THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Court Tracking No. 2014-002212
Civil Acton No. 2013-CP-43-02283
WCC File No. 9832185

Arrowpoint Capital Corporation/Arrowood Indemnity Co., Carrier, Appellant

v.

South Carolina Second Injury Fund, Respondent,

[In re: Joe Mathis, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

FINAL REPLY BRIEF OF APPELLANT

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In response to the arguments presented in Respondent's Initial Brief, Appellants hereby submit this Reply Brief for the Court's consideration.

ARGUMENT

APPELLANTS HAVE MET THE REQUIREMENTS FOR REIMBURSEMENT PURSUANT TO S.C. CODE ANN. § 42-9-400.

As set forth in their Initial Brief and in the arguments below, Appellants have met the requirements for reimbursement from the South Carolina Second Injury Fund and request that the Order of the Circuit Court be reversed.

A. Appellants have made payment to Claimant as part of a settlement agreement for his workers' compensation claim and have met the requirements for reimbursement from the Second Injury Fund.

Respondents argue that there was never an "award" made in this case for which Appellants may be reimbursed because there was never a formal decision or order from the Commission. This position has never been argued by Respondents and is not preserved for appeal. However, even if this Honorable Court considers Respondents' argument, Appellants submit that this position is disingenuous in light of the fact that, in practice, the South Carolina Second Injury Fund has regularly reimbursed claims that have been settled without a formal hearing and decision of the Commission. This argument is further disingenuous in light of the fact that the parties were ordered by the Commission to mediate the Sumter battery plant claims and the Fund was a signatory to the Consent Scheduling Order that was executed by the Commission.

1. Respondent's argument that payments made pursuant to a settlement agreement are not reimbursable under the Second Injury Fund statute is not preserved for appeal and should be disregarded by this Court.

Appellants submit the Court should not consider the argument presented by Respondent in Section I. A. of its Initial Brief as it has not been properly preserved. See, e.g., State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review) and Smith v. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) (noting only issues raised to and ruled upon by the Appellate Panel are cognizable on appeal). The Circuit Court's Order makes no mention of the definition of an "award" or that Second Injury Fund reimbursement cannot be awarded where a settlement agreement was reached between the parties. Respondents did not appeal any Circuit Court findings – or lack thereof – to this Court. This issue further was not ruled upon or considered by the Appellate Panel and the lack of such consideration was not appealed to the Circuit Court.

2. The Fund's position that it requires a formal decision and order to consider reimbursement is disingenuous in light of the practices of the Fund and the history of the Sumter battery plant claims.

Appellants submit that it would be patently unfair to deprive them of reimbursement from the Fund based on the argument that they have not made a requisite payment to Claimant because the parties settled the claim at mediation. The parties in this matter were ordered by the Commission to mediate the Sumter battery plant claims due to the large number of claimants for whom the Steinberg Law Firm initially requested hearings. For the fifty (50) claimants who would initially be requesting hearings on or before June 30, 2009, mediation was ordered to take place the week of

December 7, 2009. The Fund was a signatory to this agreement. (R. pp. 37-43.) The Fund further attended a few of the mediations and never asserted that the lack of a formal hearing would bar reimbursement.

In practice, the Fund has paid reimbursement in cases that have been resolved via settlement agreement without a formal hearing. The Fund has never taken a position similar to the one presented in its Brief. As such, there was no way for Appellants to foresee that Respondent would take the position that a settlement would negate their ability to obtain reimbursement from the Fund.

Respondent cites S.C. Code Ann. § 42-9-400(a) in which the "award" language is used. The purpose of this section is to require the carrier and employer to pay all medical and indemnity benefits in the first instance, prior to seeking reimbursement from the Fund. The purpose of this language is not to require a formal decision and order, but instead to ensure timely payments by the carrier/employer for a claimant's injury. There is no provision of S.C. Code Ann. § 42-9-400 that requires a formal decision and order prior to consideration for reimbursement from the Fund.

