STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)))	IN THE COURT OF COMMON PLEAS CP NO.: 2013-CP43-02284
ARROWPOINT CAPITAL CORPORATION / ARROWOOD INDEMNITY CO., Plaintiff/Appellant, v. SOUTH CAROLINA SECOND INJURY FUND, Defendant/Respondent, [IN RE: Mary McConico, Employee/Claimant, v. Yuasa-Exide, Inc., Employer, and Arrowpoint Capital Corp./Arrowood Indemnity Co., Carrier.	)	ORDER

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission involving a denied claim for reimbursement pursuant to S.C. Code Ann. § 42-9-400 from the South Carolina Second Injury Fund (the Fund) by Yuasa Exide Incorporated, Employer, and Arrowpoint Capital Corporation, Carrier (collectively Carrier). A hearing in this matter was held before the Single Commissioner, Andrea C. Roche, on August 13, 2012, to determine the issues as set forth on the Forms 54 and

55.

At the hearing before the Single Commissioner, Carrier alleged that it incurred substantially greater liability for compensation when employee Mary McConico's (Claimant's) alleged preexisting heavy metal poisoning, hypertension, and/or cardiovascular disease were either aggravated by or combined with her July 31, 1999, work-related injury to her brain, kidneys, cerebral vascular accident or stroke, and to his musculoskeletal, cognitive, neuropathic and cardiovascular systems, which was also caused by lead exposure. Carrier's Form 58, ROA 53. Carrier also alleged that Claimant's alleged preexisting conditions were a hindrance or obstacle to employment. Id.

At the hearing before the Single Commissioner, the Fund asserted that the Carrier's claim is barred by S.C. Code Ann. § 42-7-320(B)(2), as well as by S.C. Code Ann. § 42-7-310 and its subsections. Further, Fund denied that Carrier met any of the requirement for reimbursement, specifically asserting that Claimant's heavy metal exposure, hypertension, and/or cardiovascular disease did not preexist her lead exposure. The Fund further denied that the alleged preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment as per S.C. Code Ann. § 42-9-400. Hrg. Tr. p. 3, ROA p. 94; Hrg. Tr. p. 5, ROA p. 96; Hrg. Tr. p. 25, ROA p. 116; Fund's Form 58, ROA p. 55.

At the hearing, the Fund objected to the inclusion and consideration of Carrier's APA Submission Number 10, Post Yuasa Medical Records, APA pages 95 – 169. Hrg. Tr. p. 3, ROA p. 94. The basis for the Fund's objection was that these documents were not submitted to the Fund on or prior to June 30, 2011, as required by S.C. Code Ann. § 42-7-320(B)(2). On June 30, 2011, Carrier did submit to the Fund a compact disc by which it asserts it intended to submit electronic copies of documentary material. The single file on the disc was a hyperlink that does

not access any files outside of Carrier's counsel's database. Finding of Fact 9, Full Commission Order pp. 10 – 11, ROA pp. 11 – 12; Conclusion of Law 3, Full Commission Order pp. 13 – 15, ROA pp. 13 – 15; Hrg. Tr. p. 4 – 5, ROA p. 95 – 96; Fund's APA Submissions p. 2-B, ROA p. 342. The Fund took the position that because there were no electronic copies of any documents on the disc, the documents were not timely submitted, as required by S.C. Code Ann. §42-7-320(B)(2). Id.

At the hearing, the Single Commissioner overruled the Fund's objections, saying, "I think everybody would agree that the intent was to submit records . . . ." Hrg. Tr. p. 5, ll. 10 – 11; ROA p. 96 (emphasis added). The Single Commissioner issued her order on December 19, 2012. ROA p. 19. In Finding of Fact 9, the Single Commissioner wrote:

> . . . even though the disc did not contain electronic copies of medical records, because the Carrier intended to submit the documents . . . the Fund's objection was overruled and the documents may be considered. Therefore, S.C. Code Ann. § 42-7-320(B)(2) does not act as a bar to Carrier's potential recovery in this instance.

Single Commissioner's Order, p. 15, ROA p. 33 (emphasis added).

Nevertheless, the Single Commissioner went on to deny Carrier's claim for reimbursement based on its failure to establish all necessary elements for reimbursement pursuant to S.C. Code Ann. § 42-9-400. Single Commissioner's Order, ROA pp. 19 – 36.

