THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

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

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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]

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

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

This appeal arises before this honorable Court based upon Appellants' entitlement to reimbursement from the South Carolina Second Injury Fund for injuries suffered by Mr. Joe Mathis at the Sumter battery manufacturing facility (also known as Yuasa-Exide) on or about November 30, 1998.

### I. GENERAL INFORMATION CONCERNING LEAD CASES AND SECOND INJURY FUND REIMBURSEMENT

#### A. The South Carolina Second Injury Fund

The South Carolina Second Injury Fund ("the 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 the subsequent (second) workplace injury. The Fund was designed to encourage the employment and retention of disabled workers by providing financial relief to employers. Thus, the Fund removes any financial incentive an employer may have to terminate a handicapped worker who may increase the employer's liability. See generally State Workers' Compensation 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. 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 permanent physical impairment (a/k/a preexisting 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 or obstacle to employment or re-employment (§ 42-9-400(d)); and (4) for pre- July 1, 2007 injuries, 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). It is important to note that the funds used to reimburse carriers who meet the requirements for Second Injury Fund reimbursement do not derive from tax revenue or some other source of state funding, but rather from the assessments paid by carriers. 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 State Budget and Control Board was tasked 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 to the Fund. See, e.g., Approved Second Injury Fund Closure Plan, *available at*

http://www.scsif.sc.gov (noting the mechanism for funding payment and administration of Fund obligations is by equitable assessments upon each carrier through FY 2018).

## B. 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. purchased the industrial division of Exide Corp. Thereafter, the company became Yuasa-Exide, Inc. and then Yuasa, Inc. In 2000, Yuasa, Inc. sold off its industrial division to EnerSys. (R. p. 6.) 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.

## C. Chronic Lead Exposure

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, and plate processing departments were exposed to the greatest amounts of lead. (R. p. 280-292.)

The dangerous health problems associated with lead exposure are numerous. Lead exposure has been associated with various maladies, such as brain damage and damage to the peripheral nerves of the body, hypertension, heart disease, anemia, kidney

failure, kidney cancer, and gout. Once lead is absorbed into the body, it is stored in the tissues and bones. The mean life of lead in bone is thirty (30) years, and it is a cumulative toxicant. 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. 293-297, 311-327.)

Drs. Edward L. Baker, Howard Hu, and J. Routt Reigart reviewed the battery assembly processes of the Exide plant, as well as the health records of workers there. They concluded that Exide workers had elevated blood lead levels that led to the development or aggravation of hypertension, heart disease, kidney failure, nervous system damage, gout, and kidney cancer. (R. pp. 294-297.)

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).

Beginning in 1978, OSHA began recommending permissible exposure limits as measured by blood lead levels. OSHA first promulgated legally enforceable regulations in 1983. OSHA's 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 60 micrograms per deciliter of blood. Moreover, if an employee has blood lead levels of 50 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"). 29 C.F.R. 1910.1025(k), *et seq.* (R. p. 373.)

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 is less than 10 μg/dL, and expert reports state the average blood lead level for the general population is 3 μg/dL. (R. p. 296, 304.) 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. 296.)

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 on MRP if a six month lead level average or three samples of blood registered greater than 36 micrograms per deciliter of blood. A medical removal program was also indicated if there was a one-time blood lead level reading of 44 micrograms per deciliter of blood or greater. (R. p. 392.)

## II. CASE OF ARROWPOINT CAPITAL CORPORATION V. S.C. SECOND INJURY FUND, IN RE: JOE MATHIS V. YUASA-EXIDE, INC.

Joe Mathis ("Claimant") alleged that occupational exposure to lead and other toxins resulted in injuries to his brain, kidneys, liver, musculoskeletal system, cognitive system, pulmonary system, and neuropathic system on or before November 30, 1998. (R. pp. 44-45.) The parties entered into a Consent Scheduling Order on August 13, 2009, following a scheduling conference before Commissioner Derrick Williams on April 22, 2009. As part of the scheduling order, the parties were compelled to participate in mediation conferences the week of December 7, 2009. The South Carolina Second Injury Fund participated in this scheduling conference and was a signatory to the Consent Scheduling Order. (R. pp. 37-43.)

Following mediation, the parties entered into a Settlement Agreement, Release, and Order on the underlying claim. The Agreement was approved by the South Carolina Workers' Compensation Commission on November 8, 2010. The claim was settled for ninety-five thousand and no/100ths dollars ($95,000.00). (R. pp. 25-36.)

The Fund was placed on notice of Appellants' reimbursement claim on April 20, 2010. On June 28, 2011, Appellants timely submitted documents in support of the reimbursement claim to the South Carolina Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-7-320. The Second Injury Fund denied reimbursement.

Appellants filed a Form 54, Request for Hearing, on October 28, 2011. Respondent filed a Form 55 on November 18, 2011, denying Appellants' entitlement to reimbursement. (R. pp. 46-47.) A hearing was held before the Honorable Andrea C. Roche on August 13, 2012, in Sumter, South Carolina. (R. pp. 147-159.)

The Hearing Commissioner issued a Decision and Order dated November 27, 2012, in which she found Appellants did not meet the requirements for reimbursement from the South Carolina Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-9-400. (R. p. 24.) Specifically, the Hearing Commissioner concluded as a matter of law that Appellants failed to meet their burden to prove that Claimant suffered from a preexisting condition that was permanent and serious enough to be a hindrance to or obstacle to Claimant's employment. (R. p. 23.) Moreover, the Hearing Commissioner concluded as a matter of law that Appellants failed to meet their burden to prove that Claimant's preexisting condition was aggravated by or combined with the work-related injury to create substantially greater medical costs and permanent disability. (R. p. 23.)

