER

Subrogation Partners on Behalf of Legion in Liquidation represented by R. Daniel Addison, Esquire, of Columbia, South Carolina.

S.C. Property & Casualty Insurance Guaranty Association represented by Mark D. Cauthen, Esquire, of Columbia, South Carolina.

S.C. Second Injury Fund represented by Latonya D. Edwards, Esquire, of Columbia, South Carolina.

This matter came before the South Carolina Workers' Compensation Full Commission on November 17, 2008 upon Subrogation Partners, on behalf of Legion Insurance Company in Liquidation ("Legion") and the South Carolina Property & Casualty Insurance Guaranty Association ("the Guaranty Association")' petition for an *en banc* hearing of the above-captioned claim. The Commission has reviewed the Petition, the reply thereto, and the entire record in this matter. Based on this review, we enter the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Legion and the Guaranty Association filed their Petition on October 15, 2008. The grounds for the Petition are as follows:

a) This claim holds enormous precedential value and the need for a unified answer on these issues is urgent. The Petition is submitted on the grounds that an *en banc* hearing is necessary to obtain such a decision.

b) There are no rules governing when an appeal to the Full Commission may be heard *en banc*. However, an appeal from a Single Commissioner to the Appellate Panel can be compared to a civil appeal from the circuit court to the Court of Appeals for which guidelines exist. See S.C. Code Ann. § 14-8-90.

c) This matter involves a request for reimbursement from the S.C. Second Injury Fund ("SIF") for all qualifying benefits paid to Claimant arising out of a work injury suffered on or about September 13, 1999.

d) Specifically, Legion and the Guaranty Association claim the work injury aggravated and/or combined with Claimant's pre-existing brittle diabetes. While the SIF has asserted the work injury did not aggravate or combine with the pre-existing condition, or the pre-existing condition did not present a hindrance or obstacle to employment, the SIF's main assertion for denying reimbursement is its assertion that Legion and the Guaranty Association are precluded from receiving reimbursement pursuant to the 2003 amendment to S.C. Code Ann. § 42-7-310.

e) This claim represents one of over 100 or more claims filed or to be filed against the SIF seeking reimbursement for work-related injuries suffered before 2003. The SIF has consistently taken the position in each of these claims that S.C. Code Ann. § 42-7-310 applies retroactively to bar Legion and the Guaranty Association's claim for reimbursement.

f) Legion and the Guaranty Association have argued consistently in each claim that the 2003 Amendment applies prospectively only and does not bar Legion and the Guaranty Association from receiving reimbursement for claims arising before the 2003 amendment.

g) The issues presented in this claim are not unique to this Claimant. The SIF has consistently denied reimbursement to Legion and the Guaranty Association for claims arising before the 2003 amendment to § 42-7-310 insisting the amendment applies retroactively to claims arising before the statute's amendment. Legion and the Guaranty Association assume the SIF will continue to take this position until this issue is decided with finality. Therefore, there is a need to have all of the issues presented heard on a single occasion and preserved on appeal.

h) Legion and the Guaranty Association petition the Commission to certify the following question to the South Carolina Supreme Court:

Does the 2003 amendment to S.C. Code Ann. § 42-7-310 apply retroactively to bar an insurer from receiving reimbursement from the South Carolina Second Injury Fund for an otherwise reimbursable injury suffered in a year for which the insurer had paid its assessments.

i) An *en banc* hearing and the certification of the above question to the Supreme Court, would allow for a cohesive answer to this issue; an answer which represents the opinions and considerations of all of the commissioners.

j) A unified decision on these issues would not only help end the continuous hearings being held on the sole issue of interpretation of this statute, but potentially prevent the same time consuming and inconclusive process from occurring with other claims against the SIF seeking reimbursement for claims that arose before 2003.

