

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

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C.A. No.: 2013-CP-43-02284  
Appellate Case No.: 2017-001929

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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,

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**RETURN IN OPPOSITION TO THE SOUTH CAROLINA  
SECOND INJURY FUND'S PETITION FOR WRIT OF CERTIORARI**

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Vernon F. Dunbar, SC Bar No. 7836  
McAngus Goudelock and Courie  
55 East Camperdown Way, Ste. 300  
Post Office Box 2980  
Greenville, South Carolina 29602  
Telephone: 864-239-6735  
Email: Vernon.Dunbar@MGClaw.com

*Attorneys for Respondent*

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Other Counsel of Record:

Timothy B. Killen, Esquire  
Willson, Jones, Carter & Baxley, P.A.  
421 Wando Park Boulevard, Suite 100  
Mount Pleasant, South Carolina 29464

*Attorney for Petitioner*

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**QUESTIONS PRESENTED**

- I. Should this Court grant certiorari review in this case where the South Carolina Court of Appeals determined that the Circuit Court and the Workers' Compensation Commission's Decision and Orders constituted an error of law and are not supported by substantial evidence?
  
- II. Should this Court grant certiorari review in this case pursuant to Rule 242, SCACR when none of the following factors exist: (a) there are no novel questions of law; (b) there is no dissent in the South Carolina Court of Appeals Opinion; (c) the decision of the Court of Appeals is not in conflict with a prior decision of the South Carolina Supreme Court, but actually adheres to judicial precedent unlike the decisions of the South Carolina Workers' Compensation Commission and the Sumter County Court of Common Pleas; (d) there are no substantial constitutional issues directly involved in the proceeding; (e) there is no federal question and no federal issue has been raised?
  
- III. Whether Arrowpoint Capital Corporation met all required statutory prerequisites in perfecting its claim with the Second Injury Fund?

## STATEMENT OF THE CASE

Mary McConico, Employee/Claimant, suffered with heavy metal poisoning, a stroke, and hypertension because of chronic and acute lead exposure. Mary McConico [hereinafter "McConico"] worked in the battery manufacturing facility, which exposed her to lead from May 4, 1974 to July 31, 1999. During the course of McConico's 25-year employment tenure the battery manufacturing facility was operated by ESB, Inc., Exide Corporation, Yuasa-Exide, Inc., and Yuasa, Inc., all different employers. Claimant was treated for high blood pressure, kidney dysfunction, cardiac disease, and peripheral neuropathy prior to her last date of employment in July, 1999. McConico sustained a permanent disabling stroke on her last date of employment in 1999.

Pursuant to a Commission-ordered mediation, McConico resolved her worker's compensation claim against Yuasa-Exide, Inc., the last Employer, and its workers' compensation insurance carrier, Arrowpoint Capital Corporation/Arrowwood Indemnity [ hereinafter "Arrowpoint Capital" or "Arrowpoint" or "Respondent"] by virtue of a Settlement Agreement, Release and Order (Clincher). In particular, McConico was paid \$110,000.00 in indemnity or permanent disability benefits to resolve her allegations of a compensable injury or occupational disease. No monies were paid for past, present or future medical treatment.

Arrowpoint Capital subsequently filed a Form 54 requesting reimbursement from the South Carolina Second Injury Fund for indemnity benefits paid. (App. p. 75). The Form 54 stated that McConico had pre-existing conditions of heavy metal poisoning, diabetes, cardiovascular or cardiac disease, arthritis, hypertension, gout and coronary artery disease, which were aggravated by McConico's repeated and/or cumulative exposure to lead on her last day of employment on July 31, 1999. Arrowpoint Capital argued the aggravation of the preexisting

medical conditions resulting from injurious occupational exposure to lead qualified it to obtain reimbursement from the South Carolina Second Injury Fund. Arrowpoint Capital also asserted in the Form 54 that McConico's pre-existing medical conditions were known to the numerous employers during her twenty-five (25) year employment tenure; and that the preexisting conditions combined with other health maladies to render McConico permanently disabled in 1999. (App. p. 75). The Fund filed a Form 55 denying Arrowpoint's request for indemnity or disability reimbursement.

On December 19, 2012, the Workers' Compensation Hearing Commissioner promulgated an Order denying Second Injury Fund reimbursement to Arrowpoint Capital. Specifically, the Hearing Commissioner denied the claim because McConico did not have hypertension or cardiovascular disease or had been exposed to heavy metal poisoning prior to her initial employment and occupational exposure at the battery manufacturing facility on May 4, 1974; and because the occupational or heavy metal exposure constituted one injury.

The Hearing Commissioner, without explanation, chose to ignore the medical opinions of three medical experts in the field of lead toxicology, who opined that McConico's last exposure to lead caused, aggravated, or accelerated her underlying health problems. There was no contradictory medical evidence or any other lay evidence in the record in support of the Hearing Commissioner's decision.

The Hearing Commissioner, however, rejected the Fund's argument that its inability to read post-employment medical records contained on a compact disc or CD statutorily barred Arrowpoint Capital's claim for reimbursement.