Appellants timely filed a Form 30, Request for Commission Review, on December 10, 2012. (R. p. 53.) The appeal was heard by the Full Commission Appellate Panel on September 16, 2013. (R. pp. 120-146.) By order dated December 12, 2013, the Commission fully affirmed the order of the Hearing Commissioner. (R. pp. 7-14.) Appellants timely filed an appeal to the Sumter County Court of Common Pleas on December 19, 2013. The parties appeared before the Honorable W. Jeffrey Young on June 3, 2014. (R. pp. 55-119.) By Order filed September 16, 2014, Judge Young affirmed the order of the Commission. (R. pp. 1-6.) Appellants timely filed a Notice of Appeal to this honorable Court on October 6, 2014.

## STATEMENT OF FACTS

Joe Mathis, Jr., the claimant, is a 64 year old divorced male. He has a high school education and is the father of two adult children. (R. p. 176.) Claimant was hired by ESB, Inc. on September 15, 1975. Claimant worked continuously for the Exide Corporation and its successor corporation, Yuasa-Exide, Inc., until November 30, 1998. He testified he was terminated for a mistake he made in pouring lead into the molds. (R. pp. 234-235.) Claimant initially received good employment performance reviews (R pp. 269-270), but toward the end of his employment tenure, he was not filling out his usage log form appropriately and had been reprimanded for unacceptable attendance and failure to observe Health and Safety Rules. (R. pp. 271.)

It is undisputed that Claimant was exposed to lead at extremely dangerous levels while working at the Sumter plant. He worked in several different areas but primarily worked in the small parts casting area. (R. p. 173.) During Claimant's twenty-three year employment tenure, his blood lead levels ranged from 9 to 64 micrograms per deciliter of blood (μg/dL), with several test results above 40 μg/dL. (R. pp. 194-197, 203-207.) Claimant's highest blood lead level readings, exposing him to acute and dangerous levels of lead, occurred prior to the promulgation of OSHA Regulations in 1983 and prior to Claimant working for Yuasa-Exide from 1991 onward. Claimant's elevated blood lead levels would have required him to be medically removed from work under the plant policy, but he does not recall removal at any time. (R. pp. 187, 249.) He used a respirator when his blood lead levels went up, and he showered before leaving the battery plant, but only in the last seven to eight years of his employment. (R. pp. 187, 249, 251.)

Following his time at the Sumter Battery plant, Claimant went on to work for Federal Mogul and then through employment agencies as a material handler, fast food worker, and helper at an animal shelter. He was unemployed and picked up occasional jobs as a painter around the time he settled his underlying claim. (R. pp. 173, 223-225.)

Dr. Barry Weissglass evaluated Claimant on June 24, 2009. At that time, Claimant complained of non-cardiac chest pain, aching in his right arm and right thumb, intermittent shortness of breath, reduced memory functioning, and some depression and sleep difficulties. (R. p. 187.) Claimant had a pinched nerve that caused some numbness just after he left work at the battery plant (R. pp. 231-233.) Dr. Weissglass stated Claimant experienced a health condition which was caused, aggravated, or accelerated by his occupational lead exposure at the Exide plant. He stated "[t]he lead exposure which he experienced as an employee of the Exide pant was either a significant contributor, accelerating factor, direct cause, or aggravating factor for the medical problems he now suffers." (R. p. 190.) Dr. Weissglass' diagnosis was toxic encephalopathy with impaired attention and memory deficits. He assigned 15% impairment to Claimant's brain due to toxic encephalopathy. (R. p. 189.) Dr. Weissglass believed this condition was permanent and would deteriorate, resulting in increased medical costs. He further believed these cognitive and memory impairments would limit Claimant's activities of daily living and would result in the need for significant supervision at work. (R. p. 190.)

L. Randolph Waid. Ph.D. performed a neuropsychological evaluation on September 2, 2009. Dr. Waid determined Claimant had borderline intellectual functioning, functional illiteracy, and deficits in verbal comprehension, perceptual organization, working memory, and processing speed. He also determined Claimant had

reduced capacity for immediate learning/memory and difficulty sustaining attention/concentration. (R. p. 186.) Claimant's achievement tests were consistent with functional illiteracy, and his intelligence tests placed him in the second percentile compared to age related peers. (R. pp. 176, 184.) Dr. Waid diagnosed claimant as having Cognitive Disorder and concluded that Claimant's cognitive dysfunction was related to lead exposure, noting:

> Mr. Mathis is demonstrating a cluster of neurocognitive deficits that are commonly associated with a history of exposure to neurotoxic agents. Mr. Mathis was not highly complaining of neurocognitive deficits except for increased absentmindedness/forgetfulness . . . The etiology for his difficulties is a history of exposure to neurotoxins in the workplace as well as interference to some ongoing depression.

(R. p. 186.) Claimant's vocational evaluator, David R. Price, M. Ed., CRC, believed Claimant was incapable of full-time gainful employment and had minimum wage earning potential as a part-time, semi-skilled worker. (R. p. 179.) He noted Claimant's intelligence test scores equated to borderline mental retardation. (R. p. 178.)

The finding of mild mental retardation was corroborated by Appellant's expert neuropsychological witness, Dr. Nicholas Lind. (R pp. 169-172.) Dr. Lind highlighted Claimant's high school experience and noted that Claimant may have missed many fundamentals in school and was always behind in what others appeared to know. Dr. Lind went on to state "his history does suggest that he may have been limited in what he learned in school and he may have gotten by with the impaired intellect witnessed in the recent evaluation." (R. p. 171.) Dr. Lind stated it was difficult to determine Claimant's true premorbid functioning and therefore necessary to utlilize a process of elimination in determining whether Claimant's lead poisoning was a direct cause of his cognitive impairment. Dr. Lind noted that Claimant's intelligence measure placed him in the

mildly mentally retarded range and his achievement scores suggested a fourth grade reading level. Dr. Lind emphasized that these scores were inconsistent with the report that Claimant was a high school graduate but consistent with Claimant's educational experience, in which he went to school only about three days a week up until he was 13 years old and then felt he missed many of the fundamentals of reading and writing. (R. p. 172.)

