IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.: 2017-001929
WCC File No.: 9930459

Arrowpoint Capital Corporation / Arrowood Indemnity Co., Respondent,

v.

South Carolina Second Injury Fund, Petitioner,

IN RE: Mary McConico, Employee,

v.

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

CORRECTED
PETITION FOR 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.

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II. **IF THE CLAIM IS NOT BARRED, WHETHER THE COMMISSION AND CIRCUIT COURT PROPERLY DETERMINED THAT CARRIER FAILED TO SATISFY THE REQUIREMENTS OF S.C. CODE ANN. § 42-9-400?**

III. **THE COURT OF APPEALS ERRED BY DETERMING INFORMATION THE FUND REQUIRED TO ACCEPT, DENY, OR COMPROMISE THE CLAIM WAS UNNECESSARY TO THAT DECISION.**

STATEMENT OF THE CASE

This is an appeal from the Court of Appeal's unpublished decision reversing the Circuit Court's Order affirming a decision of the South Carolina Workers' Compensation Commission. The opinion is Unpublished Opinion No. 2017-UP-227, which was filed on May 31, 2017. App. p. 728. The matter involves a demand for reimbursement by Arrowpoint Capital Corporation / Arrowood Indemnity Co., Inc. (collectively "Carrier") from the South Carolina Second Injury Fund ("Fund").

The case was initially heard by Commissioner Andrea C. Roche on August 13, 2012. At the hearing, the Fund asserted that, 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 by the plain language of § 42-7-320(B)(2). App. pp. 47.

Alternatively, the Fund denied that Carrier met any of the requirement for reimbursement, specifically asserting that Claimant's heavy metal exposure,

hypertension, and/or cardiovascular was a single, chronic injury. 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.

In asserting its claim for reimbursement, Carrier alleged that it incurred substantially greater liability for compensation and/or medical benefits when employee Mary McConico's (Claimant's) alleged preexisting heavy metal poisoning, hypertension, and/or cardiovascular disease were either aggravated by or combined with a July 31, 1999, work-related injury to her brain, kidneys, cerebral vascular accident or stroke, and to his musculoskeletal, cognitive, neuropathic and cardiovascular systems, which was also caused by lead exposure. App. p. 46; Carrier's Form 58. Carrier also alleged that Claimant's alleged pre-existing conditions were a hindrance or obstacle to employment. The Carrier asserted that the heavy metal or lead to which the Employer exposed the Claimant over the course of her employment was both the pre-existing permanent physical position and the aggravating/combining condition necessary for reimbursement from the Fund.

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." App. p. 55. 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 the Claimant's questionnaires at

APA pp. 9 – 14 were insufficient to support its claims. App. p. 56.

However, the Single Commissioner also 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.

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 her findings regarding § 42-7-320(B)(2). App. pp. 25 – 42. Carrier timely appealed to the Sumter County Court of Common Pleas.

The Circuit Court affirmed the Commission's Order on September 5, 2014. App. pp. 1 – 21. Carrier timely appealed to the Court of Appeals. The Court of Appeals reversed the Circuit Court in an unpublished opinion on May 31, 2017. App. p. 681. The Court of Appeals denied Appellant's Petition for Rehearing on August 18, 2017. App. pp. 728 – 729.

STATEMENT OF THE FACTS

Mary McConico worked for Employer for approximately twenty-five (25) years. App. p. 48. During that entire time, Claimant was exposed to lead as part of her working conditions. More than a decade following her alleged date of accident, Carrier filed a claim for reimbursement from the Fund. App. p. 76. However, because the Fund was being closed, the Legislature established certain requirements for the submission of claims in the closing days. Particularly, per § 42-7-320, the Carrier was required to submit all necessary materials to the Fund on or before June 30, 2011. On that date, Carrier submitted a compact disc to the Fund. App. p. 611; Respondents' Final Brief, p.

5. Apparently, Carrier intended to submit electronic copies of documentary material via the disc. However, there was not a single copy of any document on the disc, which contained only a single, 1Kb file. App. pp. 35. The file on the disc was a simple hyperlink; the hyperlink connected to nowhere. As the Fund has since learned, if one is logged onto the Carrier's attorneys' computer system, the hyperlink may provide access to documents stored in the Respondents' counsel's database.

