THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-000020

Case No. 2018-CP-23-2580

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

v.

Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a 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/Defendant.

RETURN TO PETITION FOR REHEARING

J. Hubert Wood, III
Wood Law Group, LLC
Post Office Box 20550
Charleston, SC 29413
(843) 577-5732
Attorney for Respondent

Pursuant to South Carolina Appellate Court Rules (SCACR) 221(a) and 224, South Carolina Second Injury Fund (the Fund) petitions the Court for rehearing of its decision in *South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund*, Op. No. 5849 (S.C. Ct. App. filed August 18, 2021). Respondent, South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association) opposes the petition and submits this return pursuant to the Court's correspondence dated September 17, 2021. A petition for rehearing must state with particularity the points supposed to have been overlooked or misapprehended by the court. Appellate Practice in South Carolina, Second Edition (Toal, Vafai and Muckenfuss) at p. 293 *citing* Rule 221(a), SCACR; *see Kennedy v. South Carolina Retirement System.*, S.C. Sup. Ct. Order dated July 23, 2021 (Shearouse Adv. Sh. No. 27 at 61 (in order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument). The purpose of a petition for rehearing is not to present points in which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court for a second time. Id. *citing Kennedy*, S.C. Sup. Ct. Order dated July 23, 2021; *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E.2d 234 (1933). Apart from pointing out the Court's citation of the South Carolina Supreme Court's decision in *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014), which neither party cited in their respective briefs, the Fund's petition essentially makes the same arguments rejected by the Court, and rejected below by the Circuit Court and the Workers' Compensation Commission (Commission) without dissent in this matter and prior related litigation. In addition to its weak re-argument on the statutory authorization issue, the Fund's Memorandum in Support of Petition for Rehearing continues to feature a classic red

herring/straw man "corollary" argument associated with the assessment issue and a legal argument on the prior settlement issue that when applied, yields the result advocated by Respondent, determined by the Commission, and affirmed by the Circuit Court and this Court. The Fund's Petition distorts and mischaracterizes the Court's reliance on *Hudson* and fails to articulate any meaningful misapprehension or overlooking of meritorious arguments. As such, the petition does not meet the standard for rehearing by this Court.

Statutory Authorization

As a threshold matter, there is no prohibition on the Court citing case law not cited in the parties' briefs. Moreover, it is readily apparent from the Court's opinion that it did not focus "solely" on *Hudson* in deciding the statutory authorization issue. Rather, the Court's opinion reflects that it thoroughly analyzed the Commission's rationale and reasoning, as affirmed by the Circuit Court, based on applicable statutory provisions and the evidentiary record under the applicable standard of review.

As previously argued, the Fund 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 the Guaranty Association is not an insurance carrier entitled to reimbursement.[1] Notably, the Fund has previously conceded that *Brock* was decided in a different context (R.p. 93; and R.p. 126). The Fund's reliance on *Brock* continues to be misplaced. The statement in *Brock* that the Guaranty Association is "...neither the wrongdoer or the insurer of the wrongdoer, but it is instead a statutory entity that exists to provide some protection for the insureds

[1] In its Appellant Brief and again in its Memorandum in Support of Petition for Rehearing, the Fund correctly asserts that the Guaranty Association has conceded it is not an "insurance company" but erroneously asserts that it claims a statutory entitlement reserved only for insurance companies (the Fund's Appellant Brief at page 9 and Memorandum in Support of Petition for Rehearing at p. 7). While the Guaranty Association conceded that it is not an "insurance company," it maintains, as was held by the Commission and affirmed by the Circuit Court and this Court, that it is the Employer's "insurance carrier" as the term is defined under §42-1-60 and §42-5-20, and used in §42-9-400 and §42-7-320.

of insolvent insurance companies" was made in the context of the Supreme Court's analysis of the Guaranty Association's rights to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. 764 S.E.2d at 922-923. *Brock* did not involve a workers' compensation claim or a policy of workers' compensation insurance in connection with which the Guaranty Association would be responsible for paying the full amount of a covered claim 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. The Fund's reliance on the South Carolina Supreme Court's holding in *Buchanan v. South Carolina Property and Casualty Insurance Guaranty Association*, 424 S.C. 542, 819 S.E.2d 124 (2018) for the same proposition is also misplaced as *Buchanan* is distinguishable and inapplicable to the current matter for the same reasons.

