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



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Appellate Case No. 2014-002212

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Arrowpoint Capital Corporation/Arrowood Indemnity Co., Carrier, Appellant

v.

South Carolina Second Injury Fund, Respondent,

[In re: Joe Mathis, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

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

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Attorneys for Arrowpoint Capital Corporation

Pursuant to Rule 240, SCACR, Respondent Arrowpoint Capital Corporation/Arrowood Indemnity Co. ("Arrowpoint") submits this Return in opposition to Petitioner South Carolina Second Injury Fund's Petition for Rehearing of this Court's Opinion No. 2017-UP-229. In rendering its decision that Arrowpoint met all elements of reimbursement from the South Carolina Second Injury Fund, the Court considered all points made by the parties and properly interpreted longstanding case law concerning reimbursement from the Fund.

## ARGUMENT

I. THE COURT APPROPRIATELY DISMISSED PETITIONER'S ARGUMENT CONCERNING WHETHER ARROWPOINT MADE THE REQUISITE PAYMENT OF COMPENSATION PURSUANT TO S.C. CODE ANN. § 42-9-400, AS PETITIONER'S ARGUMENT IS IRRELEVANT TO THE MERITS OF THE CASE, LACKING IN LEGAL BASIS, AND WAS NOT TIMELY RAISED.

Petitioner makes the nonsensical argument that Arrowpoint has not complied with S.C. Code § 42-9-400(a) because "it has not made any payment of compensation or medical benefits which would implicate reimbursement." As an initial matter, Arrowpoint notes that it entered into a compromise settlement with the claimant, Mr. Joe Mathis, for $95,000.00. Therefore, to argue that "no medical or compensation benefits have been paid" is simply a last-ditch effort by Petitioner to deny liability for reimbursement even though all elements for reimbursement have been met. Moreover, Petitioner argues that there was no "award" made in this case for which Arrowpoint may be reimbursed. Notwithstanding the fact that the terms of the agreement were adopted and made an Order and *Award* (emphasis added) of the South Carolina Workers' Compensation Commission by Commissioner Derrick Williams on November 8, 2010 (R. pp. 34-35), Petitioner's position was not preserved for appeal and is incredibly disingenuous in light of the longstanding practices of the Fund, as well as the procedural history of the underlying case.

A. Petitioner's argument is not preserved for appeal and should be disregarded by this Court.

Petitioner's argument that there is no basis upon which to allow reimbursement from the Fund was never raised at the Commission. Moreover, the Circuit Court's Order makes no mention of the definition of an "award" or that Second Injury Fund reimbursement cannot be requested where a settlement agreement was reached between the parties. Petitioner did not appeal any Circuit Court findings – or lack thereof – to this Court. This issue further was not ruled upon or considered by the Commission's Appellate Panel, and the lack of such consideration was not presented to the Circuit Court. Therefore, Arrowpoint submits this Court should not consider the argument presented by Petitioner as it has not been properly preserved. See 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).

B. Petitioner cites no legal authority for its argument.

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 clincher 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 and then somehow attempting to say that, despite Arrowpoint's payment of $95,000.00, the "substantially greater" argument cannot be met.

Petitioner points to S.C. Code Ann. § 42-9-400(a), but Arrowpoint submits that the purpose of this statute section is to outline the procedure for reimbursement, namely that the carrier and employer pay all medical and 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 or specific settlement language, but instead to ensure timely payments by the carrier/employer for a claimant's injury. In this case, Arrowpoint paid the award and then sought reimbursement because it had met all requirements under the Act. There is no provision of S.C. Code Ann. § 42-9-400 that requires a formal decision and order prior to consideration of reimbursement from the Fund.

C. Petitioner's position is disingenuous in light of the practices of the Fund and the history of the Sumter battery plant claims.

Arrowpoint submits that it would be patently unfair to deprive them of reimbursement from the Fund based on the argument that they have not made a requisite payment to Claimant simply because the parties settled the claim at mediation and included doubtful and disputed language in the settlement agreement. The parties in this matter were ordered by the Commission to mediate the Sumter battery plant claims, and Petitioner was a signatory to this agreement. (R. pp. 37-43.) Petitioner further attended some of the mediations and never asserted that the lack of a formal hearing or that settlement on a doubtful and disputed basis would bar reimbursement. Moreover, there is little doubt that resolving this claim at mediation reduced exposure to both Arrowpoint and Petitioner, in addition to benefiting the Claimant. Therefore, using a court-mandated resolution at mediation as an attempt to escape responsibility for reimbursement is manifestly unjust and is an about-face by Petitioner in light of their reimbursement practices in the past. In practice, the Fund has paid reimbursement in cases that have been resolved via settlement agreement without a formal hearing. In addition, the

Commission's own Form 54 notes that a carrier may conclude a disability claim by "Agreement." (R. p. 46.) Petitioner has never taken a position similar to the one presented now. As such, there was no way for Arrowpoint to foresee that Petitioner would take the position that a settlement (in any form) would negate its ability to obtain reimbursement from the Fund.

Given the reasons set forth above, Arrowpoint contends that this argument set forth by Petitioner should not be any basis for rehearing, as it should never have been a factor in the Court's decision regarding Appellants' entitlement to reimbursement from the Fund.