Appellants further note that pages 10 and 11 of the settlement paperwork approved by the Commission on November 8, 2010, is entitled "Order and Award." The language specifically provides that "the terms of the settlement agreement are adopted herein and made the *Order and Award* of the South Carolina Workers' Compensation Commission." (R. pp. 34-35.) (emphasis added) Appellants fail to understand the argument that this settlement agreement is not an "award" where is it specifically entitled as such and has been executed by the South Carolina Workers' Compensation Commission.

Finally, Respondent relies on S.C. Code Ann. § 42-9-5 in its argument regarding this issue. Appellants note that S.C. Code Ann. § 42-9-5 is only applicable to post-July 2007 injuries. The instant injury took place on November 30, 1998, and, as such, Section 42-9-5 is inapplicable.

Given the reasons set forth above, even if this Court considers this argument advanced by Respondent, Appellants contend it should not be a factor in the Court's decision regarding Appellants' entitlement to reimbursement from the Fund.

B. Appellants have met their burden of proof in establishing that Claimant suffered from a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment.

1. The Circuit Court erred in failing to find that Appellants were entitled to a statutory presumption that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment.

Respondent's argument that heavy metal poisoning and brain damage did not constitute a hindrance or obstacle to Claimant's employment is inapplicable in light of the South Carolina Supreme Court's recent decision in State Accident Fund v. South Carolina Second Injury Fund (In re: Johnny M. Adger v. City of Manning), 409 S.C. 240, 762 S.E.2d 19 (2014). In State Accident Fund, the Court found the Commission erred in incorrectly applying the presumption found in Section 42-9-400(d). Despite the employer being entitled to a presumption that the claimant's preexisting diabetes was a hindrance to his employment, the Commission found the medical evidence rebutted the presumption. The Court noted the Commission further erred in concluding as a matter of law that the employer had the burden to prove that the claimant's preexisting diabetes

was permanent and serious enough to constitute a hindrance or obstacle to his employment. Id. at 246-47, 762 S.E.2d at 22-23.

The Court went on to reason that, because the employer was entitled to the presumption set forth in Section 42-9-400(d), the burden to rebut the presumption shifted to the Second Injury Fund. Id. at 247, 762 S.E.2d at 23. Substantial evidence was required in order to rebut the presumption. Id. In State Accident Fund, the Fund was unable to present such evidence and the Commission's order was reversed. Id. at 248, 762 S.E.2d at 23.

In the instant matter, heavy metal poisoning and brain damage are two enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. S.C. Code Ann. § 42-9-400(d)(23), (28) (Supp. 2002). Similar to the situation in State Accident Fund, in which the Fund submitted no evidence to rebut the presumption set forth in Section 42-9-400(d), Respondent submitted no evidence in the instant matter to rebut a similar presumption. Appellants agree that the Commission determines the weight of the evidence. However, where there was no evidence presented by the Fund to refute the evidence presented by Appellants, the weight of the evidence falls in favor of Appellants. As such, Appellants contend they have met their burden to prove the existence of permanent physical impairments that constituted a hindrance or obstacle to employment.

2. The Circuit Court erred in finding there were no conditions that preexisted Claimant's occupational exposure.

With respect to Respondent's arguments concerning the question of preexisting brain damage and heavy metal poisoning, Appellants rely on the arguments presented in their Final Brief. Respondent's statement on page 12 of its Brief that "Carrier is

necessarily required to show evidence of the condition prior to the initial exposure [to lead]" is a complete misstatement of the law of South Carolina. There is no South Carolina authority to suggest that Claimant must have had permanent physical impairments that preexisted his first-ever exposure to lead.

Appellants' position is supported by South Carolina authority concerning occupational disease claims. Appellant's position is also supported by South Carolina authority finding an entitlement to reimbursement where the preexisting condition arose out the same employment as the subsequent injury. See, e.g., Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (2012) and State Workers' Compensation Fund v. South Carolina Second Injury Fund (In re: Warren M. Hunt v. S.C. State Forestry Comm'n), 313 S.C. 536, 443 S.E.2d 546 (1994). For a more detailed explanation of these arguments, Appellants refer back to their Final Brief.