Hudson, however, is instructive far beyond this Court's citation of it for the proposition that the Guaranty Association is a last resort insurer created by the legislature to protect consumers in the event their insurer becomes insolvent. It should be noted that *Hudson* was decided in the context of a workers' compensation claim unlike *Brock* or *Buchanan*. As the Fund points out, *Hudson*, like *Brock and Buchanan*, did not decide the Guaranty Association's status as an "insurer" or "carrier" as defined under §42-1-60 and §42-5-20, and used in §42-9-400 and §42-7-320; but it clearly substantiates the reasoning and rationale of the Commission in deciding the statutory authorization issue as affirmed by the Circuit Court and this Court. In that regard, *Hudson* references the language in S.C. Code Ann. §38-31-60(j) (1976, as amended) that the Guaranty Association "may sue or be sued" *as a clear indication of the legislature's intent for the Guaranty Association to both enforce its own direct claims*, and be held directly liable for its own actions (emphasis added). 754 S.E.2d at 491.

While not necessary to affirming the Commission's rationale/reasoning and decision on the statutory authorization issue, *Hudson* further diminishes the Fund's already weak argument. To briefly recap, the Commission found and concluded in pertinent part as follows: that [the Guaranty Association] 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 §42-7-300; that [the Guaranty Association] is statutorily authorized to make a reimbursement claim against [the Fund] and receive reimbursement from [the Fund] for workers' compensation benefits paid by [the Guaranty Association] in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation entered by [the insolvent insurer] and [the Fund]; and that under §38-31-60(b), the rights of [the insolvent insurer] under the Workers' Compensation Act which [the Guaranty Association] maintains are not limited exclusively to matters pertaining to the defense by [the Guaranty Association] of ongoing claims or alternatively, [the Guaranty Association'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 [the Guaranty Association's] obligation for payment of this covered claim and its defense thereof. The Commission's rationale/reasoning and analysis in making its pertinent findings and fact, conclusions of law and decision on the statutory authorization issue are further validated by and supported *Hudson* effectively refuting the Fund's argument that the Guaranty Association's rights of recovery/recoupment/offset are to those provided under §38-31-90. This leaves the Fund in the patently absurd position of relying on the terms and provisions of §42-1-560 (the third

party/subrogation statute under the Workers' Compensation Act) and its "circuitive litigation" argument; neither of which have any merit.

Section 42-1-560 sets forth the rights and remedies of the parties to a workers' compensation claim that also involves third party liability. Section 42-1-560(a) does not "re-define" the term "carrier" as defined pursuant to §42-1-60 and §42-5-20, and used in §42-7-320 and §42-9-400. Rather, by use of the term "*hereinafter*," §42-1-560(a) merely specifies those entities, including the employer, to which the term "carrier" *refers in §42-1-560* (emphasis added). Reimbursement from the Fund in connection with this claim is governed by §42-9-400 and §42-7-320, and has absolutely nothing to do with §42-1-560.[2]

Concerning the "circuitive litigation" argument, the Fund continues to conveniently ignore the fact that while denying reimbursement, it has collected and continues to collect, assessments from the Guaranty Association's workers' compensation member insurers to fund its reimbursement obligation on this particular claim while those member insurers are also paying separate assessments to the Guaranty Association to fund the Guaranty Association's obligations on this particular claim (R.p. 432; and R.p.p. 546-549, 552 and 554; *see also* Commission's unappealed finding of fact no. 10 and conclusions of law nos. 5 and 6). The double assessment situation this produces is plain to see. The Fund is essentially arguing that it be allowed to collect assessments from the Guaranty Association's workers' compensation member insurers to fund reimbursement of the claim but retain the money without making reimbursement while the Guaranty Association's workers' compensation member insurers are forced to pay assessments to the Guaranty Association to fund payment of benefits on the claim with no right to reimbursement.

[2] It is also self-evident that the General Assembly had no intentions with respect to the Guaranty Association when it enacted the text of §42-1-560(a) in 1969, two years prior to enactment of the Guaranty Act and creation of the Guaranty Association in 1971.

If the Fund's argument were to be accepted, it would require the Guaranty Association's workers' compensation member insurers to fund the claim twice. The "circuitive litigation" argument is baseless and without merit.

Assessments

As set forth in the Guaranty Association's Respondent Brief, the Fund's position and arguments in connection with the assessment issue have changed and shifted at various stages in the process. The Fund's current argument has no basis in law or fact. In connection therewith, the Fund's assertion that the Court, along with the Circuit Court and the Commission, have engaged in a rationale that "constitutes nothing more than judge-made 'legal' fiction" is insulting and should be rejected.

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 and provides that if an employer or insurance carrier fails to pay assessments, they shall be barred from any recovery from the Fund on all claims without exception until the assessment is paid along with any penalty associated therewith. The uncontradicted evidence in the record, along with the findings of fact and conclusions of law of the Commission as affirmed by the Circuit Court and this Court, reflect that neither the insolvent insurer or any of the Guaranty Association's workers' compensation member insurers are delinquent in assessments to the Fund.[3] In addition, the uncontradicted record reflects, as was found by the Commission and affirmed by the Circuit Court

[3] As a result of the uncontradicted record establishing that neither [the insolvent insurer] or any of the Guaranty Association'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, the Fund has abandoned any position in that regard as such was not included in its Form 30 exceptions. *Ham v. Mullins Lumber Company*, 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).

and this Court, that [the Guaranty Association] has never been assessed by [the Fund] and is not delinquent or in default with respect to any assessments.

