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

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]

REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. APPELLANTS WERE NOT REQUIRED TO LITIGATE THIS CLAIM TO BE ENTITLED TO REIMBURSEMENT.

In Respondent's Initial Brief, the Fund asserts that because there was no formal decision and order with a formal award of benefits granted to Claimant as the result of a litigated hearing, that this claim is not subject to reimbursement. Not only is this a new argument, but it is also disingenuous considering the fact that the Fund has never taken this position before and has a history of reimbursing claims that have been settled without a formal decision and order (including claims stemming from the lead exposure at the Sumter Battery Plant).

In the case at hand, as well as all other claims stemming from lead exposure at the Sumter Battery Plant, the South Carolina Workers' Compensation Commission ordered that the claims be mediated. (R. pp. 37–43.) Thus, there was not an opportunity for Appellants to acquire a formal decision and order on these cases, unless Appellants defied the Commission's order that the claims be mediated in good faith. Additionally, there was no way for Appellants to foresee that Respondent would take a position that a settlement would negate Appellants' ability to acquire reimbursement from the Fund, given that the Fund has always paid reimbursement on such cases and has never taken a position similar to the one it has presented in its Brief. In fact, the Fund was made a party to these claims, attended a few of the mediations, but never asserted that they would assert that the lack of a formal hearing would bar reimbursement.

Section 42-9-400 does not require a formal decision and order with findings of fact and conclusions of law as a prerequisite for reimbursement. In fact, the Fund has never argued such until the submission of its Initial Brief to this Court. Section 42-9-400

requires that the carrier and employer pay all medical and indemnity benefits in the first instance and that they then seek reimbursement from the Fund. The purpose of this language is not to require a formal decision and order but instead to ensure timely payment of benefits for a claimant's injury by the carrier or employer or for the issue of reimbursement to handled subsequently.

Furthermore, the Fund relies heavily on South Carolina Code Annotated § 42-9-5 for the proposition that the lack of a formal award results in a bar to Appellants' request for reimbursement. The Fund argues that because there was no formal order with findings of fact and conclusions of law that the compensation received by Claimant was not an award and can therefore not be subject to reimbursement pursuant to § 42-9-400. This argument ignores the fact that § 42-9-5 is only applicable to injuries that occur on or after July 1, 2007. *See* S.C. Code Ann. § 42-9-5 (Supp. 2014). The injury at hand carries a date of accident of February 1, 1999, which is eight years before the enactment of § 42-9-5. Thus, § 42-9-5 is not even applicable to this claim.

Lastly, the language of the settlement agreement in this matter states that an award has been issued. Specifically, on Page Eleven of the settlement agreement, it states. "IT IS ORDERED AND AWARDED…" (R. p. 34.) This agreement was approved and executed by a commissioner on October 21, 2010. Thus, the language of the agreement specifically states that an award has occurred.

In light of the above, Appellants request that this Honorable Court reverse the decision of the Circuit Court and reject Respondent's argument that the lack of a formal decision and order bars reimbursement.

II. APPELLANTS CARRIED THEIR BURDEN OF PROOF IN ESTABLISHING THAT CLAIMANT'S PREEXISTING CONDITIONS CONSTITUTED A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT.

Although in Respondent's Initial Brief it cites § 42-9-400 as the "prevailing statute" to determine whether a hindrance or obstacle to employment or reemployment exist, it ignores the fact that the very same statute outlines conditions that serve as presumptive hindrances or obstacles to employment or reemployment. "When an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists when the condition is one of the following impairments: . . . (3) cardiac disease . . . (23) heavy metal poisoning . . . (32) pulmonary disease . . . . S.C. Code Ann. § 42-9-400 (Supp. 2004).

The South Carolina Supreme Court recently addressed this very issue and held that the presumptive hindrances or obstacles to employment or reemployment found in § 42-9-400 shift the burden to the Fund and require that the Fund establish by substantial evidence that the condition is not entitled to its presumption. State Accident Fund v. S.C. Second Injury Fund, 409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014). In State Accident Fund, Respondent introduced no evidence rebutting the presumptive hindrances or obstacles to employment but instead took the position that because the claimant's diabetes was well managed at the time of his injury, that diabetes was not entitled to its presumption as delineated in § 42-9-400. Id. at 247, 762 S.E.2d at 23. The South Carolina Supreme Court rejected the validity of that argument and held that the Commission erred by considering the status of the claimant's diabetes at the time

of the claimant's accident as opposed to whether the condition constituted a hindrance or obstacle to employment "as the statute requires." Id. at 247, 762 S.E.2d at 23.

In the case at hand, Appellants presented evidence that Claimant had cardiac disease, pulmonary disease, and heavy metal poisoning all before his date of injury. Thus, Appellants are entitled to the rebuttable presumptions found in § 42-9-400 for these conditions. Further, as in State Accident Fund, Respondent submitted no evidence rebutting the presumptions. Thus, Appellants request that this Honorable Court reverse the findings of the Circuit Court to the contrary.

III. APPELLANTS ESTABLISHED PREEXISTING PERMANENT CONDITIONS AS REQUIRED BY § 42-9-400.

Respondent erroneously analyzes the point in time at which a condition must occur for it to satisfy the element of § 42-9-400 which requires the existence of a permanent preexisting condition before the subsequent disability. Because this is an occupational disease claim, Respondent convolutes § 42-9-400 to require that the preexisting condition preexist the first day Claimant was ever exposed to lead at the Sumter Battery Facility. This position is not supported by South Carolina law, and Appellants assert that the Circuit Court erred in adopting this new interpretation of the law by the Commission.