Appellants further submit that Respondent's argument regarding "brain damage" is erroneous. Respondent states on page 11 of its Brief that preexisting "brain damage" in Section 42-9-400(28) must be both permanent and severe. This argument, taken to its logical conclusion, makes no practical sense when considered in the context of the Second Injury Fund. The definition of physical brain damage as set forth in Sparks v. Palmetto Hardwood, 401 S.C. 619, 738 S.E.2d 831 (2013) and Crisp v. SouthCo., 401 S.C. 627, 738 S.E.2d 835 (2013) is meant to clarify a claimant's entitlement to lifetime benefits under S.C. Code Ann. § 42-9-10(C). A permanent and severe brain injury under Section 42-9-10 would render an employee unable to work for life. In the context of the Second Injury Fund, the employer is entitled to reimbursement for hiring or retaining an individual with brain damage, provided all other elements of reimbursement are met.

Therefore, this tends to suggest an individual with brain damage as contemplated in Section 42-9-400(d)(28) would be able to obtain gainful employment, as brain damage is a condition for which an employer could be reimbursed if it combined with or aggravated a subsequent injury arising out of the employment. Applying the definition of physical brain damage in Section 42-9-10(C) as interpreted by these Supreme Court cases is misplaced in light of the reasoning behind the Second Injury Fund reimbursement statute.

C. South Carolina case law supports a reversal of the Circuit Court's decision.

Appellants disagree that Carolinas Recycling warrants affirmation of the Circuit Court's order, as argued by Respondent in Section C of its brief. Respondent notes that this Honorable Court in Carolinas Recycling reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct. App. 2012). Appellants point out that this non-treating physician in Carolinas Recycling was Dr. William Felmly, who evaluated the claimant after his January 2001 injury, but not after the claimant's subsequent injuries. Id. at 481-82, 730 S.E.2d at 325-26. In its reasoning, this Court noted:

> Dr. Felmly never treated Claimant following his October 2002 or June 2004 injury to assess his condition or opine whether either of his two preexisting physical conditions combined with or aggravated the June 2004 injury. Moreover, the Fund failed to present any expert testimony from a physician who evaluated the Claimant after his October 2002 or June 2004 injuries to discredit the overwhelming medical testimony and evidence Carrier presented to the Appellate Panel.

Id. at 485, 730 S.E.2d at 327.

In contrast to the opinion presented by Dr. Felmly, which was rendered prior to the claimant's subsequent injuries, the opinions presented by Drs. Shippen and Baker, as

well as the other expert opinions contained in Appellants' evidentiary submissions, were rendered after Claimant's subsequent injury in 1998. Therefore, Appellants do not believe the Carolinas Recycling decision warrants affirmation of the Circuit Court's order.

Respondents also attempt to distinguish Burnette from the instant matter. Appellants offered the Burnette opinion, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), to highlight that the Hearing Commissioner in the instant matter abused her discretion in formulating her own interpretation of the medical evidence contained in the opinions of Drs. Baker and Shippen. (R. pp. 163-68.) Whether the issue is compensability or reimbursement from the Fund, a Hearing Commissioner is not a medical doctor and cannot come up with her own interpretation of medical evidence where there is no other competent evidence in the record. Appellants reiterate that there was no evidence presented by the Fund to refute the opinions contained in Appellant's evidentiary submissions. As such, the Circuit Court's order in the present case is clearly erroneous in view of the substantial evidence in the record.

D. The Second Injury Fund was intended to encourage employers to hire and retain employees with disabilities and the question of causation concerning such disabilities is irrelevant.