Arrowpoint Capital Corporation and the Fund both filed appeals to the South Carolina Workers' Compensation Full Commission.

On November 21, 2013, the Full Commission Appellate Panel promulgated a Decision and Order affirming in part the Hearing Commissioner's decision denying Second Injury Fund reimbursement. (App. pp. 25-41). By contrast, the Full Commission Appellate Panel ruled that the Fund's inability to read the post-employment medical records contained on the compact disc barred Arrowpoint's claim for reimbursement pursuant to Section 42-7-320(B)(2). *Id.* Thus, the Full Commission Appellate Panel reversed the Hearing Commissioner on this issue.

Arrowpoint Capital timely filed an appeal to the Sumter County Court of Common Pleas. By Order dated September 5, 2014 and filed on November 24, 2014, the Sumter County Court of Common Pleas promulgated an Order affirming the Decision and Order of the South Carolina Workers' Compensation Commission.

Arrowpoint Capital filed an appeal to the South Carolina Court of Appeals. On May 31, 2017, the Court of Appeals promulgated an Order reversing the Decision and Orders of the South Carolina Workers' Compensation Commission and the Circuit Court and ordered reimbursement from the South Carolina Second Injury Fund because of an erroneous comprehension of the law and lack of substantial evidence in support of the lower tribunals' decisions. *Arrowpoint Capital/Arrowood Indemnity v. South Carolina Second Injury Fund*, 2017-UP-227 (Ct. App. filed May 31, 2017).

The Second Injury Fund thereupon filed a petition for rehearing, which was denied by the Court of Appeals by Order dated August 18, 2017. Subsequently, the Second Injury Fund filed a petition for writ of certiorari to this Honorable Court dated September 18, 2017.

## STATEMENT OF FACTS

Mary McConico, Employee/Claimant, is a 72 year old female, who worked at Yuasa-Exide and its predecessor companies from March 4, 1974 to July 31, 1999. (App. pp. 158, 217 and 221). During McConico's first nine years of employment, she worked for ESB, Inc. Over the next eight years, McConico worked at the Exide Corporation. (App. p. 217). In June 1991, Yuasa purchased the Sumter Industrial Battery Division of Exide Corporation. McConico was retained as an employee and began working for Yuasa-Exide, Inc. and later Yuasa, Inc. (App. pp. 221, 311-313). While at work for Yuasa-Exide, Inc., in 1999, McConico suffered an aneurysm and stroke. McConico was medically deemed totally disabled from returning to work. McConico began receiving long-term company disability benefits and Social Security disability benefits at age 54. (App. pp. 319-323 and 342).

Medical Health History Questionnaires completed by McConico during her employment tenure with ESB, Inc., the Exide Corporation and later with Yuasa-Exide reflected a family history of diabetes, rheumatism and arthritis. (App. pp. 163, 169, 175 and 186).

Over 25 years, McConico was treated by the physicians in the medical departments of ESB, Inc., Exide Corporation, Yuasa-Exide, and Yuasa, Inc. for anemia, high blood pressure, kidney dysfunction, hypertension (cardiac disease) and peripheral neuropathy. (App. pp. 173, 177, 182, 184, 188, 190, 198-200 and 202-216). Each employer had complete knowledge of McConico's medical conditions.

When McConico first began working at the Battery Manufacturing Plant in 1974, her blood lead level was recorded at 7 micrograms per deciliter of blood. A normal blood level is less than 10 micrograms per deciliter of blood. The toxicology experts providing testimony in this case state that the average blood lead level for the general population is 3 micrograms per

deciliter of blood. (App. pp. 142, 144 and 470). From June 3, 1975 to May 2, 1985, McConico's blood lead levels ranged from 7 to 34 micrograms per deciliter of blood. (App. pp. 200 and 217). During this time, McConico worked for ESB, Inc. and the Exide Corporation.

From September 23, 1987 through July 18, 1995, McConico's blood lead levels ranged from 15 to 55 micrograms per deciliter of blood. (App. pp. 224-226). Specifically, on January 8, 1991, McConico was placed in the medical removal program (MRP) by the Exide Corporation because her blood lead levels exceeded 36 micrograms per deciliter of blood over a three (3) month period in violation of industry standards. (App. p. 224). The records reflect that even after being placed in the medical removal program, McConico's blood lead levels remained above 40 micrograms per deciliter of blood from March 6, 1991 through May 1992. (App. pp. 224-226).

From September 23, 1987 through July 18, 1995, McConico's blood lead levels ranged from 15 to 55 micrograms per deciliter of blood. (App. p. 226). The Exide records reflect that even after being placed in the medical removal program, McConico's blood lead levels remained above 40 micrograms per deciliter of blood from March 6, 1991 through May 1992. (App. p. 226).

Despite placing McConico in the medical removal program and taking extra safety precautions to decrease her blood lead levels, McConico's blood lead levels ranged from 27 to 47 micrograms per deciliter of blood from 1995 until her stroke. (App. pp. 226-234).

