THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young

Unpublished Opinion No. 2017-UP-228 (S.C. Ct. App. Filed May 31, 2017)

Arrowpoint Capital Corporation/Arrowood Indemnity Co.,.....Respondent,

v.

South Carolina Second Injury Fund,..... Petitioner.

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

v.

Yuasa Exide, Incorporated, Employer)

PETITON FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2017.

September 21, 2017

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QUESTION PRESENTED

1. Did the Court of Appeals err in holding that Carrier is entitled to reimbursement pursuant to S.C. Code Ann. 42-9-400?

STATEMENT OF THE CASE

This is a claim for partial reimbursement from the South Carolina Second Injury Fund ("the Fund") by Yuasa Exide Incorporated, Employer, and Arrowpoint Capital Corporation, Carrier (collectively "Carrier"), pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that they incurred substantially greater liability for compensation and medical benefits when employee C.L. Williams' ("Claimant") preexisting hypertension, diabetes, chronic obstructive pulmonary disease, cardiomyopathy, pulmonary disease, cardiovascular disease, arterial sclerosis, and renal insufficiency were either aggravated by or combined with his February 1, 1999 work related occupational exposure. Carrier further alleged that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund denied that Carrier met any of the requirements for reimbursement, specifically asserting that Claimant's heavy metal exposure and brain damage were not preexisting conditions. The Fund further denied that if heavy metal poisoning and brain damage preexisted, they were not permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment as contemplated by S.C. Code Ann. § 42-9-400.

The Hearing Commissioner denied Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400 and the Full Commission, En Banc, affirmed. The Circuit

Court affirmed and the Court of Appeals reversed. Petitioner now seeks a writ of certiorari to review this decision.

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 "interval 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 the employ the Claimant after exposing him to lead.

ARGUMENT

I. THIS CLAIM DOES NOT MEET THE REQUIREMENTS OF REIMBURSEMENT PURSUANT TO S.C. 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 Fund began as encouragement for employers to hire and retain employees with disabilities. The Fund was never intended to operate as a safety net for employers, such as Yuasa-Exide, Incorporated, who place their workforce in hazardous working conditions as a part of their business and due to the nature of its business. In Am. Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 386 S.E.2d 276 (S.C. Ct. App. 1989), the Court of Appeals addressed the purpose and scope of the Fund:

> The Second Injury Fund was created in 1972. See Section 42-9-400, Code of Laws of South Carolina (1976). One of the purposes in establishing the Second Injury Fund was to encourage employers to hire handicapped persons by providing reimbursement to the employer or insurer for compensation paid as a result of a second injury. The Fund was designed to compensate handicapped workers fully for subsequent injuries without penalizing employers for hiring them in the first place. The Second Injury Fund granted a new remedy or right of reimbursement to the insurer; and the Legislature could properly impose such reasonable terms and conditions upon the exercise of such right as it deemed appropriate. The right of a claimant to secure reimbursement under the statute depends upon complete

> compliance with the requirements imposed for recovery. The success and future of the Second Injury Fund depend upon proper and careful application of these statutory requirements.

300 S.C. 17, 21–22, 386 S.E.2d 276, 278 (S.C. Ct. App. 1989) (emphasis added) (internal citations omitted).

The Court of Appeals later wrote that the Fund is intended to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995). In this case, Carrier wants reimbursement from the Fund for conditions caused by the exposure to lead that was its very business. If reimbursement is granted, Carrier would realize little or no liability, although it was wholly responsible for the alleged conditions and maladies suffered by Claimant.

For a Carrier to be entitled to reimbursement from the Fund, it must prove that a claimant's preexisting condition aggravated or combined with a subsequent injury to create substantially greater permanent disability or medical costs. S.C. Code Ann. § 42-9-400.

The section provides in pertinent part:

> Section 42-9-400. Manner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from preexisting impairment and subsequent injury.
> (a) 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, (Supp. 2006).

Thus, Carrier "shall in the first instance pay all awards of compensation and medical benefits" before it can assert a colorable claim for reimbursement.

A. CARRIER HAS NOT MADE THE REQUISITE PAYMENT OF COMPENSATION AND MEDICAL BENEFITS PURSUANT TO S.C. CODE ANN. § 42-9-400(a).