Because were no copies of any documents on the disc, the Fund asserted that the documents were not submitted to the Fund on or prior to June 30, 2011. The Commissioner, however, ruled that the Carrier's intention to submit the documents satisfied the deadlines as set forth in S.C. Code Ann. § 42-7-320(B)(2).

The Carrier has, however, presented evidence that the Employer exposed the Claimant to unsafe levels of lead from the date that the Claimant began work with Employer. This Carrier has never paid a penny in medical care and treatment for this Claimant. App. p. 73; Form 19. This Carrier has never paid a penny in either temporary or permanent disability benefits to this Claimant. Form 19. However, this Carrier now demands to be paid the One Hundred and Ten Thousand Dollars ($110,000.00) it paid in cash to the Claimant without admitting liability of any sort. Following, as a result of the monies paid pursuant to the doubtful and disputed settlement, Carrier alleged that it incurred substantially greater liability for compensation and/or medical benefits (neither of which it actually paid) when Claimant's alleged pre-existing heavy metal poisoning combined or aggravated the very conditions that it caused.

STANDARD OF REVIEW

In an appeal from the Commission, the 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. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct.App. 1999); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App. 2002). Where the issue is jurisdictional, including whether the Court and Commission has subject matter jurisdiction to hear the case, the question is one of law. Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct.App. 2000). However, when the appeal is one on a matter of law, the Court may review that issue *de novo*. "As a result, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. Id.; see S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).

ISSUES PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY FINDING THAT CARRIER'S CLAIM WAS NOT BARRED FOR ITS FAILURE TO COMPLY WITH THE PLAIN LANGUAGE OF STATUTORY DEADLINES.

The Fund asserts that the Commission and the Circuit Court were correct in law and in fact by requiring Carrier to abide by the statute governing the termination of the Second Injury Fund. The Fund further asserts that the Commission and the Circuit Court were correct in striking, from the record, Carrier's APA 10. The Court of Appeals, however, erred by considering the materials that were stricken from the record. Therefore, these materials were not before the Court of Appeals.

A. SUNSET OF THE SECOND INJURY FUND

The Second Injury Fund is a state agency created by the Legislature 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. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550,

551 (1995) (citing Springs Industries v. South Carolina Second Injury Fund, 296 S.C. 359, 372 S.E.2d 915 (Ct.App.1988)). However, in 2007, the Legislature enacted legislation to effect the closure of the Second Injury Fund. See S.C. Code Ann. § 42-7-320. S.C. Code Ann. § 42-7-320 ("Termination of the Second Injury Fund; schedule") reads as follows, in part:

> (B) After December 31, 2011, the Second Injury Fund shall not accept a claim for reimbursement from any employer, self-insurer, or insurance carrier. The fund shall not consider a claim for reimbursement for an injury that occurs on or after July 1, 2008.
>
> (1) An employer, self-insurer, or insurance carrier must notify the Second Injury Fund of a potential claim by December 31, 2010. Failure to submit notice by December 31, 2010, shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.
>
> (2) An employer, self-insurer, or insurance carrier must submit all required information for consideration of accepting a claim to the Second Injury Fund by June 30, 2011. Failure to submit all required information to the fund by June 30, 2011, so that the claim can be accepted, compromised, or denied shall bar an employer, self-insurer, or insurance carrier from recovery from the fund.

(emphasis added). As you can see, the language chosen by the Legislature in crafting this law is mandatory: the "[f]ailure to submit all required information . . . by June 30, 2011 . . . shall bar . . . carrier from recovery . . . ." Id.

B. FAILURE TO SUBMIT NECESSARY MATERIALS

The documents that were not timely submitted to the Fund were required by the Fund before it could consider reimbursement were narrative medical reports that would show whether the Claimant's disability or medical expenses were substantially increased due to the alleged pre-existing condition. App. p. 352; Fund APA p. 2; see Carrier's APA 10. Carrier was notified of the requirement of these documents on April 25, 2011. App. p. 352; Fund APA p. 2. Additionally, the Carrier's inclusion of these documents in

its APA Submissions also indicates that these materials are necessary to recovery.