Both parties timely appealed. The Fund asserted that the Single Commissioner erred in ignoring the plain language of S.C. Code Ann. § 42-9-320(B) and, also, by allowing the untimely produced medical records into evidence. Full Comm. Hrg. Tr. pp. 4 – 5, ROA pp. 64 – 65; Fund's Form 30, ROA p. 59. The Carrier appealed the substantive denial of its claim. Employer's Form 30, ROA pp. 57 – 58.

An En Banc panel of the Full Commission heard the cross-appeals on August 12, 2013. After reviewing all the evidence de novo, the Full Commission issued its Order November 21, 2013. The Full Commission found that the Carrier's failure to comply with S.C. Code Ann. § 42-9-320(B)(2) served as bar to its claim for reimbursement under S.C. Code Atm. § 42-9-400. Full Commission Order, ROA pp.1 – 18. The Commission further ruled on the substantive issues, finding that the Claimant's lead exposure over the course of twenty-five (25) years constituted a single injury, and that the lead exposure was not a hindrance or obstacle to employment. Findings of Fact 4 and 5, Full Commission Order pp. 9-10, ROA pp. 9-10.

The Full Commission's Findings of Fact and Conclusions of Law are as follows:

FINDINGS OF FACT
(FULL COMMISSION)

1. On July 31, 1999, Claimant sustained an occupational exposure to heavy metal/lead during the course of her employment with Yuasa Exide, Incorporated. This finding is based upon the totality of the records in evidence.

2. The Fund was placed on notice of this potential reimbursement claim on December 15, 2010. This is based on the parties' stipulations and Fund's APA p. 1.

3. Claimant did not have preexisting heavy metal poisoning, hypertension, or cardiovascular disease prior to her occupational exposure. The Carrier offers no evidence to support any such conclusion, and it is the Carrier's burden to prove compliance with the requirements of S.C. Code Ann. § 42-9-410. The Carrier offers no medical records antedating the Claimant's employment with Employer in 1974 and/or her subsequent exposure. The Claimant herself testified that she "didn't have any [health] problems until [she] went [to work]" with Employer. Carrier's APA p. 195; Claimant's Deposition, p. 11, ll. 2 – 3. In 1979, after she had been employed for approximately five (5) years, the Carrier's position was that the Claimant suffered no disability that would prevent her from working. Fund's APA pp. 3 – 4. Further, this is based on the totality of the medical evidence in the record.

4. We do not find persuasive Carrier's position that the occupational exposure to heavy metal is Claimant's both first and subsequent injuries. Claimant was

exposed to lead over a twenty-five (25) year period of employment; and, as such, we find that the occupational or heavy metal exposure is one injury and there was no preexisting heavy metal exposure. This is based on the totality of the medical evidence in the record.

5. Even if Claimant's occupational exposure can be viewed as separate injuries, we find that it was not a hindrance or obstacle to her employment. Claimant worked for this employer for twenty-five (25) years until suffering a stroke and/or aneurysm. This is based on the totality of the medical evidence in the record.

6. Since we find that there was no preexisting heavy metal exposure, we also find that there was no combination or aggravation of the preexisting condition by the subsequent injury to create substantially greater medical costs and permanent disability. In 1979, after she had been employed for approximately five (5) years and had been exposed to lead, the Carrier's position was that the Claimant suffered no disability that would prevent her from working. Fund's APA pp. 3 – 4. This finding is based on the totality of the evidence in the record.

7. Even if there were preexisting heavy metal exposure, the Carrier has only offered questionnaires to support substantially greater medical costs and permanent disability. Carrier's APA pp. 9 – 14. These questionnaires consider only heavy metal poisoning and coronary artery disease (not cardiovascular disease or hypertension) of the alleged preexisting conditions, and also consider other conditions (i.e., heavy metal poisoning, bronchitis, stroke, cerebral aneurysm) as equally causative of greater medical costs and permanent disability. Considering the entirety of the medical evidence presented, the other conditions cannot be reasonably said to have pre-existed the lead exposure. The finding is based on the totality of the evidence in the record.