In support of its application for reimbursement, Appellant submitted into evidence an Employee Knowledge Affidavit (R. pp. 264-66) and Second Injury Fund Medical Questionnaires from Dr. Edward L. Baker and Dr. Eugene Shippen. (R. pp. 163-68.) In Claimant's Employee Knowledge Affidavit, Claimant stated he was aware of no preexisting conditions prior to sustaining a work related accident or contracting an occupational disease. (R. pp. 264-66.)

Dr. Baker opined that Claimant had pre-existing conditions of heavy metal poisoning and brain damage (cognitive impairment) and that Claimant's exposure to lead either aggravated or combined with his underlying pre-existing conditions to render Claimant permanently disabled. (R. pp. 163-65.) Dr. Baker commented that Claimant's cognitive impairment was aggravated by his exposure to lead, rendering him permanently disabled. (R. p. 163.) Dr. Baker also opined that, due to Claimant's preexisting conditions, he lost more time from work, sustained substantially higher disability, and experienced increased medical costs than he would have solely from the last exposure to lead on November 30, 1998. (R. p. 164.) Dr. Baker specifically affirmed that Claimant suffered from heavy metal poisoning prior to November 30, 1998 and that his last exposure to lead constituted a new accidental injury. (R. p. 164.) He further believed

Claimant's exposure to lead resulted in substantially greater disability as a result of the combined effects of the preexisting conditions and heavy metal poisoning or by the aggravation of the preexisting conditions (including heavy metal poisoning) (R. p. 165.)

Dr. Baker is an imminently qualified physician in the area of occupational and environmental medicine. He is board certified in internal medicine and preventive/occupational medicine. He was trained in epidemiology at the Centers for Disease Control and Prevention and served on the faculty for the Harvard School of Public Health from 1980 to 1985. He went on to serve as Deputy Director of the National Institute for Occupational Safety and Health, Assistant Surgeon General in the U.S. Public Health Service, and Director of the CDC's Public Health Practice Program. He has led numerous research studies concerning the exposure of workers to toxic substances in the workplace and currently serves as professor of health policy and epidemiology at the University of North Carolina. (R. pp. 276-77.) Dr. Eugene Shippen agreed with the opinions of Dr. Baker. (R. pp. 166-68.) Dr. Shippen is a board certified physician and expert in lead toxicology, with twenty-five years of practical experience dealing with lead toxicology. (R. pp. 426-27.)

In their global report, Drs. Baker, Hu, and Reigart noted that exposure to a neurotoxic agent such as lead causes brain damage which is manifest only later in life during the time when normal aging occurs, thereby accelerating the aging process. (R. p. 295.) Claimant testified in his deposition he had some memory problems that got worse as he got older. (R. pp. 236-37.)

## STANDARD OF REVIEW

The South Carolina Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions by the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2014), Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Appellants submit that this case concerns issues of law and of fact; therefore, two separate standards of review are applicable.

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.

Under the APA, a reviewing court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in light of the reliable, probative, and substantial evidence in the whole record. S.C. Code Ann. § 1-23-380(5)(d),(e) (Supp. 2014); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010). 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 same conclusion that the administrative agency reached or must have reached in order to justify its action." Lark, 275 S.C. at 135, 276 S.E.2d at 306.

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 Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (2005). 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

**THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' CLAIM FOR REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND.**

Appellants are entitled to reimbursement from the South Carolina Second Injury Fund, as they have met their burden in proving the elements for reimbursement under S.C. Code Ann. § 42-9-400. Appellants have proven that Claimant had permanent preexisting impairments/conditions that constituted a hindrance or obstacle to his employment or reemployment. They have further proven that Yuasa-Exide had knowledge of these preexisting conditions prior to Claimant's last date of exposure to lead on November 30, 1998, or that such conditions were unknown to Claimant during the time he worked there. Finally, they have proven that the preexisting conditions combined with or were aggravated by the lead exposure (the workplace injury) to result in substantially greater disability than that which would have resulted from the lead exposure alone. Because Appellants satisfied all of these elements, the Circuit Court erred in denying their claim for reimbursement from the Fund. Therefore, Appellants respectfully request that the Order of the Circuit Court be reversed.

### A. The Circuit Court erred in finding that Claimant did not have any permanent physical impairments prior to his workplace injury.

The Circuit Court erred in finding that Claimant's heavy metal exposure was one injury. The Circuit Court further erred in finding that Claimant did not have brain damage or cognitive dysfunction prior to his occupational exposure. The Court committed legal error in ignoring South Carolina authority that provides a "preexisting" impairment, in the context of Second Injury Fund reimbursement, need only precede the subsequent disability. The Court further ignored South Carolina case law that establishes

a preexisting impairment/condition and subsequent injury may occur at the same employer. There is no authority supporting the Court's reasoning that Claimant must have had permanent physical impairments that preexisted Claimant's first-ever exposure to lead.

Claimant suffered from chronic lead exposure throughout his employment at the plant, as indicated by his blood samples. The evidence in the record establishes that his subsequent exposure to lead while employed at the plant continuously aggravated an underlying condition of heavy metal poisoning and cognitive impairment/mental retardation. Moreover, Claimant's last employer, Yuasa-Exide, hired Claimant in 1991 and took on the liability of his past exposure to toxins in the battery plant. As such, Claimant's preexisting heavy metal poisoning and cognitive impairment did precede the subsequent disability incurred from an injury at Yuasa-Exide.