## II. ARROWPOINT MET ITS BURDEN OF PROOF IN ESTABLISHING THAT CLAIMANT SUFFERED FROM A PREEXISTING CONDITION THAT WAS PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT, AND THE COURT'S DECISION WAS APPROPRIATE IN LIGHT OF THE SAME.

Petitioner argues that "the Court failed to address" Petitioner's argument that the Claimant did not have a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment. Not only did this Court address Petitioner's argument, but this Court also appropriately found legal error in Petitioner's argument and the decision of the Circuit Court, which found in favor of Petitioner by ignoring longstanding legal precedent regarding reimbursement from the SC Second Injury Fund.

### A. Petitioner failed to rebut the presumption that Claimant's lead exposure, cognitive impairment, and brain damage were a hindrance or obstacle to employment or reemployment.

At the outset, Arrowpoint notes that it is unsure what argument Petitioner attempts to make in the first paragraph under its Petition's Section II, as Arrowpoint agrees that the preexisting conditions of heavy metal poisoning and brain damage are two enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. Claimant further suffered from cognitive impairment, which is also

entitled to the same presumption. S.C. Code Ann. § 42-9-400(d)(23), (28), (33) (Supp. 2004). 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), it is clear that Petitioner bears the burden to present evidence to rebut the presumptions created by S.C. Code Ann. § 42-9-400(d). Substantial evidence was required in order to rebut the presumption. Id. at 247, 762 S.E.2d at 23.

Similar to the situation in State Accident Fund, in which Petitioner/the Fund submitted no evidence to rebut the presumption set forth in Section 42-9-400(d), Petitioner in the instant matter submitted no evidence to rebut a similar presumption that heavy metal poisoning, brain damage, and cognitive impairment were permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. Petitioner's argument on pp. 5 and 6 of its Petition seems to focus on the fact that Claimant was still able to work over the course of twenty-three (23) years with the employer at the Sumter battery plant. Arrowpoint submits that Petitioner may be confusing the language of "hindrance or obstacle to employment" with total disability. S.C. Code Ann. § 42-9-400 does not require that an employee be completely unable to work as a result of his preexisting impairment, but instead that it is a hindrance or obstacle to employment or reemployment. Indeed there would be no purpose of the South Carolina Second Injury Fund if the preexisting impairment completely prevented an employee from working.

Such conditions of heavy metal poisoning, brain damage, and cognitive impairment were a hindrance or obstacle to reemployment when Claimant left the Sumter battery plant. As Petitioner points out, Claimant initially received good employment performance reviews (R. pp. 269-270), but toward the end of his employment tenure, he was not filling out his usage log form appropriately and had been reprimanded for unacceptable attendance and failure to observe

Health and Safety Rules. (R. pp. 271.) Following his time at the Sumter Battery plant and around the time he settled his underlying claim, Claimant was mostly unemployed, only picking up occasional jobs as a painter. (R. pp. 173, 223-225.) Therefore, these conditions were a hindrance or obstacle to his employment or reemployment.

In addition, Petitioner submitted absolutely no evidence of its own in this case. Arrowpoint presented medical questionnaires from Dr. Edward Baker and Dr. Eugene Shippen which stated the preexisting conditions of heavy metal poisoning and cognitive impairment constituted a hindrance or obstacle to employment or reemployment. (R. pp. 163, 167.) These medical questionnaires were not refuted. Where there was no evidence presented by Petitioner to refute the evidence presented by Arrowpoint, the weight of the evidence falls in favor of Arrowpoint.

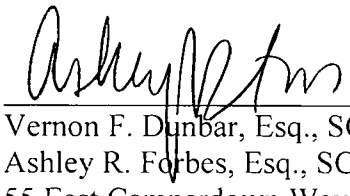
B. The Court properly determined that Arrowpoint met all elements for reimbursement from the South Carolina Second Injury Fund.

This Court appropriately relied on our state Supreme Court's longstanding holding in State Workers' Compensation Fund v. S.C. Second Injury Fund, 313 S.C. 536, 529-40, 443 S.E.2d 546, 548 (1994) in finding that the circuit court's interpretation of S.C. Code Ann. § 42-9-400 was erroneous. There is no reason for rehearing on these issues, as nothing has been overlooked or misapprehended by the court.

## CONCLUSION

For the reasons set forth above, the Court should deny the Fund's Petition for Rehearing.

Respectfully submitted,



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June 26, 2017

THE STATE OF SOUTH CAROLINA
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The Honorable W. Jeffrey Young, Circuit Court Judge

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Arrowpoint Capital Corporation/Arrowood Indemnity Co., Carrier, Appellant

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South Carolina Second Injury Fund, Respondent,

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Yuasa Exide, Incorporated, Employer]

**PROOF OF SERVICE**

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

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

The Honorable Jenny A. Kitchings
Clerk of Court – SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

June 26, 2017

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June 26, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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RE: Arrowpoint Capital Corporation v. SC Second Injury Fund
(In re: Joe Mathis v. Yuasa-Exide, Inc.)
Appellate Case No.: 2014-002212
Our File No.: 20113.14171

Dear Ms. Kitchings:

Enclosed, please find the original and seven copies of Arrowpoint Capital Corporation's Return in Opposition to South Carolina Second Injury Fund's Petition for Rehearing, 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,

Ashley R. Forbes

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