

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

The Honorable W. Jeffrey Young

Appellate Case No. : 2014-002212

RECEIVED

JUN 15 2017

SC Court of Appeals

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

v.

South Carolina Second Injury Fund, ..... Appellant.

[In Re: Joe Mathis, Employee/Claimant,

v.

Yuasa Exide, Incorporated, Employer].

**PETITION FOR REHEARING OF APPELLANT  
SOUTH CAROLINA SECOND INJURY FUND**

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SC SECOND INJURY FUND

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## INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR, the Appellant South Carolina Second Injury Fund (the Fund) respectfully petitions this Court for rehearing of Opinion Number 2017-UP-229 dated May 31, 2017. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. SC Retirement Systems, 349 S.C. 531, 564 S.E.2d 322 (2001).

## HISTORY OF THE CLAIM

Claimant worked for Yuasa Exide, Incorporated for twenty-three (23) years until he was terminated in 1998. After being terminated from Yuasa Exide, Inc., now known as EnerSys, Claimant worked in various other capacities. R.pp.173-223-227. In 2009, eleven (11) years after Claimant was terminated from Yuasa Exide, Inc., Dr. Barry Weissglass, an expert but not a treating physician, determined that Claimant's health conditions (which included non-cardiac chest pain, aching right arm, and right thumb; intermittent shortness of breath, reduced memory function, depression and sleep difficulties) were aggravated by his employment at Yuasa Exide, Inc. R.p.180-191.

In 2009, eleven (11) years after Claimant was terminated from Yuasa Exide, Inc., Vocational Evaluator L. Randolph Waid, Ph.D., concluded that Claimant was "functioning in the borderline range of intellectual abilities", "compromised with regard to his capacity of effectively sustain his concentration" but "without history of highly compromising medical problems." R.p.186. While Dr. Waid's evaluation determined that Claimant was incapable of full time gainful employment, Claimant was actually working as a painter at the time Dr. Waid's evaluation. R.p.188.

Claimant pursued this claim as a result of alleged exposure to lead at Employer's battery manufacturing plant in Sumter, South Carolina. The underlying case was not adjudicated by any tribunal, including the Commission. Instead, the underlying case was settled by Carrier and Claimant by the payment of a lump sum of money on a doubtful and disputed basis, meaning that Carrier accepted no liability for the payment of benefits, but agreed to pay a lump sum to Claimant in order to avoid litigation. As a result of the money paid pursuant to the doubtful and disputed settlement, Carrier alleged that it incurred substantially greater liability for compensation and medical benefits (neither of which it actually paid) when Claimant's alleged preexisting heavy metal poisoning combined with or aggravated the very conditions that it caused.

The Fund asserts that Carrier cannot prove any entitlement to reimbursement because the evidence does not support that Claimant suffered any preexisting condition that combined with or was aggravated by a subsequent injury to substantially increase medical and/or indemnity costs; that the alleged preexisting conditions were neither a hindrance nor obstacle to Claimant's employment; and that pursuant to the statute, Carrier has not paid any medical costs or indemnity on this claim, which is prerequisite to reimbursement. S.C. Code Ann. § 42-9-400. The Carrier asserts it is entitled to reimbursement from the Fund because the lead to which it exposed Claimant caused and then subsequently aggravated certain medical conditions in Claimant. As a result of the continued exposure, Carrier seeks to be absolved from all financial responsibility to the Claimant simply because it continued to employ Claimant after exposing him to lead.

## ARGUMENT

- I. THE COURT DID NOT ADDRESS THE FUND'S ARGUMENT THAT CARRIER HAS NOT MADE THE REQUISITE PAYMENT OF COMPENSATION AND MEDICAL BENEFITS PURSUANT TO SC CODE ANN. §42-9-400.

This reimbursement case was brought before the Commission on the eve of the sunset of the Fund. There has been no adjudication of any facts or issues in this underlying case. This case was settled on doubtful and disputed basis. R.pp25-35. According to the settlement agreement, this settlement applies to Yuasa-Exide, Inc. and all of its predecessors. R. p.26.

The Court cites §42-9-400 (a) to support its decision. That section reads as outlined below:

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; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits in the following manner

. . . .