Industry regulations regulating lead exposure and OSHA regulations require an employee to be placed in the medical removal program ("MRP") when blood lead levels reach an unsafe level. (App. p. 542). Accordingly, McConico was placed on MRP on at least three (3) occasions. (App. pp. 224, 227-229). McConico's high blood lead levels constitute injuries from heavy metal

poisoning during the times blood lead levels exceeded 36 micrograms per deciliter of blood over a six month period or 40 micrograms per deciliter of blood at any instance. (App. pp. 224-229).

Prior to McConico's employment at Yuasa Exide in 1992, she suffered with severe cardiac disease or hypertension, which resulted in continuous medical treatment. McConico's blood pressure was recorded as follows:

190/110 (App. p. 182);	170/104 (App. p. 184);	162/102 (App. p. 175);	182/120 (App. p. 183);
180/100 (App. p. 198);	190/110 (App. p. 199);	170/108 (App. p. 187);	160/100 (App. p. 189);
172/104 (App. p. 206);	234/116, 224/120, 230/120, and 170/88 (App. p. 208);	160/94 (App. p. 194);	204/118 (App. p. 196); and
204/126 (App. p. 211)			

As a consequence of severe hypertension aggravated by acute and chronic exposure to lead, McConico's cardiac disease and lead exposure resulted in a totally debilitating stroke. (App. pp. 315-317 and 470).

In support of its request for reimbursement, Respondent relies upon 25 years of in-house medical records and numerous expert reports. (App. pp. 141-234). First, the neuropsychological report of Dr. Randolph L. Waid, states that blood lead levels in the range of 10 to 19 micrograms per deciliter of blood can cause hypertension, kidney damage, and neurocognitive impairment. (App. p. 144). McConico was exposed to this level of lead during her employment tenure with ESB and the Exide Corporation. Dr. Waid further opined McConico had also sustained brain damage with respect to neurocognitive functioning because of the stroke. (App. pp. 144-148).

Second, Dr. Eugene Shippen, Dr. Edward L. Baker and Dr. J. Routt Reigart, experts in the field of lead toxicology, completed Second Injury Fund Medical Questionnaires indicating that McConico's preexisting conditions of heavy metal poisoning, coronary artery disease, cardiovascular disease, arthritis and hypertension were aggravated by cumulative exposure to lead and resulted in her being permanently disabled. (App. pp. 141-143 and 149-154). Dr. Reigart's expert report was also submitted as evidence for Appellant's reimbursement request. Drs. Shippen, Baker and Reigart further opined that McConico's last episode of heavy metal poisoning and/or her cerebral vascular accident (stroke) combined with other maladies, i.e., diabetes and gout to render her disabled.

Third, company medical records comprising of approximately twenty-five (25) years of medical history; treatment records of McConico; and medical questionnaires from toxicology experts were submitted to the Fund on June 30, 2011, as required by *Section 42-7-320(B)(2)*. *S.C. Code Ann. §42-7-320(B)(2) (2015)*.

In addition to company medical records, post-employment medical records were submitted to the Fund by virtue of compact disc ("CD"). (App. pp. 235-309). The CD is an electronic copy of all the medical records generated after McConico's disabling stroke and medical care and treatment from 1999 to 2010. The CD contained a hyperlink rather than the medical documents, the latter which was believed to have been downloaded onto the CD. The Fund was unable to access the medical documents through the hyperlink. Thereafter, The Fund notified Respondent's counsel in September, 2011 that the documents on the CD could not be retrieved. Within approximately three (3) days after receiving notice of the Fund's inability to retrieve the post-employment documents, another CD containing the same documents was hand delivered to the Fund.

The Fund alleged that Arrowpoint's claim was barred by *Sections 42-7-310 and 42-7-320(B)(2) (2015)*. The Fund asserted that the documents were not timely submitted by the June 30, 2011, deadline, and therefore, were barred from consideration. *S.C. Code Ann. §§ 42-7-310 and 42-7-320(B)(2) (2015)*.

The Hearing Commissioner rejected the Fund's argument that the post-employment documents were not timely submitted. (App. pp. 56-58). The Hearing Commissioner further concluded that *Section 42-7-320(B)(2)* did not act as a bar to Respondents' recovery in view of the other printed/written evidence submitted to and received by the Fund.

The Fund cross-appealed the Hearing Commissioner's Decision on this issue to the Full Commission Appellate Panel. (App. p. 83). The Full Commission determined that the statute acted as a bar to Respondent's recovery, despite arguments of Respondent that the Fund had not proven that the post-employment medical documents constituted the required information as is required pursuant to *Section 42-7-320(B)(2)*. *Id.* (App. pp. 34-36). Further, Respondent contended that the post-employment documents were not needed to meet its burden of proof in light of the expert reports and questionnaires and 25 years of in-house company medical records.

