THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Case No. 2013-CP-43-02286
Appellate Case No. 2014-002214

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

v.

South Carolina Second Injury Fund.....Respondent.

[In re: C.L. Williams, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

FINAL BRIEF OF APPELLANT

Vernon F. Dunbar, Esq.
Stephanie Lamb Pugh, Esq.
55 East Camperdown Way, Ste. 300
Post Office Box 2980
Greenville, SC 29601
Telephone: 864-239-4000

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL v

STATEMENT OF THE CASE 1

A. Procedural History of this Case 1

B. The South Carolina Second Injury Fund 2

C. The Sumter Battery Manufacturing Facility 3

STATEMENT OF THE FACTS OF THIS CASE 6

STANDARD OF REVIEW 7

ARGUMENTS

I. The Circuit Court erred in concluding that Appellants are not entitled to reimbursement from the South Carolina Second Injury Fund pursuant to South Carolina Code Annotated § 42-9-400 9

A. The Circuit Court erred in failing to review the Commission's interpretation of § 42-9-400 under a de novo standard of review and in failing to find that substantial evidence in the record establishes that Williams had preexisting, permanent conditions as required by the statute 10

B. Substantial evidence in the record establishes that Williams' preexisting conditions were aggravated by or combined with Williams' workplace injury of heavy metal poisoning to result in substantially greater disability 19

C. The Circuit Court erred by failing to remand the case to the Commission for findings of fact consistent with a determination that substantial evidence in the record establishes that Williams' preexisting conditions constituted a hindrance or obstacle to employment or reemployment 20

D. Appellants had knowledge of Williams' preexisting conditions as required by § 42-9-400 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

American Motorists Ins. Co. v. S.C. Second Injury Fund,
300 S.C. 17, 386 S.E.2d 276 (Ct. App. 1989).....2

Bass v. Isochem,
365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005).....8, 13

Burnette v. City of Greenville,
401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012).....20

Burnette v. City of Greenville,
Op. No. 5059 (S.C. Sup. Ct. filed May 8, 2014).....20

Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 600
S.E.2d 80 (Ct. App. 2004).....8

Carolinas Recycling Group and Employers Ins. Co. of Wausau v. S.C. Second Injury Fund,
398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012).....20, 22

Drake v. Raybestos-Manhattan, Inc.,
241 S.C. 116, 127 S.E.2d 288 (1962).....12

Etheredge v. Monsanto Co.,
349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).....9

Frame v. Resort Services Inc.,
357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004).....8

Glenn v. Columbia Silica Sand Co.,
236 S.C. 13, 112 S.E.2d 711 (1960).....12

Greenwood Mills v. Second Injury Fund,
315 S.C. 256, 433 S.E.2d 846 (1993).....2

Hunt v. Whitt,
279 S.C. 343, 306 S.E.2d 62 (1983).....13

King v. Int'l Knife & Saw - Florence,
395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011).....9, 11

Lark v. Bi-Lo,
276 S.C. 130, 276 S.E.2d 304 (1981).....8

Liberty Mutual Insur. Co. v. S.C. Second Injury Fund,
363 S.C. 612, 611 S.E.2d 297 (2005) 2, 9

Muir v. C.R. Bard, Inc.,
336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) 13

Pee Dee Reg'l Transp. v. S.C. Second Injury Fund,
375 S.C. 60, 650 S.E.2d 464 (2007) 1

Rogers v. Kunja Knitting Mills,
312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994) 13, 14

S.C. Uninsured Employers' Fund v. House,
360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004) 9, 11

Springs Industries, Inc. v. S.C. Second Injury Fund,
296 S.C. 359, 372 S.E.2d 915 (Ct. App. 1988) 16, 17

State Accident Fund v. S.C. Second Injury Fund,
409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014) 22

State Workers' Comp. Fund v. S.C. SIF (In Re: Warren M. Hunt v. S.C. State Forestry Comm'n),
313 S.C. 536, 443 S.E.2d 546 (1994) 16, 17

Tiller v. Nat'l Health Care Ctr.,
334 S.C. 333, 513 S.E.2d 843 (1999) 8

Transp. Ins. Co. v. S.C. Second Injury Fund,
389 S.C. 422, 699 S.E.2d 687 (2010) 11

Wehle v. S.C. Retirement Syst.,
363 S.E. 394, 611 S.E.2d 240 (2005) 9

STATUTES

S.C. Code Ann. § 1-23-380 (Supp. 2014) 8

S.C. Code Ann. § 42-7-310 (Supp. 2014) 3

S.C. Code Ann. § 42-7-320 (Supp. 2014) 3

S.C. Code Ann. § 42-9-400 (Supp. 2002) 23

S.C. Code Ann. § 42-9-400 (Supp. 2006) 19

S.C. Code Ann. § 42-9-400 (Supp. 2014) 10, 18, 21

S.C. Code Ann. § 42-11-10 (Supp. 2014) 12

S.C. Code Ann. § 42-11-40 (Supp. 2014) 12

REGULATIONS

29 C.F.R. 1910.1025(k)(1) 5

SECONDARY AUTHORITY

2 Larson's Workers' Compensation Law § 95.21 12

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in denying Appellants' claim for reimbursement from the South Carolina Second Injury Fund where Appellants met all elements for reimbursement pursuant to S.C. Code Ann. § 42-9-400?