As outlined in Appellants' Initial Brief, the date of injury or disablement controls in occupational disease claims. Thus, the preexisting permanent impairment required by § 42-9-400 most certainly does not have to preexist the first day Claimant was exposed to lead, but instead must preexist the subsequent disability as stated in § 42-9-400. This position is supported by South Carolina authority concerning occupational disease

claims. Appellants' position is also supported by South Carolina authority finding an entitlement to reimbursement where the preexisting condition arose out the same employment as the subsequent injury. See, e.g., Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (2012) and State Workers' Compensation Fund v. South Carolina Second Injury Fund (In re: Warren M. Hunt v. S.C. State Forestry Comm'n), 313 S.C. 536, 443 S.E.2d 546 (1994).

In the claim at hand, there is no question that Claimant had cardiac disease, pulmonary disease, hearing loss, and heavy metal poisoning prior to his date of injury or his date of disablement. For that reason, Appellants submit that the Circuit Court's opinion should be reversed as a matter of law.

IV. SOUTH CAROLINA CASE LAW SUPPORTS A REVERSAL OF THE LOWER COURT'S DECISION.

In its Initial Brief, Respondent misinterprets the cases of Carolinas Recycling Group v. S.C. Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (2012), and 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). Appellants submit that the correct interpretation of these cases leads to the conclusion that the Circuit Court's decision should be reversed.

In its brief, Respondent misconstrues the Carolinas Recycling Group case. In Carolinas Recycling Group, the South Carolina Workers' Compensation Commission ignored medical evidence establishing an element of Second Injury Fund reimbursement and cited a piece of evidence that had no bearing on the element in support of its denial of benefits. The South Carolina Supreme Court rejected this erroneous approach and held

that substantial evidence supported that the employer and carrier had carried their burden of proof in establishing all prerequisites for reimbursement. Carolinas Recycling Group, 398 S.C. at 484, 730 S.E.2d at 327. Similarly, in the case at hand, the Fund has submitted no reliable evidence of any sort to counter the medical evidence Appellants have submitted establishing their entitlement to reimbursement. Therefore, Appellants submit that the Carolinas Recycling case provides support for their claim for reimbursement.

Likewise, in Respondent's Brief, the Fund argues that because the underlying issue in the Burnette case is one of compensability, that the analysis regarding the substantial evidence standard of review is inapplicable to the reimbursement case at hand. Appellants submit that the analysis under a substantial evidence standard of review does not change depending on the type of case. Furthermore, Appellants believe that Respondent makes this argument in an effort to minimize the fact that this Honorable Court has previously held that the Commission can ignore medical evidence only when there is other competent evidence in the record upon which it can base its opinion. Burnette, 401 S.C. at 428, 737 S.E.2d at 206. In the case at hand, just as in Burnette, there is no evidence other than that presented by Appellants, and this evidence establishes all of the necessary elements for reimbursement. By disregarding this evidence in favor of no other evidence, the Lower Court erred, and Appellants are requesting that this Court reverse that decision.

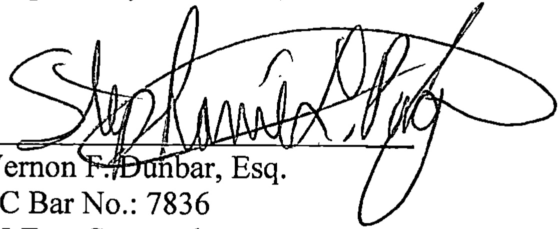
In light of the aforementioned case law, Appellants request that this Honorable Court reverse the decision of the Circuit Court.

CONCLUSION

For the reasons stated, Appellants respectfully request that this Honorable Court reverse the Lower Court's decision.

June 23, 2015

Respectfully submitted,



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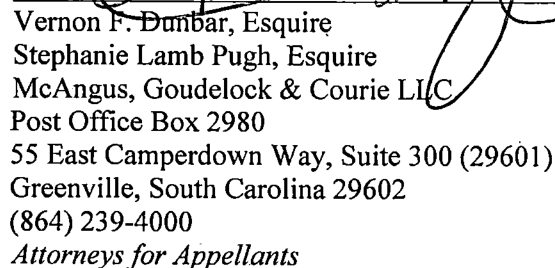
Yuasa Exide, Incorporated, Employer]

CERTIFICATE OF COUNSEL

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

June 23, 2015



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WCC File No. 9930399

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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:

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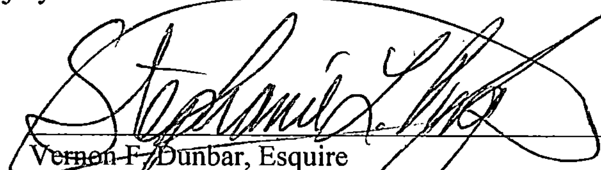

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RE: Yuasa-Exide, Inc. and Arrowpoint Capital Corporation v. South Carolina Second Injury Fund
In Re: C.L. Williams v. Yuasa-Exide, Inc and Arrowpoint Capital Corp
Appellate Court Tracking No.: 2014-002214
Civil Action No.: 2013-CP-43-02286
Our File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

Dear Ms. Kitchings:

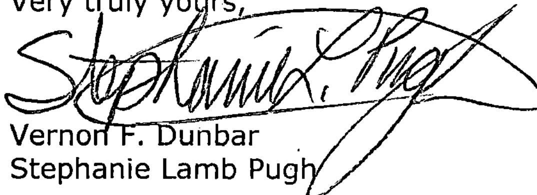
Enclosed for filing in the above referenced matter are the following:

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,



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