IN 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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SC Court of Appeals

C.A. No.: 2013-CP-43-02284
Appellate Case No.: 2014-002215
WCC File No.: 9930459

Arrowpoint Capital Corporation / Arrowood Indemnity Co., Appellant,

v.

South Carolina Second Injury Fund, Respondent,

IN RE: Mary McConico, Employee,

v.

Yuasa-Exide, Inc., Employer and Arrowpoint Capital Corp. / Arrowood Indemnity Co., Carrier.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE CARRIER'S CLAIM WAS BARRED FOR FAILURE TO COMPLY WITH THE PLAIN LANGUAGE OF STATUTORY DEADLINES.**

II. **IF THE CLAIM IS NOT BARRED, WHETHER THE COMMISSION AND CIRCUIT COURT PROPERLY DETERMINED THAT CARRIER FAILED TO SATISFY THE REQUIREMENTS OF S.C. CODE ANN. § 42-9-400?**

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's Order affirming a decision of the South Carolina Workers' Compensation Commission. The matter involves a demand for reimbursement by Arrowpoint Capital Corporation / Arrowood Indemnity Co., Inc. (collectively "Carrier") from the South Carolina Second Injury Fund ("Fund").

The case was initially heard by Commissioner Andrea C. Roche on August 13, 2012, per the issues as set forth on the Forms 54 and 55. At the hearing, the Fund asserted that, first and foremost, S.C. Code Ann. § 42-7-320(B)(2) stood as a bar to Carrier's claim for reimbursement. Alternatively, the Fund objected to the inclusion and consideration of Carrier's APA Submission Number 10, Post Yuasa Medical Records, were not submitted to the Fund on or prior to June 30, 2011, as required by the plain language of § 42-7-320(B)(2). R. pp. 44.

Alternatively, the Fund denied that Carrier met any of the requirement for reimbursement, specifically asserting that Claimant's heavy metal exposure, hypertension, and/or cardiovascular disease did not preexist her lead exposure. The Fund further denied that the alleged preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment as per S.C. Code Ann. § 42-9-400, as highlighted by Claimant's lengthy career.

In asserting its claim for reimbursement, Carrier alleged that it incurred substantially greater liability for compensation and medical benefits when employee Mary McConico's (Claimant's) alleged preexisting heavy metal poisoning, hypertension, and/or cardiovascular disease were either aggravated by or combined with her July 31, 1999, work-related injury to her brain, kidneys, cerebral vascular accident or stroke, and to his musculoskeletal, cognitive, neuropathic and cardiovascular systems, which was also caused by lead exposure. R. p. 43; Carrier's Form 58. Carrier also alleged that Claimant's alleged pre-existing conditions were a

hindrance or obstacle to employment. The Carrier asserted that the heavy metal or lead to which the Employer exposed the Claimant over the course of her employment was both the pre-existing permanent physical position and the aggravating/combining condition necessary for reimbursement from the Fund:

> THE COURT: Your lead exposure is the injury that you're seeking – is the second injury that you're seeking?
>
> MR. DUNBAR: It is the second injury, correct, and is also the aggravating injury. Now the Commission [in a previous matter] also took the position –
>
> THE COURT: How can it be the aggravating injury? It's the second injury.
>
> MR. DUNBAR: They also took the position – that was my argument as a defense attorney, how can it be aggravating, but they looked at it from a repetitive trauma standpoint.

R. pp.122 – 123; Hrg. Tr., p. 18, l. 22 – p. 19, l. 8.

The Single Commissioner issued her Order on December 19, 2012. In the order, she denied Carrier's claim for reimbursement on substantive grounds, finding that Claimant "did not have preexisting heavy metal poisoning, hypertension, or cardiovascular disease prior to her occupational exposure" and that "the occupational or heavy metal exposure is one injury." R. p. 52. The Single Commissioner further found "no combination or aggravation of the preexisting condition by the subsequent injury to create substantially greater medical costs and permanent disability," as required by § 42-9-400. The Single Commissioner further found the Claimant's questionnaires at APA pp. 9 – 14 were insufficient to support its claims. R. p. 53.

However, the Single Commissioner also ruled that that Carrier's apparent intentions to comply with S.C. Code § 42-7-320(B)(2) actually operated to satisfy the statutory requirement that Carrier submit documentation by a particular date. Both parties appealed to the Full Commission. Both parties appealed.

The matter was heard *en banc* by the Commission. On November 21, 2013, the Full

Commission promulgated a Decision and Order affirming the Single Commissioner's denial of reimbursement by reversing her findings regarding § 42-7-320(B)(2). R. pp. 22 – 39. Carrier timely appealed to the Sumter County Court of Common Pleas.

The Circuit Court affirmed the Commission's Order on September 5, 2014. R. pp. 1 – 21.