The Fund is left with nothing more than an equitable argument which the Guaranty Association fully countered with overwhelming evidence demonstrating that the Guaranty Association's workers' compensation member insurers have paid assessments to the Fund, specifically including assessments to fund reimbursement on this particular claim, all the while leaving them responsible for paying assessments to the Guaranty Association necessary to fund this particular claim while the Fund denies reimbursement. To assert that the Commission engaged in "judge-made legal fiction" by making findings of fact and conclusions of law addressing what is essentially an equitable argument by the Fund, and that the Circuit Court and this Court did the same by affirming the Commission's findings and conclusions, is beyond the pale. There is absolutely no legal or factual basis to substantiate any assertion that the reimbursement claim in this matter should be barred based on anything pertaining to the payment of assessments.

Prior Settlement Agreement

Footnote no. 4 of the Fund's Memorandum in Support of Petition for Rehearing asserts that the Guaranty Association did not answer the question the Fund posited in its briefs and on page 17 of its memorandum: [w]hat then could be the purpose of the modifiers 'unknown,' 'not asserted,' 'not accepted,' or 'potential'?" The Fund goes on in footnote no. 4 to assert that the Court provides no answer and that the question cannot be answered in a way that allows the Guaranty Association to prevail. The answer to the question is clear to all except the Fund. The Guaranty Association asserted in its Respondent Brief, and re-asserts herein, what was apparently plain and obvious to this Court, the Circuit Court and the Commission, to wit: that such apply only

to the "Legion" and "Reliance" claims and to the claims that are not " Legion" or "Reliance" with the limiting phrase "on which [the Fund] is currently paying the Guaranty Association as of February 22, 2013." Contrary to its own legal argument that reading entirely out a phrase in the prior settlement agreement so as to render it meaningless and superfluous would constitute an error of law; the Fund is asking this Court to do precisely that (i.e. read entirely out the phrase "on which [the Fund] is currently paying the Guaranty Association as of February 22, 2013" thereby rendering it meaningless and superfluous). The Commission's findings, conclusions and decision on this issue, as affirmed by the Circuit Court and this Court, do not read out, or render meaningless or superfluous, the language relied on by the Fund; and are not affected by any error of law.

CONCLUSION

For the foregoing reasons, Respondent, South Carolina Property and Casualty Insurance Guaranty Association, respectfully requests that the Petition for Rehearing be denied.

Respectfully submitted,

Wood Law Group, LLC
P.O. Box 20550
Charleston, SC 29413
Ph.: 843-577-5732
Email: hubie@woodgroupllc.com

By: */s/ J. Hubert Wood, III*
J. Hubert Wood, III #65169
Attorney for Respondent

Charleston, South Carolina
September 16, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2019-000020

Case No. 2018-CP-23-2580

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

v.

Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a 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/Defendant.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (issued August 25, 2021), the undersigned counsel for the Respondent, does hereby certify that service of the **Return to Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only at the below listed email addresses this the 16th day of September 2021:

Robert M. Cook, II, Esquire
The Robert Cook Law Firm, LLC
Email: robcook1965@yahoo.com

Andrew F. Lindemann, Esquire
Lindemann & Davis
Email: andrew@ldlawsc.com

s/ J. Hubert Wood, III, Esquire

WOOD LAW GROUP, LLC
ATTORNEYS AT LAW
ONE WESLEY DRIVE
CHARLESTON, SOUTH CAROLINA 29407
(843)577-5732 FAX (843) 577-4326

J. HUBERT WOOD, III
KATHRYN F. WALTON*

MATTHEW J. FULTZ+

*MEDICARE SET-ASIDE CERTIFIED CONSULTANT
+S.C. CERTIFIED MEDIATOR

REPLY TO
P.O. BOX 20550
CHARLESTON, SOUTH CAROLINA 29413

September 16, 2021

Via Email Only: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: South Carolina Property and Casualty Insurance Guaranty Association v. Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund
Appellate Case Number: 2019-000020
Civil Action No.: 2018-CP-23-2580
Our File No.: 45.124

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (issued August 25, 2021) and per the request of the Court, please find enclosed for filing by email only the **Return to Petition for Rehearing** in the above referenced matter. Copies are being served upon all counsel of record pursuant to Section (d)(1) of the same order. If you have any questions, please advise.

Very truly yours,

J. Hubert Wood, III

JHWIII/jms
Enclosures
cc: Robert M. Cook, II, Esquire (via email only) (w/ encl.)
Andrew F. Lindemann (via email only) (w/ encl.)