## **CONSIDERATIONS GOVERNING SUPREME COURT REVIEW**

Pursuant to Rule 242(b), SCACR, a writ of certiorari is not a matter of right, but of sound judicial discretion, and will only be granted where there are special and important reasons. The following factors are considered in determining whether a writ of certiorari should be granted: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict of a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

## ARGUMENTS

### I. **THE SOUTH CAROLINA COURT OF APPEALS CORRECTLY REVERSED THE COMMISSION AND THE CIRCUIT COURT IN DETERMINING THAT ARROWPOINT CAPITAL CORPORATION IS ENTITLED TO REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND AFTER SATISFYING THE REQUIREMENTS AS SET FORTH IN SECTION 42-9-400.**

#### A. **THE PURPOSE OF THE SOUTH CAROLINA SECOND INJURY FUND**

The South Carolina Second Injury Fund was established to encourage employers to hire disabled or handicapped workers, or to retain employees who become partially disabled in the course and scope of their employment. The Fund provides reimbursement to an insurer or employer for compensation paid to an injured worker, who suffers increased permanent disability as a result of the preexisting condition and a subsequent workplace injury. The Fund was designed to encourage the employment and retention of disabled workers by providing financial relief to employers. Thus, the Fund removed any financial incentive an employer may have had to terminate a disabled worker who may increase the employer's liability. *See generally State Workers' Comp. Fund v. S.C. Second Injury Fund*, 313 S.C. 536, 538, 443 S.E.2d 546, 547 (1994); *Greenwood Mills v. Second Injury Fund*, 315 S.C. 256, 257, 433 S.E.2d 846, 847 fn.1 (1993); *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 625, 611 S.E.2d 297, 303 (Ct. App. 2005); *American Motorists Ins. Co. v. S.C. Second Injury Fund*, 300 S.C. 17, 21-22, 386 S.E.2d 276, 278-79 (Ct. App. 1989).

The Second Injury Fund Statute as set forth in Section 42-9-400(d) lists thirty-three (33) medical maladies or conditions which constitute a presumption that the underlying pre-existing listed condition is permanent and constitutes a hindrance or obstacle to employment or re-employment. *S.C. Code Ann. §42-9-400(d) (2001)*. (R. pp. 591-592). McConico's preexisting conditions of cardiac disease, arthritis and heavy metal poisoning are three of the 35 statutorily

listed medical conditions that existed prior to her last exposure to lead. *S.C. Code Ann. §42-9-400(d)(3)(4) and (22) (2001)*. (R. pp. 597-598). Despite these pre-existing medical conditions and impairments, Yuasa Exide continued to employ and retain McConico in employment.

Respondent provided proof of the pre-existing conditions of heavy metal poisoning and hypertension or cardiac disease by virtue of blood lead level reports, expert medical questionnaires, and company medical records dating from 1975 through 2000. (App. pp. 141-216 and 316). Accordingly, it is presumed as a matter of law that the pre-existing cardiac condition, arthritis and heavy metal poisoning constitute a hindrance or obstacle to employment or re-employment. *S.C. Ann. §42-9-400 (2001)*. Thus, the prerequisites of the Second Injury Fund needed to trigger reimbursement were proven by Respondent and un-refuted by the Second Injury Fund.

Reimbursement from the Fund is governed by *South Carolina Code Annotated Section 42-9-400*. In addition to providing timely notice of the reimbursement claim, a carrier/employer must establish four elements in order to be entitled to reimbursement. For a pre-July 1, 2007 claim, these elements include the following: (1) that the claimant had a preexisting permanent physical impairment/condition (*§42-9-400(a)*); (2) that the employer had knowledge of the preexisting impairment prior to the workplace injury (*§42-9-400(c)*); (3) that the preexisting impairment was a hindrance/obstacle to employment or re-employment (*§42-9-400(d)*); and (4) that the preexisting impairment combined with or was aggravated by the workplace injury to result in substantially greater disability than that which would have resulted from the subsequent injury alone (*§42-9-400(a)*).

Yuasa Exide, Inc. is entitled to reimbursement from the Fund because it was the last employer for which McConico worked. McConico was exposed to lead which aggravated pre-existing conditions caused by her previous employment with ESB, Inc. and the Exide Corporation. (App. pp. 142-143, 149-154 and 470).

By way of background, the initial owner of the Sumter Battery Plant was ESB, Inc. (App. pp. 311 and 313). The company began its battery manufacturing operations in Sumter in 1965. McConico began working at ESB, Inc. in 1974. It was during this initial employment tenure at the battery manufacturing facility that McConico began experiencing problems with high blood pressure, cardiac disease, and heavy metal poisoning. (App. pp. 200 and -217).

In 1983, the Exide Corporation purchased the battery plant from ESB, Inc. (App. p. 217). McConico continued to work at the battery manufacturing facility as an Exide employee, despite diagnosed problems of hypertension and heavy metal poisoning, which warranted continuous medical treatment. During McConico's employment at the Exide Corporation, she was also plagued with anemia and kidney problems. During this time, McConico underwent various x-rays and other diagnostic tests which revealed abnormalities of the heart. (App. pp. 171, 175, 180, 186 and 193). McConico had numerous abnormal electrocardiograms, which further reflected cardiac disease. (App. pp. 171, 175, 182 and 186).