The entirety of Section B sets deadlines that must be met in order to perfect a claim for Second Injury Fund recovery. By setting deadlines, the Legislature effected an orderly manner by which to close the agency. S.C. Code Ann. § 42-7-320(B) sets forth a cut-off date for reimbursable injuries, July 1, 2008. If a carrier pays for compensable injuries occurring after that date, the "Fund shall not consider" that claim. S.C. Code Ann. § 42-7-320(B)(emphasis added). S.C. Code Ann. § 42-7-320(B)(1) sets forth the last date that notice may be sent to the Fund. Notice sent after December 31, 2011 is not timely, and failure to provide timely notice "shall bar an employer, self-insurer, or insurance carrier from recovery from the fund." S.C. Code Ann. § 42-7-320(B)(1)(emphasis added). S.C. Code Ann. § 42-7-320(B)(2) is the section that is applicable here, and that section requires all necessary information to be submitted to the Fund by June 30, 2011. If a carrier fails to timely submit all necessary materials, such failure "shall bar" the Carrier "from recovery from the Fund." S.C. Code Ann. § 42-7-320(B)(2) (emphasis added).

This case involves statutory construction. "The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation." Seckinger v. Vessel Excalibur, 483 S.E. 2d 775, 777, 326 S.C. 382, 387 (Ct. App. 1997) (quoting Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App.1986)). The particular section under discussion, S.C. Code Ann. § 42-7-320(B)(2), involves two uses of mandatory language: these are the words "must" and "shall". According to the Supreme Court, the word "shall" in a statute ordinarily means the action referred to is mandatory. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C.

611, 620, 503 S.E.2d 471, 476 n. 3 (1998). The statute does not allow wiggle room for a party's good intentions inasmuch as a statute of limitations would.

According to the this 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).

"In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)). The subject section herein appears as just one deadline in a list of deadlines required to be met by a Carrier before it can even argue its case against the Fund.

For whatever reason or reasons, the Carrier waited until the afternoon of June 30, 2011, to attempt to submit file materials to the Fund. In doing so, it submitted some – but not all – of the file materials the Fund requires for consideration of reimbursement. The sunset provisions mandates that June 30, 2011, is the final date for the submission of such documents.

The General Assembly has determined that the Second Injury Fund shall be closed. In doing so, the General Assembly created a law that acts similar to a statute of

limitations. According to the Court of Appeals,

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App.1996) (internal citations and quotations omitted).

This Court has held that notice requirement deadlines dealing with Second Injury Fund reimbursement should be strictly construed. See Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982). Additionally, the Supreme Court has held that the right of a claimant to secure Second Injury Fund reimbursement depends upon complete compliance with the requirements imposed for recovery. Boone's Masonry Construction Co., Inc. v. South Carolina Second Injury Fund, 267 S.C. 277, 282, 227 S.E.2d 659, 661 (1976).

For these reasons and those that may be set forth in the oral arguments, the Second Injury Fund prays that this Court reverses the Order of the Court of Appeals. The Fund respectfully requests that the Carrier's claim for reimbursement be dismissed pursuant to S.C. Code Ann. § 42-7-320(b)(2).

II. IF THE CLAIM IS NOT BARRED, WHETHER THE COURT OF APPEALS ERRED BY DETERMING THAT CARRIER SATISFIED THE REQUIREMENTS OF § 42-9-400?

The Carrier and/or the Claimant in this case picked the date of July 31, 1999, as the alleged date of accident.[1] The Carrier's assertion was that, on that date, Claimant sustained an alleged injury by accident to her brain, kidneys, "cerebral and vascular accident or stroke," and to her musculoskeletal, cognitive, neuropathic and cardiovascular systems when she was exposed to lead during the course of her employment with Yuasa Exide, Incorporated.

A. REQUIREMENTS FOR REIMBURSEMENT

The Fund, of course, began as encouragement for employers to hire and retain employees with disabilities. In American Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 386 S.E.2d 276 (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 (Ct. App. 1989) (emphasis added) (internal citations omitted).