S.C. Code Ann. § 42-9-400 allows for Second Injury Fund reimbursement of "awards of compensation and medical benefits" under certain circumstances. That section subsequently sets forth the manner and operation by which medical and weekly indemnity benefit payments are to be reimbursed in qualified cases. An "award" is "[a] final judgment or decisions, esp. one by an arbitrator or by a jury assessing damages." BLACK'S LAW DICTIONARY 132 (7th ed. 1999). S.C. Code Ann. § 42-9-5 requires that "[a]n award made pursuant to this Title must be based upon specific and written detailed findings of fact substantiating the award." Under S.C. Code Ann. § 42-17-40, an award is made by the Commission as a result of a dispute between parties. An award is not a "Settlement Agreement, Release and Order."

The Settlement Agreement, Release and Order 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 none of those reasons include allowing employers and carriers to avoid their statutory responsibilities. Since there is no statutory authority to grant reimbursement on denied claims where no medical costs or weekly benefits are paid, this claim should be denied.

B. 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.

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 had many employees that were exposed to lead, and they all were employed for 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.

In its effort to establish that Claimant had a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment, Carrier relies heavily on the Claimant's blood levels and the OSHA regulations regarding permissible exposure to lead. R.p.363. However, the prevailing statute is S.C. Code Ann. §42-9-400, and this Court is not required to give deference to OSHA regulations. See S.C. Code Ann. § 42-9-400.

C. CLAIMANT'S LEAD EXPOSURE IS NOT HIS FIRST AND SUBSEQUENT INJURIES.

In this case, Carrier asserts that both the first and second injuries were the same: the exposure to lead. Carrier's position is that the lead caused the Claimant's conditions, and, subsequent to the development of his maladies, he was further exposed to lead. Carrier alleges that Claimant's continued or subsequent exposure resulted in additional or worsening maladies. Thus, Carrier argues that it is entitled to reimbursement for payment of a lump sum settlement that neither represents indemnity nor medical payments. However, by statute, the Fund only reimburses for disability benefits and medical payments. S.C. Code Ann. § 42-9-400.

In this case, the only evidence presented is subsequent to the initial exposure to lead. Here, the exposure to lead was coincidental to the beginning of work. Since Carrier must prove that the exposure to lead is the alleged preexisting condition, Carrier is required to show evidence of the condition prior to the initial exposure. See S.C. Code Ann. § 42-9-400.

Carrier submitted questionnaires and medical reports from Dr. Eugene Shippen and Dr. Edward L. Baker, Jr. Dr. Shippen's and Dr. Baker's questionnaires list all of the conditions allegedly suffered by Claimant as "pre-existing conditions," regardless of when the symptoms for those conditions appeared (most of which appeared several years subsequent to Claimant's employment with Yuasa Exide, Incorporated). While Dr. Shippen and Dr. Baker are experts, neither were treating physicians.

Carrier's experts do not support Carrier's position that exposure to lead and its malignant effects on the body become preexisting conditions to continuing exposure to the same substance and continuing malignant effects. Carrier's experts write that

> [l]ead poisoning is a chronic illness. It has long been recognized that much of the toxicity of lead poisoning is not reversible by medical therapy. Prevention of exposure is the main aim in lead poisoning management[,] as treatment has little effect on reversing toxicity or preventing toxicity later in life related to lead mobilization from bone. Since lead remains in bone lead stores for many decades, it is considered a chronic illness requiring long term management and observation.

R.pp.294-295.

As a chronic illness, lead poisoning is the illness itself. As a chronic illness, lead poisoning does not stand apart from the maladies it causes. As their experts note, the Claimants' "[c]onditions [were] caused by lead exposure in the workplace." R.p.295. As the doctors write, "Chronic lead poisoning is manifested by a range of damage to various systems of the body." Id. They further state, "We also conclude that lead, once absorbed into the body, was distributed to various parts of the body, including the brain, the kidneys and bone, and caused damage to the body of Exide workers." R.p.299. Thus, the

manifestations of lead poisoning do not preexist the chronic illness, and the chronic illness is not separate and apart from the conditions to which it leads. They are one and the same. During the short life of the Second Injury Fund, it existed to encourage the hiring of disabled persons. Am. Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 386 S.E.2d 278 (S.C. Ct. App. 1989). The Second Injury Fund was not created to encourage long term exposure to toxins in the workplace so that employers can go without liability.