STATEMENT OF THE CASE

A. Procedural History of this Case

This appeal stems from a workers' compensation claim filed by C.L. Williams (Williams), wherein he alleged he suffered lead poisoning in the course and scope of his employment at a battery manufacturing facility in Sumter, South Carolina on or about February 1, 1999. The South Carolina Workers' Compensation Commission (the Commission) ordered mediation of this matter and all other lead claims against this facility.

After settlement of Williams' workers' compensation claim, Appellants filed a claim for reimbursement from the South Carolina Second Injury Fund (The Fund) pursuant to South Carolina Code Annotated § 42-9-400. The Fund denied this request, so the reimbursement claim was heard before Commissioner Andrea Roche on August 13, 2012. Commissioner Roche issued an order on November 27, 2012, denying Appellants' request for reimbursement, and in so doing, she issued conclusions of law, which had never been argued by either party or reported in any South Carolina case. Thus, Appellants appealed the Hearing Commissioner's decision to the Full Commission, which resulted in an affirmation of same.

Because this claim arose before the 2007 amendments to the South Carolina Workers' Compensation Act, Appellants had to first appeal the Commission's decision to the Circuit Court. See Pee Dee Reg'l Transp. v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007). Four appeals from the Commission were set before Judge W. Jeffrey Young on June 3, 2014. He issued his order affirming the Commission's decision

in the case at hand on September 16, 2014. Appellants timely filed a Notice of Appeal with this Honorable Court on October 6, 2014.

B. The South Carolina Second Injury Fund

The South Carolina Second Injury Fund was established to encourage employers to hire disabled or handicapped workers, or to retain employees who become partially disabled in the course and scope of their employment. The Fund provides reimbursement to an insurer or employer for compensation paid to an injured worker, who suffers increased permanent disability as a result of the preexisting condition and a subsequent workplace injury. The Fund was designed to encourage the employment and retention of disabled workers by providing financial relief to employers. Thus, the Fund removed any financial incentive an employer may have had to terminate a disabled worker who may increase the employer's liability. See generally State Workers' Comp. Fund v. S.C. Second Injury Fund, 313 S.C. 536, 538, 443 S.E.2d 546, 547 (1994); Greenwood Mills v. Second Injury Fund, 315 S.C. 256, 257, 433 S.E.2d 846, 847 n.1 (1993); Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 625, 611 S.E.2d 297, 303 (Ct. App. 2005); American Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 21–22, 386 S.E.2d 276, 278–79 (Ct. App. 1989).

Reimbursement from the Fund is governed by South Carolina Code Annotated Section 42-9-400. In addition to providing timely notice of the reimbursement claim, a carrier/employer must establish four elements in order to be entitled to reimbursement. For a pre-July 1, 2007 claim, these elements include the following: (1) that the claimant had a preexisting permanent physical impairment/condition (§ 42-9-400(a)); (2) that the employer had knowledge of the preexisting impairment prior to the workplace injury (§

42-9-400(c)); (3) that the preexisting impairment was a hindrance/obstacle to employment or re-employment (§ 42-9-400(d)); and (4) that the preexisting impairment combined with or was aggravated by the workplace injury to result in substantially greater disability than that which would have resulted from the subsequent injury alone (§ 42-9-400(a)).

The Fund is funded by annual assessments paid by carriers, self-insurers, and the State Accident Fund. S.C. Code Ann. § 42-7-310(d)(2) (Supp. 2014). In 2007, the Workers' Compensation Act underwent a substantial reformation. As part of the reform, the Second Injury Fund officially terminated on July 1, 2013. S.C. Code Ann. § 42-7-320 (a) (Supp. 2014). The Legislature tasked the State Budget and Control Board with winding down the affairs of the Fund and providing for its "efficient and expeditious closure." Id. Despite the fact that insurance carriers are no longer entitled to the benefit of reimbursement from the Fund for payment of second injury benefits, they continue to pay assessments indefinitely to the Fund.

C. The Sumter Battery Manufacturing Facility

In 1961, a battery manufacturing facility began operations in Sumter, South Carolina. The initial owner of the company was ESB, Inc. The facility first produced nickel-plated batteries then, around 1974, it converted its manufacturing operations to the production of lead batteries. In 1983, there was a change of ownership of the plant, as ESB, Inc., was sold off to Exide Corp. Subsequently, on June 10, 1991, Yuasa Battery (America), Inc. (also known as Yuasa-Exide), purchased the industrial division of Exide Corp. Thereafter, the company became Yuasa, Inc. In 2000, Yuasa, Inc., sold off its industrial division to EnerSys. (R. p. 280.) Therefore, most of the employees at the

center of these reimbursement claims worked for at least three different employers. During those tenures of employment, the employees experienced heavy metal poisoning and a plethora of other health maladies.

There is no dispute that employees who worked at the Sumter battery manufacturing facility were exposed to various amounts of lead on a daily basis through inhalation, ingestion, and dermal contact. Employees working in the plant's grid casting, battery assembly, formation, plate cleaning and pasting departments were exposed to the greatest amounts of lead.

Once lead is absorbed into the body, it is stored in the tissues and bones. The mean life of lead in bone is thirty years. Because lead can be stored for such a long period of time, it can cause certain conditions, such as hypertension, heart disease, kidney failure, and cognitive impairment to become worse with age. (R. pp. 294–98.)

Lead exposure can also result in aggravation of hypertension, diabetes, arthritis, and erectile dysfunction. (R. pp. 312–28.) The dangerous health problems associated with lead exposure are numerous. Lead exposure has been associated with various health maladies, such as brain damage and damage to the peripheral nerves of the body, in addition to kidney failure and gout.

