

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable W. Jeffrey Young

Appellate Case No.: 2017-001956

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

v.

South Carolina Second Injury Fund, ...Petitioner.

[In Re: Joe Mathis, Employee/Claimant v. Yuasa Exide, Incorporated, Employer]

APPENDIX – VOLUME II

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Court Tracking No. 2014-002212
Civil Action No. 2013-CP-43-02283
WCC File No. 9832185

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

v.

South Carolina Second Injury Fund, Respondent,

[In re: Joe Mathis, Employee/Claimant]

v.

Yuasa Exide, Incorporated, Employer]

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court err in denying Appellants' claim for reimbursement from the South Carolina Second Injury Fund where Appellants met all elements for reimbursement pursuant to S.C. Code Ann. § 42-9-400?

STATEMENT OF THE CASE

This appeal arises before this honorable Court based upon Appellants' entitlement to reimbursement from the South Carolina Second Injury Fund for injuries suffered by Mr. Joe Mathis at the Sumter battery manufacturing facility (also known as Yuasa-Exide) on or about November 30, 1998.

I. GENERAL INFORMATION CONCERNING LEAD CASES AND SECOND INJURY FUND REIMBURSEMENT

A. The South Carolina Second Injury Fund

The South Carolina Second Injury Fund ("the 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 the subsequent (second) workplace injury. The Fund was designed to encourage the employment and retention of disabled workers by providing financial relief to employers. Thus, the Fund removes any financial incentive an employer may have to terminate a handicapped worker who may increase the employer's liability. See generally State Workers' Compensation 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 n. 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).

Reimbursement from the Fund is governed by South Carolina Code Annotated Section 42-9-400. 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 permanent physical impairment (a/k/a preexisting 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 or obstacle to employment or re-employment (§ 42-9-400(d)); and (4) for pre-July 1, 2007 injuries, 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)).

The Fund is funded by annual assessments paid by carriers, self-insurers, and the State Accident Fund. S.C. Code Ann. § 42-7-310(d)(2) (Supp. 2014). It is important to note that the funds used to reimburse carriers who meet the requirements for Second Injury Fund reimbursement do not derive from tax revenue or some other source of state funding, but rather from the assessments paid by carriers. In 2007, the Workers' Compensation Act underwent a substantial reformation. As part of the reform, the Second Injury Fund officially terminated on July 1, 2013. S.C. Code Ann. § 42-7-320(a) (Supp. 2014). The State Budget and Control Board was tasked with winding down the affairs of the Fund and providing for its "efficient and expeditious closure." *Id.* Despite the fact that insurance carriers are no longer entitled to the benefit of reimbursement from the Fund for payment of second injury benefits, they continue to pay assessments to the Fund. See, e.g., Approved Second Injury Fund Closure Plan, available at

<http://www.scsif.sc.gov> (noting the mechanism for funding payment and administration of Fund obligations is by equitable assessments upon each carrier through FY 2018).

B. The Sumter Battery Manufacturing Facility

In 1961, a battery manufacturing facility began operations in Sumter, South Carolina. The initial owner of the company was ESB, Inc. The facility first produced nickel-plated batteries, then, around 1974, it converted its manufacturing operations to the production of lead batteries. In 1983, there was a change of ownership of the plant, as ESB, Inc., was sold off to Exide Corp. Subsequently, on June 10, 1991, Yuasa Battery (America), Inc. purchased the industrial division of Exide Corp. Thereafter, the company became Yuasa-Exide, Inc. and then Yuasa, Inc. In 2000, Yuasa, Inc. sold off its industrial division to EnerSys. (R. p. 6.) Therefore, most of the employees at the center of these reimbursement claims worked for at least three different employers. During those tenures of employment, the employees experienced heavy metal poisoning and a plethora of other health maladies.

C. Chronic Lead Exposure

There is no dispute that employees who worked at the Sumter battery manufacturing facility were exposed to various amounts of lead on a daily basis through inhalation, ingestion, and dermal contact. Employees working in the plant's grid casting, battery assembly, and plate processing departments were exposed to the greatest amounts of lead. (R. p. 280-292.)

The dangerous health problems associated with lead exposure are numerous. Lead exposure has been associated with various maladies, such as brain damage and damage to the peripheral nerves of the body, hypertension, heart disease, anemia, kidney

failure, kidney cancer, and gout. Once lead is absorbed into the body, it is stored in the tissues and bones. The mean life of lead in bone is thirty (30) years, and it is a cumulative toxicant. Because lead can be stored for such a long period of time, it can cause certain conditions, such as hypertension, heart disease, kidney failure, and cognitive impairment to become worse with age. (R. pp. 293-297, 311-327.)

Drs. Edward L. Baker, Howard Hu, and J. Routt Reigart reviewed the battery assembly processes of the Exide plant, as well as the health records of workers there. They concluded that Exide workers had elevated blood lead levels that led to the development or aggravation of hypertension, heart disease, kidney failure, nervous system damage, gout, and kidney cancer. (R. pp. 294-297.)

Prior to 1980, the federal government had not established permissible exposure limits regarding lead. Further, there were no universally recognized industry standards regarding permissible exposure limits to lead. Thus, prior to 1980, chronic exposure to lead often resulted in workers' blood lead levels routinely exceeding 100 micrograms per deciliter of blood ($\mu\text{g}/\text{dL}$).

Beginning in 1978, OSHA began recommending permissible exposure limits as measured by blood lead levels. OSHA first promulgated legally enforceable regulations in 1983. OSHA's current permissible exposure limit guidelines require an employer to immediately remove a worker from a lead laden environment when his/her blood lead levels reach 60 micrograms per deciliter of blood. Moreover, if an employee has blood lead levels of 50 micrograms per deciliter of blood or more for two consecutive blood sampling tests, the worker is to be removed from the work environment and placed into a medical removal program ("MRP"). 29 C.F.R. 1910.1025(k), *et seq.* (R. p. 373.)

Presently, there is a debate among lead industry experts as to whether the current permissible exposure limit is sufficient to avoid various health maladies associated with chronic lead exposure. A desirable blood lead level is less than 10 µg/dL, and expert reports state the average blood lead level for the general population is 3 µg/dL. (R. p. 296, 304.) Employees of the Sumter battery plant had blood lead levels as high as 102 µg/dL, with many whose blood lead concentrations remained above 50 µg/dL for extended periods of time. (R. p. 296.)

In an effort to better protect its employees, the Sumter plant reduced the permissible exposure limit below the OSHA threshold. An employee would be placed on MRP if a six month lead level average or three samples of blood registered greater than 36 micrograms per deciliter of blood. A medical removal program was also indicated if there was a one-time blood lead level reading of 44 micrograms per deciliter of blood or greater. (R. p. 392.)

**II. CASE OF ARROWPOINT CAPITAL CORPORATION V. S.C. SECOND INJURY FUND,
IN RE: JOE MATHIS V. YUASA-EXIDE, INC.**

Joe Mathis ("Claimant") alleged that occupational exposure to lead and other toxins resulted in injuries to his brain, kidneys, liver, musculoskeletal system, cognitive system, pulmonary system, and neuropathic system on or before November 30, 1998. (R. pp. 44-45.) The parties entered into a Consent Scheduling Order on August 13, 2009, following a scheduling conference before Commissioner Derrick Williams on April 22, 2009. As part of the scheduling order, the parties were compelled to participate in mediation conferences the week of December 7, 2009. The South Carolina Second Injury Fund participated in this scheduling conference and was a signatory to the Consent Scheduling Order. (R. pp. 37-43.)