2. The SIF has asked to stay all cases involving this issue as it is already before the circuit court.

3. The SIF's Motion to Stay is granted as the issue in question is currently before the circuit court.

4. The Motion for an *en banc* hearing to certify a question to the Supreme Court is moot.

Based upon the findings of fact are the following:

CONCLUSIONS OF LAW

1. Because this issue is currently before circuit court, the Second Injury Fund's Motion to Stay is granted, and the Motion for a Hearing *en banc* is rendered moot.

ORDER

IT IS, THEREFORE, ORDERED the Motion to Stay be, and hereby is, granted.

IT IS FURTHER ORDERED the Motion for a Hearing *en banc* and the Request to Certify the Question to the Supreme Court is moot.

AND IT IS SO ORDERED.



Andrea C. Roche, Chairman

Columbia, South Carolina

December 3, 2008

CONCURRING:

Commissioner David W. Huffstetler
Commissioner G. Bryan Lyndon
Commissioner Derrick L. Williams
Commissioner Avery B. Wilkerson, Jr.
Commissioner T. Scott Beck

NOT PARTICIPATING:

Commissioner Susan S. Barden

(a:19918207)

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above-captioned action upon all parties to this cause by depositing a copy hereof, first class postage paid, or if indicated below by certified mail, return receipt requested, in the United States mail addressed to the attorney or attorneys for said parties.

This 8th day of Dec, 2008

By Marion Buraczynski
Marion Buraczynski, Paralegal

Mark D. Cauthen, Esquire
P.O. Box 7217
Columbia, SC 29202

R. Daniel Addison, Esquire
P.O. Box 11267
Columbia, SC 29211

Latonya D. Edwards, Esquire
220 Executive Center Drive, Suite 119
Columbia, SC 29210

**BEFORE THE APPELLATE PANEL
OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO.: 0013231**

Subrogation Partners on behalf of Legion
Insurance Company in Liquidation,

Carrier,

And

South Carolina Property and Casualty
Insurance Guaranty Association,

Carrier,

vs.

South Carolina Second Injury Fund,

Defendant.

In Re:

Walder Woodard,

Claimant,

vs.

Woodard & Associates, Inc.,

Employer,

And

Legion Insurance Co. in Liquidation,
through the S.C. Property & Casualty
Insurance Guaranty Association,

Carriers.

DECISION AND ORDER

HEARING:

May 23, 2012, in Columbia, South Carolina

APPEARANCES:

The Defendant/Appellant, South Carolina Second Injury Fund, was represented by attorney Robert M. Cook, II, Esquire of Robert Cook Law Firm, 128 N. Oak Street, Batesburg, SC 29006.

The Plaintiff/Respondent South Carolina Property & Casualty Insurance Guaranty Association was represented by Mark D. Cauthen, Esquire, and Peter P. Leventis IV, Esquire, of McKay, Cauthen, Settiana & Stubley, P.A., P.O. Box 7217, Columbia, SC 29202.

The Plaintiff Legion Insurance Company through Subrogation Partners, was represented by R. Dan Addison, Esquire and Margaret H. Donahue, of Hedrick Gardner Kincheloe & Garofalo, L.L.P., P.O. Box 11267, Columbia, SC 29211.

PURPOSE OF HEARING: To determine the issues as set forth on the Form 30 raised for exception by the Appellant S.C. Second Injury Fund.

OPINION BY:

Susan S. Barden,
Avery B. Wilkerson, Jr.,
Derrick L. Williams,

Commissioner
Commissioner
Commissioner, Panel Chair

FILED:

_____, 2012

STATEMENT OF THE CASE

The instant case comes before the Commission through the consolidation of two separate Form 54a, properly and timely filed with the Commission, by successive Carriers: Subrogation Partners, on behalf of Legion Insurance Company in liquidation, "Legion"; and South Carolina Property and Casualty Insurance Guaranty Association, "SCPCIGA", respectively against the South Carolina Second Injury Fund, "SIF." The SIF properly and timely filed a Form 55 in response.