Prior to 1980, the Federal Government had not established permissible exposure limits regarding lead. Further, there were no universally recognized industry standards regarding permissible exposure limits to lead. Thus, prior to 1980, chronic exposure to lead often resulted in workers' blood lead levels routinely exceeding 100 micrograms per deciliter of blood (μg/dL). (R. pp. 363–92.)

Beginning in 1978, OSHA started recommending permissible exposure limits as measured by blood lead levels. OSHA first promulgated legally enforceable regulations in 1983, and its current permissible exposure limit guidelines require an employer to immediately remove a worker from a lead laden environment when his/her blood lead levels reach sixty micrograms per deciliter of blood. 29 C.F.R. 1910.1025(k)(1), (R. p. 374.) Moreover, if an employee has blood lead levels of fifty micrograms per deciliter of blood or more for two consecutive blood sampling tests, the worker is to be removed from the work environment and placed into a medical removal program ("MRP").

Presently, there is a debate among lead industry experts as to whether the current permissible exposure limit is sufficient to avoid various health maladies associated with chronic lead exposure. A desirable blood lead level for individuals who are not exposed to lead is less than ten micrograms per deciliter of blood, and expert reports state the average blood lead level for the general population is three micrograms per deciliter of blood. (R. pp. 297, 305.) Employees of the Sumter battery plant had blood lead levels as high as 102 μg/dL, with many whose blood lead concentrations remained above 50 μg/dL for extended periods of time. (R. p. 297.)

In an effort to better protect its employees, the Sumter plant reduced the permissible exposure limit below the OSHA threshold. An employee would be placed in the MRP if a six month lead level average or three samples of blood registered greater than thirty-six micrograms per deciliter of blood. A medical removal program was also indicated if there was a one-time blood lead level reading of forty-four micrograms per deciliter of blood or greater. (R. p. 393.)

STATEMENT OF THE FACTS OF THIS CASE

C.L. Williams (Williams) is an African-American male born on October 3, 1948. ESB, Inc., initially hired him on March 12, 1976, but he was later rehired by Exide Corp. in 1983, and Yuasa-Exide, Inc., in 1991. Yuasa-Exide then changed names to Yuasa, Inc. in April 1998. (For the sake of this brief, the location where Williams worked will hereinafter be referred as the Sumter battery plant.) Williams was ultimately terminated, because he had restrictions stemming from cardiac and pulmonary problems that the employer could not accommodate.

While at the Sumter battery plant, Williams had multiple jobs to include janitorial work, lead plate stacking, finishing, and fabrication of lead posts. Throughout his tenure of employment, his blood lead levels ranged from 21–93 μg/dL, with many reports noting a blood lead level greater than 50 μg/dL. (R. pp. 217–20.) It is undisputed that Williams was exposed to lead at dangerous levels, while working at the battery plant.

The records from the Sumter battery plant's in house health department reveal that during Williams' tenure of employment, he suffered from a variety of maladies. As early as January 20, 1982, while working for ESB, Inc., the medical department noted that Williams had a history of liver disease, hypertension, and heightened blood lead levels. (R. p. 184.) In fact, as of December 12, 1983, a company document noted that Williams blood lead levels averaged 59 μg/dL over the past six months, and subsequent records also reveal extremely heightened levels of lead in Williams' blood. (R. pp. 184–86, 188, 217–20.) Multiple medical records further reveal that Williams was placed in the medical removal program because of these heightened levels. (R. pp. 192, 194, 196, 198, 200.) Furthermore, Appellants' APA submissions also reveal evidence, in addition to that noted above, of

Williams having cardiovascular disease (R. pp. 186, 189, 194, 198, 200, 202, 204, 206–08, 213–15), pulmonary problems (R. pp. 213–14), neurological problems (R. p. 210), and hearing loss (R. pp. 184, 213.) all during his tenure of employment at the Sumter battery plant and all before his date of injury on his workers' compensation claim.

Records from the Davis Clinic also reveal that Williams suffered from multiple health conditions prior to his date of injury. He initially reported to Dr. Davis complaining of shortness of breath on January 11, 1994. On that same day, he was assessed with mild chronic heart failure (CHF), and the notes reveal that Williams had ongoing problems with the CHF to the extent that he had an intra-coronary defibrillator inserted. (R. pp. 221, 227, 229, 234.) Dr. Davis also noted that Williams has hypertension, had a pleural effusion, and suffered with hemoptysis and diabetes (R. pp. 222–23, 225–26, 229–33.)

As noted above, Williams continued to work around lead at the Sumter battery plant until he was terminated on August 12, 1998. Upon termination, Williams began receiving his disability pension benefits, because Williams' doctor stated that he had "severe depressed left ventricular function" and was unable to do heavy, repetitive labor. (R. p. 207.)

STANDARD OF REVIEW

In the instant case, Appellants submit that the standard of review is bifurcated. The question of statutory interpretation is a question of law for the court, which requires a de novo standard of review, while the question of whether Appellants satisfied their burden of proof in establishing the elements for reimbursement is a question of fact, requiring the application of the substantial evidence standard of review.

Judicial review of a Workers' Compensation Commission decision is governed by South Carolina Code Annotated § 1-23-380 of the Administrative Procedures Act (hereafter "the APA"); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a decision of the South Carolina Workers' Compensation Commission should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2014).