1. **The Circuit Court's reasoning concerning Claimant's "preexisting" impairments is contrary to South Carolina law and, due to the Court's legal error, its order should be reversed.**

There is no South Carolina authority that suggests the term "preexisting," as used in the context of Second Injury Fund reimbursement, means that an impairment must be present prior the employment where the subsequent injury occurs. Rather, pursuant to the plain language of the reimbursement statute, a permanent physical/preexisting impairment only needs to be present prior to the subsequent disability. S.C. Code Ann. § 42-9-400(a) (Supp. 2014). South Carolina law establishes that carriers have been reimbursed for preexisting and subsequent injuries that occur at the same employer.

The Circuit Court notes in its order that "[t]he Commission's decision that Claimant did not have brain damage prior to his occupational exposure was supported by

the substantial evidence in the record" and further that "Claimant's exposure to lead during his twenty-three (23) years of exposure constitutes a single occupational exposure based on the plain meaning of the statute." (R. p. 3.) The Court goes on to state that "[t]he plain meaning of the statute requires that the preexisting condition predate the work injury, which in this case is the occupational exposure." (R. p. 4.) These statements are a misunderstanding of the law concerning Second Injury Fund reimbursement and occupational disease cases.

The Circuit Court affirmed the Commission's reasoning that none of Claimant's alleged permanent impairments preexisted his workplace injury, not because there was lack of evidence establishing the conditions were present prior to his date of accident of November 30, 1998, but instead because the preexisting conditions did not exist prior to Claimant's first ever day of employment at the Sumter plant in 1975, the first date of his occupational exposure. According to this reasoning, Claimant's compensable work injury (occupational exposure to heavy metal/lead) and its manifestation that brought about Claimant's disability (toxic encephalopathy thought to be related to heavy metal/lead exposure) occurred on his first date of employment. Thus, the lower courts seem to have inserted an additional requirement for reimbursement from the South Carolina Second Injury Fund, namely, that a preexisting impairment must be one that precedes the Claimant's employment with the employer responsible for the ultimate workers' compensation claim. Such logic is unsound and is not supported by authority in South Carolina.

The South Carolina Workers' Compensation Act establishes that an occupational disease is not a compensable injury until the employee alleging the disease suffers a

disability as described in Sections 42-9-10, 42-9-20, or 42-9-30. S.C. Code Ann. § 42-11-10(D) (Supp. 2014). The disablement resulting from an occupational disease is treated as an injury by accident. S.C. Code Ann. § 42-11-40 (Supp. 2014). Case law explicitly holds that the "accident" in occupational disease cases occurs "when 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* Hanks v. Blair Mills, Inc., 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985), Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), and Bass v. Isochem, 365 S.C. 454, 476, 617 S.E.2d 369 (Ct. App. 2005).

The South Carolina Supreme Court expounded on the timing of the date of injury in occupational disease cases by citing 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 . . . start the claims period running, establish claimant's right to benefits, and fix the employer and insurer liable for compensation, the date of disability has been found to be the most satisfactory. . . . 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.

Glenn v. Columbia Silica Sand Co., 236 S.C.13, 19-20, 112 S.E.2d 711, 714 (1960). With respect to the statute of limitations for occupational disease claims, the two-year period does not begin to run until the employee has been definitively diagnosed as having an occupational disease and has been notified of the diagnosis. S.C. Code Ann. § 42-15-40 (Supp. 2014). In summary, South Carolina law suggests that an occupational disease does not occur on the first day of occupational exposure, as the lower courts in this case

suggested by their findings. Rather an occupational disease is the culmination of prolonged exposure to a disease-causing agent.

In this case, Claimant's date of injury, chosen by Claimant/his attorney on the underlying claim and not by Appellants, is November 30, 1998, his last official date of employment with Yuasa-Exide. Therefore, the date of disability can be no earlier than November 30, 1998, and his date of injury most definitely cannot be the first day he ever worked at the plant. Given that South Carolina Code Annotated Section 42-9-400 provides for reimbursement where there is a preexisting condition prior to disability incurred from a subsequent accident, the preexisting conditions only have to precede the subsequent disability.

Given the law cited above, it follows, then, that Claimant's preexisting impairments only had to preexist, at the earliest, his date of injury of November 30, 1998. There is nothing in the record to support the Commission's conclusion, with which the Circuit Court agreed, that there were no preexisting impairments because the twenty-three year exposure constituted one single occupational injury. Claimant's preexisting conditions did not have to exist prior to his first day of work at the Sumter battery plant.

Moreover, South Carolina Code Annotated Section 42-9-400(a) states that the permanent physical impairment may be "from any cause or origin." South Carolina courts have found employers and carriers are entitled to reimbursement where the Claimant's underlying preexisting condition arose out of employment with the same employer as the injury for which the employer seeks to be reimbursed from the Fund. See, e.g., Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (2012) (holding the carrier was entitled to partial reimbursement

from the Fund where the claimant's 2004 back injury combined with or aggravated a preexisting back injury that occurred on the same job in 2001) 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) (holding that the State Workers' Compensation Fund was entitled to reimbursement from the Second Injury Fund where a firefighter was retained by his employer after he was diagnosed with coronary artery disease and, twelve years later, was rendered totally disabled because of his heart disease and arteriosclerosis). See also Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010) (noting that the Fund failed to cite any authority for its position that a condition had to preexist a claimant's occupational exposure at Yuasa-Exide)[1] and S.C. Code Ann. § 42-9-400(c) (providing for reimbursement where an employer *retains* an employee after it acquires knowledge of a permanent physical impairment).