The underlying workers' compensation claim is from an admitted back and shoulder injury, with the initial date of injury being March 31, 2000. This claim has not reached final resolution and is still ongoing with the Commission, and the Claimant, Mr. Woodard, is also still

receiving medical treatment and TTD benefits. It should be noted that Mr. Woodard was the president of Woodard & Associates, Inc., and, therefore, is the Claimant and the Employer for purposes of "knowledge," under the Second Injury Fund statutes in the Workers' Compensation Act.

At the time of the Claimant's initial injury in March of 2000, the Employer's workers' compensation carrier was Legion Insurance Company. It is uncontested by the Defendants that as of the date of injury, March 31, 2000, that Legion Insurance Company was up to date on its assessment payments. Furthermore, it is also uncontested by either party that at some time after March 2000, Legion Insurance Company was no longer current and ultimately became delinquent on its SIF assessments; however, the record is unclear as to the specific dates of those events.

In March of 2002 Legion Insurance Company was placed in rehabilitation status by the Commonwealth Court of Pennsylvania. In July 2003 Legion was declared insolvent and an Order of Liquidation was issued by the Commonwealth Court of Pennsylvania. At that time, SCPCIGA, took over responsibility for Legion Insurance Company's continuing workers' compensation obligations. Legion's interests in this particular matter are represented by Subrogation Partners on behalf of Legion Insurance Company in liquidation, hereinafter referred to as "Legion." Of consequence, for the purposes of this claim against SIF, is that from the date of injury until July 2003, Legion was responsible for all workers' compensation claims, and from July 2003 to present and continuing, SCPCIGA is responsible for all of the workers' compensation benefits owed to the Claimant, to include any outstanding obligations not paid prior to July 2003.

The Joint Plaintiffs/Respondents, Legion and SCPCIGA, brought action against the SIF via their Forms 54 asserting that they were entitled to reimbursement from the SIF pursuant to S.C. Code Ann. §§ 42-7-310, and 42-9-400, for the pre-existing condition of diabetes. Plaintiffs argued that these injuries meet the threshold and requirements for reimbursement set forth in §42-9-400, in that the pre-existing condition was permanent, serious enough in nature to be a hindrance or obstacle to employment and that such preconditions substantially increased liability for medical costs and indemnity in the underlying workers' compensation claim. Also, the Plaintiffs asserted the "knowledge," requirement of §42-9-400 was met in this case by the fact that the Employee, who is also the Employer himself in this case, both did not know of his pre-existing arthritis/osteoarthritis in his shoulder and back. Note, prior to the 2003 changes to S.C. Code Ann. §42-9-400 changes to the Act, the "knowledge" requirement could be met if the pre-existing condition was 'unknown' to both the employer and employee. The Respondents also jointly argued that the condition of a previously herniated disc was known to both the Claimant and the Employer, prior to the date of accident. Again, they are both the same person.

The Plaintiffs/Respondents jointly argued that the Carrier was current on its assessments as of the date of injury. Again, this was undisputed by the Defendant before the trial Commissioner. Respondents further contended that by virtue of payment of such assessments through date of this accident, the Plaintiffs were entitled to SIF reimbursement pursuant to the provisions of the Act, for the consequence of the injuries that took place in March of 2000, which also meet the threshold requirements of §42-9-400.

In addition, Plaintiffs/Respondents asserted that the 2003 statutory changes to § 42-7-310 - which bar from SIF recovery employers or carriers that fail to pay assessments or subsequent fines - as a matter of proper statutory interpretation, should be applied prospectively, and not

retroactively. Therefore, such statutory amendment cannot stand as a bar coverage and reimbursement to the Respondents in this matter. Plaintiffs jointly contend that a prospective application of the statutory amendments to §42-7-310 would bar this claim for statutory reimbursement, as a matter of public policy and as a proper interpretation of SIF assessments being tantamount to insurance premiums. That is, 'coverage,' or here reimbursement from SIF, should properly be allocated for claims arising during time periods for which premiums or assessment were properly paid.