STATEMENT OF THE FACTS

Mary McConico worked for Employer for approximately twenty-five (25) years. R. p. 45. During that time, Claimant was exposed to lead as part of her working conditions.

More than a decade following her alleged date of accident, Carrier filed a claim for reimbursement from the Fund. R. p. 73. However, because the Fund was being closed, the Legislature established certain requirements for the submission of claims in the closing days. Particularly, per § 42-7-320, the Carrier was required to submit all necessary materials to the Fund on or before June 30, 2011. On that date, Carrier submitted a compact disc to the Fund. Appellants' Final Brief, p. 5. Apparently, Carrier *intended* to submit electronic copies of documentary material *via* the disc. However, there was not a single copy of any document on the disc, which contained only a single, 1Kb file. R. pp. 32, 350. The file on the disc was a simple hyperlink; the hyperlink connected to nowhere. As the Fund has since learned, if one is logged onto the Carrier's attorneys' computer system, the hyperlink may provide access to documents stored in the Appellants' counsel's database.

Because were no copies of any documents on the disc, the Fund asserted that the documents were not submitted to the Fund on or prior to June 30, 2011. The Commissioner, however, ruled that the Carrier's intention to submit the documents satisfied the deadlines as set forth in S.C. Code Ann. § 42-7-320(B)(2).

The Carrier has, however, presented evidence that the Employer exposed the Claimant to

unsafe levels of lead from the date that the Claimant began work with Employer. Then, years after the fact, Employer and Carrier settled the case with the Claimant on a doubtful and disputed basis. This Carrier has never paid a penny in medical care and treatment for this Claimant. R. p. 70; Form 19. This Carrier has never paid a penny in either temporary or permanent disability benefits to this Claimant. Form 19. However, this Carrier now demands to be paid the One Hundred and Ten Thousand Dollars ($110,000.00) it paid in cash to both the Claimant and her lawyer to make this case go away. *Id.*

As a result of the monies paid pursuant to the doubtful and disputed settlement, Carrier alleged that it incurred substantially greater liability for compensation and/or medical benefits (neither of which it actually paid) when Claimant's alleged pre-existing heavy metal poisoning combined or aggravated the very conditions that it caused.

Essentially, the Carrier's argument is that: (1) the Claimant comes to work in the morning; (2) the Claimant is exposed to lead on the job; (3) the Claimant develops medical conditions as a result of the exposure to lead on the job; (4) the Claimant leaves work for the day; (5) the Claimant returns to work the next day; (6) the Claimant is again exposed to the same lead on the job; (7) the Claimant develops more medical conditions as a result of the continued exposure to lead on the job. According to the Carrier, because there is a continued exposure on day two (2), the exposure on day one (1) is now a pre-existing condition.

STANDARD OF REVIEW

In an appeal from the Commission, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct.App. 1999); see also Etheredge v. Monsanto Co., 349 S.C. 451; 562 S.E.2d 679 (Ct.App. 2002). Where the issue is jurisdictional, including whether the Court and Commission has

subject matter jurisdiction to hear the case, the question is one of law. Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct.App. 2000). However, when the appeal is one on a matter of law, the Court may review that issue *de novo*. "As a result, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. Id.; see S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).

ISSUES PRESENTED

I. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE CARRIER'S CLAIM WAS BARRED FOR FAILURE TO COMPLY WITH THE PLAIN LANGUAGE OF STATUTORY DEADLINES.

The Fund asserts that the Commission and the Circuit Court were correct in law and in fact by requiring Carrier to abide by the statute governing the termination of the Second Injury Fund. The Fund further asserts that the Commission and the Circuit Court were correct in striking, from the record, Carrier's APA 10. Therefore, these materials are not before this Court. However, upon review of Appellants' Brief, Appellant liberally refers to those documents. However, as they are addressed in Appellants' Brief, reference is made below to the same.

A. SUNSET OF THE SECOND INJURY FUND

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

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

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

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

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

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

(emphasis added). As you can see, the language chosen by the Legislature in crafting this law is mandatory: the "[f]ailure to submit all required information . . . by June 30, 2011 . . . shall bar . . . carrier from recovery . . . ." Id. However, for reasons outside the scope of that allowed by the statute, the Appellants request that the claim to proceed despite the Carrier's failure to submit all required information to the Fund by the specified date.

B. FAILURE TO SUBMIT NECESSARY MATERIALS

The documents that were not timely submitted to the Fund were required by the Fund before it could consider reimbursement were narrative medical reports that would show whether the Claimant's disability or medical expenses were substantially increased due to the alleged pre-existing condition. R. p. 349; Fund APA p. 2; see Carrier's APA 10. Carrier was notified of the requirement of these documents on April 25, 2011. R. p. 349; Fund APA p. 2. Additionally, the Carrier's inclusion of these documents in its APA Submissions also indicates that these materials are necessary to recovery.

