

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

The Honorable W. Jeffrey Young

RECEIVED

Appellate Case No.: 2014-002214

JUN 15 2017

SC Court of Appeals

Arrowpoint Capital Corporation/Arrowwood Indemnity Co., ..... Appellant,

v.

South Carolina Second Injury Fund, ..... Respondent.

[In Re: C.L. Williams, Employee/Claimant,

v.

Yuasa Exide, Incorporated, Employer)

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

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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-five (25) years until he was terminated in 1998. Claimant worked in various capacities at Yuasa Exide, Incorporated, now known as EnerSys, until he was terminated in August 12, 1998. In 1983, a company report noted Claimant's blood lead levels but also indicated that "there were no findings of any lead involvement period", that Claimant's "internal history has been completely negative from that standpoint and it is felt that it poses no problem to his health by continuing to work in an area that he has previously been employed." R.p. 185.

On May 31, 2011, approximately thirteen (13) years after Claimant was terminated from Yuasa Exide, Incorporated, Dr. Edward Shippen, an expert but not a treating physician, determined that Claimant's health conditions (which included diabetes, hypertension, heavy metal poisoning, chronic obstructive pulmonary disease, pulmonary hypoventilation syndrome, rectal bleeding, coronary artery disease, pulmonary enema, tinnitus, loss of hearing and vertigo) were permanent and serious enough to constitute a hindrance or obstacle to employment, combined with or were aggravated by Claimant's lead exposure and caused Carrier to incur substantially greater

liability for medical costs and permanent disability than that which would have resulted from the work injury alone. R.p.181-183.

On June 26, 2011, approximately thirteen (13) years after Claimant was terminated from Yuasa Exide, Incorporated, Dr. Edward L. Baker, an expert but not a treating physician, completed a questionnaire supporting Second Injury Fund reimbursement. R.p.178-180.

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 conditions combined with or were aggravated by the very conditions that it caused.

The Fund asserts that Carrier cannot prove an 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 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 the 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 all 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 a doubtful and disputed basis. 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, 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.

Furthermore, the Settlement Agreement states in relevant part the following:

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. 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), (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. 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 does not address this argument 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.

The statutory reimbursement scheme also requires that Carrier establish that Claimant’s permanent preexisting impairment was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. S.C. Code Ann. §42-9-400(d). Claimant’s conditions, if they preexisted, were not permanent and serious enough to constitute a hindrance or obstacle to his employment.

The Court failed to address the Fund’s evidence, which would serve to rebut a presumption, if one existed in this case. On December 12, 1983, Claimant’s physical examination indicated that there were no findings of lead involvement and that he could continue working in his area. R.p.185. On January 11, 1984, Claimant’s physical examination revealed a past history of hypertension and mild cirrhosis. R.p.186. In

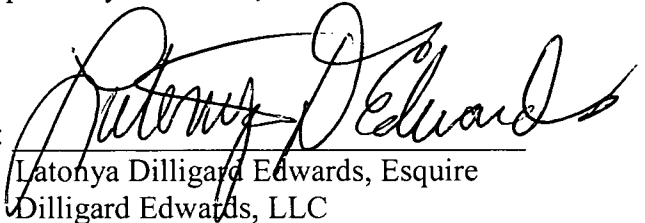
February, April and September 1984, Claimant's physical examinations revealed that he could function safely in his present job without complications. R.p.188. Claimant's subsequent physical examinations from 1988 to 1997 revealed hypertension, and a history of elevated lead levels. R.pp.191-192, 194, 196, 198, 200, 202 and 204.

It is important to note that Yuasa Exide, Incorporated 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-five (25) years. The Court did not address this argument and a rehearing 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  
Columbia, South Carolina

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**PROOF OF SERVICE**

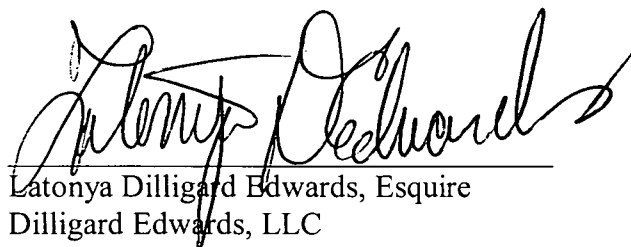
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The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **Petition for Rehearing of the South Carolina Second Injury Fund** to South Carolina Court of Appeals in the above-captioned matter 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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A handwritten signature in black ink, appearing to read "Latonya Dilligard Edwards", written over a horizontal line.

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