Following mediation, the parties entered into a Settlement Agreement, Release, and Order on the underlying claim. The Agreement was approved by the South Carolina Workers' Compensation Commission on November 8, 2010. The claim was settled for ninety-five thousand and no/100ths dollars (\$95,000.00). (R. pp. 25-36.)

The Fund was placed on notice of Appellants' reimbursement claim on April 20, 2010. On June 28, 2011, Appellants timely submitted documents in support of the reimbursement claim to the South Carolina Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-7-320. The Second Injury Fund denied reimbursement.

Appellants filed a Form 54, Request for Hearing, on October 28, 2011. Respondent filed a Form 55 on November 18, 2011, denying Appellants' entitlement to reimbursement. (R. pp. 46-47.) A hearing was held before the Honorable Andrea C. Roche on August 13, 2012, in Sumter, South Carolina. (R. pp. 147-159.)

The Hearing Commissioner issued a Decision and Order dated November 27, 2012, in which she found Appellants did not meet the requirements for reimbursement from the South Carolina Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-9-400. (R. p. 24.) Specifically, the Hearing Commissioner concluded as a matter of law that Appellants failed to meet their burden to prove that Claimant suffered from a preexisting condition that was permanent and serious enough to be a hindrance to or obstacle to Claimant's employment. (R. p. 23.) Moreover, the Hearing Commissioner concluded as a matter of law that Appellants failed to meet their burden to prove that Claimant's preexisting condition was aggravated by or combined with the work-related injury to create substantially greater medical costs and permanent disability. (R. p. 23.)

Appellants timely filed a Form 30, Request for Commission Review, on December 10, 2012. (R. p. 53.) The appeal was heard by the Full Commission Appellate Panel on September 16, 2013. (R. pp. 120-146.) By order dated December 12, 2013, the Commission fully affirmed the order of the Hearing Commissioner. (R. pp. 7-14.) Appellants timely filed an appeal to the Sumter County Court of Common Pleas on December 19, 2013. The parties appeared before the Honorable W. Jeffrey Young on June 3, 2014. (R. pp. 55-119.) By Order filed September 16, 2014, Judge Young affirmed the order of the Commission. (R. pp. 1-6.) Appellants timely filed a Notice of Appeal to this honorable Court on October 6, 2014.

STATEMENT OF FACTS

Joe Mathis, Jr., the claimant, is a 64 year old divorced male. He has a high school education and is the father of two adult children. (R. p. 176.) Claimant was hired by ESB, Inc. on September 15, 1975. Claimant worked continuously for the Exide Corporation and its successor corporation, Yuasa-Exide, Inc., until November 30, 1998. He testified he was terminated for a mistake he made in pouring lead into the molds. (R. pp. 234-235.) Claimant initially received good employment performance reviews (R. pp. 269-270), but toward the end of his employment tenure, he was not filling out his usage log form appropriately and had been reprimanded for unacceptable attendance and failure to observe Health and Safety Rules. (R. pp. 271.)

It is undisputed that Claimant was exposed to lead at extremely dangerous levels while working at the Sumter plant. He worked in several different areas but primarily worked in the small parts casting area. (R. p. 173.) During Claimant's twenty-three year employment tenure, his blood lead levels ranged from 9 to 64 micrograms per deciliter of blood ($\mu\text{g/dL}$), with several test results above 40 $\mu\text{g/dL}$. (R. pp. 194-197, 203-207.) Claimant's highest blood lead level readings, exposing him to acute and dangerous levels of lead, occurred prior to the promulgation of OSHA Regulations in 1983 and prior to Claimant working for Yuasa-Exide from 1991 onward. Claimant's elevated blood lead levels would have required him to be medically removed from work under the plant policy, but he does not recall removal at any time. (R. pp. 187, 249.) He used a respirator when his blood lead levels went up, and he showered before leaving the battery plant, but only in the last seven to eight years of his employment. (R. pp. 187, 249, 251.)

Following his time at the Sumter Battery plant, Claimant went on to work for Federal Mogul and then through employment agencies as a material handler, fast food worker, and helper at an animal shelter. He was unemployed and picked up occasional jobs as a painter around the time he settled his underlying claim. (R. pp. 173, 223-225.)

Dr. Barry Weissglass evaluated Claimant on June 24, 2009. At that time, Claimant complained of non-cardiac chest pain, aching in his right arm and right thumb, intermittent shortness of breath, reduced memory functioning, and some depression and sleep difficulties. (R. p. 187.) Claimant had a pinched nerve that caused some numbness just after he left work at the battery plant (R. pp. 231-233.) Dr. Weissglass stated Claimant experienced a health condition which was caused, aggravated, or accelerated by his occupational lead exposure at the Exide plant. He stated "[t]he lead exposure which he experienced as an employee of the Exide plant was either a significant contributor, accelerating factor, direct cause, or aggravating factor for the medical problems he now suffers." (R. p. 190.) Dr. Weissglass' diagnosis was toxic encephalopathy with impaired attention and memory deficits. He assigned 15% impairment to Claimant's brain due to toxic encephalopathy. (R. p. 189.) Dr. Weissglass believed this condition was permanent and would deteriorate, resulting in increased medical costs. He further believed these cognitive and memory impairments would limit Claimant's activities of daily living and would result in the need for significant supervision at work. (R. p. 190.)

L. Randolph Waid, Ph.D. performed a neuropsychological evaluation on September 2, 2009. Dr. Waid determined Claimant had borderline intellectual functioning, functional illiteracy, and deficits in verbal comprehension, perceptual organization, working memory, and processing speed. He also determined Claimant had

reduced capacity for immediate learning/memory and difficulty sustaining attention/concentration. (R. p. 186.) Claimant's achievement tests were consistent with functional illiteracy, and his intelligence tests placed him in the second percentile compared to age related peers. (R. pp. 176, 184.) Dr. Waid diagnosed claimant as having Cognitive Disorder and concluded that Claimant's cognitive dysfunction was related to lead exposure, noting:

Mr. Mathis is demonstrating a cluster of neurocognitive deficits that are commonly associated with a history of exposure to neurotoxic agents. Mr. Mathis was not highly complaining of neurocognitive deficits except for increased absentmindedness/forgetfulness . . . The etiology for his difficulties is a history of exposure to neurotoxins in the workplace as well as interference to some ongoing depression.

(R. p. 186.) Claimant's vocational evaluator, David R. Price, M. Ed., CRC, believed Claimant was incapable of full-time gainful employment and had minimum wage earning potential as a part-time, semi-skilled worker. (R. p. 179.) He noted Claimant's intelligence test scores equated to borderline mental retardation. (R. p. 178.)