Review of the Commission's factual findings is governed by the substantial evidence standard. "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.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from* Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); *see also* Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999); *see also* S.C. Code Ann. § 1-23-380(A)(5)(e). "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." Frame v. Resort Services Inc., 357 S.C. 520, 527–28, 593 S.E.2d 491, 495 (Ct. App. 2004); Bass v. Isochem, 365 S.C. at 468, 617 S.E.2d at 376. In particular, workers' compensation awards "must not be based on surmise, conjecture or speculation." Tiller, 334 S.C. at 339, 513 S.E.2d at 845.

In addition, a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Case law unequivocally establishes that statutory interpretation is a question of law, and the appellate court "is free to decide matters of law with no particular deference to the fact finder." King v. Int'l Knife & Saw - Florence, 395 S.C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011); S.C. Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). Likewise, the determination of legislative intent in a statute is a matter of law. Wehle v. S.C. Retirement Syst., 363 S.E. 394, 611 S.E.2d 240 (2005); Liberty Mutual Insur. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (2005). Thus, in summary, an appellate court must review the Commission's interpretation of a statute as a question of law and must review the Commission's application of the facts to the statute as a question of fact under the substantial evidence standard of review. *See* King, 395 S.C. at 442, 718 S.E.2d at 229.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT APPELLANTS WERE NOT ENTITLED TO REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND PURSUANT TO SOUTH CAROLINA CODE ANNOTATED § 42-9-400.

Appellants submit that the Circuit Court erroneously affirmed the Commission's decision that Appellants are not entitled to reimbursement from the South Carolina Second Injury Fund pursuant to South Carolina Code Annotated § 42-9-400 for the injuries sustained by C.L. Williams. Therefore, Appellants respectfully request that this Honorable Court reverse the Circuit Court's errors of law and remand this case for additional fact finding, which is consistent with the substantial evidence in the record.

A. The Circuit Court erred in failing to review the Commission's interpretation of § 42-9-400 under a de novo standard of review and in failing to find that substantial evidence in the record establishes that Williams had preexisting, permanent conditions as required by the statute.

Appellants submit that the evidence unequivocally establishes that Williams suffered with the permanent, preexisting conditions of cardiac disease, diabetes, pulmonary disease, heavy metal poisoning, and loss of hearing prior to his workplace injury. The Circuit Court erred in failing to apply a de novo standard of review to the Commission's new interpretation of § 42-9-400 and erred in its application of the substantial evidence standard of review when it applied that statute to the facts of this claim. For those reasons, Appellants respectfully request that this Honorable Court reverse the Lower Court's findings.

a. The Circuit Court should have applied a de novo standard of review to the Commission's construction of § 42-9-400, and case law supports the conclusion that the date of injury, at the earliest, controls as to when a preexisting condition has to be present for purposes of Second Injury Fund reimbursement.

South Carolina Code Annotated § 42-9-400 requires that an employee have a preexisting permanent physical impairment "from any cause or origin" prior to the "subsequent disability" from the work accident in order for the employer/carrier to be entitled to reimbursement from the Second Injury Fund. S.C. Code Ann. § 42-9-400(a) (Supp. 2014). The Circuit Court's Order applies the substantial evidence standard of review and erroneously construes this statute to require an injured employee's preexisting conditions to preexist not his date of injury or his date of disability but the first date he was ever exposed to the disability or injury causing hazard. As noted *supra*, statutory interpretation is a question of law, and the appellate court "is free to decide matters of

law with no particular deference to the fact finder." King v. Int'l Knife & Saw - Florence, 395 S.C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011); S.C. Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). Appellants submit that a de novo standard of review should have been applied by the Circuit Court in construing § 42-9-400(a) and that the plain meaning of this statute coupled with case law in the occupational disease arena lead to the conclusion that the Lower Court and the Commission misinterpreted the statute.

The Lower Court found that none of Williams' preexisting conditions satisfy the requirement of § 42-9-400(a), not because there is a lack of evidence establishing the conditions were present prior to his date of injury or his date of disability, but instead because the preexisting conditions did not exist prior to Williams' first ever day of exposure to lead when he was hired by ESB, Inc. in 1976. According to this reasoning and novel construction of § 42-9-400, Williams' compensable work injury actually occurred on his first date of employment with ESB, Inc., which is impossible, given there was no disability. This logic is unsound, ignores decades of jurisprudence, and is not supported by any evidence or legal authority. Further, the Second Injury Fund made this same argument in the case of Transportation Insurance Co. v. S.C. Second Injury Fund, and the South Carolina Supreme Court rejected the argument, because the Fund did not provide any legal authority for the proposition. Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010). Respondent is yet to provide any authority supporting this novel interpretation of § 42-9-400(a).

In workers' compensation, the date of injury almost always controls, and the conclusion that Williams' preexisting conditions must have been in existence prior to his

first day of work at the Sumter battery plant or first day of exposure to lead is not supported by South Carolina law. The South Carolina Workers' Compensation Act specifically establishes that an occupational disease is treated like an injury by accident and is not a compensable injury until the injured employee suffers a disability as described in Sections 42-9-10, 42-9-20, or 42-9-30. S.C. Code Ann. §§ 42-11-10, 42-11-40 (Supp. 2014). The South Carolina Supreme Court has also drawn this same conclusion in Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 19-20, 112 S.E.2d 711, 714 (1960). In Glenn, the court quoted with approval this statement from Professor Larson's Treatise:

> Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration.

Id. at 19–20, 112 S.E.2d at 714 (quoting 2 Larson's Workers' Compensation Law § 95.21). This same statement was used to support the South Carolina Supreme Court's decision in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 122–23, 127 S.E.2d 288, 291–92 (1962), *overruled on other grounds by* Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983).