For a Carrier to be entitled to reimbursement from the Second Injury Fund, it must prove that a claimant's pre-existing condition aggravated or combined with her

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[1] This is despite the evidence showing that the Claimant's last day of employment with Defendant Employer was July 23, 1999. App. p. 315; Carrier's APA p. 178.

subsequent injury to cause increased disability or medical costs. S.C. Code Ann. § 42-9-400. In this case, the Carrier asserted that the first and second injuries were the same: chronic exposure to lead. App. pp. 125 – 126; Hrg. Tr., p. 18, l. 22 – p. 19, l. 8. The Carrier's position was that the lead caused the Claimant's conditions, and, subsequent to the development of her maladies, she was further exposed to lead. Per the Carrier, the further exposure resulted in additional and/or worsening maladies. Thus, it argues, it is entitled to reimbursement for payment of a lump sum to cash that neither represents indemnity or medical payments. Of course, by statute, the Fund only reimburses for disability benefits and/or medical payments. S.C. Code Ann. § 42-9-400.

As the Commission and the Circuit Court found, the Carrier presented no evidence of an alleged pre-existing condition prior to the exposure. Claimant's first day of work with Employer was March 4, 1974. App. p. 317; Carrier's APA p. 178. The Carrier presented no medical records from any time preceding Claimant's employment with Defendant. Claimant's Initial Occupational History form, which is dated May 21, 1981, indicates that the Claimant worked with Employer for seven (7) years. App. p. 158; Carrier's APA p. 18.

According to the Claimant's testimony, which was submitted by the Carrier *via* her deposition, the Claimant "didn't have any [health] problems until [she] went [to work]" with Employer. App. p. 334; Carrier's APA p. 195; Claimant's Deposition, p. 11, ll. 2 – 3.

The first medical note comes from September 10, 1975, showing Claimant suffered a knee abrasion. App. p. 208; Carrier's APA p. 68. In 1977 and 1980, the Claimant complained of headaches and/or dizziness. *Id.*

On March 19, 1979, Claimant filed a claim with employer for "accident and sickness weekly benefits." App. p. 311; Carrier's APA p. 172. This was not a workers' compensation claim, but a benefit associated with Claimant's pregnancy. Dr. William H. Carpenter filled out an Attending Physician's Statement, in which he wrote: "I do not feel that this patient should be exposed to lead hazards at Exide and have recommended to patient that she longer work at Exide, From this date 3/9/79, until the day of her [child's] delivery." App. p. 312; Carrier's APA p. 173. Regardless, at that time, the Employer made it clear that it believed the Claimant was healthy enough to work. Dunbar P. Gibson, Jr., Manager, Employee Relations, denied Claimant's request for benefits. App. p. 354; Fund's APA p. 3. He wrote, "the medical evidence supplied does not support a disability which prevents you from performing your job . . . ." Id.

The Initial Occupational History from May 21, 1981, indicates that she had been exposed to lead and cadmium, but that she had not sustained any work injuries. App. p. 158; Carrier's APA p. 18. A physician's examination included in Yuasa's Health History documents shows that her blood pressure on July 12, 1984, was 110 over 78. App. p. 167; Carrier's APA p. 27. An Occupational Health History Questionnaire dated August 13, 1986, shows that the Claimant, having worked approximately twelve (12) years with Employer, was now developing anemia, bleeding tendencies, and eye problems. App. p. 171; Carrier's APA p. 31. She was also showing more problems with her cardiovascular system, including racing heart, dizzy spells, and swollen feet or ankles. App. p. 172; Carrier's APA p. 32. She continued to smoke cigarettes. Id.

On November 12, 1987, Claimant saw Employer's medical personnel, and it's noted that Claimant "[s]tates doctor [in Columbia] says that Exide won't let him do allergy testing." App. p. 214; Carrier's APA p. 74. An Occupational Health History

Questionnaire from August 24, 1989, or approximately fifteen (15) years after she was first employed by Employer, shows that she was then developing "chest pains", and that she was not on high blood pressure medications. App. pp. 181 – 182; Carrier's APA pp. 40 – 41. By May 4, 1993, or after almost twenty (20) years of employment with Defendant, the records show that Claimant considered herself to be in poor health, and that she continued to smoke one (1) pack of cigarettes per day. App. p. 192; Carrier's APA p. 52. In 1998, after twenty-five (24) years of employment, the Claimant was transported by EMS to the hospital after suffering from left sided numbness in face, hand and foot for five minutes. App. p. 210; Carrier's APA p. 70. Nevertheless, the Claimant returned to work. On March 10, 1998, Claimant requested disability following a stroke. App. p. 315; Carrier APA p. 175.