Respondent notes in its brief, prior to its argument presented in Section A, that "the Fund was never intended to operate as a safety net for employers . . . who place their workforce in hazardous working conditions as part of their business and due to the nature of its business." Respondent goes on to note that "Carrier wants reimbursement from the Fund for conditions caused by the exposure to lead that was its very business" and alleges

that Appellant "was wholly responsible for the alleged conditions and maladies suffered by Claimant."

In response, Appellants submit that causation is not at issue. Although there are medical opinions addressing the same, no one knows what ultimately "caused" the physical maladies from which Claimant suffered. However, even if the exposure to lead is the "cause" of Claimant's maladies, the Second Injury Fund statute, S.C. Code Ann. § 42-9-400, makes no reference to the "cause" of a pre-existing permanent impairment or subsequent injury. Reimbursement from the Second Injury Fund is available to employers who meet the elements for reimbursement from the Fund. Whether an employer caused a condition is not at issue.

Respondent's statements are without support from South Carolina authority and fail to take into account the fact that the workers' compensation system in South Carolina is a strict liability system. Arguably, every workers' compensation case involves an injury "caused by" the employer. As such, there are several cases involving Second Injury Fund reimbursement where a condition was "caused by" the employer. See, e.g., Carolinas Recycling, supra, where Claimant sustained a work-related injury to his back in 2001 and another work-related injury to his back in 2004. 398 S.C. at 481, 730 S.E.2d at 325. Employers are required to pay assessments into the Second Injury Fund for the purpose of obtaining reimbursement should circumstances warrant the same. There is no caveat carved out in Section 42-9-400 that an employer can obtain reimbursement from the Fund only if it is not at fault for the conditions suffered by the claimant. Workers' compensation is already a no-fault system. Therefore, Respondent's argument in this regard is unpersuasive.

Respondent correctly notes "[t]he Fund began as encouragement for employers to hire and retain workers with disabilities." Appellants highlight that the plain language of the Second Injury Fund statute provides for reimbursement not only where an employee with a disability was hired, but also where an employee with a disability was *retained.* S.C. Code Ann. § 42-9-400(c). This is precisely the situation in the present case and is notable because Appellants *retained* Claimant in employment despite knowledge of his permanent impairments. Contrary to the reasoning in the Circuit Court order, the plain language of the statute does not require that a permanent physical impairment exist only prior to an employee being *hired.*

CONCLUSION

For the reasons stated above, Appellants respectfully request that the Order of the Circuit Court be reversed and that Appellants be granted reimbursement from the Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-9-400.

Respectfully submitted,

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June 23, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

June 23, 2015

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PROOF OF SERVICE

I certify that I have served the Record on Appeal, Final Brief and Final Reply Brief of Appellant by depositing a copy of them in the United States Mail, postage prepaid, on the 23rd day of June, 2015 addressed to:

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June 23, 2015

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RE: Joe Mathis v. Yuasa-Exide, Inc. and Arrowpoint Capital Corp
WCC File No.: 9832185
Our File No.: 20113.14171
Claim No.: 715001269300
Appellate Case No.: 2014-002212

Dear Ms. Kitchings:

Enclosed for filing in the above referenced matter are the following:

1. An unbound copy and 9 bound copies of the Record on Appeal;
2. An unbound copy and 9 bound copies of Appellant's Final Brief;
3. An unbound copy and 9 bound copies of Appellant's Final Reply Brief;
4. An original and one copy of the Proof of Service reflecting service on the South Carolina Court of Appeals for the Record on Appeal, Final Brief and Final Reply Brief reflecting service of the Final Brief and Final Reply Brief to Latonya D. Edwards, attorney for the South Carolina Second Injury Fund, as the Record on Appeal was previously served.

I would appreciate it if you would return a clocked copy of the Proof of Service in the envelope provided for your convenience.

Please call me if you have any additional questions regarding the enclosed information. With kindest regards, I remain

Very truly yours,

Vernon F. Dunbar
Ashley R. Forbes

VFD/rhd
Enclosures
cc: Latonya D. Edwards, Esquire
Eric Rowell, Arrowpoint Capital Corp.