IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Commons Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

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

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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FINAL REPLY BRIEF OF APPELLANT

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I. APPELLANT'S CLAIM FOR SECOND INJURY FUND REIMBURSEMENT IS NOT BARRED BY S.C. CODE ANN. §§42-7-320(B) OR 42-9-400.

The Fund focuses only on the post-employment medical records in its brief and ignores 25 years of Mary McConico's medical history which the Fund had in its possession on June 30, 2011. These 25 years of medical reports comprise approximately 108 printed pages, which were compiled during Ms. McConico's employment tenure at the Sumter battery manufacturing facility. The printed reports also contain expert medical opinions on causation; references to McConico's pre-existing medical conditions; medical opinions on the impact of cardiac disease (hypertension), etc. upon McConico's health; and McConico's increased disability resulting from the cardiac disease, coronary artery disease and heavy metal poisoning. (R. pp. 138-211).

The Fund presented no medical evidence to refute the medical expert reports and opinions submitted into evidence by Appellant. Rather, the Fund dedicates all of its focus on McConico's condition after she suffered a permanent disabling stroke in July, 1999, the last day of her employment, as the basis of its defense. The records pertaining to McConico's health after she last worked or "post-employment records" were submitted into to the Fund on a compact disc, which the Fund could not access. The post-employment records were the only documents that the Fund could not initially read. The Fund's brief totally ignores the 108 pages of medical reports and expert opinions that were delivered in printed form and is the basis for Appellant's entitlement to reimbursement.

A review of the record reflects the Fund never argued that the post-employment medical records contained **"required information for consideration of accepting a claim to the Second Injury Fund..."** S.C. Code Ann. §42-7-320(B)(2) (2015). Because of McConico's catastrophically debilitating stroke, the post-employment records shed no new light on the status

of her medical condition regarding her ability to work or whether the cardiac disease posed an obstacle or hindrance to employment or reemployment. *S.C. Code Ann. §42-9-400 (2015).* As a matter of fact, the post-employment records, which the Fund now argues were needed for it to decide whether to accept or deny Appellant's claim for reimbursement, address unrelated medical treatment obtained by McConico after she was deemed disabled by her employer and other entities, *e.g.,* mammograms, degenerative joint disease of the right knee, abdominal ultrasounds, bronchitis, etc. (R. pp. 232-305). Clearly, the medical conditions addressed in the post-employment records were neither relevant nor material to the Fund's decision-making process with regard to reimbursement.

What is most perplexing about the Fund's argument is that it now argues that the post-employment medical documents should be stricken from the record. Candidly, if these documents were so critical to the Fund's decision-making process, logic and conventional wisdom would dictate that the Fund would desire for the Court to review these purportedly important post-employment records in order to convince this Court that the decisions of the Circuit Court and the South Carolina Workers' Compensation Commission should be affirmed. On the contrary, the reason the Fund seeks the exclusion of the post-employment records is because the evidence exposes an obvious legal error and abuse of discretion by the South Carolina Workers' Compensation Full Commission in striking these "important" records from consideration.

The Fund has never argued that any single document contained in the post-employment records was **required and necessary** for its decision-making process. More importantly, the Commission's findings of fact do not reveal that the Full Commission examined the post-employment records to determine whether these records were **required and necessary**.

Accordingly, the post-employment medical records are necessary for the Court's review of this legal argument and the decision of the Commission and the Circuit Court.

II. THE SETTLEMENT AGREEMENT, RELEASE AND ORDER OF McCONICO CONSTITUTE AN AWARD OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION.

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

1. The Fund's argument that payments made pursuant to a settlement agreement are not reimbursable under the Second Injury Fund statute is not preserved for appeal.

Appellant submits the Court should not consider the argument presented by the Fund because it has not been properly preserved. See, e.g., State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review) and Smith v. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) (noting only issues raised to and ruled upon by the Appellate Panel are cognizable on appeal).

The Circuit Court's Order makes no mention of the definition of an "award" or that Second Injury Fund reimbursement cannot be awarded where a settlement agreement was reached between the parties. Respondent did not appeal any Circuit Court findings – or lack

thereof – to this Court. This issue further was not ruled upon or considered by the Appellate Panel; and the lack of such consideration was not appealed to the Circuit Court.