Given this authority, Appellants submit that they are not required to prove that Claimant had an impairment that pre-existed his first day of employment at the Sumter

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[1] The Hearing Commissioner in this reimbursement case found that the carrier was entitled to reimbursement from the Second Injury Fund as a consequence of heavy metal poisoning resulting from continuous lead exposure throughout his employment tenure at the plant. The Commissioner noted that the exposures resulted in continuous and aggressive injuries and accelerated the claimant's kidney failure, which was discovered after the claimant's employment at the plant and exposure to lead. In turn, the subsequent exposures accelerated and aggravated the claimant's kidney disease, and the subsequent exposures to lead were a direct cause of the kidney disease progressing from Stage I to Stage V. The claimant's last injury resulting from lead exposure combined with the last stage of renal kidney disease and aggravated the preexisting condition to cause substantially greater disability. (R. pp. 14-16.) Although Appellants do not offer this opinion as precedent, it does illustrate the Commission's previous conclusion that lead exposure/heavy metal poisoning can be both the preexisting permanent impairment (in that case manifesting itself as kidney disease) and that subsequent exposures to lead were considered the subsequent injuries, as they continuously accelerated and aggravated the claimant's underlying conditions. The Supreme Court ultimately disagreed with the Fund's position that the carrier was not entitled to reimbursement because the preexisting impairments did not preexist the occupational exposure. (R. p. 442.)

battery plant. Appellants are entitled to reimbursement because they retained Claimant in employment despite knowledge of his permanent impairments.

**2. The reliable, probative, and substantial evidence in the record establishes that Claimant suffered from a permanent physical impairment of heavy metal poisoning.**

The evidence in the record indicates that Claimant suffered from heavy metal poisoning prior to Claimant's date of injury on November 30, 1998. Claimant worked at the plant from 1975 to 1998. During that time, his blood lead levels ranged from 9 μg/dL to 64 μg/dL, with several tests registering above 40 μg/dL. (R. pp. 194-97, 203-07.) The blood lead levels represent both acute and chronic lead poisonings. The questionnaires completed by Drs. Baker and Shippen further support that Claimant had preexisting heavy metal poisoning, and the Fund submitted no evidence to refute these opinions. (R. pp. 163, 166.)

Where there was no evidence presented by the Fund, the Hearing Commissioner abused her discretion in coming to her own conclusion regarding the medical questionnaires. As such, the Commission and Circuit Court erred in affirming the Hearing Commissioner's conclusions. See 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). In Burnette, the hearing commissioner found that the greater weight of the medical evidence presented did not support the claimant's claim of a lower back injury in 2007. The commissioner based her opinion, at least in part, on a review of an MRI scan of claimant's back. She stated that an MRI scan from 2008 showed only a minimal protrusion, with no greater pathology of any significance as compared to a 2004 MRI scan. Id. at 425, 737 S.E.2d at 205.

The Court of Appeals found that substantial evidence did not support the finding that there was no injury or aggravation of the claimant's lower back injury in 2007. Id. at 427, 737 S.E.2d at 205. The Court was particularly disturbed by the single commissioner's finding regarding the 2008 MRI because there was no evidence such an opinion originated from a medical provider. The Court further found no evidence to challenge the conclusion of the claimant's doctors concerning her lower back pain. Id. at 428, 737 S.E.2d at 206.

The Court noted that the Commission was not bound by the opinions of medical experts and could disregard medical evidence in favor of other competent evidence in the record. However, where there was no evidence to challenge the conclusion of the claimant's experts, the Court could only conclude the opinions stated in the order were the medical opinions of the single commissioner and were not supported by substantial evidence in the record. Id.

In the instant case, the Hearing Commissioner drew her own conclusions based on her reading of the medical evidence. Although the Commissioner operated within her discretion to weigh the evidence and determine the credibility of witnesses, the Fund presented neither evidence nor witnesses for the Commissioner to consider in opposition to the expert opinions of Drs. Baker and Shippen. As such, it was an abuse of the Hearing Commissioner's discretion to determine Appellant's questionnaires were unsupported by the medical evidence in the record, where there was no evidence to the contrary upon which she could base her conclusion.

In affirming the Hearing Commissioner's findings, the lower courts' rulings in this case were against the weight of substantial evidence. Where the evidence presented

regarding the elements of reimbursements was set forth in the medical questionnaires, the lower courts erred in finding they were not supported by the medical evidence.

**3. South Carolina authority supports the contention that heavy metal poisoning can be both a preexisting impairment and a subsequent injury.**

Appellants submit that Claimant's heavy metal poisoning can be both a preexisting condition and a subsequent injury. In the context of reimbursement cases, the impairment/disease which is aggravated by a work hazard can be both the preexisting permanent physical impairment and the subsequent injury. State Workers' Compensation Fund v. South Carolina Second Injury Fund, 313 S.C. 536, 537, 443 S.E. 2d 546, 547 (1994). This authority speaks both to the Court's interpretation of the reimbursement statute as well as the evidence presented.

In State Workers' Compensation Fund, a firefighter for the State Forestry Commission was diagnosed with coronary artery disease in 1974 and, in 1986, was rendered totally disabled because of his heart disease and arteriosclerosis. The State Workers' Compensation Fund paid the claim relative to the claimant's total disability, but the South Carolina Second Injury Fund denied the carrier's claim for reimbursement. The Court of Appeals found that there had been no "second injury" and the only "injury" was the claimant's 1986 disability. The Supreme Court held this was error and determined that the carrier was entitled to reimbursement because the heart disease was both a preexisting condition and subsequent injury. The Court noted that the claimant's arteriosclerosis and cardiac disease were "permanent physical impairments." Moreover, the claimant's total disability from heart disease in 1986 qualified as a subsequent disability arising out of his employment. Id. at 539, 443 S.E.2d 548.