On July 22, 1999, Claimant was transported to the hospital *via* ambulance after experiencing headache, neck pain and sudden dizziness. App. p. 212; Carrier's APA p. 72. Claimant indicated that she only became unable to work because of illness or injury on July 23, 1999, which was her last day of employment with Defendant. App. p. 317; Carrier's APA p. 178. She testified that she stopped working for Employer after having a stroke and an aneurysm. App. p. 330; Carrier's APA p. 191; Claimant's Deposition, p. 7, ll. 1 – 3.

Following her employment with Defendant, Claimant developed "[n]ew onset diabetes." App. pp. 122, 232; Carrier's APA p. 95; Hrg. Tr. p. 15, ll. 7 – 8. On December 17, 2007, a Duplex Lower Extremity Venous Study was normal. App. p. 257; Carrier's APA 117. The Claimant confirmed that she did not develop diabetes until 2001 through her testimony. App. p. 335; Carrier's APA p. 196; Claimant's Deposition, p. 12, ll. 19 – 20.

On March 17, 2011, Claimant underwent a neuropsychological evaluation by L. Randolph Waid, Ph.D., in which he opined that her neurocognitive deficits were related to lead exposure and to "the residuals of an aneurysm/cerebral vascular accident". App. pp.147 – 150; Carrier's APA pp. 4 – 7. Dr. Waid did not address any SIF criteria, and he does not address the possible effect any pre-existing medical condition may have had on Carrier's subsequent liability for compensation and medical benefits or whether the pre-existing conditions (if there were any) constituted hindrances or obstacles to employment. See App. pp. 144 – 147.

On April 7, 2011, Claimant signed a statement indicating that she was aware that she had the following preexisting conditions: arthritis, diabetes (which she testified she developed in 2001), cerebral vascular accident (which occurred in 1999), chronic osteomyelitis and ankylosis of joints, heavy metal poisoning / lead (of which there is no evidence preceding employment with Employer), brain damage, and deafness. App. pp. 345 – 347; Carrier's APA pp. 210 – 212.

On May 31, 2011, Dr. Eugene Shippen completed a questionnaire supporting Second Injury Fund reimbursement with respect to Claimant's preexisting heavy metal poisoning, bronchitis, stroke, degenerative joint disease, coronary artery disease, cerebral aneurysm, osteoarthritis and hypertension. App. p. 149 – 151; Carrier's APA pp. 9 – 11. Interestingly, Dr. Shippen refers to each and every one of the foregoing conditions as "pre-existing conditions", and all of these conditions are considered as a whole. Id. Dr. Shippen completed at least sixteen (16) other questionnaires for Carrier on that same day, May 31, 2011. App. pp. 356 – 403; Fund's APA pp. 5 – 52. Dr. Shippen was not a treating physician, and his *curriculum vitae* was not submitted by any party.

On June 26, 2011, Dr. Edward L. Baker, Jr., completed a questionnaire supporting Second Injury Fund reimbursement with respect to preexisting heavy metal poisoning, bronchitis, stroke, degenerative joint disease, coronary artery disease, cerebral aneurysm, osteoarthritis and hypertension. App. p. 404 – 406; Carrier's APA pp. 12 – 14. Interestingly, Dr. Baker refers to each and every one of the foregoing conditions as "pre-existing conditions", and all of these conditions are considered as a whole." Id. Dr. Baker completed at least sixteen (16) other questionnaires for Carrier on that same day, June 26, 2011. App. pp. 404 – 448; Fund's APA pp. 53 – 97. Dr. Baker was not a treating physician.

On March 17, 2011, J. Routt Reigart, M.D., completed a "Brief Health Evaluation of Mary McConico." App. pp.141 – 143 Carrier's APA pp. 1 – 3. Dr. Reigart assigned an eighty-six percent (86%) impairment rating to the Claimant based on hypertensive cardiovascular disease, osteoarthritis, and encephalopathy. Dr. Reigart notes that the impairment is "calculated for each of the health conditions attributable to lead exposure and physical demands at the Exide plant." App. p. 142; Carrier's APA p. 2. Dr. Reigart does not address any SIF criteria, and he does not address the possible effect any pre-existing medical condition may have had on Carrier's subsequent liability for compensation and medical benefits or whether the pre-existing conditions (if there were any) constituted hindrances or obstacles to employment. See App. pp. 141 – 143; Carrier's APA pp. 1 – 3. Dr. Reigart was not a treating physician.

