

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

**RECEIVED**

JUN 15 2017

**SC Court of Appeals**

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

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Arrowpoint Capital Corporation / Arrowood Indemnity Co., Appellant,

v.

South Carolina Second Injury Fund, Respondent/Petitioner,

IN RE: Mary McConico, Employee,

v.

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

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**PETITION FOR REHEARING**

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This is an appeal involving a request for reimbursement by a Carrier from the South Carolina Second Injury Fund under the Workers' Compensation Act. Petitioner/Respondent, by and through their undersigned counsel, hereby files this Petition for Rehearing pursuant to Rule 221, SCACR. On May 31, 2017, this Court filed an opinion reversing the Decision and Order of the Sumter County Circuit Court, affirming the Order of the Commission. Arrowpoint v. S.C. Second Injury Fund, Unpublished Opinion No. 2017-UP-227 (S.C. Ct. App. filed May 31, 2017).

The matter involves a demand for reimbursement by Arrowpoint Capital Corporation / Arrowood Indemnity Co., Inc. (collectively "Carrier" or "Appellants") from the South Carolina Second Injury Fund ("Fund"). The case was initially heard by a Single Commissioner on August 13, 2012.

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, as a fact, that the Claimant's questionnaires at APA pp. 9 – 14 were insufficient to support its claims. R. p. 53.

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.

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 § 42-7-320(B)(2). R. pp. 44.

However, the Single Commissioner 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 the Single Commissioner's 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.

As grounds for this Petition, Respondents would respectfully argue that this Court may have overlooked or misapprehended the evidence, law, or arguments involving the “substantial evidence” standard of review, and the Court exceed their role as an appellate court by substituting its judgment for that of the commission instead of deferring to the Commission as the appropriate fact finders. As our Courts have previously stated, “[u]nder the scope of review established in the APA, this 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. Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct.App.2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); Stephen v. Avins

Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996); S.C.Code Ann. § 1-23-380(A)(6)(d) (Supp.2003).

## ARGUMENT

**I. The Court of Appeals may have overlooked or misapprehended the evidence, law, or arguments involving whether the Fund required post-employment medical records before issuing a decision regarding accepting, denying, or compromising a reimbursement claim.**

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by an error of law. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004).

Petitioner respectfully asserts that this Court may have overlooked or misapprehended the evidence, law, or arguments regarding what is “required information” pursuant to S.C. Code Ann. § 42-7-320. Throughout its history, Petitioner has required medical records subsequent to the trigger injury or accident to determine whether or not disability and/or medical costs were substantially increased due to the alleged preexisting condition(s). Since liability or medical costs must be increased in order to qualify for reimbursement from the Fund, this is a necessary element of recovery from Fund. § 42-9-400. Appellants were made aware of this requirement on April 25, 2011, or months before the statutory deadline. R. p. 345. Alternatively, if the Carrier proves, under §42-9-400(g) that “but for” the pre-existing condition(s), the second injury would not have occurred. However, this Court did not base its decision on that section.

Without narrative medical reports subsequent to the triggering accident, there is no way to determine what happened subsequent (medically or concerning disability) to the triggering accident. With no narrative reports subsequent to the second injury, a claim for reimbursement

must be denied.

Petitioner further asserts that this Court's review of these records and its assertion that "the majority of these records address bronchitis, diabetes, blurred vision, heel pain, and knee pain" overlooks the fact these records were stricken from the record by the Workers' Compensation Commission. Arrowpoint v. S.C. Second Injury Fund, Unpublished Opinion No. 2017-UP-227 (S.C. Ct. App. filed May 31, 2017); R. p. 32. Of course, the Order of the Circuit Court affirmed the Commission's Order on all issues. R. p. 21. That issue was not appealed. Because these records were stricken from the record, this Court's reliance on such material was error.

Petitioner asserts that, even if the records were appropriately part of the record, this Court's summary dismissal of their importance to Second Injury Fund reimbursement overlooks their role in determining qualifications for reimbursement. This Court wrote:

We find Claimant's post-employment medical records were unnecessary to the Fund's decision to accept, compromise, or deny Carrier's reimbursement claim because the majority of these records address ailments unrelated to Claimant's toxic exposure such as urinary frequency, bronchitis, diabetes, blurred vision, heel pain, and knee pain.

Arrowpoint v. S.C. Second Injury Fund, Unpublished Opinion No. 2017-UP-227 (S.C. Ct. App. filed May 31, 2017). However, even though this Court cited to the report of J. Routt Reigert, MD and the "ten health conditions 'which [were] caused, aggravated, or accelerated by [her] occupational lead exposure'", this Court overlooked the conditions listed in that report. Dr. Reigert who opined that Claimant's diabetes, Hypercholesterolemia, back pain, arm pain, knee pain, vertigo, and hypertension were "[h]ealth conditions attributable to [Claimant's] occupation. Arrowpoint v. S.C. Second Injury Fund, Unpublished Opinion No. 2017-UP-227 (S.C. Ct. App. filed May 31, 2017); R. p. 139. Thus, a review of the post-employment medical records show

that, in actuality, the majority of the records address conditions Appellants' expert opined and/or this Court found (such as coronary artery disease and hypertension) were directly related to the exposure to lead at work, including diabetes<sup>1</sup>, hypertension<sup>2</sup>, coronary disease<sup>3</sup>, subarachnoid hemorrhage<sup>4</sup>, hyperlipidemia<sup>5</sup>, back pain<sup>6</sup>, vertigo<sup>7</sup>, and arm pain<sup>8</sup>. To say that there is a dearth of causally related issues in these records, as this Court has done, clearly overlooks the majority of records, which are directly on point.

