

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM SPARTANBURG COUNTY

Clifton B. Newman, Circuit Court Judge
Trial Court Case No.: 2012-CP-42-8259

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Appellate Case No.: 2013-000634

SC Court of Appeals

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

v.

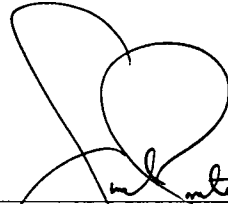
Spartanburg Regional Healthcare System and
PHTS Risk Management Services.....Respondents

**MOTION TO ALLOW FILING OF MOTION
IN CIRCUIT COURT**

The Respondents, Spartanburg Regional Healthcare System and PHTS Risk Management Services, by and through their undersigned counsel, hereby move the Court pursuant to Rule 240, SCACR to grant limited jurisdiction to the Spartanburg County Court of Common Pleas to allow Respondents to file a motion with that court to enter judgment providing for interest pursuant to Rule 58, SCRCR and S.C. Code Ann. § 34-31-20 (1976). The Order of the Honorable Clifton B. Newman, At Large

Circuit Judge, granting reimbursement in Respondents' favor is attached to this Motion as Exhibit A and incorporated herein by reference.

Respectfully submitted,



Jared M. Pretulak (S.C. Bar No.74884)
Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, SC 29603
(864) 271-5354

Attorney for Respondents

May 3, 2013

Greenville, SC

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IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY

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

v.

Spartanburg Regional Healthcare System and
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EXHIBIT A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 PHTS Risk Management Services,)
 (Carrier) and Spartanburg Regional)
 Healthcare System (Employer),)
)
 Plaintiffs/Appellants,)
)
 vs.)
)
 South Carolina Second Injury Fund,)
)
 Defendant/Respondent)
)
 (In Re: Sarah Jones v. Spartanburg)
 Regional Healthcare System))

IN THE COURT OF COMMON PLEAS

**ORDER REVERSING DECISION OF
 THE APPELLATE PANEL OF THE
 SOUTH CAROLINA WORKERS'
 COMPENSTION COMMISSION**

W.C.C. FILE NO. 0607833

C.A. No.: 2012-CP-42-2859

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ORDER

This matter is before the Court on the motion of PHTS Risk Management Services (Carrier) and Spartanburg Regional Healthcare System (Employer), collectively Plaintiffs/Appellants, wherein they appeal from the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") denying them full Second Injury Fund reimbursement for benefits paid or to be paid to the injured employee, Sarah Jones, on the underlying workers' compensation claim stemming from Ms. Jones' April 17, 2006 work accident.

The parties submitted briefs to the Court and appeared for oral arguments on December 13, 2012, at the Spartanburg County Judicial Center. After hearing the arguments of counsel, reviewing the memoranda and other documents submitted to the Court, and the applicable authority, the Court hereby reverses the decision of the Appellate Panel insofar as it denies Plaintiffs/Appellants full Second Injury Fund reimbursement pursuant to S.C. Code § 42-9-400.

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COMPUTERS

FACTS OF THE CLAIM

Ms. Jones injured her left upper extremity on April 17, 2006 in a work-related accident while employed by Spartanburg Regional Healthcare System. PHTS Risk Management Services admitted the claim and authorized appropriate medical treatment. Prior to this incident, in 1993, Ms. Jones had sustained another work-related accident affecting her right wrist while working for a different employer. In addition, Ms. Jones suffered from anxiety prior to her April 17, 2006 work accident.

Plaintiffs/Appellants sought Second Injury Fund reimbursement pursuant to S.C. Code § 42-9-400, contending that Ms. Jones' right wrist injury and anxiety predated her April 17, 2006 work accident, that the conditions were permanent and serious enough so as to constitute a hindrance or obstacle to her employment, that the preexisting conditions were concealed from Spartanburg Regional Healthcare System, and that they incurred substantially greater liability for medical costs, disability, and compensation based upon Ms. Jones' preexisting conditions combining with or being aggravated by her April 17, 2006 work accident. In so contending, Plaintiffs/Appellants relied upon medical evidence and medical questionnaires completed by physicians, including Ms. Jones' authorized treating physician, establishing the elements of reimbursement under S.C. Code § 42-9-400.