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

Appellant submits it would be patently unfair to deprive it of reimbursement from the Fund based on the argument that they have not made a requisite payment to Mary McConico because the parties settled the claim at mediation. The parties in this matter were ordered by the Commission to mediate the Sumter battery plant claims due to the large number of claimants for whom the Steinberg Law Firm initially requested hearings. The Fund argues that Appellant sat on its rights from 1999 to June 30, 2011. To the contrary, McConico did not file a claim of an accidental injury until filing a Form 50 on November 16, 2010. McConico did not pursue a claim from the date she last worked in 1999 until 2010 because she did not discover that her injuries emanated from her occupational exposure to lead. The alleged compensability of her injuries because of occupational exposure to lead was not medically linked until March 2011.

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

Respondent cites S.C. Code Section 42-9-400(a) in which the "award" language is used. S.C. Code Ann. § 42-9-400(a)(2015). This section only requires the carrier and employer to pay all medical and/or indemnity benefits in the first instance, prior to seeking reimbursement from the Fund. The purpose of this language is not to require a formal decision and order, but instead

to ensure timely payments by the carrier/employer for a claimant's injury. There is no provision of Section 42-9-400 which requires a formal decision and order prior to consideration for reimbursement from the Fund. *S.C. Code Ann. §42-9-400 (2015).*

Appellant further notes that pages 11 and 12 of the settlement paperwork approved by the Commission on October 6, 2011 is designated as "Order and Award." (R. p. 68). The language specifically provides that "the terms of the settlement agreement are adopted herein and made the *Order and Award* of the South Carolina Workers' Compensation Commission." (R. p. 68) (Emphasis added). Appellant is unable to comprehend the Fund's argument that this settlement agreement is not an "award" where it is specifically designated as such and has been executed or approved by a Commissioner of the South Carolina Workers' Compensation Commission. (R. p. 69).

In a futile attempt at a persuasive argument, Respondent relies on Section 42-9-5 regarding this non-issue. Appellant notes that S.C. Code Ann. §42-9-5 (2015) is only applicable to post-July 2007 injuries. The injury occurred in July 1999, and as such, §42-9-5 is not applicable. S.C. Code Ann. §42-9-5. Id.

III. APPELLANT HAS MET ITS BURDEN OF PROOF IN ESTABLISHING THAT McCONICO SUFFERED FROM PREEXISTING CONDITIONS THAT WERE PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT.

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

preexisting diabetes was a hindrance to his employment, the Commission found the medical evidence rebutted the presumption. The Court noted the Commission further erred in concluding as a matter of law that the employer had the burden to prove that the claimant's preexisting diabetes was permanent and serious enough to constitute a hindrance or obstacle to his employment. Id. at 246-47, 762 S.E.2d at 22-23.

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

In the instant matter, heavy metal poisoning, coronary artery disease and cardiac disease are enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. S.C. Code Ann. §42-9-400(d)(23) and (28) (Supp. 2004). Similar to the situation in State Accident Fund, in which the Fund submitted no evidence to rebut the presumption set forth in §42-9-400(d), Respondent submitted no evidence in the instant matter to rebut a similar presumption. Appellant agrees that the Commission determines the weight of the evidence. However, where there was no evidence presented by the Fund to refute the evidence presented by Appellant, the weight of the evidence falls in favor of Appellant. As such, Appellant contends it has proven the existence of permanent physical impairments that constituted a hindrance or obstacle to employment or re-employment for McConico.

With respect to Respondent's arguments concerning the question of preexisting heavy metal poisoning, Appellant relies on the arguments presented in its first Brief. Respondent's statement that "Carrier is necessarily required to show evidence of the condition prior to the

initial exposure [to lead]" is a complete misstatement of the law of South Carolina. There is no South Carolina authority to suggest that McConico must have had permanent physical impairments that preexisted her first-ever exposure to lead.

Appellant's position is supported by South Carolina authority concerning occupational disease claims. Appellant's position is also supported by South Carolina authority determining that employer is entitled 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).

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

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

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

> the overwhelming medical testimony and evidence Carrier presented to the Appellate Panel.