Similar to the heart disease from which the firefighter in State Workers' Compensation Fund suffered for twelve years prior to his total disability in 1986, Claimant in the instant case suffered from heavy metal poisoning for several years prior to his date of injury on November 30, 1998, as evidenced by his high blood lead levels. Just as the court above determined the firefigher's arteriosclerosis and heart disease were permanent physical impairments and his total disability in 1986 was the second injury, the same reasoning applies to Claimant's preexisting heavy metal poisoning and his subsequent permanent disability as the result of the same. Given the reasoning of the court in State Workers' Compensation Fund, Appellants submit that the lower courts erred in finding that the exposure to lead was one injury and that there were no impairments that preexisted the lead exposure. See also Springs Industries, Inc. v. S.C. Second Injury Fund, 296 S.C. 359, 372 S.E.2d 915 (Ct. App. 1988) (holding the claimant's preexisting cotton dust exposure was a preexisting condition under § 42-9-400 and that her total disability due to byssinosis was the subsequent injury).

In light of the above, Appellants submit that heavy metal poisoning during his employment tenure at the Sumter battery manufacturing facility constituted a preexisting impairment and that Claimant's ultimate disability attributable to the lead exposure constituted the subsequent injury as required by S.C. Code Ann. § 42-9-400. The reliable, probative, and substantial evidence in the record, in addition to South Carolina case law, support this position. Therefore, Appellants respectfully request that this Court reverse the lower courts' findings to the contrary.

4. **The reliable, probative, and substantial evidence in the record suggests Claimant suffered from preexisting brain damage/cognitive impairment, and, therefore, the Circuit Court's finding to the contrary should be reversed.**

The Court stated in its order that "[m]edical evidence, including neuropsychological evaluation, indicated that Claimant's cognitive deficits, lead/heavy metal poisoning and alleged brain damage were caused by the lead/heavy metal poisoning and did not preexist." (R. p. 4.) Appellants first highlight that, while Claimant's cognitive deficits were thought to be related to his lead exposure, Dr. Weissglass characterized the lead exposure as a "significant contributor, accelerating factor, direct cause, or aggravating factor for the medical problems he now suffers." (R. p. 190.) This is notable because the reimbursement statute in place at the time of Claimant's date of accident provides for reimbursement where there 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. S.C. Code Ann. § 42-9-400(a) (Supp. 2006). Furthermore, causation is not relevant under the reimbursement statute, and the Court's determination that a lead exposure/brain damage causal relationship thereby rendered the brain damage "non-preexisting" constitutes an error of law. As set forth above, the date of measurement for preexisting permanent impairments is the date of injury.

With respect to the evidence weighed, the lower courts appeared to focus their analysis on Claimant's lack of memory/brain problems while he worked for Yuasa-Exide and the fact that he was a high school graduate. However, Dr. Lind noted inconsistencies in Claimant's educational history as compared to his intelligence level. He thought Claimant's scores were more consistent with Claimant's actual educational experience, in

which he went to school in his early years only about three days a week and felt he missed many fundamentals (R. p. 172.) As such, Appellants submit the substantial evidence in the record shows Claimant was suffering from cognitive impairment prior to his employment at the battery plant.

However, even if this Court does not find substantial evidence to support cognitive impairment/mild mental retardation prior to Claimant's employment, Claimant's mental condition deteriorated during his tenure at the plant. Claimant initially received good performance reviews (R. pp. 269-70), but toward the end of his employment tenure, he was not filling out his usage log form and had been reprimanded for unacceptable attendance and failure to observe Health and Safety Rules. (R. p. 271.) Appellants contend that Claimant's cognitive impairment/mild mental retardation—whether caused by the lead exposure or not—preexisted Claimant's last injurious exposure to lead on November 30, 1998. This last injurious exposure aggravated any prior cognitive problems caused by heavy metal poisoning. In the alternative, the last date of accidental injury caused by exposure to lead combined with the previous heavy metal poisonings to render Claimant permanently disabled. These findings would be consistent with the effects of lead noted by Drs. Baker, Hu, and Reigart in their global report, in particular that lead causes brain damage which is manifest only later in life during the time when normal aging occurs, thereby accelerating the aging process. (R. p. 295.)

The questionnaire completed by Dr. Baker further supported that Claimant had preexisting cognitive impairment, and the Fund submitted no evidence to refute this opinion. (R. p. 163.) Pursuant to the reasoning in Burnette, supra, in which the appellate

court noted the Commission may not substitute its judgment for that of a medical expert and must base its decision on some other competent evidence in the record, the Court erred in affirming the Commission's decision regarding Claimant's preexisting cognitive impairment.

**5. Even if the Circuit Court did not err in ignoring South Carolina precedent defining a "preexisting" impairment, Claimant suffered from the permanent preexisting impairment of heavy metal poisoning prior to coming to work for his last employer at the Sumter battery plant.**

Even if the Circuit Court and Commission were correct in interpreting Section 42-9-400 to require a condition to preexist employment with Appellant Yuasa-Exide in order to qualify for reimbursement from the Second Injury Fund, Claimant was employed by several different employers during the course of his employment at the plant. Appellants submit that, under this line of reasoning, the date of measurement for the preexisting conditions would be the date of hire with the employer at the time of the date of accident, not the first day the claimant ever stepped foot into the Sumter battery plant.

Claimant was hired in 1975 by ESB, Inc. In 1983, ESB, Inc. sold the industrial battery business, and Exide Corp. was established. The corporation became Yuasa-Exide in 1991. Claimant's blood lead samples prior to 1991 would have indicated medical removal under the policy in place at the time. (R. pp. 203-07.) Therefore, Claimant suffered from chronic heavy metal poisoning during his employment with Exide Corp. and then became an employee of Yuasa-Exide, Inc.

The Circuit Court affirmed that Claimant was exposed to lead throughout his twenty-three years of employment. If this Court were to agree with the Commission's logic and the Circuit Court's logic affirming the same, Appellants submit that this Court

should find Claimant suffered from preexisting heavy metal poisoning that preceded his employment with Yuasa-Exide.