Despite the aforesaid problems, McConico was retained as an employee when Yuasa Battery, also known as Yuasa Exide, purchased the Sumter battery manufacturing facility from the Exide Corporation on June 10, 1991.

The aforesaid chronology of events manifests the applicability of the Second Injury Fund statute in this instance. The purpose of the Second Injury Fund is to employ and retain disabled workers who suffer with permanent disability and pre-existing medical conditions that are an

obstacle or hindrance to employment and reemployment. Moreover, McConico's medical and employment history prove that the heavy metal poisoning and cardiac disease were not one continuous event but separate and distinct events transpiring over 25 years in which various levels of lead exposure are reflected - some harmful and injurious while other exposures were less pernicious.

**B. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT OF APPEALS DECISION THAT MCCONICO SUFFERED WITH PRE-EXISTING CONDITIONS OF HEAVY METAL POISONING, HYPERTENSION AND CARDIAC DISEASE PRIOR TO HER DEBILITATING STROKE.**

It is axiomatic that in workers' compensation cases, the date of injury is controlling with regard to the payment of benefits, statute of limitations, and reimbursement from the South Carolina Second Injury Fund. *Section 42-9-400(a)* states that an employer or insurance carrier, after paying awards of compensation stemming from a disability resulting from an injury by accident, is entitled to reimbursement from the South Carolina Second Injury Fund **upon providing proof of the existence of preexisting conditions.** *S.C. Code Ann. §42-9-400(a) (1999). State Accident Fund v. S.C. Second Injury Fund, 409 S.C. 240, 762 S.E.2d 19 (2014).* It stands to reason that if July 1999 is the operative date of injury, then evidence of heavy metal poisoning, arthritis and cardiac disease existing before July 31, 1999 is ample proof of a pre-existing medical condition.

Despite the Commission's finding of fact that McConico sustained an occupational exposure or accidental injury to heavy metal or lead on July 31, 1999, (Finding of Fact #1), the Commission inexplicably found that exposure to lead over a twenty-five (25) year employment history was only one injury and that there was no pre-existing heavy metal exposure or poisoning (Finding of Fact #4). (App. p. 55). These two findings are simply incongruent and illogical, and

the factual findings and legal conclusions are not supported by the only evidence in the record. (App. pp. 141-234 and 470).

The only evidence in the record reflects that prior to McConico's last exposure to heavy metal or lead in 1999, she had received medical treatment during the course of her twenty-five (25) year employment history for heavy metal lead poisoning and cardiac or cardio vascular disease (hypertension) (App. pp. 171-172; 175; 180; 182; 184; 186; 188; 196; 198; and 203-211) and heavy metal poisoning. (App. pp. 225-228).

The medical records reflect McConico had suffered with hypertension and stroke-like symptoms on October 13, 1977, a few years after first working at ESB, Inc. or her first employer in the battery manufacturing industry. (App. p. 310). McConico's treatment for heavy metal poisoning and cardiac disease is evident during her employment tenure with the Exide Corporation or second employer. McConico later became temporarily disabled due to severe hypertension on February 26, 1998, while employed for Yuasa Exide (App. pp. 314-318). These separate and distinct events certainly manifest the Respondent's knowledge of pre-existing conditions of cardiac disease and heavy metal poisoning in accordance with *Section 42-9-400(a) as of July 23, 1999. Id.*

It is obvious that McConico had been diagnosed and treated for heavy metal poisoning by placement in the medical removal program for high lead levels at various times, from 1990 through 1998, prior to her employment and last date of employment with Yuasa Exide in July 1999. Accordingly, the Circuit Court and Commission's Decision and Orders were clearly erroneous and were reversed as a matter of law by the Court of Appeals. *S.C. Code Ann. §42-9-400(a)(3)(22) (1999).*

In *State Workers' Compensation Fund v. The South Carolina Second Injury Fund In Re: Hunt v. S.C. State Forestry Comm.*, 313 S.C. 536, 443 S.E.2d 546 (1994), the State Accident Fund was awarded reimbursement for disability suffered by Warren M. Hunt ("Hunt"), a firefighter for the State Forestry Commission. Hunt was deemed disabled as a consequence of coronary artery disease and arteriosclerosis. Hunt had been employed with the Forestry Commission for thirty (30) years. Hunt had been diagnosed with heart disease and arterial sclerosis, for twelve (12) years prior to him becoming permanently and totally disabled. *Id.* In *Hunt*, the coronary artery disease did not pre-exist prior to the initial hire. Hunt's cardiac disease developed during the course of his employment. Because the cardiac disease developed during the course and scope of Hunt's employment with the Forestry Commission, the law did not disqualify the Forestry Commission and the State Accident Fund from obtaining reimbursement from the South Carolina Second Injury Fund:

The Court noted that Second Injury Fund reimbursement is available when:

**"[T]he employer had knowledge of the permanent physical impairment at the time the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge..."** S.C. Code Ann, §42-9-400(c) (1999). (Emphasis added).

