

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

RECEIVED

Case No. 2013-CP-43-02286
Appellate Case No. 2014-002214

JUN 27 2017

SC Court of Appeals

Arrowpoint Capital Corporation/Arrowood Indemnity Co.,Appellant,

v.

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

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

v.

Yuasa Exide, Incorporated, Employer]

RETURN IN OPPOSITION TO SOUTH CAROLINA SECOND INJURY
FUND'S PETITION FOR REHEARING

Vernon F. Dunbar, Esq.
Stephanie Lamb Pugh, Esq.
55 East Camperdown Way, Ste. 300
Post Office Box 2980
Greenville, SC 29601
Telephone: 864-239-4000

Attorneys for Appellant

Pursuant to Rules 221 and 240, SCACR, Arrowpoint Capital Corporation/Arrowood Indemnity Company (Arrowpoint) hereby opposes the South Carolina Second Injury Fund's (Petitioner) Petition for Rehearing. This Court did not overlook or misapprehend any points raised by Petitioner, but instead properly considered all arguments of both parties. *Arrowpoint Capital Corp./Arrowpoint Indem. Co. v. South Carolina Second Injury Fund*, No. 2017-UP-228, S.C. Ct. App. App. filed May 31, 2017. Therefore, Petitioner's Petition for Rehearing should be denied.

Argument

I. THIS COURT PROPERLY DISMISSED PETITIONER'S ARGUMENT THAT ARROWPOINT WAS REQUIRED TO LITIGATE THE UNDERLYING MATTER IN ORDER FOR IT TO BE ENTITLED TO REIMBURSEMENT FROM THE SECOND INJURY FUND.

Petitioners incorrectly assert that Arrowpoint was required to litigate this matter in order to be entitled to reimbursement from the Second Injury Fund. As an initial note, Petitioner did not present this preposterous argument until it filed its Initial Brief with this Honorable Court. For that reason, Arrowpoint asserts that this argument is not preserved for appeal. Furthermore, Arrowpoint submits that Petitioner misconstrues its interpretation of § 42-9-400, cites no case law to support its interpretation, ignores the Commission's directive that this claim be mediated, and ignores years of practice by the Second Injury Fund granting reimbursement on claims that were settled.

A. This issue is not preserved for appeal.

Arrowpoint asserts that Petitioner's argument that Arrowpoint is not entitled to reimbursement from the Second Injury Fund because Arrowpoint settled the case at a Commission ordered mediation is not preserved for appeal. To preserve an issue for appeal, the issue must be raised and the fact finder must rule upon it. *See Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998); Smith v. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006). Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend the judgment, the issue is not preserved. *South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001). The purpose of post-trial motions is to preserve such issues for appeal. *Wilder Corp.*, 330 S.C. at 256, 631 S.E.2d at 279. In the case at hand, Petitioner did not raise this argument until it filed its Initial Brief with this Court. Final Brief of Arrowpoint at 7, *Arrowpoint Capital Corp./Arrowpoint Indem. Co. v. S.C. Second Injury Fund*, No. 2017-UP-228 (Ct. App. May 31, 2017). At no point did Petitioner raise this issue at the Commission or at the Circuit Court. There are no findings of fact or of law on this issue by the Commission or the Circuit Court. (See R. pp. 1–24.) Furthermore, Petitioner never filed any post-hearing motions. Therefore, Arrowpoint submits this issue is not preserved for appeal and should be dismissed by this Honorable Court.

B. Petitioner misconstrues § 42-9-400 and cites no authority for its interpretation of the statute.

If this Court finds this issue is preserved for appeal, Arrowpoint submits that Petitioner has misinterpreted § 42-9-400 to require parties to litigate all claims where a carrier plans to seek reimbursement. There is no authority for this argument, as § 42-9-400 does not, on its face, require all parties to litigate an underlying claim when a carrier seeks reimbursement from the South Carolina Second Injury Fund. In fact, such an interpretation would be contrary to the policy of judicial economy and also to the past practices of Petitioner.