8. Carrier failed to meet its burden in establishing all necessary elements for partial reimbursement pursuant to S.C. Code Ann. § 42-9-400. Accordingly, Carrier is not entitled to reimbursement from the South Carolina Second Injury Fund.

9. We find that Carrier's claim for reimbursement is barred by S.C. Code Ann. § 42-7-320(b)(2). We further find that Carrier's APA 10, Post Yuasa Medical Records, shall be stricken from the record. This finding is based on Carrier's failure to timely submit all materials required by the Fund by June 30, 2011, so that the claim could be accepted, compromised, or denied. In particular, on June 30, 2011, Carrier submitted a compact disc to the Fund. Purportedly, Carrier intended to submit electronic copies of documentary materials (those included in Carrier's APA 10, Post Yuasa Medical Records) via the disc. There were no copies, electronic or otherwise, of any documents on the disc.

The disc contained only a single, 1Kb file. The file on the disc was a simple hyperlink. The hyperlink did not access any documents.

In 2007, the Legislature enacted legislation to affect the closure of the Second Injury Fund. S.C. Code Ann. § 42-7-320 ("Termination of the Second Injury Fund; schedule") reads as follows:

(A) Except as otherwise provided in this section, on and after July 1, 2013, the programs and appropriations of the Second Injury Fund are terminated. The State Budget and Control Board must provide for the efficient and expeditious closure of the fund with the orderly winding down of the affairs of the fund so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, loss portfolio transfers, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund. The Department of Insurance and the Workers' Compensation Commission may submit comments and suggestions to be considered by the State Budget and Control Board in planning for the closure of the fund. The State Budget and Control Board shall cause all necessary actions to be taken to provide appropriate staffing of the fund until such time as the staff services are no longer required to administer the obligations of the fund. The fund's administrative costs, including employee salaries and benefits, shall be paid from the Second Injury Fund Trust if the interest from the trust becomes insufficient to pay these obligations.

(B) After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier. The fund shall not consider a claim for reimbursement for an injury that occurs on or after July 1, 2008.

(1) An employer, self-insurer, or insurance carrier must notify the Second Injury Fund of a potential claim by December 31, 2010. Failure to submit notice by December 31, 2010, shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

(2) An employer, self-insurer, or insurance carrier must submit all required information for consideration of accepting a claim to the Second Injury Fund by June 30, 2011. Failure to submit all required information to the fund by June 30, 2011, so that the claim can be accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

(3) Insurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund assessments, as

> determined by the State Budget and Control Board, in order to pay accepted claims. The fund shall continue reimbursing employers and insurance carriers for claims accepted by the fund on or before December 31, 2011.

The language chosen by the Legislature in crafting this law is mandatory: the "[f]ailure to submit all required information . . . by June 30, 2011 . . . shall bar . . . carrier from recovery . . . ." Id.

The Fund requires "narrative medical reports" and "treating doctor's opinion" in order to consider a claim for reimbursement. Fund APA 2. A necessary element of Second Injury Fund recovery includes whether a determination whether Claimants disability or medical expenses were substantially increased due to the alleged pre-existing condition. S.C. Code Ann. § 42-9-400; see Fund APA p. 2. Carrier was notified specifically of the requirement of these documents on April 25, 2011. Fund APA p. 2.

"The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation." Seckinger v. Vessel Excalibur, 483 S.E. 2d 775, 777, 326 S.C. 382, 387 (Ct. App. 1997) (quoting Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App.1986)). S.C. Code Ann. § 42-7-320(b)(2) involves two uses of mandatory language: these are the words "must" and "shall". According to the Supreme Court, the word "shall" in a statute ordinarily means the action referred to is mandatory. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 n. 3 (1998).

According to the Supreme Court, "a court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (internal citations omitted). Further, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000).

The Supreme Court has held that notice requirement deadlines dealing with Second Injury Fund reimbursement should be strictly construed. See Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982). Additionally, the Supreme Court has held that the right of a claimant to secure Second Injury Fund reimbursement depends upon complete compliance with the requirements imposed for recovery. Boone's Masonry Construction Co., Inc. v. South Carolina Second Injury Fund, 267 S.C. 277, 282, 227 S.E.2d 659, 661 (1976). Accordingly, we find that this claim is barred by S.C. Code Ann. § 42-7-320(b)(2).