Lastly, Plaintiff/Respondent SCPCIGA individually argued that they were entitled to reimbursement from the SIF in the instant case in accordance to the aforementioned arguments and in conjunction with the fact SCPCIGA, while not an insurance company *per se*, is entitled to, all rights, duties and obligations of the insolvent insurer pursuant to S.C. Code Ann. § 38-31-60(b). However, this issue – whether or not the SCPCIGA is entitled to recovery reimbursement benefits from the SCSIF by its status as such – was not raised in the Form 30 appeal of the Appellant SCSIF. Therefore, this is not currently before this Appellate Panel on consideration of the appeal single Commissioner's Order by the SCSIF.

The Defendant/Appellant, SCSIF, contended they should not be liable for reimbursement to Legion or SCPCIGA on several grounds. The Appellant originally based this contention on the argument that no previously existing injury existed that would have satisfied §42-9-400 requirements of permanency, hindrance or obstacle to employment or of such severity that would substantially increase the liability for medical costs and indemnity, including lost time from work, than would have otherwise been lost, but for the pre-existing condition.

Furthermore, while stipulating that the Plaintiffs/Respondents were current on their assessments as of the date of injury in 2000, the Respondent SIF contended that the

Plaintiffs/Respondents were at some later date delinquent on assessment payments and resultant fines. The SCSIF argues that 2003 amendments to §42-7-310(d)(2) of the Act, which effectively preclude SCSIF reimbursement to insurers who fail to stay current on such payments, should have been applied retroactively to bar reimbursement to the Plaintiffs. The Defendant/Appellant alternatively contended that this claim should be barred via a prospective or retroactive reading of the 2003 amendments to § 42-7-310.

The SIF asserted, particularly against the Respondent SCPCIGA, that because SCPCIGA is not an insurance company or self insured, per se, under § 42-1-60, it is not entitled to reimbursement under the Act, specifically §§ 42-7-310, and 42-9-400. Furthermore, the Defendant Second Injury Fund argues that S.C. Code Ann. § 38-31-10 et seq. is inapplicable. Again, this particular issue was not timely raised in the Form 30 appeal of the SCSIF, and therefore is not properly before the Appellate review panel on appeal.

The single Commissioner ruled in favor of the Respondents SCPCIGA and Legion in Liquidation on all grounds, and as to the applicability, qualifications and contested legal issues in this matter, and ordering the Appellant SCSIF to provide reimbursement for this accident to the Plaintiffs/Respondents in accordance with the Act. This Order was issued on March 11, 2008 by Commissioner G. Bryan Lyndon. The SCSIF filed a timely Form 30 appeal of that Order. During the pendency of the scheduling of this appeal two separate motions were filed by the parties. First the SCSIF filed a motion to stay further proceedings in this and all similarly situated claims. Secondly, Plaintiff/Respondent Legion, filed a motion to the Appellate Panel for the Form 30 appeal of the SCSIF to be heard by the Commission *en banc*. The Commission granted the stay request of the SCSIF, and after further litigation, that stay was subsequently lifted.

The Commission also denied the motion of the Plaintiff/Respondent Legion to hear the Form 30 appeal *en banc*. Legion appealed this ruling of the full Commission to the Circuit Court of Lexington County. By consent agreement of the parties, the appeal by Legion, of the decision of the full Commission not to hear this appeal *en banc*, was withdrawn and the case was remanded from the Circuit Court of Lexington to the South Carolina Workers' Compensation Commission. Plaintiff/Appellant Legion also withdrew its motion for the Form 30 appeal of the SCSIF to be heard *en banc*. Also by consent agreement of the parties, it was stipulated and agreed upon that this matter is no longer subject to any stay of litigation previously ordered by this Commission. The stay itself has previously been lifted by a separate Order of this Commission.