According to the Claimant's testimony, she was only placed in the medical removal program once during her tenure with Employer. App. p. 331; Carrier's APA p. 192; Claimant's Deposition, p. 8, ll. 5 – 8.

The Commission found that "Claimant was exposed to lead over a twenty-five (25) year period of employment; and, as such, I find that the occupational exposure is one injury and there was no preexisting heavy metal exposure."

B. EXPOSURE TO LEAD AS BOTH PRE-EXISTING AND SUBSEQUENT INJURIES

In this case, 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 necessarily required to show evidence of the condition prior to the initial exposure. See S.C. Code Ann. § 42-9-400.

Carrier has 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. 470 – 471.

As a chronic illness, lead poisoning is the illness itself and 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. 468. 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. 475. 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. 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 her 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.

The Court of Appeals determined that it was bound by State Workers' Compensation Fund v. SC SIF, 313 S.C. 536, 443 S.E.2d 546 (1994). In that case, this Court decided the issues partly based on a statute that applied only to law enforcement officers, including firefighters, that 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. Here, 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. More importantly, State Workers' Compensation Fund v. SC SIF was decided under the "but for" cause of the subsequent injury pursuant to S.C. Code Ann. § 42-9-400(g). That code section was argued by Respondents. Further, in its Order, the Court of Appeals apparently confused that section with § 42-9-400(a): "Thus, the circuit court's interpretation of section 42-9-400(a) to preclude reimbursement conflicts with our supreme court's analysis in State Workers' Compensation Fund." However, that case was not determined under § 42-9-400(a).

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). Again, 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.

Further, 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.

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.

Even if the Carrier could prove that the Claimant's lead exposure amounted to both the pre-existing and subsequent injuries, it can't prove that the Claimant's exposure to lead was a hindrance or obstacle to employment or reemployment. This factory was filled with employees that were exposed to lead, and it employed them all for many, many years. If the lead exposure were a hindrance or obstacle to employment, the employees would not have been able to work as they did for the course of decades. This Claimant, Mary McConico, worked at the factor for over twenty-five (25) years. App. p. 55; Order, p. 13. She did not stop working until she suffered a stroke and/or aneurysm. App. p. 330; Carrier's APA p. 191; Claimant's Deposition, p. 7, ll. 1 – 3. Further, Employer itself – after years on the job and while the Claimant was pregnant – expressed that the exposure did not amount to a hindrance or obstacle to employment. App. p. 354. Dunbar P. Gibson, Jr., wrote to the Claimant, "the medical evidence supplied does not support a disability which prevents you from performing your job . . ." while she was pregnant. Id.

Carrier argues, additionally, that Claimant's high blood pressure was caused by the exposure to lead, and that "there is a clear association between the development of hypertension and the occurrence of . . . stroke." App. 628. Respondents don't even indicate whether Dr. Reiggart made this correlation relative to this Claimant or in general. Regardless, the Carrier offers no evidence in regards to whether the now allegedly pre-existing hypertension caused greater disability or medical costs, which the Code requires. It should be noted that Dr. Reiggart pointed to a list of conditions he related directly to work (stroke, diabetes, hypercholesterolemia, back pain, osteoarthritis in arms and knees, vertigo, hypertension, gout, poor memory and concentration, depression, skin eruption, and coronary artery disease). App. p. 142; Carrier's APA

Submissions p. 2. Dr. Reiggart does not opine that the hypertension resulted in greater disability or medical costs.

Further, 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:

> WHEREAS, 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.

App. p. 63.

The Employer and Carrier deny the very contentions for which they now seek reimbursement. 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). Here, Carrier did not pay any medical costs or compensation to Claimant.

For these reasons, and for those that may be set forth in the oral arguments in this matter, the Fund respectfully request that the Circuit Court's Order be affirmed.

III. THE COURT OF APPEALS ERRED BY DETERMING INFORMATION THE FUND REQUIRED TO ACCEPT, DENY, OR COMPROMISE THE CLAIM WAS UNNECESSARY TO THAT DECISION.