B. **The Circuit Court erred in finding that Appellants did not prove Claimant's preexisting condition was either aggravated by or combined with the work related injury to create substantially greater disability where the reliable, probative, and substantial evidence in the record supports this element of reimbursement.**

Substantial evidence in the record establishes that Appellants carried their burden of proof in establishing Claimant had preexisting conditions that combined with or were aggravated by the heavy metal poisoning to result in substantially greater disability. S.C. Code Ann. § 42-9-400(a) (Supp. 2006). In the case at hand, Drs. Baker and Shippen both stated that Claimant's exposure to lead combined with or aggravated the preexisting conditions to result in substantially higher medical costs and permanent disability. (R. pp. 163-68.) Moreover, Dr. Weissglass believed Claimant's condition was permanent and would deteriorate, resulting in increased medical costs. He further believed Claimant's cognitive and memory impairments would limit Claimant's activities of daily living and would result in the need for significant supervision at work. (R. p. 190.) Claimant's vocational evaluator, David R. Price, M. Ed., CRC, believed Claimant was incapable of full-time gainful employment and had minimum wage earning potential as a part-time, semi-skilled worker. (R. p. 179.)

Where a carrier presents medical testimony and evidence to support its case and Fund fails to present evidence to refute it, the only reasonable conclusion, as long as other elements for reimbursement are met, is that the carrier is entitled to partial reimbursement from the Fund. Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 485-86, 730 S.E.2d 324, 327-28 (2012). In Carolinas

Recycling, Claimant sustained a work-related back injury in 2001, for which he sought a second opinion from Dr. William Felmly. Id. at 481, 730 S.E.2d at 325. Claimant strained his back again in 2002 as he was standing up from a bent position, but this injury was not work-related. In 2004, Claimant sustained a second work-related back injury, for which the Carrier sought reimbursement from the Fund. Id. at 482, 730 S.E.2d at 326.

The Commission relied exclusively on the second opinion evaluation of Dr. Felmly in determining that Claimant's 2004 injury did not combine with or aggravate the preexisting condition so as to increase Claimant's disability or medical costs. Id. at 485, 730 S.E.2d at 327. The South Carolina Court of Appeals held the carrier had presented overwhelming medical testimony and evidence that the claimant's preexisting condition combined with or aggravated his subsequent injury. Id. In contrast, the Fund failed to present any expert testimony from a physician who evaluated Claimant after the 2002 and 2004 injuries. Thus, the only reasonable conclusion was that the carrier was entitled to reimbursement from the Fund. Id. at 485-86

As mentioned above, the Commission may not substitute its judgment for that of a medical expert. See Burnette, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012). Moreover, where the Fund did not submit any evidence of its own to refute the questionnaires presented, the Commission erred in finding the medical questionnaires were not supported by the medical evidence in the record.

The Circuit Court cites Carolinas Recycling in support of its decision not to rely on the medical opinions of Drs. Baker and Shippen because they were non-treating physicians. However, the instant matter is distinguishable from Carolinas Recycling because the Commission in Carolinas Recycling had more reliable opinions from treating

physicians on which to rely. In the instant matter, there are no other opinions on which the Fund can rely to support its position that Claimant did not sustain substantially greater disability as a result of a combination or aggravation of a preexisting impairment and a subsequent injury.

Appellants recognize that the Commission is not required to give medical questionnaires conclusive effect to the exclusion of other more compelling evidence. See Ballenger v. Southern Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). However, the key is that there must be *other more compelling evidence*, which was not present in this case. See also Edwards v. Pettit Constr. Co., Inc., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979) ([w]hile a finding of fact of the commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on *evidence of sufficient substance* to afford a reasonable basis for it") (emphasis added).

The Fund had ample opportunity to depose the doctors questioned. They further had the opportunity to present their own documentary evidence in the form of APA submissions. However, the Fund presented no evidence to refute Appellants' evidence. Therefore, the only reasonable conclusion based on the evidence in the record is that Claimant's work-related injury combined with or aggravated his preexisting conditions to create substantially greater disability. Appellants submit that they have met this element for reimbursement from the Second Injury Fund and the Circuit Court's order should be reversed.

C. **<u>The Circuit Court erred in weighing the evidence concerning whether Claimant had a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to his employment, where the Commission did not provide any findings of fact concerning this element of reimbursement.</u>**

The Circuit Court notes in its Order that Appellants could not rely on the statutory presumption that the Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance to his employment because the condition first had to be preexisting. The Court also noted that Appellants relied heavily on OSHA regulations regarding permissible exposure to lead and that "the statutory reimbursement scheme does not require any deference to OSHA regulations." (R. p. 4.) The Court appears to be weighing the evidence relied upon by Appellants in defining heavy metal poisoning by the high levels of lead to which Claimant was exposed. Such a weighing of evidence concerning the hindrance/obstacle element would be improper.

The Commission never provided Findings of Fact speaking to whether Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. It is unclear if the Commission did not reach this question because of its erroneous interpretation of the preexisting condition requirement—that is, in finding that there were no preexisting conditions—or if the Commission had evidence to support that the conditions were not permanent and serious enough to be hindrances or obstacles to employment, or if there was some reason the Commission believed that Appellants were not entitled to a presumption that these preexisting conditions were hindrances or obstacles to employment. Regardless, the Circuit Court made its own decision concerning why such a presumption did not apply. The Court erred in making its own decision about the hindrance/obstacle presumption and failing to remand this

question to the Commission for further findings concerning the hindrance/obstacle element.

Pursuant to South Carolina Code Section 42-9-400, Appellants are entitled to a presumption that Claimant's preexisting conditions were a hindrance or obstacle to his employment. The reliable, probative, and substantial evidence in the record further supports that these conditions were a hindrance or obstacle. Therefore, Appellants request that this case be remanded to the Commission for specific findings of fact concerning this element.