The purpose of the this Order and related proceedings, was to determine the issues raised in the Form 30 appeal of the SCSIF filed on March 26, 2008. The Form 30 was filed within the applicable time period prescribed by law, setting forth its grounds for exception and request for judicial review of the Order of Commissioner G. Bryan Lyndon dated March 11, 2008. The Defendant/Respondent SCSIF forth four grounds for exception and judicial error in its Form 30 appeal as follows:

ISSUES ON APPEAL

1. Did the hearing Commissioner err in finding as a fact (Finding of Fact No. 11) that the Claimant had no knowledge of previous medical conditions of arthritis [of] his lumbar spine in the form of degenerative disc disease nor severe arthritis of the AC joint of his left shoulder when such finding is against the greater weight of the reliable, probative and substantial evidence in the record?
2. Did the hearing Commissioner err in finding as a fact (Finding of Fact No. 13 (a-b)) that the greater weight of the evidence shows that the Claimant's pre-existing conditions were permanent and serious enough to be a hindrance or obstacle to employment and did either combine with or were aggravated by the March 31, 2000 injury when such a finding is against the greater weight of the reliable, probative and substantial evidence in the record?
3. Did the hearing Commissioner err in finding as a fact (Finding of Fact No. 13 (c-e)) that said the combination of the Claimant's pre-existing conditions caused the Claimant to miss more time from work and incur substantially greater medical costs than would have resulted from the March 31, 2000 injury alone when such a finding is against the greater weight of the reliable, probative and substantial evidence in the record?
4. Did the hearing Commissioner err in failing to find that prospective application also bars [the] Employer/Carrier from recovery because the statutory amendments were added in 2003 and [the] Employer/Carrier did not file its reimbursement claim until 2007?

In appellate oral argument before the Commission in this matter, counsel for the SCSIF argued a separate ground for review which was not initially raised in the March 26, 2008 original Form 30 notice of appeal in this matter. Namely, that the South Carolina Property and Casualty Insurance Guaranty Association (SCPCIGA) is not entitled to reimbursement because it is not a carrier pursuant to S.C. Code Ann. §42-1-60.

However, as this argument and grounds for review was not timely raised to the full Commission within the statutory or regulatory period prescribed by law, it is therefore not preserved for review by this appellate panel. (See Gen. S.C. Code Ann. §42-17-50 et seq.; S.C.

Code of Regs. §67-701 (A); and *Allson v. W.L. Gore and Associates* 394 S.C. 185, 714 S.E.2d 547 (2011)).

The single Commissioner for the Form 54/55 hearing between these parties, the Honorable G. Bryan Lyndon, in a rather lengthy and detailed opinion summarized his analysis of the evidence and the legal and factual position of the parties, in which he issued the following findings of fact and conclusions of law in his Order dated March 11, 2008:

Single Commissioner's Findings of Fact

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. That Claimant, Walder Woodard, was an employee of Woodard & Associates, Inc..
3. That the Claimant suffered a compensable injury under the Act on March 31, 2000.
4. That Woodard & Associates, Inc. was the employer and Legion Insurance Company was the insurer on the date of injury.
5. That venue for the hearing is proper in Columbia, South Carolina.
6. That notice of the hearing was timely and properly served upon all parties of interest.
7. That notice of the accident was given to the employer in a timely fashion.
8. That a notice for a potential claim for reimbursement was given to the South Carolina Second Injury Fund within 78 weeks of the accident by the carrier.
9. That the Claimant had knowledge of a previous medical condition of a herniated disc and subsequent surgery to his lumbar spine.
10. That the Employer had knowledge of a previous medical condition of a herniated disc and subsequent surgery to his lumbar spine.
11. That the Claimant had no knowledge of previous medical conditions of arthritis of his lumbar spine in the form of degenerative disc disease nor severe arthritis of the AC joint of his left shoulder.
12. That the Employer had no knowledge of the Claimant's previous medical conditions of arthritis of his lumbar spine in the form of degenerative disc disease nor severe arthritis of the AC joint of his left shoulder.
13. That the greater weight of the evidence shows these pre-existing medical conditions of the claimant, both known and unknown, in the form of arthritis/degenerative disc disease of the back and left shoulder as well as a previously herniated disc were:
 - a. Permanent and serious enough in nature to be a hindrance or obstacle to employment;