Additional case law from South Carolina's appellate courts reaffirm that an occupational disease accident does not occur until the point that "the employee becomes disabled and could, through reasonable diligence, discover that his condition is compensable." Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999); *see also* Bass v. Isochem, 365 S.C. 454, 476, 617 S.E.2d 369 (Ct. App. 2005). For an employee to know that a condition is compensable, it must be definitively diagnosed. Rogers v. Kunja Knitting Mills, 312 S.C. 377, 379–81, 440 S.E.2d 401, 403–04 (Ct. App. 1994). It goes to follow that an occupational disease injury does not exist until an employee has been diagnosed with an occupational disease or until, through reasonable diligence, he could have discovered he had an occupational disease.

In the case at hand, the date of injury is Williams' last official date of employment at the Sumter battery plant.[1] However, Williams had no idea he had an occupational disease until he met with his attorney and was evaluated by medical doctors with expertise in lead exposure on May 22, 2008. He had been to multiple doctors over the years, because of his failing health, but none of his doctors ever linked any of his health conditions to an occupational disease. Thus, in all actuality, Williams did not discover his case was compensable until he had a definitive diagnosis on May 22, 2008. It would therefore follow that pursuant to South Carolina case law, Williams' date of injury or disability as referenced in § 42-9-400(a) most definitely cannot be the first day he ever worked at the Sumter battery plant but was instead when he realized his claim was compensable. See Rogers, 312 S.C. at 379–81, 440 S.E.2d at 403–04 (Ct. App. 1994). Given that South Carolina Code Annotated § 42-9-400 provides for reimbursement in

[1] His last day of exposure to lead at the plant was actually months before his final termination, because he was on disability due to a health condition prior to his termination.

cases where there is a preexisting condition prior to ***disability*** incurred from a subsequent accident, the preexisting conditions only have to precede the subsequent disability. Unsurprisingly, this disability is also what makes an occupational disease compensable. In this case, there was no real compensable injury until 2008.

In light of the above, Appellants submit that the Circuit Court erred by not reviewing the Commission's construction of § 42-9-400 under a de novo standard of review and by failing to find that substantial evidence supports the conclusion that Williams' preexisting conditions preexisted his ultimate date of disability for this claim. The Circuit Court therefore committed legal error in deciding that Williams' preexisting conditions had to preexist his first day of exposure to lead at the Sumter battery plant. The Lower Court's holdings are both contrary to South Carolina law, and not supported by any statutory or case law. Therefore, Appellants respectfully ask this Honorable Court to reverse the Circuit Court's decision.

b. Even if this Court determines that the Circuit Court properly interpreted § 42-9-400 to require Williams' preexisting condition(s) to preexist his first day of exposure to lead while working for his liable employer, Appellants have satisfied this burden as the evidence establishes that Williams was not hired by his last employer at the Sumter battery plant until well after his preexisting conditions had manifested.

Appellants argue that even if this Honorable Court determines that Williams' preexisting conditions had to preexist the first day he was exposed to lead while working for his liable employer, Appellants submit that they have met their burden in establishing this element. Williams' preexisting conditions did, in fact, preexist his first exposure to lead while he was under the employ of his last employer at the Sumter Battery Plant. As noted *supra*, Williams' last employer, the employer he worked for on his date of injury,

was legally known as Yuasa, Inc. However, he was initially hired by ESB, Inc., on March 12, 1976. He was later hired at the Sumter battery plant's location by Exide Corp. in 1983, when the plant changed ownership. In 1991, the division of the Exide plant located in Sumter was purchased by Yuasa Battery and became Yuasa, Inc. The evidence unequivocally establishes that Williams' cardiac disease, liver disease, and lead exposure were noted as early as January 20, 1982, while working for ESB, Inc. (R. p. 184.) His congestive heart failure appears in the employer records first on August 16, 1990, when he was legally employed by Exide Corp., although it is noted at that time that Williams already had a history of CHF. Furthermore, Williams' pulmonary problems are first noted in the employer records on May 24, 1993, and his hearing loss was noted even before that time. (R. pp. 184, 209–10, 213.) The evidence leaves absolutely no doubt that most of Williams' preexisting conditions existed prior to his employment with his last employer at the Sumter battery plant, which began in 1991. Thus, Appellants meet the element of reimbursement, which requires that the injured employee suffer from a preexisting, permanent physical condition prior to his subsequent disability, even if it this Court agrees that the preexisting conditions had to preexist the first day of Williams' exposure to lead while in the employ of his liable employer.

c. Pursuant to South Carolina law, Williams' heavy metal poisoning is both a preexisting condition and a subsequent injury.

Appellants submit that the Circuit Court erred in failing to find that Williams' heavy metal poisoning was a preexisting condition and subsequent injury. This position is supported by substantial evidence in the record, as well as South Carolina statutory and case law. Therefore, Appellants request that this Court reverse the Circuit Court's decision to the contrary.

As discussed *supra*, to establish a claim for reimbursement, an employer/carrier must establish that the injured employee suffered from a permanent, preexisting condition prior to his subsequent disability resulting from a work injury. In this case, Appellants presented evidence of multiple preexisting conditions, which the Lower Court disregarded. Appellants argued that in addition to all of Williams' other preexisting conditions, that heavy metal poisoned served as both a preexisting condition and a subsequent injury. The Circuit Court rejected this position, but it cited absolutely no case law or statutory law in support of its holding and in turn misconstrued the jurisprudence previously promulgated by South Carolina's appellate courts.