Further, if there were a dearth of records, this Court overlooked that a scarcity of materials would lend itself to a finding that disability and/or medical costs were not substantially greater, as required by § 42-9-400.

A review of the records also shows what medications Claimant was prescribed following the triggering injury, a measure of increased medical costs and/or disability.<sup>9</sup>

**II. The Court of Appeals may have overlooked or misapprehended the evidence, law, or arguments involving the Commission's factual finding that the lead exposure and its maladies were one illness.**

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. Lark v. Bi-Lo. Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by an error of law. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004).

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<sup>1</sup> R. pp. 232, 234, 235, 261, 262, 263, 264, 270, 271, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 286, 287, 288, 289, 290, 291, 292, 293, 295, 296, 297, and 305.

<sup>2</sup> R. pp. 232, 234, 235, 257, 262, 264, 271, 274, 276, 280, 284, 286, 287, 289, 290, 291, 292, 293, 295, 296, 297, and 304.

<sup>3</sup> R. p. 232, 262, 264, 266, 274, 276, 284, 287, 289, and 291.

<sup>4</sup> R. p. 232.

<sup>5</sup> R. pp. 232, 262, 264, 271, 274, 276, 278, 282, 284, 286, 287, 289, 290, 291, 292, 293, 296, 297, 299, and 305.

<sup>6</sup> R. pp. 251, 252, and 259.

<sup>7</sup> R. pp. 259, 303, and 304.

<sup>8</sup> R. pp. 259, 262, and 264.

<sup>9</sup> R. pp. 237, 238, 257, 259, 261, 263, 266, 270, 273, 275, 279, 281, 283, 286, 288, and 290.

The Commission found, as a matter of fact, that that the exposure to lead is a single injury. R. pp. 30 – 31. This Court determined that it was “bound” by the holding of State Workers’ Compensation Fund v. SC SIF, 313 S.C. 536, 443 S.E.2d 546 (1994). That case is distinguishable because the 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.

This Court further relied on Springs Industries, Inc. v. S.C. Second Injury Fund, where the issue was whether Claimant sustained a subsequent injury. 296 S.C. 359, 372 S.E.2d 915 (S.C. App. 1988). This case is also distinguishable. 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). The Carrier did not argue it was entitled to reimbursement under this subsection. This is noteworthy because 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 what happened herein, where the claim was settled on a doubtful and disputed basis without paying either medical or indemnity benefits in the first instance. R. pp. 58

In this case, Fund respectfully asserts that this Court found facts on its own and made new findings regarding the Appellants' expert reports. Of course, 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.

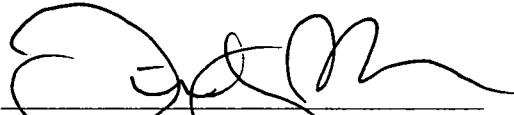
Further, this Court may have overlooked that it is well settled that an agency's interpretation of its own statutes will be given great deference unless compelling reasons require otherwise. CFRE, LLC v. Greenville Cnty Assessor, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011). In this case, there are no compelling reasons that require this Court not to give deference to the Commission's interpretation of the applicable statute. In this case, the Commission interpreted §42-7-320, and it did so en banc.

**CONCLUSION:**

Petitioner respectfully submits that this Court's decision may have overlooked or misapprehended the evidence, law, or arguments involving the standard of review and the Full Commission's role as the appropriate fact finder in the case, and Respondents/Appellants would respectfully request that this Court grant their Motion for Rehearing.

Respectfully submitted,

**WILLSON JONES CARTER & BAXLEY, P.A.**

A handwritten signature in black ink, appearing to read 'Timothy B. Killen', written over a horizontal line.

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Mt. Pleasant, South Carolina 29464  
Attorneys for Second Injury Fund

Date: June 15, 2017

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South Carolina Second Injury Fund, Respondent,

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

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**CERTIFICATE OF SERVICE**

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I certify that on the 15<sup>th</sup> day of June 2017, I served Respondent's Petition for Rehearing on the parties of record by depositing a copy in the United States Mail, sufficient postage prepaid, addressed to the respective attorneys as follows:

Vernon F. Dunbar, Esquire  
McAngus Goudelock & Courier, LLC  
P.O. Box 2980  
Greenville, SC 29602-2980



Michelle M. Adams, Paralegal  
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June 15, 2017

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JUN 15 2017

SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

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 the original and six (6) copies of the Respondents' **Petition for Rehearing**. Pursuant to Rule 240(d), no filing fee is required as this Petition is being filed on behalf of the State of South Carolina or its departments or agencies.

By copy of this letter and enclosure to Vernon F. Dunbar, Esq., counsel of record for the Appellants, I am serving him with a copy of our **Petition for Rehearing** as indicated by the enclosed **Proof of Service**. Thank you for your consideration in this manner. Please do not hesitate to contact me with any questions or if additional information is needed from our office.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



Timothy B. Killen

TBK/mma

Enclosures

cc: Mr. Vernon F. Dunbar (*via* U.S. Mail)  
Ms. Marla Rehborn (*via* electronic mail)