This provision makes it clear that if an employer can prove knowledge of a pre-existing condition at the time an employee is initially employed, working or is "retained" to continue to perform his or her employment duties, then a subsequent injury aggravating or combining with the preexisting condition, qualifies the employer for recovery or reimbursement from the Fund. *Id.*

The Fund did not initially plead or argue that Respondent had to prove McConico had pre-existing conditions of cardiac disease and heavy metal poisoning prior to her employment at ESB, Inc., the Exide Corporation or Yuasa Exide. Even if the Fund had made such an argument,

the un-contradicted evidence clearly shows Respondent had knowledge of McConico's prior medical impairments and that Respondent continued to acquire additional knowledge about McConico's medical condition from June 10, 1991 until July 1999 because of her treatment with Respondent's in-house medical department. This erroneous legal proposition introducing entirely new prerequisites for Second Injury Fund reimbursement was not enunciated by the Fund in any of its pleadings, pre-trial briefs, or oral presentations before the Commission. It stands to reason that the Fund did not initially take this position because of long established legal precedent, 25 years of company medical records and blood lead readings reflecting McConico suffered with hypertension, cardiac disease and heavy metal poisoning before she began working at Yuasa Exide in June 1991. (App. pp. 567-583).

**C. ARROWPOINT IS ENTITLED TO REIMBURSEMENT IRRESPECTIVE OF WHETHER MCCONICO'S ACCIDENT IS CHARACTERIZED AS AN INJURY BY ACCIDENT OR OCCUPATIONAL DISEASE.**

The date of injury is the controlling factor in workers' compensation claims. The conclusion that McConico's pre-existing condition must have been in existence prior to her first day of work at the Yuasa plant is contrary to South Carolina law.

The South Carolina Workers' Compensation Act establishes that an occupational disease is not a compensable injury until the employee alleging the disease suffers a disability as described in *Sections 42-9-10, 42-9-20, or 42-9-30. S.C. Code Ann. §42-11-10 (2015)*. The South Carolina Supreme Court reached this legal conclusion in *Glenn v. Columbia Silica Sand Co.*, 236 S.C. 13, 19-20, 112 S.E.2d 711, 714 (1960). In *Glenn*, the court quoted the following statement from Professor Larson's Treatise:

Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's

right to benefits, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know she has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration.

*Id.* at 19-20, 112 S.E.2d at 714 (quoting 2 Larson's Workers' Compensation Law §95.21).

This same statement was used to support the Supreme Court's decision in *Drake v. Raybestos Manhattan, Inc.*, 241 S.C. 116, 122-23, 127 S.E.2d 288, 291-92 (1962), overruled on other grounds by *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983).

Additional case law from South Carolina's Appellate Courts reaffirm that an occupational disease claim does not ripen until the point that "the employee becomes disabled and could, through reasonable diligence, discover that her condition is compensable." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999); see also *Bass v. Isochem*, 365 S.C. 454, 476, 617 S.E.2d 369 (Ct. App. 2005).

The South Carolina Court of Appeals determined that an occupational disease is compensable once a condition has been definitively diagnosed. *Rogers v. Kunja Knitting Mills*, 312 S.C. 377, 379-81, 440 S.E.2d 401, 403-04 (Ct. App. 1994). It goes to follow that an occupational disease injury does not exist until an employee has been definitely diagnosed with an occupational disease or through reasonable diligence could have discovered she had an occupational disease. See also, *State Workers' Comp. Fund v. S.C. SIF*, 313 S.C. 536, 443 S.E.2d 546 (1994).

Therefore, the Commission and the Circuit Court undoubtedly legally erred in its interpretation of the statute and case law. *State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 762 S.E.2d 19 (2015).

But for McConico's exposure to lead, her hypertension was continuously aggravated. McConico's hypertension resulted in the constant use of high blood pressure medications and increased medical monitoring. (App. pp. 179-206). Because McConico's hypertension was difficult to control, she was unable to physically work from February 26, 1998 to March 8, 1998 and received disability benefits while working for Yuasa Exide. (App. p. 311).

Despite knowledge of McConico's hypertensive condition, heavy metal poisoning, and arthritis, Yuasa-Exide, Inc., retained and re-employed McConico after its purchase of the Sumter Battery Manufacturing Facility from the Exide Corporation in June 1991. *Transportation Ins., Travelers Ins. Co. and Great American Ins. Co., et al. v. South Carolina Second Injury Fund*, 389 SC 422, 699 S.E.2d 687 (2010). *See also, Yuasa Exide v. NLRB*, 1997 U.S. App. Lexis 20848. McConico's employment voluntarily terminated because she suffered a permanently disabling stroke impacted by acute and cumulative chronic exposure to lead on July 23, 1999. *Grayson v. Gulf Oil Co.*, 292 S.C. 528, 357 S.E.2d 479 (1987).