1. **The Act creates a presumption that Claimant's conditions were a hindrance or obstacle to employment or reemployment.**

S.C. Code Annotated § 42-9-400(d) provides that there are certain conditions that constitute a hindrance or obstacle to employment or reemployment. Where an employer establishes prior knowledge of these permanent impairments, there is an irrebuttable presumption that the condition is permanent and a hindrance or obstacle to employment or reemployment. S.C. Code Ann. § 42-9-400(d).

Claimant had two of these preexisting conditions listed under the statute: brain damage and heavy metal poisoning. S.C. Code Ann. § 42-9-400(d)(23), (28) (Supp. 2006). Therefore, the Commission erred in not recognizing these conditions as a presumptive hindrance or obstacle to employment or reemployment.

2. **Evidence from Appellants' medical experts states that Claimant's conditions were a hindrance or obstacle to employment or reemployment, and such evidence was not refuted by the Fund.**

Even if the statute allowed for these presumptions to be rebutted, there was no evidence provided by the Fund for rebuttal. Appellants presented medical questionnaires from Dr. Edward Baker and Dr. Eugene Shippen which stated the preexisting conditions

of heavy metal poisoning and cognitive impairment constituted a hindrance or obstacle to employment or reemployment. (R. pp. 163, 167.) These medical questionnaires were not refuted by any evidence from the Fund. Therefore, the Commission's conclusion should have been reversed. See State Accident Fund v. S.C. Second Injury Fund In Re: Johnny M. Adger v. City of Manning, 409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014) ("[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"), Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012) (finding there was no evidence to challenge the conclusions of Claimant's medical doctors).

**D. Yuasa-Exide, Inc. had knowledge of Claimant's preexisting condition of heavy metal poisoning, and the evidence suggests that Claimant was unaware of his preexisting cognitive impairment.**

The knowledge element of reimbursement was not reached by the Circuit Court, as it was found that Appellants had not proven the existence of a preexisting impairment. The reliable, probative, and substantial evidence in the record reveals that Appellants met the requirements of 42-9-400(c) in that the employer had knowledge of Claimant's permanent physical impairment at the time the employee was hired or retained in employment. S.C. Code Ann. § 42-9-400(c) (Supp. 2002). With respect to the condition of heavy metal poisoning, the plant maintained Claimant's blood lead levels throughout his employment. (APA pp. 194-97, 203-07.) As such, his employer had knowledge of his increased blood lead levels and had knowledge of such heavy metal poisoning and retained Claimant in its employment. Moreover, when hiring Claimant in 1991, Yuasa-Exide had knowledge of preexisting heavy metal poisoning as it had access to the records from the plant medical department.

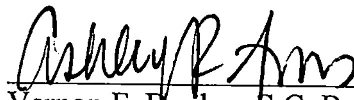
Claimant did not know until 2009 that he experienced cognitive impairment during his time at the plant and possibly before his employment with the plant. (R. pp. 187-91.) Under the applicable version of S.C. Code Ann. § 42-9-400(c), "the employer may qualify for reimbursement . . . upon proof that he did not have prior knowledge of the employee's preexisting physical impairment because the existence of such condition was concealed by the employee *or was unknown* to the employee." S.C. Code Ann. § 42-9-400(c) (Supp. 2002). Claimant was not definitively diagnosed until 2009, but the evidence suggests he was beginning to experience cognitive difficulties during his employment at the plant. Appellants submit that, even if Claimant's employer was unaware of his cognitive impairment, the knowledge element of reimbursement for cognitive impairment is met because the impairment was unknown to Claimant.

## CONCLUSION

Based on the foregoing arguments, the only evidence in the record establishes that Appellants have met all requisite requirements for reimbursement from the South Carolina Second Injury Fund. Therefore, Appellants submit that the Circuit Court erred in concluding to the contrary. Appellants respectfully request that the Order of the Circuit Court be reversed, that the case be remanded for certain findings of fact absent from the Circuit Court's order, and that Appellants be granted reimbursement from the Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-9-400.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



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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. Jeffery Young, Circuit Court Judge

Appellate Tracking No. 2014-002212
Civil Action 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

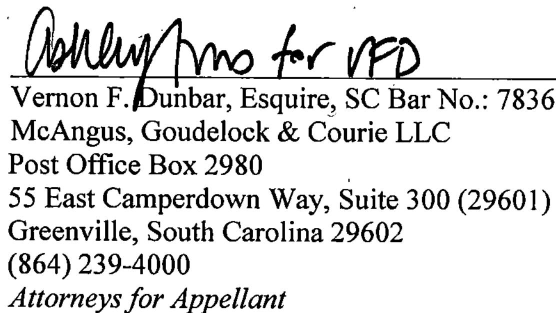
v.

Yuasa-Exide, Incorporated, Employer]

**CERTIFICATE OF COUNSEL**

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

June 23, 2015



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v.
South Carolina Second Injury Fund, Respondent,

[In re: Joe Mathis, Employee/Claimant
v.
Yuasa-Exide, Incorporated, Employer]

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**PROOF OF SERVICE**

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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
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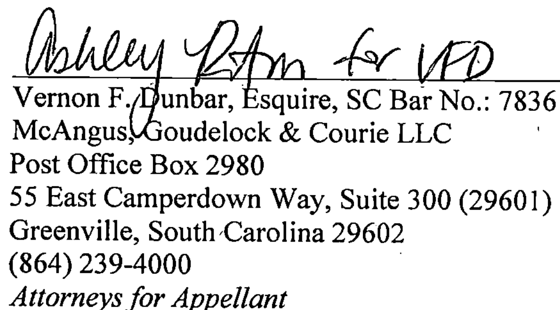
June 23, 2015



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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 29211

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.