b. That the injury of March 31, 2000 did combine with or aggravate the pre-existing conditions to the back and left shoulder;

c. That the combination of these pre-existing conditions along with the subject injury caused the Claimant to miss more time from work than he would have from the March 31, 2000 injury alone;

d. That the combination of these pre-existing conditions along with this injury caused the Claimant to have a substantially higher percentage of disability to the back and shoulder than he would have from the March 31, 2000 injury alone; and

e. The combination of these pre-existing conditions along with this injury caused the Claimant's medical costs for treatment of his back and shoulder to be substantially higher than they would have been from the March 31, 2000 injury alone.

14. That the carrier, Legion Insurance Company, was current on its assessment payments as of the date of injury in 2000.

15. That in July 2003, Legion Insurance Company went into liquidation, and the South Carolina Property and Casualty Insurance Guaranty Association assumed all rights duties and obligations in this case for Legion from that time forward, and for any outstanding obligations not yet paid by Legion up to that point.

16. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to Legion Insurance Company or their representative in liquidation, for all medical and indemnity payments made by Legion from the date of injury to July of 2003, when Legion was liquidated.

17. That the South Carolina Second Injury Fund is responsible for reimbursement of this claim in accordance with the provisions of the Act, to the South Carolina Property and Casualty Insurance Guaranty Association for all benefits paid in relation to this claim from July 2003 to present, and continuing, as well as for medical treatment, or compensation benefits that were incurred or owed, before July 2003 for with the SCPCIGA paid the obligation of Legion Insurance Company, to include all medical and indemnity payments made, and that will be made in the future, as well as awards for permanent disability made in accordance with the Act and approved by the Commission.

Single Commissioner's Conclusions of Law

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-40, it is the determination of the Commissioner that:

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under § 42-1-130, Claimant, Walder Woodard, is a covered employee.
3. Under § 42-1-140, Woodard & Associates, Inc. is a covered employer.

4. Under § 42-1-150, there was an employer/employee relationship between the parties.
5. Under § 42-17-20, venue in Columbia, South Carolina was proper and agreed upon by the parties.
6. Under § 1-23-320(b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.
7. Under § 42-9-400(f), the carrier provided written notice of the claim to the Second Injury Fund within 78 weeks of the date of injury.
8. The Claimant's pre-existing conditions satisfy the requisite requirements for reimbursement from the Fund pursuant to the subsections of §42-9-400.
9. The provisions of §42-9-400(c) as they existed on the date of accident are the controlling provisions applicable to this case.
10. Under § 42-9-400(c), the Claimant's pre-existing herniated disc of the lumbar spine was known to the Employee and to the Employer prior to the date of injury.
11. Under § 42-9-400(c)(2000), the Claimant's arthritic/degenerative condition of the lumbar spine and arthritic condition of the left shoulder were not known to the Claimant, and were not known to the Employer.
12. *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982), is relevant and controlling as to the application of the 2003 statutory amendments to § 42-7-310(d)(2). These amendments will be applied prospectively instead of retroactively. Therefore, the controlling statutory language in this case is § 42-7-310(d)(2) as it existed in March of 2000, prior to the 2003 amendments.
13. Under § 42-7-310 (2000), Legion Insurance Company was in compliance with its assessment payments, and is entitled to reimbursement under the Act from the Second Injury Fund for claims that meet the other requirements of the Act.
14. Under §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "Legion," from the date of injury until July of 2003, for benefits paid by "Legion," during that time period in relation to the claim of Mr. Woodard, for medical treatment and indemnity payments made.
15. Under §§ 38-31-10 et seq., particularly § 38-31-60(b), Plaintiff SCPCIGA, steps into the shoes of "Legion" with all rights and duties and obligations thereto, as if it were the insurer/carrier for this claim, from the date of liquidation of Legion in July 2003 onward.
16. Under §§ 38-31-10 et seq., § 38-31-60(b), §§ 42-7-310, and 42-9-400, the Second Injury Fund is responsible for reimbursement, in accordance with the Act, to the Plaintiff "SCPCIGA," from the date of liquidation of Legion in July of 2003 to the present date and ongoing, for any benefits paid on behalf of "Legion," during that time period in relations to the claim of Mr. Woodard, and for any delinquent obligations of Legion that existed prior to liquidation in July of 2003 that were paid by SCPCIGA. This includes medical treatment already rendered, and in the future, indemnity payments already made, and in the future,