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

This case involves statutory construction. "The cardinal rule of statutory construction is

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

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

The Fund has reproduced the entire sunset provision above because, "[i]n construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)). The subject section herein appears as just one deadline in a list of deadlines required to be met by a Carrier before it can even argue its case against the Fund.

Had the Carrier attempted to timely mail the documents but, for whatever reason, failed

to do, mailing only an empty envelope, would the outcome be different? The Fund's position is that either way there was no statutory compliance, and the Carrier's claim for reimbursement must be denied. The problem in this case is that the Carrier, for whatever reason or reasons, sat on its hands until the last possible date. Though the Carrier has assigned a date of accident to this case of July 31, 1999, it waited until December 15, 2010 to notify the Fund of its claim. If it had waited two more weeks, this claim would clearly be barred pursuant the same provision as set forth above.

For whatever reason or reasons, the Carrier waited until the afternoon of June 30, 2011, to attempt to submit file materials to the Fund. In doing so, it submitted some – but not all – of the necessary file materials for consideration of reimbursement. Why did the Carrier attempt to submit the file materials on that date? Because the sunset provisions mandates that June 30, 2011, is the final date for the submission of such documents. Had the Carrier exercised due care, it could have simply: (1) checked the file materials it was submitting to ensure it was actually submitting file materials; and/or (2) taken care of the matter before the final deadline. If Carrier had taken care of the matter within a reasonable time before the final deadline, any problems with the submissions could have been timely resolved. However, no such due care was taken.

The General Assembly has determined that the Second Injury Fund shall be closed. In doing so, the General Assembly created the sunset provision, which set forth the timelines necessary in order to orderly effect such closure. In this regard, the sunset provision acts as a statute of limitations. According to the Court of Appeals,

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

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

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

However, now, years after this Claimant set foot on the Employer's premises, this Carrier – as well as this Employer, which was solely responsible for any exposure the Claimant may have suffered – are trying to settle its liabilities via money from the Second Injury Fund. There is no equitable principal that would justify tolling this statute of limitations for this Employer and Carrier, who are an Employer and Carrier that slept on their rights, failed to take the slightest care in the prosecution of their claim, failed to provide a safe work environment for this Claimant.

For these reasons and those that may be set forth in the oral arguments, the Second Injury Fund prays that this Court affirm the Order of the Circuit Court. The Fund respectfully requests that the Carrier's claim for reimbursement be dismissed pursuant to S.C. Code Ann. § 42-7-320(b)(2).

II. IF THE CLAIM IS NOT BARRED, WHETHER THE COMMISSION AND CIRCUIT COURT PROPERLY DETERMINED THAT CARRIER FAILED TO SATISFY THE REQUIREMENTS OF § 42-9-400?

The Carrier and/or the Claimant in this case picked the date of July 31, 1999, as the alleged date of accident.[1] The Carrier's assertion was that, on that date, Claimant sustained an alleged injury by accident to her brain, kidneys, "cerebral and vascular accident or stroke," and to her musculoskeletal, cognitive, neuropathic and cardiovascular systems when she was exposed to lead during the course of her employment with Yuasa Exide, Incorporated.

A. REQUIREMENTS FOR REIMBURSEMENT

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

> The Second Injury Fund was created in 1972. See Section 42-9-400, Code of Laws of South Carolina (1976). One of the purposes in establishing the Second Injury Fund was to encourage employers to hire handicapped persons by providing reimbursement to the employer or insurer for compensation paid as a result of a second injury. The Fund was designed to compensate handicapped workers fully for subsequent injuries without penalizing employers for hiring them in the first place. The Second Injury Fund granted a new remedy or right of reimbursement to the insurer; and the Legislature could properly impose such reasonable terms and conditions upon the exercise of such right as it deemed appropriate. The right of a claimant to secure reimbursement under the statute depends upon complete compliance with the requirements imposed for recovery. The success and future of the Second Injury Fund depend upon proper and careful application of these statutory requirements.

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[1] This is despite the evidence showing that the Claimant's last day of employment with Defendant Employer was July 23, 1999. R. p. 312; Carrier's APA p. 178.

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

The Court of Appeals later wrote that the Fund is intended to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995). In this case, the Employer/Carrier wants reimbursement from the Fund for conditions caused by the exposure to lead that was its very business. If reimbursement is granted, this Employer/Carrier would see no liability though it was wholly responsible for the alleged conditions and maladies suffered by this Claimant.