If a party presents an argument that is merely conclusory and cites no supporting authority for the position, the argument is deemed abandoned. *See State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 616, 618 (Ct. App. 2010). Petitioner cites no authority for the proposition that settling a claim on a doubtful and disputed basis eliminates a carrier's ability to seek reimbursement. Instead, it seeks to convince this Court that Arrowpoint paid no compensation for Claimant's disability or medical benefits by pulling out language from a portion of the settlement agreement. First, the Commission required that Arrowpoint mediate this claim with Claimant, and the Second Injury Fund was a party to this scheduling order and was invited to attend all mediations. (R. pp. 37-43.) Further, this claim was settled for \$185,000; therefore, to say that Arrowpoint, Claimant's employer's workers' compensation insurance carrier, paid Claimant no benefits under the South Carolina Workers' Compensation Act is disingenuous of Petitioner. Next, there is little doubt that resolving this claim at mediation reduced the exposure for Petitioner and for Arrowpoint; therefore, to use a court

mandated resolution that benefitted both Petitioner and Arrowpoint as an attempt to escape responsibility for reimbursement is manifestly unjust. Not only is it unjust, but to adopt this position would mean that Arrowpoint should have defied the Commission's order to mediate and instead backlog the Commission's docket with hearings. Lastly, the Second Injury Fund has always reimbursed cases that met the elements for reimbursement, even if they were settled on a doubtful and disputed basis and has even done so in other lead claims, such as the one at hand. In fact, Petitioner made an offer to resolve this claim when reimbursement was initially sought. (R. p. 266.) Petitioner never presented the argument or informed Arrowpoint or the Commission that it would take such a position relative to the ordered mediations but instead signed off on the Commission's Order requiring the claims to be mediated. (R. pp. 37-43.) Arrowpoint submits that this is Petitioner's Hail Mary at denial of this reimbursement claim.

In light of all of the above, Arrowpoint submits that this Court properly dismissed Petitioner's argument that Arrowpoint had to litigate the underlying claim to finality, thereby ignoring the Commission's order to the contrary, in order to be entitled to reimbursement pursuant to § 42-9-400.

II. THIS COURT PROPERLY DETERMINED THAT ARROWPOINT MET ALL ELEMENTS FOR REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND, INCLUDING THE ELEMENT REQUIRING THAT CLAIMANT HAVE A PREEXISTING CONDITION THAT WAS SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT.

The Court properly found that Arrowpoint proved all elements required for reimbursement under § 42-9-400, including the element requiring Arrowpoint

to prove that Claimant suffered a preexisting condition that constituted a hindrance or obstacle to employment or reemployment under § 42-9-400. Arrowpoint submits that the Record is replete of evidence that Claimant suffered multiple, preexisting conditions, and that under § 42-9-400(d), these conditions constitute presumptive hindrances or obstacles to employment that were not rebutted by a shred of evidence.

Prior to his date of injury or disability, Claimant suffered from cardiac disease, diabetes, pulmonary disease, and heavy metal poisoning. Given all of these conditions have been briefed, cited, and argued previously, Arrowpoint will use Claimant's cardiac disease for purposes of this Return, as Arrowpoint only has to prove the existence of one. *See* R. pp. 186, 189, 194, 198, 200, 202, 204, 206–08, 213–15, 221, 227, 229, and 234; Final Brief of Appellant at 20, *Arrowpoint Capital Corp./Arrowpoint Indem. Co. v. S.C. Second Injury Fund*, No. 2017-UP-228 (Ct. App. May 31, 2017). However, all of the aforementioned conditions, including the cardiac disease, constitute statutorily imposed presumptive hindrances or obstacles to employment or reemployment, and none of these presumptions were refuted by a single piece of evidence from Petitioner. *See* S.C. Code Ann. § 42-9-400(d) (Supp. 2004). In fact, Petitioner submitted no evidence to the Commission in this matter, other than a one page letter withdrawing an offer of reimbursement. (R. pp. 270–72.) Further, despite Petitioner's disingenuous attempt to selectively point out Claimant's medical records from the 1980's, Claimant worked at the Sumter Battery Plant well into the late 1990's. Records from the late 1990's reveal that Claimant's cardiac

disease caused him to miss a significant amount of work, go on disability, and ultimately lose his job because his cardiac work restrictions could not be met. (R. pp. 206–08, 228.) Therefore, there is no question that Claimant’s cardiac disease constituted a preexisting condition that was a hindrance or obstacle to employment or reemployment, as required by § 42-9-400, given it was this condition that ultimately caused Claimant to miss a great deal of work and lose his job.