A review of South Carolina case law reveals that Williams' heavy metal poisoning is both a preexisting condition and subsequent injury, as required by South Carolina Code § 42-9-400. In the cases of State Workers' Compensation Fund v. S.C. SIF (In Re: Warren M. Hunt v. S.C. State Forestry Commission), 313 S.C. 536, 443 S.E.2d 546 (1994) and Springs Industries, Inc. v. S.C. Second Injury Fund, 296 S.C. 359, 372 S.E.2d 915 (Ct. App. 1988), the South Carolina Supreme Court and the Court of Appeals concluded that an occupational disease, which is aggravated by a work hazard can constitute a preexisting condition and subsequent injury.

In the Hunt case, the claimant's cardiac disease constituted both the preexisting condition and subsequent injury. Hunt was first employed by the Forestry Commission in 1956. In 1973, he was diagnosed with coronary artery disease. However, on January 1, 1986, the claimant's heart disease rendered him totally disabled. The State Workers' Compensation Fund paid the claim relative to the claimant's total disability and sought reimbursement from the SIF and argued that the claimant's preexisting condition was his

heart disease and that his subsequent injury was the worsened heart condition. The court faced the question as to whether the claimant's total disability from the heart disease constituted a subsequent injury. The carrier asserted that the heart disease could not be a second injury, but instead was just one total injury. The South Carolina Supreme Court rejected this argument and concluded that the heart disease was both a preexisting condition and subsequent injury. Hunt, 313 S.C. at 539, 443 S.E.2d at 548. While this case does, in part, address a statute that is particular to certain first responders, contrary to the holding of the Circuit Court, the discussion of that statute in this case had absolutely no bearing on the South Carolina Supreme Court's determination that the occupational disease (cardiovascular disease) could serve as both the preexisting condition and the subsequent injury. The Hunt Court went on to analyze the applicability of a prior appellate court case, Springs Industries, cited *supra*.

In Springs Industries, the claimant's cotton dust exposure served as a preexisting condition to her bysinnosis. She worked in cotton mills for around thirty years. In 1970, she began having breathing difficulties. Three years later, her symptoms worsened, and she developed a chronic cough. However, she switched employers and began working for Springs Industries in 1975. Nine months after she was hired, she was deemed totally disabled due to byssinosis. Springs Industries, 296 S.C. at 362, 372 S.E.2d at 917. The Court held that the only logical conclusion was that the claimant's preexisting cotton dust exposure was a preexisting condition under § 42-9-400, especially given the length of the claimant's exposure to the cotton dust. Id. at 363, 372 S.E.2d at 917.

The Circuit Court and Respondent have dismissed the applicability of the Springs Industries case by finding that reimbursement by the petitioners was pursued on a but-for

theory of reimbursement; however, that analysis ignores the fact that the employer/carrier still had to establish as a prerequisite for reimbursement– the existence of a permanent, preexisting condition and subsequent injury. South Carolina Code Annotated § 42-9-400(g) specifically states, "If the employee has a permanent physical impairment, as defined in this section ***and the prerequisites for reimbursement have been met***, and if it can be shown that the subsequent injury most probably would not have occurred "but for" the presence of the prior impairment, then reimbursement will be granted. . . ." S.C. Code Ann. § 42-9-400(g) (Supp. 2014) (emphasis added). In Hunt, the cotton dust exposure was the preexisting condition, and the byssinosis was the subsequent injury. This case is nearly on all fours with the case at hand, as in this case, the heavy metal poisoning was one of the initial impairments or conditions that was aggravated by repeated exposure to lead, ultimately culminating in a compensable heavy metal poisoning occupational disease.

In Hunt and Springs Industries, discussed *supra*, the injured employees' preexisting conditions and subsequent injuries were the same conditions. However, the subsequent injuries were the results of a worsening of the preexisting conditions. Therefore, similar to the Springs Industries case and the Hunt case, Appellants submit that Williams' preexisting heavy metal poisoning is both a preexisting condition and subsequent injury as required by § 42-9-400 and that both substantial evidence in the record and South Carolina case law supports this position.

Appellants respectfully submit that Williams' preexisting conditions of cardiac disease, pulmonary disease, diabetes, heavy metal poisoning, and hearing loss did in fact preexist his date of injury, and that the decision of the Commission to the contrary should

be reversed. In the alternative, Appellants submit that given the fact that Williams' last employer at the Sumter battery plant, Yuasa, Inc., did not take over until well after his preexisting conditions manifested, the evidence in the record still overwhelmingly supports the conclusion that Williams' preexisting conditions did in fact preexist his date of injury because they preexisted his first day of employment with Yuasa, Inc.

B. Substantial evidence in the record establishes that Williams' preexisting conditions were aggravated by or combined with Williams' workplace injury of heavy metal poisoning to result in substantially greater disability.

Substantial evidence in the record establishes that Appellants carried their burden of proof in establishing the element of reimbursement, which requires that one of Williams' preexisting conditions combined with or was aggravated by the heavy metal poisoning to result in substantially greater disability. *See* S.C. Code Ann. § 42-9-400(a) (Supp. 2006). Appellants submit that the Circuit Court erred in failing to reverse the Commission's decision to the contrary.