For a Carrier to be entitled to reimbursement from the Second Injury Fund, it must prove that a claimant's pre-existing condition aggravated or combined with her subsequent injury to cause increased disability or medical costs. S.C. Code Ann. § 42-9-400. As Carrier's argument is that Claimant was exposed to lead from the day she started work, the Carrier would need to prove the conditions pre-existed such exposure. In this case, the Carrier asserted that the first and second injuries were the same: the exposure to lead. R. pp.122 – 123; Hrg. Tr., p. 18, l. 22 – p. 19, l. 8. The Carrier's position was that the lead caused the Claimant's conditions, and, subsequent to the development of her maladies, she was further exposed to lead. . Per the Carrier, the further exposure resulted in additional and/or worsening maladies. Thus, it argues, it is entitled to reimbursement for payment of a lump sum to cash that neither represents indemnity or medical payments. Of course, by statute, the Fund only reimburses for disability benefits and/or medical payments. S.C. Code Ann. § 42-9-400.

As the Commission and the Circuit Court found, the Carrier presented no evidence of an alleged pre-existing condition prior to the exposure. Claimant's first day of work with Employer

was March 4, 1974. R. p. 314; Carrier's APA p. 178. The Carrier presented no medical records from any time preceding Claimant's employment with Defendant. Claimant's Initial Occupational History form, which is dated May 21, 1981, indicates that the Claimant worked with Employer for seven (7) years. R. p. 155; Carrier's APA p. 18.

Carrier has mischaracterized the Commission's findings as always requiring evidence of a pre-existing prior to employment, this is not the case. In this case, the exposure to lead was coincidental to the beginning of work. As the Employer/Carrier argued that the exposure was the pre-existing condition, it was required to show evidence of the condition prior to the initial exposure. In this case, the Commissioner found that the Employer/Carrier presented no such evidence. This is incontrovertible.

According to the Claimant's testimony, which was submitted by the Carrier via her deposition, the Claimant "didn't have any [health] problems until [she] went [to work]" with Employer. R. p. 331; Carrier's APA p. 195; Claimant's Deposition, p. 11, ll. 2 – 3.

The first medical note comes from September 10, 1975, showing Claimant suffered a knee abrasion. R. p. 205; Carrier's APA p. 68. In 1977 and 1980, the Claimant complained of headaches and/or dizziness. *Id.*

On March 19, 1979, Claimant filed a claim with employer for "accident and sickness weekly benefits." R. p. 308; Carrier's APA p. 172. This was not a workers' compensation claim, but a benefit associated with Claimant's pregnancy. Dr. William H. Carpenter filled out an Attending Physician's Statement, in which he wrote: "I do not feel that this patient should be exposed to lead hazards at Exide and have recommended to patient that she longer work at Exide, From this date 3/9/79, until the day of her [child's] delivery." R. p. 309; Carrier's APA p. 173. Regardless, at that time, the Employer made it clear that it believed the Claimant was healthy enough to work. Dunbar P. Gibson, Jr., Manager, Employee Relations, denied

Claimant's request for benefits. R. p. 351; Fund's APA p. 3. He wrote, "the medical evidence supplied does not support a disability which prevents you from performing your job . . . ." Id.

The Initial Occupational History from May 21, 1981, indicates that she had been exposed to lead and cadmium, but that she had not sustained any work injuries. R. p. 155; Carrier's APA p. 18.

A physician's examination included in Yuasa's Health History documents shows that her blood pressure on July 12, 1984, was 110 over 78. R. p. 164; Carrier's APA p. 27.

An Occupational Health History Questionnaire dated August 13, 1986, shows that the Claimant, having worked approximately twelve (12) years with Employer, was now developing anemia, bleeding tendencies, and eye problems. R. p. 168; Carrier's APA p. 31. She was also showing more problems with her cardiovascular system, including racing heart, dizzy spells, and swollen feet or ankles. R. p. 169; Carrier's APA p. 32. She continued to smoke cigarettes. Id.

On November 12, 1987, Claimant saw Employer's medical personnel, and it's noted that Claimant "[s]tates doctor [in Columbia] says that Exide won't let him do allergy testing." R. p. 211; Carrier's APA p. 74.

An Occupational Health History Questionnaire from August 24, 1989, or approximately fifteen (15) years after she was first employed by Employer, shows that she was then developing "chest pains", and that she was not on high blood pressure medications. R. pp. 178 – 179; Carrier's APA pp. 40 – 41.

By May 4, 1993, or after almost twenty (20) years of employment with Defendant, the records show that Claimant considered herself to be in poor health, and that she continued to smoke one (1) pack of cigarettes per day. R. p. 189; Carrier's APA p. 52.

In 1998, after twenty-five (24) years of employment, the Claimant was transported by EMS to the hospital after suffering from left sided numbness in face, hand and foot for five

minutes. R. p. 207; Carrier's APA p. 70. Nevertheless, the Claimant returned to work. On March 10, 1998, Claimant requested disability following a stroke. R. p. 312; Carrier APA p. 175.