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

In contrast to the opinion presented by Dr. Felmly, which was rendered prior to the claimant's subsequent injuries, the opinions presented by Drs. Shippen and Baker, as well as the other expert opinions contained in Appellant's evidentiary submissions, were rendered after Claimant's subsequent injury in 1999. Therefore, Appellant does not believe the Carolinas Recycling decision warrants affirmation of the Circuit Court's order.

Respondent also attempts to distinguish Burnette from the instant matter. Appellant offered the Burnette opinion, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), to highlight that the Hearing Commissioner in the instant matter abused her discretion in formulating her own interpretation of the medical evidence in order to refute the expert opinions of Drs. Baker and Shippen. (APA pp. 1-6.) Whether the issue is compensability or reimbursement from the Fund, a Hearing Commissioner is not a medical doctor and cannot come up with her own interpretation of medical evidence where there is no other competent evidence in the record. Appellant reiterates that there was no evidence presented by the Fund to refute the opinions contained in Appellant's evidentiary submissions. As such, the Circuit Court's order in the present case is clearly erroneous in view of the substantial evidence in the record.

Respondent contends "the Fund was never intended to operate as a safety net for employers . . . who place their workforce in hazardous working conditions as part of their business and due to the nature of its business." Respondent goes on to note that "Carrier wants reimbursement from the Fund for conditions caused by the exposure to lead that was its very business" and alleges that Appellant "was wholly responsible for the alleged conditions and maladies suffered by Claimant."

In response, Appellant submits that causation is not at issue. Although there are medical opinions addressing the same, no one knows what ultimately "caused" the physical maladies from which McConico suffered. However, even if the exposure to lead is the "cause" of Claimant's maladies, the Second Injury Fund statute makes no reference to the "cause" of a pre-existing permanent impairment or subsequent injury. Reimbursement from the Second Injury Fund is available to employers who meet the elements for reimbursement from the Fund. Whether McConico's first, second, third or last employer caused a permanent medical condition or impairment is not at issue and is immaterial. Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 SE2d 711 (1960).

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

Respondent correctly notes "[t]he Fund began as encouragement for employers to hire and retain workers with disabilities." Appellant highlights that the plain language of the Second

Injury Fund statute provides for reimbursement not only where an employee with a disability was hired, but also where an employee with a disability was *retained*. S.C. Code Ann. §42-9-400(c). This is precisely the situation in the present case and is notable because Appellant *retained* McConico in employment despite knowledge of her permanent impairments emanating from her work with EBI, Inc. and the Exide Corporation. Contrary to the reasoning in the Circuit Court order, the plain language of the statute does not require that a permanent physical impairment exist only prior to an employee being *hired*.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that the Order of the Circuit Court be reversed and that Appellant be granted reimbursement from the Second Injury Fund, pursuant to South Carolina Code Ann. §42-9-400.

Respectfully submitted,

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July 15, 2015

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CERTIFICATE OF COUNSEL

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

July 15, 2015

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In re:

Mary McConico, Employee/Claimant
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Yuasa-Exide, Inc., Employer and Arrowpoint Capital Corp./Arrowood Indemnity Co., rier.

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 15th day of July, 2015 addressed to:

The Honorable Jenny Abbott Kitchings
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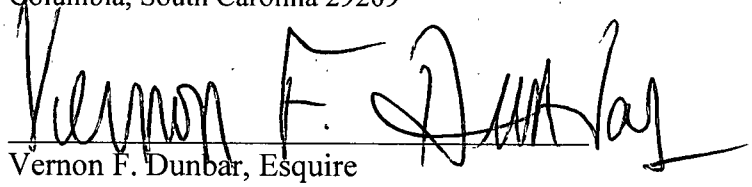

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RE: Arrowpoint Capital Corporation/Arrowood Indemnity Co. v. South Carolina Second Injury Fund
In Re: Mary McConico v. Yuasa-Exide, Inc.
Appellate Court Tracking No.: 2014-002215
Civil Action No.: 2013-CP-43-02284

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 as well as reflecting service of the Final Brief and Final Reply Brief to Timothy Killen, 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

VFD/rhd
Enclosures
cc: Timothy B. Killen, Esquire (w/copy of Final Brief and Final Reply Brief of Appellant)
Eric Rowell, Arrowpoint Capital Corp.

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