CONCLUSIONS OF LAW
(FULL COMMISSION)

1. Reimbursement from the South Carolina Second Injury Fund is governed by S.C. Code Ann. § 42-9-400.

2. The right of Carrier to receive reimbursement from the South Carolina Second Injury Fund depends upon complete compliance with the requirements for recovery. South Carolina Second Injury Fund v. American Yard Products, 330 SC 20, 496 S.E.2d 862 (1998).

3. We conclude that Carrier's claim for reimbursement is barred by S.C. Code Ann. § 42-7-320(b)(2). We further find that Carrier's APA 10, Post Yuasa Medical Records, shall be stricken from the record. This finding is based on Carrier's failure to timely submit all materials required by the Fund by June 30, 2011, so that the claim could be accepted, compromised, or denied. In particular, on June 30, 2011, Carrier submitted a compact disc to the Fund. Purportedly, Carrier intended to submit electronic copies of documentary materials (those included in Carrier's APA 10, Post Yuasa Medical Records) via the disc. There were no copies, electronic or otherwise, of any documents on the disc. The disc contained only a single, 1Kb file. The file on the disc was a simple hyperlink. The hyperlink did not access any documents. In 2007, the Legislature enacted legislation to affect the closure of the Second Injury Fund. S.C. Code Ann. § 42-7-320 ("Termination of the Second Injury Fund; schedule") reads as follows:

   (A) Except as otherwise provided in this section, on and after July 1, 2013, the programs and appropriations of the Second Injury Fund are terminated. The State Budget and Control Board must provide for the efficient and expeditious closure of the fund with the orderly winding down of the affairs of the fund so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, loss portfolio transfers, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund. The Department of Insurance and the Workers' Compensation Commission may submit comments and suggestions to be considered by the State Budget and Control Board in planning for the closure of the fund. The State Budget and Control Board shall cause all necessary actions to be taken to provide appropriate staffing of the fund until such time as the staff services are no longer required to administer the obligations of the fund. The fund's administrative costs, including employee salaries and benefits, shall be paid from the Second Injury Fund Trust if the interest from the trust becomes insufficient to pay these obligations.

   (B) After December 31, 2011, the Second Injury Fund shall not accept a

claim for reimbursement from any employer, self-insurer, or insurance carrier. The fund shall not consider a claim for reimbursement for an injury that occurs on or after July 1, 2008.

(1) An employer, self-insurer, or insurance carrier must notify the Second Injury Fund of a potential claim by December 31, 2010. Failure to submit notice by December 31, 2010, shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

(2) An employer, self-insurer, or insurance carrier must submit all required information for consideration of accepting a claim to the Second Injury Fund by June 30, 2011. Failure to submit all required information to the fund by June 30, 2011, so that the claim can be accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

(3) Insurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund assessments, as determined by the State Budget and Control Board, in order to pay accepted claims. The fund shall continue reimbursing employers and insurance carriers for claims accepted by the fund on or before December 31, 2011.

The language chosen by the Legislature in crafting this law is mandatory: the "[f]ailure to submit all required information . . . by June 30, 2011 . . . shall bar . . . carrier from recovery . . . ." Id.

The Fund requires "narrative medical reports" and "treating doctor's opinion" in order to consider a claim for reimbursement. Fund APA 2. A necessary element of Second Injury Fund recovery includes whether a determination whether Claimants disability or medical expenses were substantially increased due to the alleged pre-existing condition. S.C. Code Ann. § 42-9-400; see Fund APA p. 2. Carrier was notified specifically of the requirement of these documents on April 25, 2011. Fund APA p. 2.

"The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation." Seckinger v. Vessel Excalibur, 483 S.E. 2d 775, 777, 326 S.C. 382, 387 (Ct. App. 1997) (quoting Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App.1986)). S.C. Code Ann. § 42-7-320(b)(2) involves two uses of mandatory language: these are the words "must" and "shall". According to the Supreme Court, the word "shall" in a statute ordinarily means the action referred to is mandatory. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471,

476 n. 3 (1998).

According to the Supreme Court, "a court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (internal citations omitted). Further, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000).