PROCEDURAL HISTORY

Commissioner Derrick L. Williams held a hearing on August 22, 2011, in Spartanburg, South Carolina. The Commissioner's Decision and Order, filed October 11, 2011, denied Plaintiffs/Appellants reimbursement pursuant to S.C. Code § 42-9-400. On October 24, 2011, Plaintiffs/Appellants filed an Application for Full Commission Review of the Hearing Commissioner's Decision & Order. The parties submitted briefs in support of their respective

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position and appeared before the Appellate Panel on March 19, 2012 for oral argument. On June 6, 2012, the Appellate Panel issued its Decision and Order denying Plaintiffs/Appellants full reimbursement from the Fund and affirming the Decision and Order of the Hearing Commissioner.

Plaintiffs/Appellants submitted a Notice of Appeal and Petition for Judicial Review by the Court on July 3, 2012, listing fifty-seven (57) Grounds for Review and Exceptions to the Decision and Order of the Appellate Panel.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 15–16, 682 S.E.2d 516, 519 (Ct. App. 2009); see *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under the scope of review established by the APA, the Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel'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. *Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012); see S.C. Code § 1-23-380. Substantial evidence is defined as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion as the Appellate Panel. *Carolinas Recycling Group*, 398 S.C. at 483, 730 S.E.2d at 326 (citing *Lark*, 276 S.C. at 135, 276 S.E.2d at 306). More specifically, 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

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reasonable minds to reach the conclusion that the Appellate Panel reached. *Bazen v. Badger R. Bazen Co., Inc.*, 388 S.C. 58, 62, 693 S.E.2d 436, 438 (Ct. App. 2010) (citing *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)).

ANALYSIS

Plaintiffs/Appellants contended to the Court that the Decision and Order of the Appellate Panel was affected by other error of law insofar as the Appellate Panel's decision denying Plaintiffs/Appellants reimbursement was not supported by substantial evidence in the record. More specifically, Plaintiffs/Appellants explained that they submitted medical evidence and uncontroverted expert medical opinions from physicians, including Ms. Jones' authorized treating physician, establishing each of the requisite elements of reimbursement as provided for in S.C. Code § 42-9-400. In contrast, the Second Injury Fund/Respondent did not submit any evidence of its own, and instead, pointed to isolated medical records submitted by Plaintiffs/Appellants and contended that said medical records did not support the opinions of the experts finding that the elements of reimbursement had been met in this instance.

Plaintiffs/Appellants submitted evidence in the form of medical records and medical questionnaires completed by physicians, including Ms. Jones' authorized treating physician, establishing that Ms. Jones suffered from anxiety and a prior right wrist injury before her April 17, 2006 work accident (ROA pp. 121, 128-29, 138, 140, 143, 150, 155-59). The same evidence also establishes that these preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to Ms. Jones employment or reemployment (ROA pp. 155-59). In fact, Ms. Jones missed approximately one year of work as a result of her 1993 right wrist injury (ROA pp. 128, 138, 140, 143). Plaintiffs/Appellants also pointed to medical records and questionnaires supporting that Ms. Jones' preexisting anxiety and right wrist injury combined

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with or were aggravated by her April 17, 2006 work injury to result in substantially greater liability for medical costs, disability, and compensation, than would have resulted from her April 17, 2006 alone (ROA 56, 68, 70, 72, 121, 125, 135, 155-59). In sum, Plaintiffs/Appellants satisfied each and every requirement for Second Injury Fund reimbursement pursuant to S.C. Code § 42-9-400 via expert medical opinions and supporting medical records. As noted previously, the Second Injury Fund did not submit any medical opinions or evidence contradicting that submitted by Plaintiffs/Appellants.

The South Carolina Court of Appeals recently weighed in on what evidence the Appellate Panel may rely upon in rendering a decision on entitlement to Second Injury Fund reimbursement. In *Carolinus Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012), the South Carolina Court of Appeals found that the record was “replete with expert medical testimony” supporting reimbursement and “the Fund failed to present any expert medical testimony . . . to discredit the overwhelming medical testimony and evidence [the carrier] presented to the Appellate Panel.” *Id.* at 485, 730 S.E.2d at 327. As such, the court found that the decision of the Appellate Panel denying reimbursement was not supported by substantial evidence; correspondingly, the court reversed the Order of the circuit court affirming the Decision and Order of the Appellate Panel. *See id.* at 486, 730 S.E.2d at 328.