Appellants submit that substantial evidence in the record establishes that Appellants met this element for reimbursement. The *only* evidence in the record is that Williams' preexisting conditions did in fact combine with or suffer aggravation by his workplace injury to result in substantially greater disability. (R. pp. 178–83, 275–99.) This is a medical question, and two doctors specializing in occupational medicine and lead exposure have answered the question in the affirmative. (R. pp. 275–99, 178–83.) Respondent took no depositions to rebut these doctors' opinions. They wrote no letters to these doctors requesting them to rebut their opinions. They acquired no opinions from any additional doctors to rebut these specialists' opinions. Moreover, South Carolina's appellate courts have made clear that medical evidence should be entitled to great respect

and can be disregarded only when there is other competent evidence to the contrary. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), *cert. denied* Burnette v. City of Greenville, Op. No. 5059 (S.C. Sup. Ct. filed May 8, 2014). This Court has held that when the Second Injury Fund decides to put up no rebuttable evidence, substantial evidence will prevail on appeal. See Carolinas Recycling Group and Employers Ins. Co. of Wausau v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012). Simply doing nothing and then arguing against the medical evidence provided by Appellants is not an option.

Because the only evidence in the record establishes that Williams' preexisting conditions were aggravated by or combined with Williams' subsequent occupational injury to result in increased disability, Appellants respectfully request this Honorable Court to reverse the Lower Court's affirmation of the Commission's decision.

C. The Circuit Court erred by failing to remand the case to the Commission for findings of fact consistent with a determination that substantial evidence in the record establishes that Williams' preexisting conditions constituted a hindrance or obstacle to employment or reemployment.

Appellants submit that the Circuit Court erred in failing to remand this case to the Commission for a determination as to whether Williams' preexisting conditions of cardiac disease, diabetes, pulmonary disease, heavy metal poisoning, and hearing loss constituted a hindrance or obstacle to employment or reemployment as required by 42-9-400. Therefore, Appellants request that this case be remanded for findings of fact relative to this element of reimbursement. In the alternative, Appellants submit that substantial evidence establishes that they carried their burden of proof in establishing this element for reimbursement.

Appellants acknowledge that for them to be entitled to reimbursement, they must prove that substantial evidence in the record proves that at least one of Williams' preexisting conditions constituted a hindrance or obstacle to employment or reemployment. South Carolina Code Annotated § 42-9-400(d) outlines multiple preexisting conditions that are *presumed* to be such a hindrance or obstacle to employment. Among those statutorily imposed *presumptions* are cardiac disease, diabetes, pulmonary disease, and heavy metal poisoning. S.C. Code Ann. § 42-9-400(d) (Supp. 2014). There is absolutely nothing in the record that rebuts these presumptions. In fact, the evidence shows, without question, that it was Williams' cardiac disease that ultimately caused him to miss a great deal of work and also caused his doctor to impose restrictions that resulted in his inability to work at the Sumter battery plant, despite his ongoing desire to do so. (R. pp. 206–08, 228.)

In addition to the above statutory presumptions, the medical evidence in the record also establishes that Williams' preexisting conditions of diabetes, cardiac disease, heavy metal poisoning, pulmonary disease, and loss of hearing constituted a hindrance or obstacle to employment or reemployment. Two separate doctors, who specialize in lead poisoning and occupational injuries, completed SIF questionnaires stating that the aforementioned conditions were hindrances or obstacles to employment or reemployment. (R. pp. 178–83.) These questionnaires are supported by the evaluation performed by Dr. Baker, by the global lead report submitted to the Commission, and by the medical records in evidence.

South Carolina case law makes clear that the Commission's decisions must be supported by substantial evidence. As discussed *supra*, in a recent appellate court case

involving reimbursement from the SIF, the South Carolina Court of Appeals held that when "the only reasonable inference that can be drawn from the substantial evidence in the record is that Claimant's preexisting condition was a hindrance to his employment...[,]" it must be found that the preexisting condition is a hindrance or obstacle to employment. Carolinas Recycling Group and Employers Ins. Co. of Wausau v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012). Furthermore, this Court has recently held that "[w]hen a presumption shifts the burden of production to the opposing party, that party must present substantial evidence in order to rebut the presumption." State Accident Fund v. S.C. Second Injury Fund, 409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014).

Similar to the Carolinas Recycling Group and State Accident Fund cases, in the case at hand, the SIF presented absolutely no evidence contradicting the evidence submitted by Appellants. Therefore, the only evidence in the record is that Williams' preexisting conditions were in fact hindrances or obstacles to employment or reemployment.

Appellants submit that the Circuit Court erred by failing to remand this case to the Commission for findings on this element of reimbursement. Alternatively, Appellants assert that the substantial evidence in the record, and the only evidence in the record, establishes that Williams' preexisting conditions of cardiac disease, diabetes, pulmonary disease, heavy metal poisoning and loss of hearing were hindrances or obstacles to employment or reemployment. Thus, Appellants request that this Honorable Court remand this case for additional fact finding that is consistent with the substantial evidence.

D. Appellants had knowledge of Williams' Preexisting Conditions as required by § 42-9-400.

Appellants submit that the Circuit erred in failing to remand this case to the Commission for a factual finding regarding the knowledge element requirement for reimbursement from the South Carolina Second Injury Fund. Appellants submit that there is no legitimate argument, and no argument has been posed, that Appellants did not carry their burden of proof in establishing the knowledge element required for reimbursement. The evidence overwhelmingly supports Appellants' position that they established that they had knowledge of Williams' preexisting, permanent conditions. Therefore, Appellants respectfully request that this case be remanded to the Commission for findings of fact consistent with the substantial evidence in the record regarding this element of reimbursement.