The Supreme Court has held that notice requirement deadlines dealing with Second Injury Fund reimbursement should be strictly construed. See Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982). Additionally, the Supreme Court has held that the right of a claimant to secure Second Injury Fund reimbursement depends upon complete compliance with the requirements imposed for recovery. Boone's Masonry Construction Co., Inc. v. South Carolina Second Injury Fund, 267 S.C. 277, 282, 227 S.E.2d 659, 661 (1976).

4. To qualify for reimbursement, Carrier had the burden to prove that Claimant's had a preexisting condition that was permanent and serious enough to be a hindrance or obstacle to Claimant's employment. Carrier failed to meet its burden of proof on this issue; and, therefore, failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

5. To qualify for reimbursement Carrier had the burden to prove that Claimant's preexisting condition was either aggravated by or combined with is work related injury to create substantially greater medical costs and permanent disability. Carrier failed to meet is burden of proof on this issue; and, therefore, failed to meet all requirements for reimbursement pursuant to S.C. Code Ann. §42-9-400.

6. Since Carrier did not meet all requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400, it is not entitled to reimbursement from the South Carolina Second Injury Fund, and its claim is denied.

STANDARD OF REVIEW

The standard of review for decisions of the Workers' Compensation Commission is established in the Administrative Procedures Act. South Carolina Second Injury Fund v. Liberty Mutual Insurance Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003). A reviewing court must not disturb the Workers' Compensation Commission's findings if those findings are supported by

substantial evidence in the record. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). The fact that reasonable minds may differ or that there is the possibility of drawing inconsistent conclusions does not prevent an agency's findings from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E. 2d 388 (1995). 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. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct.App. 1999); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App. 2002).

In Brown v. Greenwood Mills, Inc., the Court of Appeals explained at length the standard of review in Workers' Compensation cases:

> The South Carolina Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the workers' compensation commission. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Under the scope of review established in the APA, this 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 where the decisions is affected by an error of law.
>
> The substantial evidence rule of APA governs the standard of review in a workers' compensation decision. Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.
>
> The appellate panel is the ultimate finder of fact in workers' compensation cases and is not bound by the single commissioner's findings of fact. The final determination of witness credibility and weight to be accorded evidence is reserved to the appellate panel. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive.

> The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence.

366 S.C. 379, 391 – 93, 622 S.E. 2d. 546, 553 – 54 (Ct.App. 2005).

ISSUES PRESENTED

(1) THE WORKERS' COMPENSATION COMMISSION WAS CORRECT IN APPLYING THE PLAIN LANGUAGE OF S.C. CODE ANN. SECTION 42-7-320(B)(2) TO THE FACTS HEREIN, WHERE CARRIER FAILED TO SUBMIT ALL REQUIRED MATERIALS BEFORE THE STATUTORILY IMPOSED DEADLINE.

This Court agrees that the Full Commission, sitting en banc, was correct in its application of S.C. Code Ann. § 42-7-320(B)(2), the statute governing the termination of the Second Injury Fund. The Second Injury Fund is a state agency created by the Legislature to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995) (citing Springs Industries v. South Carolina Second Injury Fund, 296 S.C. 359, 372 S.E.2d 915 (Ct.App.1988)). However, in 2007, the Legislature enacted legislation to effect the closure of the Second Injury Fund. See S.C. Code Ann. § 42-7-320. S.C. Code Ann. § 42-7-320 ("Termination of the Second Injury Fund; schedule") reads as follows:

> (A) Except as otherwise provided in this section, on and after July 1, 2013, the programs and appropriations of the Second Injury Fund are terminated. The State Budget and Control Board must provide for the efficient and expeditious closure of the fund with the orderly winding down of the affairs of the fund so that the remaining liabilities of the fund are paid utilizing assessments, accelerated assessments, annuities, loss portfolio transfers, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund. The Department of Insurance and the Workers' Compensation Commission may submit comments and suggestions to be considered by the State Budget and Control Board in planning for the closure of the fund. The State Budget and Control Board shall cause all necessary actions to be taken to provide appropriate staffing of the fund until such time as the staff services are no longer required to

administer the obligations of the fund. The fund's administrative costs, including employee salaries and benefits, shall be paid from the Second Injury Fund Trust if the interest from the trust becomes insufficient to pay these obligations.

(B) After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier. The fund shall not consider a claim for reimbursement for an injury that occurs on or after July 1, 2008.