The finding of mild mental retardation was corroborated by Appellant's expert neuropsychological witness, Dr. Nicholas Lind. (R pp. 169-172.) Dr. Lind highlighted Claimant's high school experience and noted that Claimant may have missed many fundamentals in school and was always behind in what others appeared to know. Dr. Lind went on to state "his history does suggest that he may have been limited in what he learned in school and he may have gotten by with the impaired intellect witnessed in the recent evaluation." (R. p. 171.) Dr. Lind stated it was difficult to determine Claimant's true premorbid functioning and therefore necessary to utilize a process of elimination in determining whether Claimant's lead poisoning was a direct cause of his cognitive impairment. Dr. Lind noted that Claimant's intelligence measure placed him in the

mildly mentally retarded range and his achievement scores suggested a fourth grade reading level. Dr. Lind emphasized that these scores were inconsistent with the report that Claimant was a high school graduate but consistent with Claimant's educational experience, in which he went to school only about three days a week up until he was 13 years old and then felt he missed many of the fundamentals of reading and writing. (R. p. 172.)

In support of its application for reimbursement, Appellant submitted into evidence an Employee Knowledge Affidavit (R. pp. 264-66) and Second Injury Fund Medical Questionnaires from Dr. Edward L. Baker and Dr. Eugene Shippen. (R. pp. 163-68.) In Claimant's Employee Knowledge Affidavit, Claimant stated he was aware of no preexisting conditions prior to sustaining a work related accident or contracting an occupational disease. (R. pp. 264-66.)

Dr. Baker opined that Claimant had pre-existing conditions of heavy metal poisoning and brain damage (cognitive impairment) and that Claimant's exposure to lead either aggravated or combined with his underlying pre-existing conditions to render Claimant permanently disabled. (R. pp. 163-65.) Dr. Baker commented that Claimant's cognitive impairment was aggravated by his exposure to lead, rendering him permanently disabled. (R. p. 163.) Dr. Baker also opined that, due to Claimant's preexisting conditions, he lost more time from work, sustained substantially higher disability, and experienced increased medical costs than he would have solely from the last exposure to lead on November 30, 1998. (R. p. 164.) Dr. Baker specifically affirmed that Claimant suffered from heavy metal poisoning prior to November 30, 1998 and that his last exposure to lead constituted a new accidental injury. (R. p. 164.) He further believed

Claimant's exposure to lead resulted in substantially greater disability as a result of the combined effects of the preexisting conditions and heavy metal poisoning or by the aggravation of the preexisting conditions (including heavy metal poisoning) (R. p. 165.)

Dr. Baker is an imminently qualified physician in the area of occupational and environmental medicine. He is board certified in internal medicine and preventive/occupational medicine. He was trained in epidemiology at the Centers for Disease Control and Prevention and served on the faculty for the Harvard School of Public Health from 1980 to 1985. He went on to serve as Deputy Director of the National Institute for Occupational Safety and Health, Assistant Surgeon General in the U.S. Public Health Service, and Director of the CDC's Public Health Practice Program. He has led numerous research studies concerning the exposure of workers to toxic substances in the workplace and currently serves as professor of health policy and epidemiology at the University of North Carolina. (R. pp. 276-77.) Dr. Eugene Shippen agreed with the opinions of Dr. Baker. (R. pp. 166-68.) Dr. Shippen is a board certified physician and expert in lead toxicology, with twenty-five years of practical experience dealing with lead toxicology. (R. pp. 426-27.)

In their global report, Drs. Baker, Hu, and Reigart noted that exposure to a neurotoxic agent such as lead causes brain damage which is manifest only later in life during the time when normal aging occurs, thereby accelerating the aging process. (R. p. 295.) Claimant testified in his deposition he had some memory problems that got worse as he got older. (R. pp. 236-37.)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (“APA”) establishes the standard for judicial review of decisions by the Workers’ Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2014), Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Appellants submit that this case concerns issues of law and of fact; therefore, two separate standards of review are applicable.

The question of statutory interpretation is a question of law for the court, which requires a *de novo* standard of review, while the question of whether Appellants satisfied their burden of proof in establishing the elements for reimbursement is a question of fact, requiring the application of the substantial evidence standard of review.

Under the APA, a reviewing court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in light of the reliable, probative, and substantial evidence in the whole record. S.C. Code Ann. § 1-23-380(5)(d),(e) (Supp. 2014); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010). Substantial evidence is “not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion that the administrative agency reached or must have reached in order to justify its action.” Lark, 275 S.C. at 135, 276 S.E.2d at 306.

In addition, a reviewing court should reverse, remand or modify a decision of the Workers’ Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Case law unequivocally

establishes that statutory interpretation is a question of law, and the appellate court “is free to decide matters of law with no particular deference to the fact finder.” King v. Int'l Knife & Saw - Florence, 395 S.C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011); S.C. Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). Likewise, the determination of legislative intent in a statute is a matter of law. Wehle v. S.C. Retirement Syst., 363 S.E. 394, 611 S.E.2d 240 (2005); Liberty Mutual Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (2005). In summary, an appellate court must review the Commission's interpretation of a statute as a question of law and must review the Commission's application of the facts to the statute as a question of fact under the substantial evidence standard of review. See King, 395 S.C. at 442, 718 S.E.2d at 229.

ARGUMENT

THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' CLAIM FOR REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND.

Appellants are entitled to reimbursement from the South Carolina Second Injury Fund, as they have met their burden in proving the elements for reimbursement under S.C. Code Ann. § 42-9-400. Appellants have proven that Claimant had permanent preexisting impairments/conditions that constituted a hindrance or obstacle to his employment or reemployment. They have further proven that Yuasa-Exide had knowledge of these preexisting conditions prior to Claimant's last date of exposure to lead on November 30, 1998, or that such conditions were unknown to Claimant during the time he worked there. Finally, they have proven that the preexisting conditions combined with or were aggravated by the lead exposure (the workplace injury) to result in substantially greater disability than that which would have resulted from the lead exposure alone. Because Appellants satisfied all of these elements, the Circuit Court erred in denying their claim for reimbursement from the Fund. Therefore, Appellants respectfully request that the Order of the Circuit Court be reversed.

A. The Circuit Court erred in finding that Claimant did not have any permanent physical impairments prior to his workplace injury.

The Circuit Court erred in finding that Claimant's heavy metal exposure was one injury. The Circuit Court further erred in finding that Claimant did not have brain damage or cognitive dysfunction prior to his occupational exposure. The Court committed legal error in ignoring South Carolina authority that provides a "preexisting" impairment, in the context of Second Injury Fund reimbursement, need only precede the subsequent disability. The Court further ignored South Carolina case law that establishes

a preexisting impairment/condition and subsequent injury may occur at the same employer. There is no authority supporting the Court's reasoning that Claimant must have had permanent physical impairments that preexisted Claimant's first-ever exposure to lead.

Claimant suffered from chronic lead exposure throughout his employment at the plant, as indicated by his blood samples. The evidence in the record establishes that his subsequent exposure to lead while employed at the plant continuously aggravated an underlying condition of heavy metal poisoning and cognitive impairment/mental retardation. Moreover, Claimant's last employer, Yuasa-Exide, hired Claimant in 1991 and took on the liability of his past exposure to toxins in the battery plant. As such, Claimant's preexisting heavy metal poisoning and cognitive impairment did precede the subsequent disability incurred from an injury at Yuasa-Exide.

1. The Circuit Court's reasoning concerning Claimant's "preexisting" impairments is contrary to South Carolina law and, due to the Court's legal error, its order should be reversed.