On July 22, 1999, Claimant was transported to the hospital *via* ambulance after experiencing headache, neck pain and sudden dizziness. R. p. 209; Carrier's APA p. 72. Claimant indicated that she only became unable to work because of illness or injury on July 23, 1999, which was her last day of employment with Defendant. R. p. 314; Carrier's APA p. 178. She testified that she stopped working for Employer after having a stroke and an aneurysm. R. p. 327; Carrier's APA p. 191; Claimant's Deposition, p. 7, ll. 1 – 3.

Following her employment with Defendant, Claimant developed "New onset diabetes." R. pp. 119, 232; Carrier's APA p. 95; Hrg. Tr. p. 15, ll. 7 – 8. On December 17, 2007, a Duplex Lower Extremity Venous Study was normal. R. p. 254; Carrier's APA 117. The Claimant confirmed that she did not develop diabetes until 2001 through her testimony. R. p. 332; Carrier's APA p. 196; Claimant's Deposition, p. 12, ll. 19 – 20.

On March 17, 2011, Claimant underwent a neuropsychological evaluation by L. Randolph Waid, Ph.D., in which he opined that her neurocognitive deficits were related to lead exposure and to "the residuals of an aneurysm/cerebral vascular accident". R. p.144 – 147; Carrier's APA pp. 4 – 7. Of course, the Claimant never returned to work after the stroke, which Dr. Waid attributed as one of the causes of her impairment. Dr. Waid did not address any SIF criteria, and he does not address the possible effect any pre-existing medical condition may have had on Carrier's subsequent liability for compensation and medical benefits or whether the pre-existing conditions (if there were any) constituted hindrances or obstacles to employment. *See* R. pp. 141 – 144.

On April 7, 2011, Claimant signed a statement indicating that she was aware that she had the following preexisting conditions: arthritis, diabetes (which she testified she developed in 2001), cerebral vascular accident (which occurred in 1999), chronic osteomyelitis and ankylosis of joints, heavy metal poisoning / lead (of which there is no evidence preceding employment with Employer), brain damage, and deafness. R. pp. 342 – 344; Carrier's APA pp. 210 – 212.

On May 31, 2011, Dr. Eugene Shippen completed a questionnaire supporting Second Injury Fund reimbursement with respect to Claimant's preexisting heavy metal poisoning, bronchitis, stroke, degenerative joint disease, coronary artery disease, cerebral aneurysm, osteoarthritis and hypertension. R. p. 146 – 148; Carrier's APA pp. 9 – 11. Interestingly, Dr. Shippen refers to each and every one of the foregoing conditions as "pre-existing conditions", and all of these conditions are considered as a whole. *Id.*. Dr. Shippen completed at least sixteen (16) other questionnaires for Carrier on that same day, May 31, 2011. R. pp. 353 – 400; Fund's APA pp. 5 – 52. Dr. Shippen was not a treating physician, and his *curriculum vitae* was not submitted by any party.

On June 26, 2011, Dr. Edward L. Baker, Jr., completed a questionnaire supporting Second Injury Fund reimbursement with respect to preexisting heavy metal poisoning, bronchitis, stroke, degenerative joint disease, coronary artery disease, cerebral aneurysm, osteoarthritis and hypertension. R. p. 401 – 403; Carrier's APA pp. 12 – 14. Interestingly, Dr. Baker refers to each and every one of the foregoing conditions as "pre-existing conditions", and all of these conditions are considered as a whole *Id.*. Dr. Baker completed at least sixteen (16) other questionnaires for Carrier on that same day, June 26, 2011. R. pp. 401 – 445; Fund's APA pp. 53 – 97. Dr. Baker was not a treating physician.

On March 17, 2011, J. Routt Reigart, M.D., completed a "Brief Health Evaluation of Mary McConico." R. pp.138 – 140; Carrier's APA pp. 1 – 3. Dr. Reigart assigned an eighty-six

percent (86%) impairment rating to the Claimant based on hypertensive cardiovascular disease, osteoarthritis, and encephalopathy. Dr. Reigart notes that the impairment is "calculated for each of the health conditions attributable to lead exposure and physical demands at the Exide plant." R. p. 139; Carrier's APA p. 2. Dr. Reigart does not address any SIF criteria, and he does not address the possible effect any pre-existing medical condition may have had on Carrier's subsequent liability for compensation and medical benefits or whether the pre-existing conditions (if there were any) constituted hindrances or obstacles to employment. *See* R. pp. 138 – 140; Carrier's APA pp. 1 – 3. Dr. Reigart was not a treating physician.

According to the Claimant's testimony, she was only placed in the medical removal program once during her tenure with Employer. R. p. 328; Carrier's APA p. 192; Claimant's Deposition, p. 8, ll. 5 – 8.