(1) An employer, self-insurer, or insurance carrier must notify the Second Injury Fund of a potential claim by December 31, 2010. Failure to submit notice by December 31, 2010, shall bar an employer, self-insurer, or insurance Carrier from recovery from the fund.

(2) An employer, self-insurer, or insurance carrier must submit all required information for consideration of accepting a claim to the Second Injury Fund by June 30, 2011. Failure to submit all required information to the fund by June 30, 2011, so that the claim can be accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

(3) Insurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund assessments, as determined by the State Budget and Control Board, in order to pay accepted claims. The fund shall continue reimbursing employers and insurance Carriers for claims accepted by the fund on or before December 31, 2011.

(emphasis added). The language chosen by the Legislature in crafting this law is mandatory: the "[f]ailure to submit all required information . . . by June 30, 2011 . . . shall bar . . . Carrier from recovery . . . ." Id. This language is explicit.

The documents that were not timely submitted to the Fund were required by the Fund before it could consider reimbursement were narrative medical reports that would show whether the Claimant's disability or medical expenses were substantially increased due to the alleged pre-existing condition. Fund APA p. 2, ROA p. 341. Carrier was notified of the requirement of these documents on April 25, 2011. Id. Additionally, the Carrier's attempted

inclusion of these documents in its APA Submissions supports the conclusion that these materials are necessary to recovery.

As a creature of statute, the Fund cannot abide by parts of the statute governing it and ignore others. Clearly, the entirety of Section B sets deadlines that must be met in order to perfect a claim for Second Injury Fund recovery. By setting deadlines, the Legislature affected an orderly manner by which to close the agency. S.C. Code Ann. § 42-7-320(b) sets forth a cut-off date for reimbursable injuries: July 1, 2008. If a carrier pays for compensable injuries occurring after that date, the "Fund shall not consider" that claim. S.C. Code Ann. § 42-7-320(b)(emphasis added). S.C. Code Ann. § 42-7-320(b)(1) sets forth the last date that notice may be sent to the Fund. Notice sent after December 31, 2011 is not timely, and failure to provide timely notice "shall bar an employer, self-insurer, or insurance carrier from recovery from the fund." S.C. Code Ann. § 42-7-320(b)(1) (emphasis added). S.C. Code Ann. § 42-7-320(b)(2) is the section that is applicable here, and that section requires all necessary information to be submitted to the Fund by June 30, 2011. If a carrier fails to timely submit all necessary materials, such failure "shall bar" the Carrier "from recovery from the Fund." S.C. Code Ann. § 42-7-320(b)(2) (emphasis added).

This case involves statutory construction. "The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation." Seckinger v. Vessel Excalibur, 483 S.E. 2d 775, 777, 326 S.C. 382, 387 (Ct. App. 1997) (quoting Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App.1986)). The particular section under discussions, S.C. Code Ann. § 42-7-320(b)(2), involves two uses of mandatory language: these are the words 'must" and "shall". According to the Supreme Court, the word "shall" in a statute ordinarily

means the action referred to is mandatory. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 n. 3 (1998).

According to the Supreme Court, "a court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (internal citations omitted). Further, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000).

"In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)). The subject section herein appears as just one deadline in a list of deadlines required to be met by a Carrier before it can pursue reimbursement.

The General Assembly has determined that the Second Injury Fund shall be closed. In doing so, the General Assembly created the sunset provision, which set forth the timelines necessary in order to affect an orderly closure. In this regard, the sunset provision acts not unlike a statute of limitations. According to the Court of Appeals,

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App.1996) (internal citations and quotations omitted).

The Supreme Court has held that notice requirement deadlines affecting Second Injury Fund reimbursement should be strictly construed. See Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982). Additionally, the Supreme Court has held that the right to secure Second Injury Fund reimbursement depends upon complete compliance with the requirements imposed for recovery. Boone's Masonry Construction Co., Inc. v. South Carolina Second Injury Fund, 267 S.C. 277, 282, 227 S.E.2d 659, 661 (1976). The Carrier did not point to any case law that lessened strict statutory compliance as a requirement for Second Injury Fund reimbursement.

This Court hereby affirms the Order of the Full Commission. The Carrier's claim for reimbursement is hereby denied and dismissed with prejudice.