There is no South Carolina authority that suggests the term "preexisting," as used in the context of Second Injury Fund reimbursement, means that an impairment must be present prior the employment where the subsequent injury occurs. Rather, pursuant to the plain language of the reimbursement statute, a permanent physical/preexisting impairment only needs to be present prior to the subsequent disability. S.C. Code Ann. § 42-9-400(a) (Supp. 2014). South Carolina law establishes that carriers have been reimbursed for preexisting and subsequent injuries that occur at the same employer.

The Circuit Court notes in its order that "[t]he Commission's decision that Claimant did not have brain damage prior to his occupational exposure was supported by

the substantial evidence in the record” and further that “Claimant’s exposure to lead during his twenty-three (23) years of exposure constitutes a single occupational exposure based on the plain meaning of the statute.” (R. p. 3.) The Court goes on to state that “[t]he plain meaning of the statute requires that the preexisting condition predate the work injury, which in this case is the occupational exposure.” (R. p. 4.) These statements are a misunderstanding of the law concerning Second Injury Fund reimbursement and occupational disease cases.

The Circuit Court affirmed the Commission’s reasoning that none of Claimant’s alleged permanent impairments preexisted his workplace injury, not because there was lack of evidence establishing the conditions were present prior to his date of accident of November 30, 1998, but instead because the preexisting conditions did not exist prior to Claimant’s first ever day of employment at the Sumter plant in 1975, the first date of his occupational exposure. According to this reasoning, Claimant’s compensable work injury (occupational exposure to heavy metal/lead) and its manifestation that brought about Claimant’s disability (toxic encephalopathy thought to be related to heavy metal/lead exposure) occurred on his first date of employment. Thus, the lower courts seem to have inserted an additional requirement for reimbursement from the South Carolina Second Injury Fund, namely, that a preexisting impairment must be one that precedes the Claimant’s employment with the employer responsible for the ultimate workers’ compensation claim. Such logic is unsound and is not supported by authority in South Carolina.

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(D) (Supp. 2014). The disablement resulting from an occupational disease is treated as an injury by accident. S.C. Code Ann. § 42-11-40 (Supp. 2014). Case law explicitly holds that the “accident” in occupational disease cases occurs “when the employee becomes disabled and could, through reasonable diligence, discover that his condition is compensable.” Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999); *see also* Hanks v. Blair Mills, Inc., 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985), Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), and Bass v. Isochem, 365 S.C. 454, 476, 617 S.E.2d 369 (Ct. App. 2005).

The South Carolina Supreme Court expounded on the timing of the date of injury in occupational disease cases by citing 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 . . . start the claims period running, establish claimant’s right to benefits, and fix the employer and insurer liable for compensation, the date of disability has been found to be the most satisfactory. . . . it is the moment at which in most instances the claimant ought to know he 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.

Glenn v. Columbia Silica Sand Co., 236 S.C.13, 19-20, 112 S.E.2d 711, 714 (1960).

With respect to the statute of limitations for occupational disease claims, the two-year period does not begin to run until the employee has been definitively diagnosed as having an occupational disease and has been notified of the diagnosis. S.C. Code Ann. § 42-15-40 (Supp. 2014). In summary, South Carolina law suggests that an occupational disease does not occur on the first day of occupational exposure, as the lower courts in this case

suggested by their findings. Rather an occupational disease is the culmination of prolonged exposure to a disease-causing agent.

In this case, Claimant's date of injury, chosen by Claimant/his attorney on the underlying claim and not by Appellants, is November 30, 1998, his last official date of employment with Yuasa-Exide. Therefore, the date of disability can be no earlier than November 30, 1998, and his date of injury most definitely cannot be the first day he ever worked at the plant. Given that South Carolina Code Annotated Section 42-9-400 provides for reimbursement where there is a preexisting condition prior to disability incurred from a subsequent accident, the preexisting conditions only have to precede the subsequent disability.

Given the law cited above, it follows, then, that Claimant's preexisting impairments only had to preexist, at the earliest, his date of injury of November 30, 1998. There is nothing in the record to support the Commission's conclusion, with which the Circuit Court agreed, that there were no preexisting impairments because the twenty-three year exposure constituted one single occupational injury. Claimant's preexisting conditions did not have to exist prior to his first day of work at the Sumter battery plant.

Moreover, South Carolina Code Annotated Section 42-9-400(a) states that the permanent physical impairment may be "from any cause or origin." South Carolina courts have found employers and carriers are entitled to reimbursement where the Claimant's underlying preexisting condition arose out of employment with the same employer as the injury for which the employer seeks to be reimbursed from the Fund. See, e.g., Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (2012) (holding the carrier was entitled to partial reimbursement

from the Fund where the claimant's 2004 back injury combined with or aggravated a preexisting back injury that occurred on the same job in 2001) and State Workers' Compensation Fund v. South Carolina Second Injury Fund (In Re: Warren M. Hunt v. S.C. State Forestry Comm'n), 313 S.C. 536, 443 S.E. 2d 546 (1994) (holding that the State Workers' Compensation Fund was entitled to reimbursement from the Second Injury Fund where a firefighter was retained by his employer after he was diagnosed with coronary artery disease and, twelve years later, was rendered totally disabled because of his heart disease and arteriosclerosis). See also Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010) (noting that the Fund failed to cite any authority for its position that a condition had to preexist a claimant's occupational exposure at Yuasa-Exide)¹ and S.C. Code Ann. § 42-9-400(c) (providing for reimbursement where an employer *retains* an employee after it acquires knowledge of a permanent physical impairment).

Given this authority, Appellants submit that they are not required to prove that Claimant had an impairment that pre-existed his first day of employment at the Sumter

¹ The Hearing Commissioner in this reimbursement case found that the carrier was entitled to reimbursement from the Second Injury Fund as a consequence of heavy metal poisoning resulting from continuous lead exposure throughout his employment tenure at the plant. The Commissioner noted that the exposures resulted in continuous and aggressive injuries and accelerated the claimant's kidney failure, which was discovered after the claimant's employment at the plant and exposure to lead. In turn, the subsequent exposures accelerated and aggravated the claimant's kidney disease, and the subsequent exposures to lead were a direct cause of the kidney disease progressing from Stage I to Stage V. The claimant's last injury resulting from lead exposure combined with the last stage of renal kidney disease and aggravated the preexisting condition to cause substantially greater disability. (R. pp. 14-16.) Although Appellants do not offer this opinion as precedent, it does illustrate the Commission's previous conclusion that lead exposure/heavy metal poisoning can be both the preexisting permanent impairment (in that case manifesting itself as kidney disease) and that subsequent exposures to lead were considered the subsequent injuries, as they continuously accelerated and aggravated the claimant's underlying conditions. The Supreme Court ultimately disagreed with the Fund's position that the carrier was not entitled to reimbursement because the preexisting impairments did not preexist the occupational exposure. (R. p. 442.)

battery plant. Appellants are entitled to reimbursement because they retained Claimant in employment despite knowledge of his permanent impairments.

2. The reliable, probative, and substantial evidence in the record establishes that Claimant suffered from a permanent physical impairment of heavy metal poisoning.

The evidence in the record indicates that Claimant suffered from heavy metal poisoning prior to Claimant's date of injury on November 30, 1998. Claimant worked at the plant from 1975 to 1998. During that time, his blood lead levels ranged from 9 µg/dL to 64 µg/dL, with several tests registering above 40 µg/dL. (R. pp. 194-97, 203-07.) The blood lead levels represent both acute and chronic lead poisonings. The questionnaires completed by Drs. Baker and Shippen further support that Claimant had preexisting heavy metal poisoning, and the Fund submitted no evidence to refute these opinions. (R. pp. 163, 166.)