Contrary to the assertions in Carrier's Brief that Commissioner the Commission found as a fact that Claimant suffered an "occupational exposure or accidental injury to heavy metal or lead on July 31, 1999" (Appellants' Final Brief p. 15), there has never been any adjudication regarding the Claimant's date of accident. Commissioner Roche only found that "[o]n July 31, 1999, Claimant sustained an occupational exposure to heavy metal/lead . . . ." R. p. 52; Order, p. 13. Despite the implications from Carrier, the Commission did not find that Claimant sustained an accident or disease on that date. In fact, the Commission specifically found that "Claimant was exposed to lead over a twenty-five (25) year period of employment; and, as such, I find that the occupational exposure is one injury and there was no preexisting heavy metal exposure." R. *Id.*

B. EXPOSURE TO LEAD AS BOTH PRE-EXISTING AND SUBSEQUENT INJURIES

In this case, Carrier asserts that both the first and second injuries were the same: the exposure to lead. Carrier's position is that the lead caused the Claimant's conditions, and,

subsequent to the development of his maladies, he was further exposed to lead. Carrier alleges that Claimant's continued or subsequent exposure resulted in additional or worsening maladies. Thus, Carrier argues that it is entitled to reimbursement for payment of a lump sum settlement that neither represents indemnity nor medical payments. However, by statute, the Fund only reimburses for disability benefits and medical payments. S.C. Code Ann. § 42-9-400.

In this case, the only evidence presented is subsequent to the initial exposure to lead. In this case, the exposure to lead was coincidental to the beginning of work. Since Carrier must prove that the exposure to lead is the alleged preexisting condition, Carrier is necessarily required to show evidence of the condition prior to the initial exposure. See S.C. Code Ann. § 42-9-400.

Carrier has submitted questionnaires and medical reports from Dr. Eugene Shippen and Dr. Edward L. Baker, Jr. Dr. Shippen's and Dr. Baker's questionnaires list all of the conditions allegedly suffered by Claimant as "pre-existing conditions," regardless of when the symptoms for those conditions appeared, (most of which appeared several years subsequent to Claimant's employment with Yuasa Exide, Incorporated). While Dr. Shippen and Dr. Baker are experts, neither were treating physicians.

Carrier's experts do not support Carrier's position that exposure to lead and its malignant effects on the body become preexisting conditions to continuing exposure to the same substance and continuing malignant effects. Carrier's experts write that

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

R.pp. 467 – 468.

As a chronic illness, lead poisoning is the illness itself. As a chronic illness, lead poisoning does not stand apart from the maladies it causes. As their experts note, the Claimants' "[c]onditions [were] caused by lead exposure in the workplace." R.p. 468. As the doctors write, "Chronic lead poisoning is manifested by a range of damage to various systems of the body." Id. They further state, "We also conclude that lead, once absorbed into the body, was distributed to various parts of the body, including the brain, the kidneys and bone, and caused damage to the body of Exide workers." R.p. 472. Thus, the manifestations of lead poisoning do not preexist the chronic illness, and the chronic illness is not separate and apart from the conditions to which it leads. They are one and the same. As the experts state, the Second Injury Fund, it existed to encourage the hiring of disabled persons. The Second Injury Fund was not created to encourage long term exposure to toxins in the workplace so that employers can go without liability.

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

The Commission determined that Claimant's exposure to lead during his twenty-five (25) years of employment constitutes a single occupational exposure based on the plain meaning of the statute. Section 42-9-400(a) references "subsequent disability," "preexisting impairment," and "subsequent injury." The injury for which reimbursement is sought is an occupational

disease, which is a chronic illness as previously discussed herein. Since this case involves a chronic illness, the plain meaning of the statute requires that the preexisting condition predate the chronic illness. In this case, the evidence indicates the contrary, as Claimant's conditions and the chronic illness or the effects thereof are one and the same, as the Single Commissioner found.

The cases cited by Carrier to support its theory are easily distinguished from this case. In State Workers' Compensation Fund v. SC SIF, 313 S.C. 536, 443 S.E.2d 546 (1994), the South Carolina Supreme Court decided the issues partly based on a statute that applied specifically to law enforcement officers, including firefighters, which presumes that heart disease arises out of and in the course of a firefighter's employment. 313 S.C. 536 at 539; 443 S.E.2d at 548 (1994). See, S.C. Code Ann. § 42-11-30. In addition, the Claimant in that case had a definitive diagnosis of coronary artery disease prior to a subsequent injury. On the contrary, Claimant's chronic illness or occupational exposure is one injury and he was not diagnosed with any condition prior to his chronic illness or exposure.

In Springs Industries, Inc. v. S.C. Second Injury Fund, the issue was whether Claimant sustained a subsequent injury. 296 S.C. 359, 372 S.E.2d 915 (S.C. App. 1988). In Springs, Claimant worked in the cotton industry for thirty-one (31) years and then became totally disabled after working for another employer for nine (9) months. The Court determined that Claimant's thirty-one (31) years of prior cotton dust exposure was the "but for" cause of the subsequent injury pursuant to S.C. Code Ann. § 42-9-400(g). It is noteworthy that a determination that the preexisting condition is the "but for" cause of the subsequent injury eliminates the need for Carrier to establish that their liability was substantially greater. See S.C. Code Ann. § 42-9-400. In both State Workers' Compensation Fund and Springs, the carriers actually paid the affected claimants compensation and medical benefits, as opposed to Appellant, who settled the claim on a doubtful and disputed basis without paying in the first instance.

