IN 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

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

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.

SECOND INJURY FUND'S REPLY TO ARROWPOINT CAPITAL'S RETURN IN OPPOSITION TO PETITION FOR REHEARING

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Pursuant to Appellate Court Rules 221 and 240, South Carolina Second Injury Fund (Fund) hereby respectfully files this Reply to Arrowpoint Capital's Return in Opposition to Petition for Rehearing. In its Return, Arrowpoint Capital argues that: (1) this Court did not overlook or misapprehend an issue by considering documents that were stricken from the record, because Arrowpoint Capital included the striking of those documents as a point of appeal in its Notice of Appeal to Circuit Court (which, also, is not part of the Record on Appeal), though Arrowpoint Capital did not address the issue in its Brief; (2) this Court did not overlook or misapprehend an issue because post-injury medical records are not necessary to determine if liability for medical costs or disability has been substantially increased, because such a determination can be made on a report (which does not even purport to be a physical evaluation of Claimant) based on those very medical records and which does not directly address Second Injury Fund reimbursement criteria (R. p. 138), and/or also based on simple questionnaires without commentary or without explanation of the source of the opinions in the questionnaires (R. p. 146 – 151).

For the following reasons and those set forth in its Petition for Rehearing, Fund respectfully requests that the Petition for Rehearing be granted.

ARGUMENT

I. Arrowpoint Capital's argument that it properly appealed the Commission's striking of documents from the record is completely erroneous, intentionally misleading, and disingenuous.

Arrowpoint Capital argues that the Fund's raising this issue in the Petition for Rehearing is "completely erroneous, intentionally misleading and disingenuous." Return in Opposition to Petition for Rehearing, p. 3. Arrowpoint Capital goes on to argue that Fund's arguments are

"untruthful." Return in Opposition to Petition for Rehearing, p. 5. Arrowpoint Capital then asks this Court to subject Fund and/or its counsel to "sanctions for knowingly and willfully advancing a frivolous argument." Return in Opposition to Petition for Rehearing, p. 8.

Arrowpoint Capital asserts that that the issue was preserved in its Notice of Intent to Appeal to the Sumter County Court of Common Please. Return in Opposition to Petition for Rehearing, p. 5; and Return in Opposition to Petition for Rehearing, Exhibit 1. However, Fund asks this Court to acknowledge that Arrowpoint did not point to its Brief to counter what it called Fund's purported "frivolous" and "untruthful" argument. See Petition for Rehearing. The reason Arrowpoint Capital failed to point its Brief, obviously, is because the issue as not raised or addressed in the Brief. See Final Brief of Appellant.

Directly on point, this Court has held, "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. See Bell v. Bennett, 307 S.C. 286,414 S.E.2d 786 (Ct.App.1992)." Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993); see Glasscock, Inc. v. US Fidelity & Guar., 348 S.C. 76, 557 S.E.2d 689 (Ct.App.2001). Accordingly, because the issue was raised in the Notice of Appeal but was not argued in the Brief, that issue was abandoned by Arrowpoint Capital. Therefore, Fund respectfully requests that this Court grant its Petition for Rehearing and deny Arrowpoint Capital's request for sanctions.

II. This Court overlooked why post-injury medical reports are necessary for Fund reimbursement because Fund must determine whether liability for medical benefits or disability was substantially increased. Herein, if post-injury reports were unnecessary, this would require Fund to accept, deny, or compromise claims based on solely on two simple questionnaire and a report using post-employment records as its basis.

Arrowpoint Capital argues that this Court was correct in determining that the records weren't necessary for the Fund to make a decision whether to accept, deny, or compromise the

claim per S.C. Code Ann. §§ 42-7-320 and 42-9-400. Arrowpoint Capital argues that liability for these things need only be supported by simple questionnaires and a "health evaluation," which was based on a review of medical records, purportedly including post-accident records. Return to Petition for Rehearing, pp. 6 – 7; R. p. i. This ignores the requirement of the Fund to analyze and verify the accuracy of questionnaires by ensuring the answers to the questionnaires are supported by narrative medical reports. This is why the legislature, in § 42-7-320(B)(2), allowed the Fund the determine what information was "required." Arrowpoint Capital was made aware of this requirement on April 25, 2011, or months before the statutory deadline. R. p. 345.

Without narrative medical reports subsequent to the triggering accident, there is no deliberate way to determine what came about 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. Arrowwood Capital argues that Dr. J. Rout Reigart's statement that Claimant's "would increase in severity over time" is tantamount to proof that its medical liability and Claimant's disability had been substantially increased as a result of the combination of factors; however, Dr. Reigart wrote only that the Claimant's conditions and medical costs would "increase over time." R. p. 139. There is nothing in his "health evaluation" regarding whether or not the liability for costs or disability was increased at the time of the report, or even whether such increases were substantial. See R. p. 138 – 140. To accept this report as decisive evidence that Arrowpoint Capital should be reimbursed would be to require the Fund to ignore the statutory language of S.C. Code Ann. § 42-9-400(a), which requires an increase in liability for costs or disability to be substantial.

The questionnaires did address whether medical costs or liability were substantially increased. R. pp. 147, 150, and 151. However, as the Supreme Court previously determined, 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). Here, since no narrative medical reports following the trigger injury were provided and no medicals bills were ever actually paid, Fund needed those reports in order to make a good faith and deliberate effort to evaluate the claim for acceptance, denial, or compromise. Accordingly, Fund respectfully requests that its Petition for Rehearing be granted.

CONCLUSION

Fund 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 Fund would respectfully request that this Court grant their Motion for Rehearing.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

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Date: June 29, 2017

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In the Court of Appeals

APPEAL FROM SUMTER COUNTY
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The Honorable W. Jeffrey Young, Circuit Court Judge

C.A. No.: 2013-CP-43-02284
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CERTIFICATE OF SERVICE

I certify that on the 29th day of June 2017, I served Second Injury Fund's Reply to Return in Opposition 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:

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June 29, 2017

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

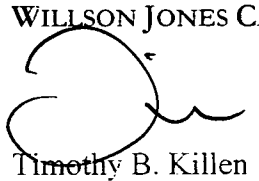
Re: Yuasa Exide v. SC Second Injury Fund [*in re:* Mary McConico vs Yuasa Exide]
Appellate Case No.: 2014-002215, C.A. No.: 2013-CP-43-02284
WCC File No.: 9930459, DOI: 7/31/1999
Carrier: Second Injury Fund - Claim No.: 147569, WJC&B File No.: 0142.00011

Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the Second Injury Fund's **Reply to Return to Petition for Rehearing**. 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 **Reply to Return to 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.

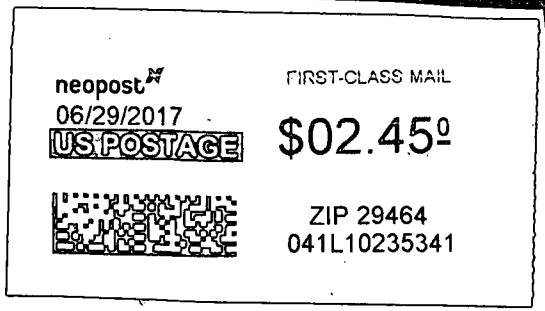


Timothy B. Killen

TBK/mma

Enclosures

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



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