In another case, *Burnette v. City of Greenville*, No. 5059, 2012 WL 6028904 (S.C. Ct. App. Dec. 5, 2012), released the week before the parties presented oral arguments to the Court, the South Carolina Court of Appeals once again reversed a circuit court affirming the decision of the Appellate Panel, on the ground that the Appellate Panel’s decision was not supported by substantial evidence. While *Burnette* does not involve reimbursement from the Second Injury Fund, the standard of substantial evidence articulated by the South Carolina Court of Appeals in

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that case is applicable to the instant action. In *Burnette*, the Appellate Panel had affirmed the decision of the Hearing Commissioner denying compensability. *Id.* at *1. The South Carolina Court of Appeals pointed out that the record contained medical evidence and opinions from the employee's physicians that the employee had sustained a compensable injury to her lumbar spine and there was no evidence in the record challenging the conclusions of the medical experts. Despite this, the Hearing Commissioner and Appellate Panel found against compensability for the lumbar spine, in spite of what the court of appeals considered to be a lack of medical evidence supporting their decision. The South Carolina Court of Appeals reversed the Order of the circuit court affirming the decision of the Appellate Panel, holding that the record provided "little or no support for the findings of the Commission." *Id.* at *6. In so holding, the court of appeals noted that "particularly disturbing" was that the opinion regarding the significance of medical evidence (an MRI) did not originate from a medical provider, but was simply the opinion of the Hearing Commissioner based upon her interpretation of the medical evidence. *Id.* at *6. The court of appeals remanded the case to the Commission with specific instructions to reconsider the issues and enter findings of fact concerning compensability of the lumbar spine that are supported by substantial evidence in the record. *Id.*

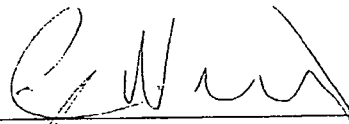
Under the authority of *Carolinas Recycling*, once Plaintiffs/Appellants submitted expert medical opinions and supporting medical evidence establishing each and every element of reimbursement under S.C. Code § 42-9-400, the South Carolina Second Injury Fund was required to submit some form of reliable, probative, and substantial medical evidence of its own contradicting that submitted by Plaintiffs/Appellants. In this instance, the South Carolina Second Injury Fund did not submit any such evidence. As such, the decision of the Appellate Panel was not supported by substantial evidence and constituted an error of law.

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While the authority of *Carolinas Recycling* alone supports reversing the decision of the Appellate Panel, the recent *Burnette* case provides additional support as well. The Court finds *Burnette* to be consistent with *Carolinas Recycling* in illustrating that the South Carolina Court of Appeals has held that the Appellate Panel is not entitled to reach its own medical opinions when faced with uncontroverted expert medical opinions favoring one party. When the Appellate Panel disregards such uncontroverted expert medical opinions, its decision is not supported by substantial evidence.

CONCLUSION

The Decision and Order of the Appellate Panel is not supported by substantial evidence in the record and is affected by other error of law. For these reasons, the decision of the Appellate Panel is reversed insofar as it denies Plaintiffs/Appellants full Second Injury Fund reimbursement. The Second Injury Fund shall immediately and fully reimburse Plaintiffs/Appellants as provided for under S.C. Code § 42-9-400.



Clifton B. Newman
Presiding Judge

Walter, South Carolina
Feb 13, 2013

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CERTIFICATE OF SERVICE

I do hereby certify that on the 3rd day of May, 2013, I served a copy of the **RESPONDENTS' MOTION TO ALLOW FILING OF MOTION IN LOWER COURT** upon the Clerk of Court for the South Carolina Court of Appeals, the attorney for the Appellant, and others as specified below, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, to the following:

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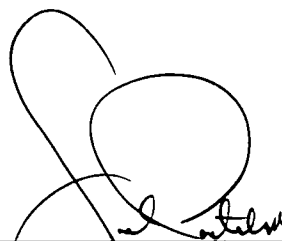
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SC Court of Appeals

Latonya D. Edwards, Esq.
Dilligard Edwards, LLC
3790 Fernandina Road, Ste. 103
Columbia, SC 29210

The Honorable Hope Blackley
Clerk of the Circuit Court - Spartanburg County
County Courthouse
180 Magnolia Street
2nd Floor, Suite 500
Spartanburg, SC 29306

Ms. Virginia L. Crocker
Judicial Director
S. C. Workers' Compensation Commission
P O Box 1715
Columbia, SC 29202



Jared M. Pretulak (S.C. Bar No. 74884)
Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, SC 29603
(864) 271-5354

Attorney for Respondents

May 3, 2013