McConico's blood lead levels routinely ranged in the mid to upper 40s. McConico was placed in the medical removal program (MRP) because of dangerously elevated blood lead levels. McConico's acute and cumulative chronic exposure to lead continuously aggravated her blood pressure. McConico received constant treatment from the medical physicians employed by ESB, Inc., the Exide Corporation and Yuasa-Exide, Inc. McConico took hypertensive medications on a regular basis during the majority of her twenty-five (25) years of employment.

Despite utilizing blood pressure medication and routinely seeing the plant physician for medical treatment, McConico suffered a stroke. Dr. J. Routt Reigart opined that blood lead levels in the ranges of McConico either caused or aggravated McConico's hypertension.

(App. p. 139). Dr. Reigart opines that there is a clear association between the development of hypertension and the occurrence of heart disease (cardiac) and stroke. (App. p. 472)

Again, the Fund presented no evidence to refute Dr. Reigart's expert medical and scientific conclusions. To this end, in absence of medical evidence to the contrary, the Commission committed reversible error in denying reimbursement. *State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 762 S.E.2d 19 (2014); *Grayson v. Gulf Oil Co.*, 292 S.C. 528, 357 S.E.2d 479 (1987); *See also Burnette v. City of Greenville*, 737 S.E.2d 200 (Ct. App. 2013).

**II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE COMMISSION AND CIRCUIT COURT ERRED AS A MATTER OF LAW IN THE ABSENCE OF ANY EVIDENCE TO REFUTE THE CLAIM FOR REIMBURSEMENT AND IGNORED LONG-ESTABLISHED JUDICIAL PRECEDENT IN ITS FAILURE TO ORDER REIMBURSEMENT FROM THE SECOND INJURY FUND.**

The Fund argues that there was never an "award" made in this case for which Respondent may be reimbursed because a formal decision or order from the Commission was never promulgated. This position has never been argued by The Fund and is not preserved for appeal. However, even if this Honorable Court considers Respondent's argument, Respondent submits that this position is disingenuous in light of the fact that, in practice, the South Carolina Second Injury Fund has regularly reimbursed claims that have been settled without a formal hearing and decision of the Commission. This argument is further disingenuous in light of the fact that the parties were ordered by the Commission to mediate the Sumter battery plant lead claims.

Respondent submits it would be patently unfair to deprive it of reimbursement from the Fund based on the argument that they have not made a requisite payment to McConico because the parties settled the claim at mediation. The parties were ordered by the Commission to

mediate the Sumter battery plant claims due to the large number of claimants for whom the Steinberg Law Firm initially requested adjudicatory hearings.

The Fund cites South Carolina Code Section 42-9-400(a) in which the “award” language is used. *S.C. Code Ann. § 42-9-400(a)(1999)*. This section only requires the carrier and employer to pay all medical and/or 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, but instead to ensure timely payments by the carrier/employer for a claimant’s injury. There is no provision of Section 42-9-400 which requires a formal decision and order prior to consideration for reimbursement from the Fund. *S.C. Code Ann. §42-9-400 (2015)*. Specifically, section 42-9-400(e) references the term “**settlement**” along with the terms- award, compensation agreement and adjudication- with respect to reimbursement. *S.C. Code §42-9-400(e)(1999)*.

In a futile attempt at a persuasive argument, The Fund relies on Section 42-9-5 regarding this non-issue. *S.C. Code Ann. §42-9-5 (1999)*. Respondent notes that section 42-9-5 is only applicable to post-July 2007 injuries. *Id.* The injury occurred in July 1999, and as such, section 42-9-5 is not applicable. *S.C. Code Ann. §42-9-5*.

**III. THE SOUTH CAROLINA COURT OF APPEALS CORRECTLY DETERMINED THAT THE COMMISSION AND THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE REIMBURSEMENT CLAIM WAS BARRED DUE TO A PURPORTED UNTIMELY SUBMISSION PURSUANT TO SECTION 42-7-320(B)(2).**

The Fund focuses only on the post-employment medical records in its brief and ignores 25 years of McConico’s medical history which the Fund had in its possession on June 30, 2011. These 25 years of medical reports comprise approximately 108 printed pages, which were compiled during McConico’s employment tenure at the Sumter battery manufacturing facility.

The printed reports also contain expert medical opinions on causation; references to McConico's pre-existing medical conditions; medical opinions on the impact of cardiac disease (hypertension), etc. upon McConico's health; and McConico's increased disability resulting from the cardiac disease, coronary artery disease and heavy metal poisoning. (App. pp. 141-216).

The Fund presented no medical evidence to refute the medical expert reports and opinions submitted into evidence by Respondent. Rather, the Fund dedicates all of its focus on McConico's condition after she suffered a permanent disabling stroke in July, 1999, the last day of her employment, as the basis of its defense. The records pertaining to McConico's health after she last worked or "post-employment records" were submitted into to the Fund on a compact disc, which the Fund could not access. The post-employment records were the only documents that the Fund could not initially read. The Fund's brief totally ignores the 108 pages of medical reports and expert opinions that were delivered in printed form and is the basis for Respondent's entitlement to reimbursement.