Where there was no evidence presented by the Fund, the Hearing Commissioner abused her discretion in coming to her own conclusion regarding the medical questionnaires. As such, the Commission and Circuit Court erred in affirming the Hearing Commissioner's conclusions. See Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), *cert. denied* Burnette v. City of Greenville, Op. No. 5059 (S.C. Sup. Ct. filed May 8, 2014). In Burnette, the hearing commissioner found that the greater weight of the medical evidence presented did not support the claimant's claim of a lower back injury in 2007. The commissioner based her opinion, at least in part, on a review of an MRI scan of claimant's back. She stated that an MRI scan from 2008 showed only a minimal protrusion, with no greater pathology of any significance as compared to a 2004 MRI scan. Id. at 425, 737 S.E.2d at 205.

The Court of Appeals found that substantial evidence did not support the finding that there was no injury or aggravation of the claimant's lower back injury in 2007. Id. at 427, 737 S.E.2d at 205. The Court was particularly disturbed by the single commissioner's finding regarding the 2008 MRI because there was no evidence such an opinion originated from a medical provider. The Court further found no evidence to challenge the conclusion of the claimant's doctors concerning her lower back pain. Id. at 428, 737 S.E.2d at 206.

The Court noted that the Commission was not bound by the opinions of medical experts and could disregard medical evidence in favor of other competent evidence in the record. However, where there was no evidence to challenge the conclusion of the claimant's experts, the Court could only conclude the opinions stated in the order were the medical opinions of the single commissioner and were not supported by substantial evidence in the record. Id.

In the instant case, the Hearing Commissioner drew her own conclusions based on her reading of the medical evidence. Although the Commissioner operated within her discretion to weigh the evidence and determine the credibility of witnesses, the Fund presented neither evidence nor witnesses for the Commissioner to consider in opposition to the expert opinions of Drs. Baker and Shippen. As such, it was an abuse of the Hearing Commissioner's discretion to determine Appellant's questionnaires were unsupported by the medical evidence in the record, where there was no evidence to the contrary upon which she could base her conclusion.

In affirming the Hearing Commissioner's findings, the lower courts' rulings in this case were against the weight of substantial evidence. Where the evidence presented

regarding the elements of reimbursements was set forth in the medical questionnaires, the lower courts erred in finding they were not supported by the medical evidence.

3. South Carolina authority supports the contention that heavy metal poisoning can be both a preexisting impairment and a subsequent injury.

Appellants submit that Claimant's heavy metal poisoning can be both a preexisting condition and a subsequent injury. In the context of reimbursement cases, the impairment/disease which is aggravated by a work hazard can be both the preexisting permanent physical impairment and the subsequent injury. State Workers' Compensation Fund v. South Carolina Second Injury Fund, 313 S.C. 536, 537, 443 S.E. 2d 546, 547 (1994). This authority speaks both to the Court's interpretation of the reimbursement statute as well as the evidence presented.

In State Workers' Compensation Fund, a firefighter for the State Forestry Commission was diagnosed with coronary artery disease in 1974 and, in 1986, was rendered totally disabled because of his heart disease and arteriosclerosis. The State Workers' Compensation Fund paid the claim relative to the claimant's total disability, but the South Carolina Second Injury Fund denied the carrier's claim for reimbursement. The Court of Appeals found that there had been no "second injury" and the only "injury" was the claimant's 1986 disability. The Supreme Court held this was error and determined that the carrier was entitled to reimbursement because the heart disease was both a preexisting condition and subsequent injury. The Court noted that the claimant's arteriosclerosis and cardiac disease were "permanent physical impairments." Moreover, the claimant's total disability from heart disease in 1986 qualified as a subsequent disability arising out of his employment. Id. at 539, 443 S.E.2d 548.

Similar to the heart disease from which the firefighter in State Workers' Compensation Fund suffered for twelve years prior to his total disability in 1986, Claimant in the instant case suffered from heavy metal poisoning for several years prior to his date of injury on November 30, 1998, as evidenced by his high blood lead levels. Just as the court above determined the firefighter's arteriosclerosis and heart disease were permanent physical impairments and his total disability in 1986 was the second injury, the same reasoning applies to Claimant's preexisting heavy metal poisoning and his subsequent permanent disability as the result of the same. Given the reasoning of the court in State Workers' Compensation Fund, Appellants submit that the lower courts erred in finding that the exposure to lead was one injury and that there were no impairments that preexisted the lead exposure. See also Springs Industries, Inc. v. S.C. Second Injury Fund, 296 S.C. 359, 372 S.E.2d 915 (Ct. App. 1988) (holding the claimant's preexisting cotton dust exposure was a preexisting condition under § 42-9-400 and that her total disability due to byssinosis was the subsequent injury).

In light of the above, Appellants submit that heavy metal poisoning during his employment tenure at the Sumter battery manufacturing facility constituted a preexisting impairment and that Claimant's ultimate disability attributable to the lead exposure constituted the subsequent injury as required by S.C. Code Ann. § 42-9-400. The reliable, probative, and substantial evidence in the record, in addition to South Carolina case law, support this position. Therefore, Appellants respectfully request that this Court reverse the lower courts' findings to the contrary.

4. The reliable, probative, and substantial evidence in the record suggests Claimant suffered from preexisting brain damage/cognitive impairment, and, therefore, the Circuit Court's finding to the contrary should be reversed.

The Court stated in its order that "[m]edical evidence, including neuropsychological evaluation, indicated that Claimant's cognitive deficits, lead/heavy metal poisoning and alleged brain damage were caused by the lead/heavy metal poisoning and did not preexist." (R. p. 4.) Appellants first highlight that, while Claimant's cognitive deficits were thought to be related to his lead exposure, Dr. Weissglass characterized the lead exposure as a "significant contributor, accelerating factor, direct cause, or aggravating factor for the medical problems he now suffers." (R. p. 190.) This is notable because the reimbursement statute in place at the time of Claimant's date of accident provides for reimbursement where there 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. S.C. Code Ann. § 42-9-400(a) (Supp. 2006). Furthermore, causation is not relevant under the reimbursement statute, and the Court's determination that a lead exposure/brain damage causal relationship thereby rendered the brain damage "non-preexisting" constitutes an error of law. As set forth above, the date of measurement for preexisting permanent impairments is the date of injury.

With respect to the evidence weighed, the lower courts appeared to focus their analysis on Claimant's lack of memory/brain problems while he worked for Yuasa-Exide and the fact that he was a high school graduate. However, Dr. Lind noted inconsistencies in Claimant's educational history as compared to his intelligence level. He thought Claimant's scores were more consistent with Claimant's actual educational experience, in

which he went to school in his early years only about three days a week and felt he missed many fundamentals (R. p. 172.) As such, Appellants submit the substantial evidence in the record shows Claimant was suffering from cognitive impairment prior to his employment at the battery plant.