as well as for any award for permanency to the Claimant should be award be made, and approved by the Commission, or agreed to by the parties.

See Lyndon Order, dated March 11, 2008.

In conjunction with his analysis of the evidence of the case and the above findings, Commissioner Lyndon awarded that the Plaintiffs/Respondents should be reimbursed by the Second Injury Fund, pursuant to the Act and specifically as outlined under §42-9-400 et seq.

This full Commission Panel has considered the arguments of the parties, which were outlined extensively in the record, the hearing transcript before the single Commissioner, as well as at oral argument before this appellate panel. Based on the evidence in the record including voluminous APA submissions and exhibits, and in consideration of the arguments of the parties both in their written appellate briefs and at oral argument, the Appellate Panel finds there was no reversible error in the single Commissioner's Order as to findings of fact or conclusions of law as outlined above.

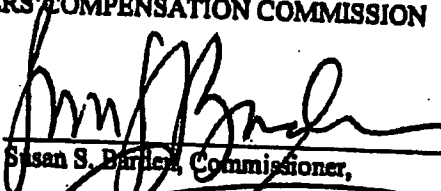
Therefore, we herein adopt those findings and conclusion, and the accompanying legal reasoning and analysis of the evidence of the case listed and outlined in the single Commissioner's Order, verbatim, as the findings and conclusions of this Appellate Panel.

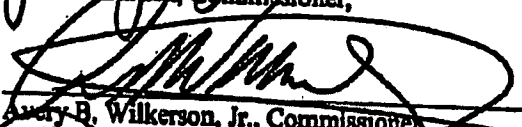
ORDER

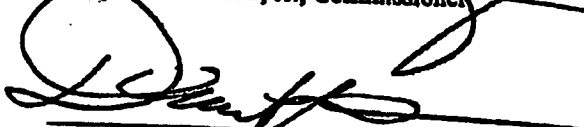
IT IS THEREFORE ORDERED the Order of the Single Commissioner, filed in the above captioned matter on March 11, 2008, is hereby affirmed by the Panel in full, and the same shall constitute the Decision and Order of this Appellate Panel. Furthermore, in conjunction with this affirmation and that prior Order, that the Defendant/Appellant, SCSIF is liable to pay reimbursement proceeds to the Plaintiffs/Respondents Subrogation Partner on behalf of Legion in Liquidation, and the S.C. Property & Casualty Insurance Guaranty Association, in conjunction therewith and pursuant to S.C. Code Ann. §§42-9-400 et seq.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION


Susan S. Barber, Commissioner,


Avery B. Wilkerson, Jr., Commissioner


Derrick L. Williams, Commissioner, Panel Chair

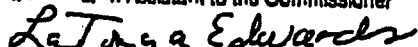
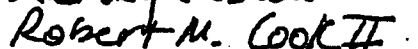
Columbia, SC
8/20, 2012

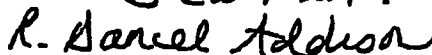
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 20 day of August, 2012
By Valerie D. DeLoach

Assistant to the Commissioner

13 