Upon learning of the Fund's inability to read the documents contained on the disc, Respondent immediately rectified the issue by providing a new disc containing the same documents within three (3) days. A technical error in service upon another party that is rectified without prejudice to the other party does not act as a bar. See e.g., *Dalenko v. News and Observer Publishing Co.*, U.S. District Lexis 136787 (2010). In *Dalenko*, Defendants timely submitted their Answer to Plaintiff's Complaint, but relied upon electronic service. *Id.* Plaintiff was not served with Defendant's responsive pleadings in a timely fashion because of the omission of the Certificate of Service. The United States District Court in *Dalenko* refused to enter an Order of Default reasoning that while Defendants may have mistakenly relied upon electronic service, the error which resulted in Plaintiff not receiving the responsive pleadings did

not arise to the level of bad faith requiring an entry of default. Id.

In addition, a review of the record reflects the Fund never argued that the post-employment medical records contained **“required information for consideration of accepting a claim to the Second Injury Fund...”** *S.C. Code Ann. §42-7-320(B)(2) (2015)*. Because of McConico’s catastrophically debilitating stroke, the post-employment records shed no new light on the status of her medical condition regarding her ability to work or whether the cardiac disease posed an obstacle or hindrance to employment or reemployment. *S.C. Code Ann. §42-9-400 (2015)*. As a matter of fact, the post-employment records, which the Fund now argues were needed for it to decide whether to accept or deny Respondent’s claim for reimbursement, address unrelated medical treatment obtained by McConico after she was deemed disabled by her employer and other entities, *e.g.*, mammograms, degenerative joint disease of the right knee, abdominal ultrasounds, bronchitis, etc. (App. pp. 235-308). Clearly, the medical conditions addressed in the post-employment records were neither relevant nor material to the Fund’s decision-making process with regard to reimbursement.

What is most perplexing about the Fund’s position is that it contended the post-employment medical documents should be stricken from the record. Candidly, if these documents were so critical to the Fund’s decision-making process, logic and conventional wisdom would dictate that the Fund would desire for the Court to review these purportedly important post-employment records in order to persuade this Court that the decisions of the Circuit Court and the South Carolina Workers’ Compensation Commission should be affirmed and the Court of Appeals decision reversed. On the contrary, the reason the Fund seeks the exclusion of the post-employment records is because the evidence exposes an obvious legal error

and abuse of discretion by the South Carolina Workers' Compensation Full Commission in striking these "important" records from consideration.

The Fund has never argued that any single document contained in the post-employment records was **required and necessary** for its decision-making process. More importantly, the Commission's findings of fact do not reveal that the Full Commission examined the post-employment records to determine whether these records were **required and necessary**. As a matter of fact, no monies were paid to McConico for past, present or future medical treatment in order to avoid Medicare issues.

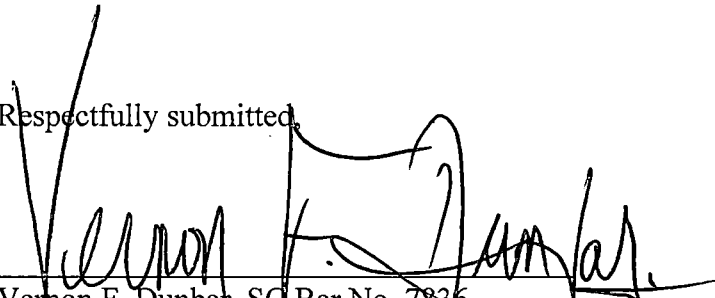
As an aside, had Arrowpoint's application for reimbursement included a request for reimbursement of past, present and future medical treatment, then the post-employment medical records would have been required and necessary for the Fund's consideration. (App. pp. 588-589 and **NOTE**). Because Arrowpoint's request is not for reimbursement of medical costs, but only permanent disability benefits or indemnity, the Fund's argument is without merit. (App. pp. 594-595).

## CONCLUSION

This Court's rules concerning further review of a decision by the Court of Appeals require the identification of "special and important reasons" for such review. The Second Injury Fund has failed to show any such valid reason for further review. Simply put, the Court of Appeals decision regarding reimbursement from the South Carolina Second Injury Fund is based upon long-established legal precedent and substantial evidence contained in the record. The Second Injury Fund has not identified any issue that has been wrongly decided, overlooked, or misunderstood.

Because the Court of Appeals decision in this case is supported by substantial evidence and is in accordance with the law of the state, Arrowpoint Capital Corporation urges the Court to deny the Second Injury Fund's plea for further review.

Respectfully submitted,



Vernon F. Dunbar, SC Bar No. 7836  
McAngus Goudelock and Courie  
55 East Camperdown Way, Ste. 300  
Post Office Box 2980  
Greenville, South Carolina 29602  
Telephone: 864-239-6735  
Email: Vernon.Dunbar@MGClaw.com

*Attorneys for Respondent*