However, even if this Court does not find substantial evidence to support cognitive impairment/mild mental retardation prior to Claimant's employment, Claimant's mental condition deteriorated during his tenure at the plant. Claimant initially received good performance reviews (R. pp. 269-70), but toward the end of his employment tenure, he was not filling out his usage log form and had been reprimanded for unacceptable attendance and failure to observe Health and Safety Rules. (R. p. 271.) Appellants contend that Claimant's cognitive impairment/mild mental retardation—whether caused by the lead exposure or not—preexisted Claimant's last injurious exposure to lead on November 30, 1998. This last injurious exposure aggravated any prior cognitive problems caused by heavy metal poisoning. In the alternative, the last date of accidental injury caused by exposure to lead combined with the previous heavy metal poisonings to render Claimant permanently disabled. These findings would be consistent with the effects of lead noted by Drs. Baker, Hu, and Reigart in their global report, in particular that lead causes brain damage which is manifest only later in life during the time when normal aging occurs, thereby accelerating the aging process. (R. p. 295.)

The questionnaire completed by Dr. Baker further supported that Claimant had preexisting cognitive impairment, and the Fund submitted no evidence to refute this opinion. (R. p. 163.) Pursuant to the reasoning in Burnette, *supra*, in which the appellate

court noted the Commission may not substitute its judgment for that of a medical expert and must base its decision on some other competent evidence in the record; the Court erred in affirming the Commission's decision regarding Claimant's preexisting cognitive impairment.

- 5. Even if the Circuit Court did not err in ignoring South Carolina precedent defining a "preexisting" impairment, Claimant suffered from the permanent preexisting impairment of heavy metal poisoning prior to coming to work for his last employer at the Sumter battery plant.**

Even if the Circuit Court and Commission were correct in interpreting Section 42-9-400 to require a condition to preexist employment with Appellant Yuasa-Exide in order to qualify for reimbursement from the Second Injury Fund, Claimant was employed by several different employers during the course of his employment at the plant. Appellants submit that, under this line of reasoning, the date of measurement for the preexisting conditions would be the date of hire with the employer at the time of the date of accident, not the first day the claimant ever stepped foot into the Sumter battery plant.

Claimant was hired in 1975 by ESB, Inc. In 1983, ESB, Inc. sold the industrial battery business, and Exide Corp. was established. The corporation became Yuasa-Exide in 1991. Claimant's blood lead samples prior to 1991 would have indicated medical removal under the policy in place at the time. (R. pp. 203-07.) Therefore, Claimant suffered from chronic heavy metal poisoning during his employment with Exide Corp. and then became an employee of Yuasa-Exide, Inc.

The Circuit Court affirmed that Claimant was exposed to lead throughout his twenty-three years of employment. If this Court were to agree with the Commission's logic and the Circuit Court's logic affirming the same, Appellants submit that this Court

should find Claimant suffered from preexisting heavy metal poisoning that preceded his employment with Yuasa-Exide.

B. The Circuit Court erred in finding that Appellants did not prove Claimant's preexisting condition was either aggravated by or combined with the work related injury to create substantially greater disability where the reliable, probative, and substantial evidence in the record supports this element of reimbursement.

Substantial evidence in the record establishes that Appellants carried their burden of proof in establishing Claimant had preexisting conditions that combined with or were aggravated by the heavy metal poisoning to result in substantially greater disability. S.C. Code Ann. § 42-9-400(a) (Supp. 2006). In the case at hand, Drs. Baker and Shippen both stated that Claimant's exposure to lead combined with or aggravated the preexisting conditions to result in substantially higher medical costs and permanent disability. (R. pp. 163-68.) Moreover, Dr. Weissglass believed Claimant's condition was permanent and would deteriorate, resulting in increased medical costs. He further believed Claimant's cognitive and memory impairments would limit Claimant's activities of daily living and would result in the need for significant supervision at work. (R. p. 190.) Claimant's vocational evaluator, David R. Price, M. Ed., CRC, believed Claimant was incapable of full-time gainful employment and had minimum wage earning potential as a part-time, semi-skilled worker. (R. p. 179.)

Where a carrier presents medical testimony and evidence to support its case and Fund fails to present evidence to refute it, the only reasonable conclusion, as long as other elements for reimbursement are met, is that the carrier is entitled to partial reimbursement from the Fund. Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 485-86, 730 S.E.2d 324, 327-28 (2012). In Carolinas

Recycling, Claimant sustained a work-related back injury in 2001, for which he sought a second opinion from Dr. William Felmly. Id. at 481, 730 S.E.2d at 325. Claimant strained his back again in 2002 as he was standing up from a bent position, but this injury was not work-related. In 2004, Claimant sustained a second work-related back injury, for which the Carrier sought reimbursement from the Fund. Id. at 482, 730 S.E.2d at 326.

The Commission relied exclusively on the second opinion evaluation of Dr. Felmly in determining that Claimant's 2004 injury did not combine with or aggravate the preexisting condition so as to increase Claimant's disability or medical costs. Id. at 485, 730 S.E.2d at 327. The South Carolina Court of Appeals held the carrier had presented overwhelming medical testimony and evidence that the claimant's preexisting condition combined with or aggravated his subsequent injury. Id. In contrast, the Fund failed to present any expert testimony from a physician who evaluated Claimant after the 2002 and 2004 injuries. Thus, the only reasonable conclusion was that the carrier was entitled to reimbursement from the Fund. Id. at 485-86

As mentioned above, the Commission may not substitute its judgment for that of a medical expert. See Burnette, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012). Moreover, where the Fund did not submit any evidence of its own to refute the questionnaires presented, the Commission erred in finding the medical questionnaires were not supported by the medical evidence in the record.

The Circuit Court cites Carolinas Recycling in support of its decision not to rely on the medical opinions of Drs. Baker and Shippen because they were non-treating physicians. However, the instant matter is distinguishable from Carolinas Recycling because the Commission in Carolinas Recycling had more reliable opinions from treating

physicians on which to rely. In the instant matter, there are no other opinions on which the Fund can rely to support its position that Claimant did not sustain substantially greater disability as a result of a combination or aggravation of a preexisting impairment and a subsequent injury.

Appellants recognize that the Commission is not required to give medical questionnaires conclusive effect to the exclusion of other more compelling evidence. See Ballenger v. Southern Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). However, the key is that there must be *other more compelling evidence*, which was not present in this case. See also Edwards v. Pettit Constr. Co., Inc., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979) ([w]hile a finding of fact of the commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on *evidence of sufficient substance* to afford a reasonable basis for it") (emphasis added).

The Fund had ample opportunity to depose the doctors questioned. They further had the opportunity to present their own documentary evidence in the form of APA submissions. However, the Fund presented no evidence to refute Appellants' evidence. Therefore, the only reasonable conclusion based on the evidence in the record is that Claimant's work-related injury combined with or aggravated his preexisting conditions to create substantially greater disability. Appellants submit that they have met this element for reimbursement from the Second Injury Fund and the Circuit Court's order should be reversed.

C. The Circuit Court erred in weighing the evidence concerning whether Claimant had a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to his employment, where the Commission did not provide any findings of fact concerning this element of reimbursement.

The Circuit Court notes in its Order that Appellants could not rely on the statutory presumption that the Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance to his employment because the condition first had to be preexisting. The Court also noted that Appellants relied heavily on OSHA regulations regarding permissible exposure to lead and that "the statutory reimbursement scheme does not require any deference to OSHA regulations." (R. p. 4.) The Court appears to be weighing the evidence relied upon by Appellants in defining heavy metal poisoning by the high levels of lead to which Claimant was exposed. Such a weighing of evidence concerning the hindrance/obstacle element would be improper.