(2) THE FULL COMMISSION PROPERLY EXCLUDED CARRIER'S APA 10 FROM EVIDENCE, WHERE SUCH DOCUMENTS WERE NOT SUBMITTED TO THE FUND ON OR BEFORE JUNE 30, 2011.

The Court agrees that the Full Commission, sitting en banc, correctly excluded Carrier's APA 10, Post Yuasa Medical Records, from evidence where the submission of said materials was not made in a timely manner. S.C. Code Ann. § 42-7-320(B)(2). Because such medical records were necessary to show an increase in disability and/or medical costs, if any, and because the Fund instructed Carrier that such documents were necessary for consideration, the Carrier failed to timely submit all required documents to the Fund. S.C. Code Ann. § 42-7-320; S.C. Code Ann. § 42-9-400; Fund APA Submissions, p. 2; ROA p. 341.

The arguments as set forth above are incorporated herein as support this

position. Because Second Injury Fund reimbursement requires strict compliance with the statutory requirements for the same, the Full Commission's exclusion of these documents from the record was proper and necessary.

This Court hereby affirms the Order of the Full Commission. The Carrier's claim for reimbursement is hereby denied and dismissed with prejudice.

(3) ALTERNATIVELY, THE FULL COMMISSION CORRECTLY AFFIRMED THE SINGLE COMMISSIONER'S FINDINGS THAT THE EMPLOYER/CARRIER FAILED TO SATISFY THE REQUIREMENTS FOR REIMBURSEMENT UNDER S.C. CODE ANN. §42-9-400.

A. In General.

This reimbursement case was brought before the Commission on the eve of the sunset of the Fund. There has been no adjudication of any facts or issues in the underlying case. This case was settled on "doubtful and disputed" bases. According to the settlement agreements, this settlement is affective to Yusasa-Exide, Inc. and all of its "predecessors". Settlement Agreement, p. 3, ROA p. 39.

The Fund, of course, began as encouragement for employers to hire and retain employees with disabilities. It was never intended to operate as a safety net for employers who, as a part of their business, expose their workforce to hazardous working conditions on long term bases. In American Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 386 S.E.2d 276 (Ct. App. 1989), the Court of Appeals addressed the purpose and scope of the Fund:

> The Second Injury Fund was created in 1972. See Section 42-9-400, Code of Laws of South Carolina (1976). One of the purposes in establishing the Second Injury Fund was to encourage employers to hire handicapped persons by providing reimbursement to the employer or insurer for compensation paid as a result of a second injury. The Fund was designed to compensate handicapped workers fully for subsequent injuries without penalizing employers for hiring them in the first place. The Second Injury Fund granted a new remedy or right of reimbursement to the insurer; and the Legislature

> could properly impose such reasonable terms and conditions upon the exercise of such right as it deemed appropriate. The right of a claimant to secure reimbursement under the statute depends upon complete compliance with the requirements imposed for recovery. The success and future of the Second Injury Fund depend upon proper and careful application of these statutory requirements.

300 S.C. 17, 21 – 22, 386 S.E.2d 276, 278 (Ct. App. 1989) (emphasis added) (internal citations omitted).

The Court of Appeals later wrote that the Fund is intended to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995). In this case, the Employer/Carrier seeks reimbursement from the Fund for conditions caused by the exposure to lead that was its very business.

For a Carrier to be entitled to reimbursement from the Second Injury Fund, it must prove that a claimant's pre-existing condition aggravated or combined with her subsequent injury to cause increased disability or medical costs. S.C. Code Ann. § 42-9-400. The section provides in pertinent part:

> Section 42-9-400. Manner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from preexisting impairment and subsequent injury.
>
> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits in the following manner . . . .

(emphasis added).

B. Exposure to Lead as Both Initial and Subsequent Conditions.

The Carrier asserts that both the first and second injuries were the same: the exposure to lead. Hrg. Tr. p. 18, I. 22 – p. 19, I. 8; ROA pp. 109 – 110. The Carrier's position is that the lead caused the Claimants' conditions, and, subsequent to the development of her maladies, she was further exposed to lead. Per the Carrier, the further exposure resulted in additional and/or worsening maladies. Thus, it argues, it is entitled to reimbursement for payment of a lump sum settlement that neither represents indemnity nor medical payments. Of course, by statute, the Fund only reimburses for disability benefits and/or medical payments. S.C. Code Ann. § 42-9-400.