Additionally, the finding that Claimant's lead exposure was not Claimant's first and subsequent (or second) injury is supported by the plain meaning of the statutory reimbursement scheme. According to the Supreme Court, "a court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (internal citations omitted). Further, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000).

The Commission determined that Claimant's exposure to lead during his twenty-five (25) years of employment constitutes a single occupational exposure based on the plain meaning of the statute. Section 42-9-400(a) references "subsequent disability," "preexisting impairment," and "subsequent injury." The injury for which reimbursement is sought is an occupational disease, which is a chronic illness as previously discussed herein. Since this case involves a chronic illness, the plain meaning of the statute

requires that the preexisting condition predate the chronic illness. In this case, the evidence indicates the contrary as Claimant's conditions and the chronic illness and effects thereof are one and the same.

The cases cited by Carrier to support its theory are easily distinguished from this case. In State Workers' Compensation Fund v. SC SIF, 313 S.C. 536, 443 S.E.2d 546 (1994), the South Carolina 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.

In Springs Industries, Inc. v. S.C. Second Injury Fund, the issue was whether Claimant sustained a subsequent injury. 296 S.C. 359, 372 S.E.2d 915 (S.C. App. 1988). 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). It is noteworthy that 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 Appellant, who settled the claim on a doubtful and disputed basis without paying in the first instance. The Commission's decision was supported by the plain meaning of the statute and must be affirmed. Since Carrier has no evidence of actual preexisting conditions prior to his exposure to lead with Employer or its predecessors, this claim for Second Injury Fund reimbursement should be denied.

D. THE CAROLINAS RECYCLYING DECISION WARRANTS REVERSAL.

Carrier cites Carolinas Recycling Grp v. S.C. Second Injury Fund to support the assertion that the Commission's decision is not supported by substantial evidence. 398 S.C. 480, 73 S.E.2d 324 (Ct. App. 2012). In Carolinas Recycling, the South Carolina Court of Appeals reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct.App. 2012). In this case, none of the experts who provided medical opinions were treating physicians on any occasion. Consistent with the Carolinas Recycling decision, the Commission and the Circuit Court refused to rely on physicians who did not provide any treatment to Claimant.

Moreover, 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.

E. BURNETTE V. CITY OF GREENVILLE IS EASILY DISTINGUISHED FROM THIS CASE.

In Burnette v. City of Greenville, this Court reversed and remanded a case to the South Carolina Workers' Compensation Commission so that it could enter findings of fact concerning Claimant's lumbar injury and disability ratings. 401 S.C. 417, 737 S.E.2d 200 (2012). In Burnette, Claimant was a police officer who sustained two (2) separate back injuries. This Court concluded that Commission's decision, which was affirmed by the Circuit Court, was based on the medical opinion of a Single Commissioner rather than a medical provider. Id. Burnette is easily distinguished from this case. Burnette presents issues of compensability rather than issues of reimbursement. S.C. Code § 42-9-400. Issues of compensability are between a claimant and the employer or carrier while issues of reimbursement are solely between the carrier and the Fund. S.C. Code § 42-9-400. Moreover, the decisions below were not based on a

Commissioner's interpretation of medical evidence but rather, the medical evidence provided by the Carrier's compensated experts.

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.

CONCLUSION

For the reasons cited herein, the South Carolina Second Injury Fund requests that this Honorable Court reverse the decision of the South Carolina Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Petitioner, does hereby certify that service of the **PETITION FOR A WRIT OF CERTIORARI** to The South Carolina Supreme in the above-captioned matter was made upon counsel of record for Respondent, 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 21st day of September, 2017, as follows:

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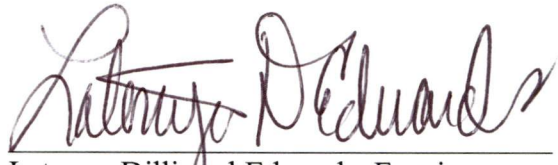

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