Due to the fact that there was an in house medical department at the Sumter battery plant, the evidence leaves no doubt that Yuasa had knowledge of Williams' preexisting conditions prior to his date of injury. Given that this case arises out of an injury, which took place prior to 2003, Appellants have to prove one of three things regarding knowledge: (1) that the employer had knowledge of the preexisting conditions before the subsequent injury occurred; (2) that the employee concealed a preexisting condition; or that (3) the employee lacked knowledge of the presence of a preexisting condition. S.C. Code Ann. § 42-9-400(c) (Supp. 2002).

As discussed *supra* in the Facts Section, the battery plant's medical department's notes unequivocally establish knowledge of Williams' preexisting conditions. In 1982, the records began reflecting Williams' hypertension and heightened blood lead levels. (R. p. 184.) The records are also replete of notes acknowledging that Williams had been

exposed to lead at high levels and that he was placed in a medical removal program. (R. pp. 17–20, 184–86, 188, 192, 194, 196, 198, 200) Furthermore, Appellants' evidentiary submissions also reveal evidence, in addition to that noted above, of Williams having cardiovascular disease (R. pp. 186, 189, 194, 198, 200, 202, 204, 206–08, 213–15), pulmonary problems (R. pp. 213–14), neurological problems (R. p. 210), and hearing loss (R. pp. 184, 213) all during his tenure of employment at the Sumter battery plant and all before his date of injury on his workers' compensation claim.

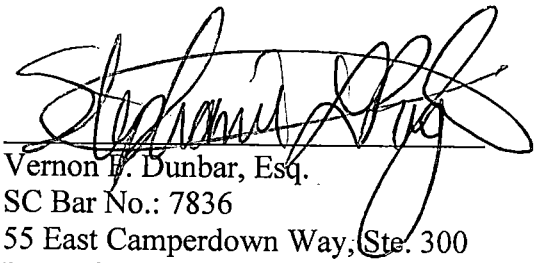
In light of the above, Appellants submit that the only evidence in the record establishes that Appellants had knowledge of Williams' preexisting conditions as required by South Carolina Code Annotated § 42-9-400(c). Therefore, Appellants request that this case be remanded for factual findings consistent with the substantial evidence in the record.

CONCLUSION

For all the reasons stated herein, Appellants respectfully request that this Court reverse the Circuit Court's errors of law and remand this case to the Commission for findings of fact consistent with the substantial evidence in the record.

Respectfully submitted,

June 23, 2015



Vernon F. Dunbar, Esq.
SC Bar No.: 7836
55 East Camperdown Way, Ste. 300
Post Office Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Stephanie Lamb Pugh
S.C. Bar No.: 78483
55 East Camperdown Way, Ste. 300
P.O. Box 2980
Greenville, South Carolina 29601
(864) 239-4000

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 24 2015
SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Case No. 2013-CP-43-02286
Appellate Case No. 2014-002214

Arrowpoint Capital Corporation/Arrowood Indemnity Co., Appellant,

v.

South Carolina Second Injury Fund, Respondent,

[In re: C.L. Williams, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

CERTIFICATE OF COUNSEL

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

June 23, 2015

Vernon F. Dunbar, Esquire
Stephanie Lamb Pugh, Esquire
McAngus, Goudelock & Courie LLC
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000
Attorneys for Appellants

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

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JUN 24 2015
SC Court of Appeals

Appellate Court Tracking No. 2014-002214
Civil Action No. 2013-CP-43-02286
WCC File No. 9930399

Arrowpoint Capital Corporation/Arrowood Indemnity Co., ...Appellant,
v.
South Carolina Second Injury Fund.....Respondent,

[In re: C.L. Williams, Employee/Claimant
v.
Yuasa Exide, Incorporated, Employer]

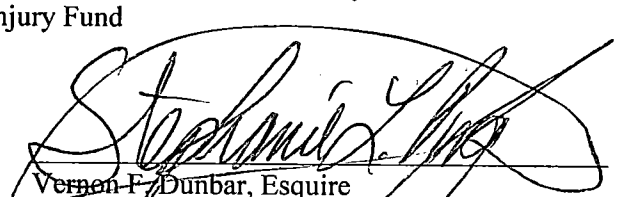
PROOF OF SERVICE

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:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeal
1015 Sumter Street
Columbia, South Carolina 29211

Latonya D. Edwards, Esquire (Final Brief and Final Reply Brief only)
Attorney for South Carolina Second Injury Fund
3790 Fernandina Road, Suite 103
Columbia, South Carolina 29210

June 23, 2015



Vernon F. Dunbar, Esquire
Stephanie Lamb Pugh, Esquire
McAngus, Goudelock & Courie LLC
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000
Attorneys for Appellants

mgc | INSURANCE DEFENSE

REPLY TO
VERNON F. DUNBAR
Direct Dial: (864) 239-6735
vernon.dunbar@mgclaw.com

June 23, 2015

RECEIVED
JUN 24 2015
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Yuasa-Exide, Inc. and Arrowpoint Capital Corporation v. South Carolina Second Injury Fund
In Re: C.L. Williams v. Yuasa-Exide, Inc and Arrowpoint Capital Corp
Appellate Court Tracking No.: 2014-002214
Civil Action No.: 2013-CP-43-02286
Our File No.: 20113.14171

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
Stephanie Lamb Pugh

VFD/rhd
Enclosures
cc: Latonya D. Edwards, Dilligard Edwards, LLC (w/enclosures)
Eric Rowell, ***SENT VIA EMAIL*** (w/enclosures)