Carrier cites Carolinas Recycling Grp v. S.C. Second Injury Fund to support the assertion that the Commission's decision is not supported by substantial evidence. 398 S.C. 480, 73 S.E.2d 324 (Ct. App. 2012). In Carolinas Recycling, the South Carolina Court of Appeals reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct.App. 2012). In this case, none of the experts who provided medical opinions were treating physicians on any occasion. Consistent with the Carolinas Recycling decision, the Commission and the Circuit Court refused to rely on physicians who did not provide any treatment to Claimant.

Moreover, the Commission determines the weight of the evidence. In Anderson et al. v. Campbell Tile Co., the South Carolina Supreme Court held that opinions of medical experts may constitute substantial evidence sufficient to support a judgment. 202 S.C. 54, 24 S.E.2d 104 (1943). Anderson does not require that the opinions of medical experts are the only evidence that may constitute substantial evidence nor does it exclude other sufficiently compelling evidence that would support a judgment. Anderson also held that the Commission determines the weight given to the opinion of medical experts. Id. While Carrier submitted medical certificates supporting the elements of reimbursement, the Commission is not required to give medical questionnaires conclusive effect to the exclusion of other more compelling evidence. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). The Commission's decision to place little weight on the opinions of physicians that did not actually treat Claimant and place more weight on the totality of the other medical evidence was well within their discretion.

It is well settled that an agency's interpretation of its own statutes will be given great

deference unless compelling reasons require otherwise. CFRE, LLC v. Greenville Cnty Assessor, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011). In this case, there are no compelling reasons that require this Court not to give deference to the Commission's interpretation of the applicable statute.

Even if the Carrier could prove that the Claimant's lead exposure amounted to both the pre-existing and subsequent injuries, it can't prove that the Claimant's exposure to lead was a hindrance or obstacle to employment or reemployment. This factory was filled with employees that were exposed to lead, and it employed them all for many, many years. If the lead exposure were a hindrance or obstacle to employment, the employees would not have been able to work as they did for the course of decades. This Claimant, Mary McConico, worked at the factor for over twenty-five (25) years. R. p. 52; Order, p. 13. She did not stop working until she suffered a stroke and/or aneurysm. R. p. 327; Carrier's APA p. 191; Claimant's Deposition, p. 7, ll. 1 – 3. Further, Employer itself – after years on the job and while the Claimant was pregnant – expressed that the exposure did not amount to a hindrance or obstacle to employment. Fund's APA p. 3. Dunbar P. Gibson, Jr., wrote to the Claimant, "the medical evidence supplied does not support a disability which prevents you from performing your job . . ." while she was pregnant. Id.

Carrier argues, additionally, that Claimant's high blood pressure was caused by the exposure to lead, and that "there is a clear association between the development of hypertension and the occurrence of . . . stroke." Appellants' Brief, p. 22. Appellant does not cite to anywhere in the record for the correlation, but does attribute it to Dr. J. Routt Reiggart. Id. Appellants assert that this qualifies it for reimbursement per S.C. Code Ann. 42-9-400(a) and (d) (Supp.

2005), though it fails to reproduce the portion of the code that requires Carrier's to make payment of medical benefits before making a claim for reimbursement.[2]

Appellants don't even indicate whether Dr. Reiggart made this correlation relative to this Claimant or in general. Regardless, the Carrier offers no evidence in regards to whether the now allegedly pre-existing hypertension caused greater disability or medical costs, which the Code requires. It should be noted that Dr. Reiggart pointed to a list of conditions he related directly to work (stroke, diabetes, hypercholesterolemia, back pain, osteoarthritis in arms and knees, vertigo, hypertension, gout, poor memory and concentration, depression, skin eruption, and coronary artery disease). R. p. 139; Carrier's APA Submissions p. 2. Dr. Reiggart does not opine anywhere that the hypertension resulted in greater disability or medical costs.

Further, S.C. Code Ann. § 42-9-400 allows for Second Injury Fund reimbursement of "awards of compensation and medical benefits" under certain circumstances. That section subsequently sets forth the manner and operation by which medical and weekly indemnity benefit payments are to be reimbursed in qualified cases. An "award" is "[a] final judgment or decisions, esp. one by an arbitrator or by a jury assessing damages." Black's Law Dictionary 132 (7th ed. 1999). S.C. Code Ann. § 42-9-5 requires that "[a]n award made pursuant to this Title must be based upon specific and written detailed findings of fact substantiating the award." Under S.C. Code Ann. § 42-17-40, an award is made by the Commission as a result of a dispute between parties. An award is not a "Settlement Agreement, Release and Order."