Petitioner respectfully asserts that the Court of Appeals erred in determining what was "required information" pursuant to S.C. Code Ann. § 42-7-320. Throughout its history, Petitioner has required medical records subsequent to the triggering 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. The Court of Appeals simply writes off the Fund's requirements, writing,

> Moreover, Claimant did not receive compensation from Employer for past, present, or future medical treatment; thus, Carrier has not sought reimbursement for such. Here, it is a stretch to argue that such post-employment records constitute "required information" . . . .

Arrowpoint v. S.C. Second Injury Fund, Unpublished Opinion No. 2017-UP-227 (S.C. Ct. App. filed May 31, 2017).

This analysis overlooks the fact that, under § 42-9-400, showing substantially increased liability or medical costs is a condition precedent for reimbursement. How else does a Carrier show increased liability or medical costs other than through medical evidence subsequent to the triggering injury or condition? Any records predating the trigging condition are wholly irrelevant to the analysis the Fund must undertake to

determine if the threshold requirements are met.

Further, Respondents were made explicitly aware of this requirement on April 25, 2011, or months before the statutory deadline. App. p. 348. 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. Yet, respectfully, the Court of Appeals appear to have taken a more myopic approach: i.e., the Carrier didn't pay medicals, therefore the Fund doesn't need to know about increased medical costs or liability.

Petitioner further asserts that the Court of Appeals 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); App. p. 35. Of course, the Order of the Circuit Court affirmed the Commission's Order on all issues. App. p. 24. That issue was not appealed to the Court of Appeals. Because these records were stricken from the record, the Court's reliance on such material was error. Petitioner asserts that, even if the records were appropriately part of the record, the Court of Appeal'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'", the Court of Appeals overlooked the conditions listed in that report. Dr. Reigert 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); App. p. 142. Thus, a review of the post-employment medical records show that, in actuality, the majority of the records address conditions Respondents' 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[2], hypertension[3], coronary disease[4], subarachnoid hemorrhage[5], hyperlipidemia[6], back pain[7], vertigo[8], and arm pain[9]. To say that there is a dearth of causally related issues in these records, as the Court of Appeals has done, turns a blind eye to the substance of the records, which is directly on point.

Further, if there were a dearth of information in the records, this Court erred in failing to acknowledge 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

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[2] App. pp. 235, 237, 238, 264, 265, 266, 267, 273, 274, 276, 277, 278, 279, 281, 282, 283, 284, 285, 286, 287, 289, 290, 291, 292, 293, 294, 295 296, 298, 299, 300, and 308.
[3] App. pp. 235, 237, 238, 260, 265, 267, 274, 277, 279, 283, 287, 289, 290, 292, 293, 294, 295, 296, 298, 299, 300, and 307.
[4] App. p. 235, 265, 267, 269, 277, 279, 287, 290, 292, and 294.
[5] App. p. 235.
[6] App. pp. 235, 265, 267, 274, 277, 279, 281, 285, 287, 289, 290, 292, 293, 294, 295, 296, 299, 300, 302, and 308.
[7] App. pp. 254, 255, and 262.
[8] App. pp. 262, 306, and 307.
[9] App. pp. 262, 265, and 267.

the triggering injury, which is another measure of increased medical costs and/or disability.[10]

CONCLUSION

The Commission is a creature of statute. The Fund is a creature of statute. The Legislature created deadlines for the submission of documents and materials to the Fund, and those deadlines are absolute. Accordingly, for the reasons set forth herein, and for those reasons that may be set forth in the oral arguments in this matter, the Fund respectfully requests that Court of Appeal's reversal of the Circuit Court's Order finding that the plain language of the statute be accorded the correct deference be reversed.

Respectfully submitted,

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Date: September 28, 2017

[10] App. pp. 240, 241, 260, 262, 264, 266, 269, 273, 276, 278, 282, 284, 286, 289, 291, and 293.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.: 2017-001929
WCC File No.: 9930459

Arrowpoint Capital Corporation / Arrowood Indemnity Co., Respondent,

v.

South Carolina Second Injury Fund, Petitioner,

IN RE: Mary McConico, Employee,

v.

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

CERTIFICATE OF SERVICE

I certify that on the 28th day of September, 2017, I served Petitioner's Corrected Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari 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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