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

The Court determined that Carrier has satisfied the requirements enumerated above. However, there can be no mistake that Carrier has not complied with §42-9-

400(a) because it has not made any payment of compensation or medical benefits which would implicate reimbursement.

Further, according to the Settlement Agreement, Carrier denies “Claimant’s allegations that he has suffered permanent disability because of the aforesaid alleged injuries; is entitled to payment for past medical treatment; payment of present and future medical payment; payment of temporary total disability compensation benefits; and payment of medications, counseling and therapy.” R.p.26. In the Settlement Agreement, Carrier also denies “Claimant sustained compensable injuries as a consequence of his employment duties either by accident, repetitive trauma, or exposure to lead, known or unknown chemical and toxins.” R.p.27. 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), 2011 Supplement. Again, Carrier did not pay any medical costs or compensation to Claimant; and, as such, by definition, the “substantially greater” argument cannot be met.

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. Because there is no statutory authority to grant reimbursement on denied claims where no medical or weekly benefits are paid, this claims should be denied. The Court’s opinion is devoid of reference to this argument by the Fund and rehearing is warranted.

II. THE COURT FAILED TO ADDRESS THE FUND’S ARGUMENT THAT CLAIMANT DID NOT HAVE A PREEXISTING CONDITION THAT WAS PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT.

Carrier alleged preexisting lead exposure and brain damage. Under the statutory reimbursement scheme certain preexisting conditions are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. Heavy metal poisoning and brain damage are two (2) of thirty-three (33) enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. S.C. Code §42-9-400(d) (22) and (27) (2011 Supplement). The Court did not address this argument proffered by the Fund and rehearing is warranted.

The Court also failed the address the evidence that served to rebut the presumption, if any, that Claimant’s brain damage, if it preexisted, was permanent and serious enough to constitute a hindrance or obstacle to employment. Yuasa Exide, Inc. was filled with employees that were exposed to lead, and it employed them all for many, many years. If the lead exposure was a hindrance or obstacle to employment, Claimant would not have

been able to work as he did over the course of twenty-three (23) years. This evidence rebuts the presumption, the Court did not address this issue; and, as such, this petition for rehearing is warranted.

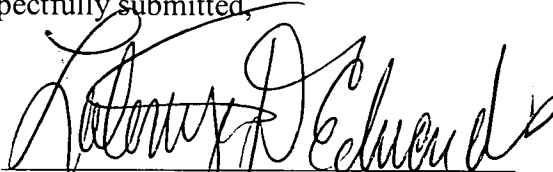
Additional evidence rebutted the presumption that the brain damage alleged by Carrier was not permanent and serious enough to constitute a hindrance or obstacle to employment. Claimant's Initial Occupational History form, which was completed in approximately 1984, indicated that he had been exposed to lead but had not sustained any work injuries. R.pp.192-193. Claimant's 1986 examination revealed he was healthy. R.p.195. Claimant's physical examinations from 1986 through 1995 revealed elevated cholesterol but he was noted to be "otherwise healthy." R.pp.195-198. On August 12, 2009, Claimant testified via deposition. Carrier APA pp.52-101. Claimant testified in his deposition that he worked for Yuasa Exide for approximately twenty-three (23) years, from 1975 to 1998. R.p.224. He noted that his most recent physical examination was normal and that in the last twenty-five (25) years he had only visited a doctor for a pinched nerve in his back that required physical therapy, which he underwent after he stopped working for Yuasa Exide. R.pp.230-234.

While the vocational assessment indicated that Claimant was severely deficient in academic achievement and functionally illiterate, the records also revealed that Claimant was a high school graduate with no history of failure of grades and had never been "diagnosed with a learning disability or with need for placement in specialized educational classes." R.pp.176 and 181. The Court failed to address this argument and this petition is warranted.

**CONCLUSION**

For the reasons cited herein, the South Carolina Second Injury Fund requests that this Honorable Court grant its Petition for Rehearing.

Respectfully submitted,

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June 15, 2017  
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**PROOF OF SERVICE**

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **Petition for Rehearing of Appellant South Carolina Second Injury Fund** to South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondents, Arrowpoint Capital Corporation/Arrowood Indemnity Co., and the South Carolina Workers' Compensation Commission, by placing same in the United States mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope on this 15<sup>th</sup> day of June, 2017, as follows:

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