In this case, the Carrier presents no evidence of an alleged 'pre-existing condition. The exposure to lead was coincidental to the beginning of work. The Carrier has submitted questionnaires/short reports from Dr. Eugene Shippen, Dr. Edward L. Baker, Jr., and Dr. J. Routt Reigart, the Claimant's experts in cases. Employer's APA Submissions, pp. 1 – 3, 9 – 11, and 12 – 14; ROA pp. 125 – 127, pp. 133 – 138. These questionnaires list all of the conditions allegedly suffered by the Claimant as "pre-existing conditions," regardless of when the symptoms for those conditions appeared (even if they appeared subsequent to employment with Employer). Id. Neither Dr. Shippen nor Dr. Baker is a treating physician.

Dr. Reigart completed what he called "Brief Health Evaluation[s]" of the Claimant. Dr. Reigart assigned impairment ratings to the Claimants and noted that the Claimant's conditions "are attributable to [her] occupation." Carrier's APA Submissions, p. 2; ROA p. 126. Thus, Dr. Reigart directly relates the conditions to employment and not to any pre-existing condition. Further, Dr. Reigart does not address any SIF criteria, and he does not address the

possible effect any pre-existing medical condition may have had on Carrier's subsequent liability for compensation and medical benefits or whether the pre-existing conditions (if there were any) constituted hindrances or obstacles to employment. See Carrier's APA Submissions, pp. 1 – 3; ROA pp. 125 – 127. Lastly, Dr. Reigart is not a treating physician.

These doctors relied on by Carrier do not support the Carrier's position that exposure to lead and its malignant effects on the body become pre-existing conditions to continuing exposure to the same substance and continuing malignant effects. Drs. Baker, Reigart, and Hu write that:

> [l]ead poisoning is a chronic illness. It has long been recognized that much of the toxicity of lead poisoning is not reversible by medical therapy. Prevention of exposure is the main aim in lead poisoning management[,] as treatment has little effect on reversing toxicity or preventing toxicity later in life related to lead mobilization from bone. Since lead remains in bone lead stores for many decades, it is considered a chronic illness requiring long term management and observation.

Carrier's Binder, Tab IA, pp. 20 – 21; ROA pp. 459 – 460. The Fund argues that, as a chronic illness, lead poisoning is the illness itself. As a chronic illness, lead poisoning does not stand apart from the maladies it causes. As the doctors note, the Claimant's "[c]onditions [were] caused by lead exposure in the workplace." Carrier's Binder, Tab IA, p. 21; ROA p. 460. As the doctors write, "Chronic lead poisoning is manifested by a range of damage to various systems of the body." Id. They go on to say, "We also conclude that lead, once absorbed into the body, was distributed to various parts of the body, including the brain, the kidneys and bone, and caused damage to the body of Exide workers." Carrier's Binder, Tab IA, p. 25; ROA p. 464. Thus, as the Fund argues, the manifestations of lead poisoning do not pre-exist the chronic illness, and the chronic illness is not separate and apart from the conditions to which it leads.

C. **Hindrance or Obstacle to Employment.**

The Full Commission ruled, as a Finding of Fact, that the Claimant's lead exposure to lead was not a hindrance or obstacle to the Claimant's employment or reemployment. Finding of Fact 5; Full Commission Order p. 10; ROA p. 10. There is substantial evidence to support this Finding, as the Claimant was employed at the plant for a quarter of a century. Because there is substantial evidence to support this Finding, and because this is a question of fact, this Court cannot substitute its judgment for that of the Workers' Compensation Commission sitting en banc. See Lorick v. S.C. Electric & Gas Co., 245 S.C. 513, 141 S.E.2d (1965).

For the foregoing reasons, this Court hereby affirms the Order of the Full Commission. The Carrier's claim for reimbursement is hereby denied and dismissed with prejudice

ORDER

For the foregoing reasons, the Commission's Order in this matter is affirmed on all issues.

AND IT IS SO ORDERED!

Respectfully Submitted,

W. Jeffrey Young
Judge, Third Circuit Court

Dated: 5 Sept 2014