The Settlement Agreement, Release and Order states in relevant part the following:

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[2] "If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title." S.C. Code Ann. 42-9-400 (Supp. 2005).

> WHEREAS, Claimant contends that he is in need of an additional medical examination and further medical treatment; that he has sustained injuries to the brain, cardiovascular system, musculoskeletal system, liver, kidneys, pulmonary system, and neuropathic system; and the Employer and Carrier expressly deny that Claimant suffered any disability and assert that there is no need for past, present or future medical treatment. The Employer and Carrier also deny Claimant sustained compensable injuries as a consequent of his employment duties either by accident, repetitive trauma, or exposure to lead, known or unknown chemical and toxins. The Employer and Carrier deny Claimant's allegations and rely upon the report of Dr. Nicholas Lind and other medical providers to refute Claimant's allegations.

R. p. 60.

The Employer and Carrier deny the very contentions for which they now seek reimbursement pursuant to S.C. Code § 42-9-400. It is noteworthy that the reimbursement statute allows Carrier to receive reimbursement for those medical costs and compensation payments that are substantially greater "than that which would have resulted from the subsequent injury alone." S.C. Code Ann. § 42-9-400(a), (Supp. 2011). Here, Carrier did not pay any medical costs or compensation to Claimant.

The Fund presumes that the Settlement Agreement filed on behalf of Carrier and its predecessors were done so in good faith. Thus, there is no basis upon which to allow reimbursement from the Fund. There has been no award, and if these cases are to remain denied by Carrier, and if no medical or compensation benefits have been paid to Claimant, there is not an award for compensable injuries upon which reimbursement can rest.

While the Fund recognizes that there are occasions that a "doubtful and disputed" settlement agreement may benefit the parties to an underlying claim, the Fund is a state agency and a creature of statute. The Fund was created by the Legislature for specific reasons and not one of those reasons is to allow employers and carriers avoid their statutory responsibilities. Since there is no statutory authority to grant reimbursement on denied claims where no medical costs or weekly benefits are paid, this claim should be denied.

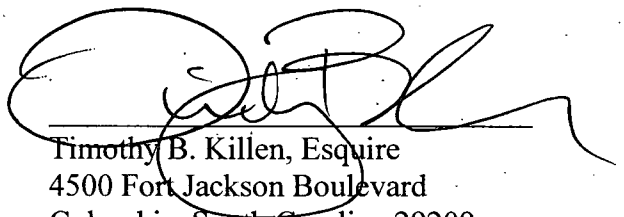
For these reasons, and for those that may be set forth in the oral arguments in this matter, the Fund respectfully request that the Circuit Court's Order be affirmed.

CONCLUSION

The Commission is a creature of statute. The Fund is a creature of statute. The Legislature created deadlines for the submission of documents and materials to the Fund, and those deadlines are absolute. Accordingly, for the reasons set forth herein, and for those reasons that may be set forth in the oral arguments in this matter, the Fund respectfully request that Circuit Court's Order finding that the plain language of the statute be accorded the correct deference be affirmed.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



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Date: July 28, 2015

IN 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

C.A. No.: 2013-CP-43-02284
Appellate Case No.: 2014-002215
WCC File No.: 9930459

Arrowpoint Capital Corporation / Arrowood Indemnity Co., Appellant,

v.

South Carolina Second Injury Fund, Respondent,

IN RE: Mary McConico, Employee,

v.

Yuasa-Exide, Inc., Employer and Arrowpoint Capital Corp. / Arrowood Indemnity Co., Carrier.

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SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that on the 29th day of July 2015, I served Respondent's Final Brief on the parties of record by depositing a copy in the United States Mail, sufficient postage prepaid, addressed to the respective attorneys as follows:

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July 14, 2015

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: Yuasa Exide v. SC Second Injury Fund [*in re:* Mary McConico vs Yuasa Exide]
Appellate Case No.: 2014-002215
C.A. No.: 2013-CP-43-02284
WCC File No.: 9930459 DOI: 7/31/1999
Carrier: Second Injury Fund - Claim No.: 147569
WJC&B File No.: 0142.00011

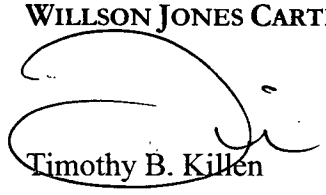
Dear Ms. Kitchings:

Enclosed for filing please find (1) the original and fifteen copies of Respondent's Final Brief in the above-referenced matter; and (2) the original and one copy of the Certificate of Service of the Final Brief. I you would, please filed these documents, returning clocked copies.

Thanks very much for your time and attention in this matter.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



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Enclosures

cc: Vernon F. Dunbar, Esq.