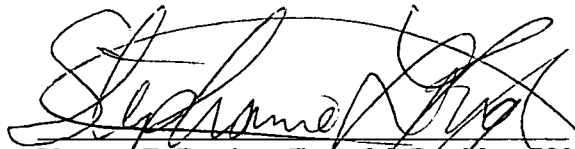
Additionally, Petitioner submitted no evidence rebutting the medical evidence Arrowpoint presented establishing that Claimant’s diabetes, cardiac disease, heavy metal poisoning, hearing loss, and pulmonary disease constituted a hindrance or obstacle to employment or reemployment. Two separate doctors, who specialize in lead poisoning and occupational injuries opined these conditions constitute hindrances or obstacles to employment or reemployment, and these opinions are supported by the global lead report and other evidence submitted by Arrowpoint. Arrowpoint again points out that Petitioner never took these experts’ depositions. It never hired its own experts. To the contrary, Petitioner submitted no evidence to counter the evidence submitted by Arrowpoint or to rebut the presumptions in § 42-9-400(d). As the South Carolina Supreme Court recently explained, once Arrowpoint invoked these presumptions, the burden was on Petitioner to “present substantial evidence in order to rebut the presumption.” *State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014). It failed to do so in this case.

In light of the above, Arrowpoint submits that it has proven beyond a preponderance of the evidence that Claimant suffered preexisting conditions prior to the disability from this claim and that all of the aforementioned medical conditions constituted hindrances or obstacles to employment or reemployment. In fact, there is absolutely no evidence to the contrary to rebut this presumption.

Conclusion

For the foregoing reasons, Arrowpoint respectfully requests this Court to deny Petitioner's Petition for Rehearing.

Respectfully submitted,



Vernon F. Dunbar, Esq., SC Bar No.: 7836
Stephanie L. Pugh, Esq., SC Bar No.: 78483
55 East Camperdown Way, Ste. 300
Post Office Box 2980
Greenville, South Carolina 29601
(864) 239-4000

June 26, 2017

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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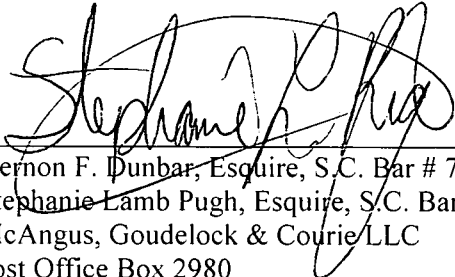
PROOF OF SERVICE

I certify that I have served the Return in Opposition to the South Carolina Second Injury Fund's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on the 26th day of June, 2017 addressed to:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Latonya D. Edwards, Esquire
Dilligard Edwards, LLC
Attorney for South Carolina Second Injury Fund
3790 Fernandina Road, Suite 103
Columbia, South Carolina 29210

June 26, 2017



Vernon F. Dunbar, Esquire, S.C. Bar # 7836
Stephanie Lamb Pugh, Esquire, S.C. Bar # 78483
McAngus, Goudelock & Courie LLC
Post Office Box 2980
Greenville, South Carolina 29602
(864) 239-4000
Attorneys for Appellants

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v.

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

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Yuasa Exide, Incorporated, Employer)

PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Respondent, does hereby certify that service of the **Petition for Rehearing of South Carolina Second Injury Fund** to South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Appellants, 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 19th day of June, 2017, as follows:

Vernon F. Dunbar, Esquire
Stephanie L. Pugh, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 2980
Greenville, South Carolina 29602

The Honorable Amy Bracy, Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

A handwritten signature in black ink, appearing to read "Latonya Dillgard Edwards", written over a horizontal line.

Latonya Dillgard Edwards, Esquire
Dillgard Edwards, LLC
3790 Fernandina Road, Suite 103
Columbia, South Carolina 29210
S.C. Bar#: 14593
(803) 750-2214 (telephone)
(803) 750-2377 (facsimile)

ATTORNEY FOR RESPONDANT

Reply To

STEPHANIE LAMB PUGH
Direct Dial: (864) 239-6710
stephanie.pugh@mgclaw.com

June 26, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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RE: Arrowpoint Capital Corp./Arrowood Indemnity Co. v. South Carolina
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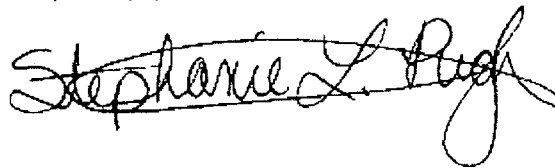
JUN 27 2017
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed, please find the original and seven copies of Arrowpoint's Return in Opposition to South Carolina Second Injury Fund's Petition for Re-Hearing and the original and one copy of the Proof of Service in the above-referenced matter. Please file the original and return a clocked copy to me in the self-addressed, stamped envelope, at your earliest convenience. If you have any questions, please do not hesitate to contact me at any time.

With kind regards, I remain

Very truly yours,



Stephanie Lamb Pugh

SP/bhg

cc: Latonya D. Edwards, Esquire
Eric Rowell, Arrowpoint Capital Corp