The Commission never provided Findings of Fact speaking to whether Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment. It is unclear if the Commission did not reach this question because of its erroneous interpretation of the preexisting condition requirement—that is, in finding that there were no preexisting conditions—or if the Commission had evidence to support that the conditions were not permanent and serious enough to be hindrances or obstacles to employment, or if there was some reason the Commission believed that Appellants were not entitled to a presumption that these preexisting conditions were hindrances or obstacles to employment. Regardless, the Circuit Court made its own decision concerning why such a presumption did not apply. The Court erred in making its own decision about the hindrance/obstacle presumption and failing to remand this

question to the Commission for further findings concerning the hindrance/obstacle element.

Pursuant to South Carolina Code Section 42-9-400, Appellants are entitled to a presumption that Claimant's preexisting conditions were a hindrance or obstacle to his employment. The reliable, probative, and substantial evidence in the record further supports that these conditions were a hindrance or obstacle. Therefore, Appellants request that this case be remanded to the Commission for specific findings of fact concerning this element.

1. The Act creates a presumption that Claimant's conditions were a hindrance or obstacle to employment or reemployment.

S.C. Code Annotated § 42-9-400(d) provides that there are certain conditions that constitute a hindrance or obstacle to employment or reemployment. Where an employer establishes prior knowledge of these permanent impairments, there is an irrebuttable presumption that the condition is permanent and a hindrance or obstacle to employment or reemployment. S.C. Code Ann. § 42-9-400(d).

Claimant had two of these preexisting conditions listed under the statute: brain damage and heavy metal poisoning. S.C. Code Ann. § 42-9-400(d)(23), (28) (Supp. 2006). Therefore, the Commission erred in not recognizing these conditions as a presumptive hindrance or obstacle to employment or reemployment.

2. Evidence from Appellants' medical experts states that Claimant's conditions were a hindrance or obstacle to employment or reemployment, and such evidence was not refuted by the Fund.

Even if the statute allowed for these presumptions to be rebutted, there was no evidence provided by the Fund for rebuttal. Appellants presented medical questionnaires from Dr. Edward Baker and Dr. Eugene Shippen which stated the preexisting conditions

of heavy metal poisoning and cognitive impairment constituted a hindrance or obstacle to employment or reemployment. (R. pp. 163, 167.) These medical questionnaires were not refuted by any evidence from the Fund. Therefore, the Commission's conclusion should have been reversed. See State Accident Fund v. S.C. Second Injury Fund In Re: Johnny M. Adger v. City of Manning, 409 S.C. 240, 247, 762 S.E.2d 19, 23 (2014) (“[w]hen a presumption shifts the burden of production to the opposing party, that party must present substantial evidence in order to rebut the presumption”), Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012) (finding there was no evidence to challenge the conclusions of Claimant's medical doctors).

D. Yuasa-Exide, Inc. had knowledge of Claimant's preexisting condition of heavy metal poisoning, and the evidence suggests that Claimant was unaware of his preexisting cognitive impairment.

The knowledge element of reimbursement was not reached by the Circuit Court, as it was found that Appellants had not proven the existence of a preexisting impairment. The reliable, probative, and substantial evidence in the record reveals that Appellants met the requirements of 42-9-400(c) in that the employer had knowledge of Claimant's permanent physical impairment at the time the employee was hired or retained in employment. S.C. Code Ann. § 42-9-400(c) (Supp. 2002). With respect to the condition of heavy metal poisoning, the plant maintained Claimant's blood lead levels throughout his employment. (APA pp. 194-97, 203-07.) As such, his employer had knowledge of his increased blood lead levels and had knowledge of such heavy metal poisoning and retained Claimant in its employment. Moreover, when hiring Claimant in 1991, Yuasa-Exide had knowledge of preexisting heavy metal poisoning as it had access to the records from the plant medical department.

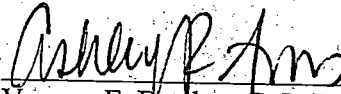
Claimant did not know until 2009 that he experienced cognitive impairment during his time at the plant and possibly before his employment with the plant. (R. pp. 187-91.) Under the applicable version of S.C. Code Ann. § 42-9-400(c), “the employer may qualify for reimbursement . . . upon proof that he did not have prior knowledge of the employee’s preexisting physical impairment because the existence of such condition was concealed by the employee *or was unknown* to the employee.” S.C. Code Ann. § 42-9-400(c) (Supp. 2002). Claimant was not definitively diagnosed until 2009, but the evidence suggests he was beginning to experience cognitive difficulties during his employment at the plant. Appellants submit that, even if Claimant’s employer was unaware of his cognitive impairment, the knowledge element of reimbursement for cognitive impairment is met because the impairment was unknown to Claimant.

CONCLUSION

Based on the foregoing arguments, the only evidence in the record establishes that Appellants have met all requisite requirements for reimbursement from the South Carolina Second Injury Fund. Therefore, Appellants submit that the Circuit Court erred in concluding to the contrary. Appellants respectfully request that the Order of the Circuit Court be reversed, that the case be remanded for certain findings of fact absent from the Circuit Court's order, and that Appellants be granted reimbursement from the Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-9-400.

Respectfully submitted,

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June 19, 2015
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMNER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young

Appellate Case No. 2014-002212

JUL 24 2015
SC Court of Appeals

Acrowpoint Capital Corporation/Acrowood Industries Co. Appellant,

v.

South Carolina Second Injury Fund Respondent,

Plaintiff for Merits, Employee/Chairman,

v.

Yousafzade, Incorporated, Employee)

GENERAL BRIEF OF RESPONDENT

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ISSUES OF APPEAL

1. Under S.C. Code Ann. § 42-9-400(a), did substantial evidence support the Commission's finding that Claimant did not have any condition prior to his lead exposure and therefore, Carrier was not entitled to reimbursement?
2. Under S. C. Code Ann. § 42-9-400(d), did substantial evidence support the Commission's finding that Claimant's exposure to lead was not the first and subsequent injuries?
3. Under S.C. Code Ann. § 42-9-400, did substantial evidence in the record support the Commission's finding that the Carrier did not incur a substantial increase in liability?
4. Under S.C. Code Ann. § 42-9-400, did substantial evidence in the record support the Commission's finding that Claimant did not have a permanent preexisting impairment that was permanent and serious enough to constitute a hindrance or obstacle to employment.

STATEMENT OF THE CASE

This is a claim for partial reimbursement from the South Carolina Second Injury Fund ("the Fund") by Yuasa Exide Incorporated, Employer, and Arrowpoint Capital Corporation, Carrier (collectively "Carrier"), pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that they incurred substantially greater liability for compensation and medical benefits when employee, Joe Mathis' ("Claimant") alleged preexisting heavy metal poisoning and brain damage were either aggravated by or combined with his November 30, 1998 work related injury to his brain, kidneys, liver, and to his musculoskeletal, cognitive, pulmonary, neuropathic and cardiovascular systems. Carrier further alleged that Claimant's preexisting conditions were a hindrance or obstacle to employment. The Fund denied that Carrier met any of the requirements for reimbursement, specifically asserting that Claimant's heavy metal exposure and brain damage were not preexisting conditions. The Fund further denied that if heavy metal poisoning and brain damage preexisted, they were not permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment and did not substantially increase Carrier's liability for medical costs and permanent disability as contemplated by S.C. Code Ann. § 42-9-400.

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

STANDARD OF REVIEW

The standard of review for decisions of the Workers' Compensation Commission is established in the Administrative Procedures Act. S.C. Second Injury Fund v. Liberty Mut. Ins. Co. 353 S.C. 117, 576 S.E.2d 199 (S.C. Ct. App. 2003). A reviewing court must not disturb the Workers' Compensation Commission's findings if those findings are supported by substantial evidence in the record. Pearson v. JPS Converter & Indus. Corp. 327 S.C. 393, 489 S.E.2d 219 (S.C. Ct. App. 1997). The fact that reasonable minds may differ or that there is the possibility of drawing inconsistent conclusions does not prevent an agency's findings from being supported by substantial evidence. Grant v. South Carolina Coastal Council 319 S.C. 348, 461 S.E. 2d 388 (1995).

HISTORY OF THE CLAIM

Claimant worked for Yuasa Exide, Incorporated for twenty-three (23) years until he was terminated in 1998. After being terminated from Yuasa Exide, Incorporated, now known as EnerSys, Claimant worked in various other capacities. R.pp.173, 223-227. In 2009, eleven (11) years after Claimant was terminated from Yuasa Exide, Incorporated, Dr. Barry Weissglass, an expert but not a treating physician, determined that Claimant's health conditions (which included non-cardiac chest pain, aching right arm, and right thumb; intermittent shortness of breath, reduced memory function, depression and sleep difficulties) were aggravated by his employment at Yuasa Exide, Incorporated. R.pp.180-191.

In 2009, eleven (11) years after Claimant was terminated from Yuasa Exide, Incorporated, Vocational Evaluator L. Randolph Waid, Ph.D., concluded that Claimant

was "functioning in the borderline range of intellectual abilities"; "compromised with regard to his capacity of effectively sustain his concentration" but "without history of highly compromising medical problems." R.p.186. While Dr. Waid's evaluation determined that Claimant was incapable of full time gainful employment, Claimant was actually working as a painter at the time of Dr. Waid's evaluation. R.p.188.

Claimant pursued this claim as a result of alleged exposure to lead at Employer's battery manufacturing plant in Sumter, South Carolina. The underlying case was not adjudicated by any tribunal, including the Commission. Instead, the underlying case was settled by Carrier and Claimant by the payment of a lump sum of money on a doubtful and disputed basis, meaning that Carrier accepted no liability for the payment of benefits, but agreed to pay a lump sum to Claimant in order to avoid litigation. As a result of the money paid pursuant to the doubtful and disputed settlement, Carrier alleged that it incurred substantially greater liability for compensation and medical benefits (neither of which it actually paid) when Claimant's alleged preexisting heavy metal poisoning combined with or aggravated the very conditions that it caused.

The Fund asserts that Carrier cannot prove any entitlement to reimbursement because the evidence does not support that Claimant suffered any preexisting condition that combined with or was aggravated by a subsequent injury to substantially increase medical and/or indemnity costs; that the alleged preexisting conditions were neither a hindrance nor obstacle to Claimant's employment; and that pursuant to the statute, Carrier has not paid any medical costs or indemnity on this claim, which is prerequisite to reimbursement. S.C. Code Ann. § 42-9-400. The Carrier asserts it is entitled to reimbursement from the Fund because the lead to which it exposed Claimant caused and

then subsequently aggravated certain medical conditions in Claimant. As a result of the continued exposure, Carrier seeks to be absolved from all financial responsibility to the Claimant simply because it continued to employ Claimant after exposing him to lead.

ARGUMENT

I. THIS CLAIM DOES NOT MEET THE REQUIREMENTS OF REIMBURSEMENT PURSUANT TO S.C. CODE ANN. § 42-9-400.

This reimbursement case was all brought before the Commission on the eve of the sunset of the Fund. There has been no adjudication of any facts or issues in this underlying case. This case was settled on doubtful and disputed basis. R.pp.25-35. According to the settlement agreement, this settlement applies to Yuasa-Exide, Incorporated and all of its predecessors. R.p.26.

The Fund began as encouragement for employers to hire and retain employees with disabilities. The Fund was never intended to operate as a safety net for employers, such as Yuasa-Exide, Incorporated, who place their workforce in hazardous working conditions as a part of their business and due to the nature of its business. In Am. Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 386 S.E.2d 276 (S.C. Ct. App. 1989), the Court of Appeals addressed the purpose and scope of the Fund:

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

deemed appropriate. The right of a claimant to secure reimbursement under the statute depends upon complete compliance with the requirements imposed for recovery. The success and future of the Second Injury Fund depend upon proper and careful application of these statutory requirements.

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

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

For a Carrier to be entitled to reimbursement from the Second Injury Fund, it must prove that a claimant's preexisting condition was aggravated by or combined with a subsequent injury to cause increased disability or medical costs. S.C. Code Ann. § 42-9-400.

The section provides in pertinent part:

§ 42-9-400. Manner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from preexisting impairment and subsequent injury.

(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and

medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits in the following manner

....

S.C. Code Ann. § 42-9-400 (Supp. 2006)

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

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

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

Further, according to the Settlement Agreement, Carrier denies "Claimant's allegations that he has suffered permanent disability because of the aforesaid alleged injuries; is entitled to payment for past medical treatment; payment of present and future medical payment; payment of temporary total disability compensation benefits; and payment of medications, counseling and therapy." R.p.26. In the Settlement Agreement, Carrier also denies "Claimant sustained compensable injuries as a consequence of his employment duties either by accident, repetitive trauma, or exposure to lead, known and unknown chemical and toxins." R.p.27. The Employer and Carrier deny the very contentions for which they now seek reimbursement pursuant to S.C. Code § 42-9-400. It is noteworthy that the reimbursement statute allows Carrier to receive reimbursement for those medical costs and compensation payments that are substantially greater "than that which would have resulted from the subsequent injury alone." S.C. Code Ann. § 42-9-400(a) (Supp. 2011). Here, Carrier did not pay any medical costs or compensation to Claimant.

The Fund presumes that the Settlement Agreement filed on behalf of Carrier and its predecessors were done so in good faith. Thus, there is no basis upon which to allow reimbursement from the Fund. There has been no award, and if these cases are to remain denied by Carrier, and if no medical or compensation benefits have been paid to Claimant, there is not an award for compensable injuries upon which reimbursement can rest.

While the Fund recognizes that there are occasions that a "doubtful and disputed" settlement agreement may benefit the parties to an underlying claim, the Fund is a state agency and a creature of statute. The Fund was created by the Legislature for specific

reasons and not one of those reasons is to allow employers and carriers avoid their statutory responsibilities. Because there is no statutory authority to grant reimbursement on denied claims where no medical or weekly benefits are paid, this claims should be denied.

B. CLAIMANT DID NOT HAVE A PREEXISTING CONDITION THAT WAS PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT.

Carrier alleged preexisting lead exposure and brain damage. Under the statutory reimbursement scheme certain preexisting conditions are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. Heavy metal poisoning and brain damage are two (2) of thirty-three (33) enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. S.C. Code § 42-9-400(d) (22) and (27) (Supp. 2011). However, as previously noted herein, Carrier has not established that the conditions preexisted.

Furthermore, Yuasa Exide, Incorporated was filled with employees that were exposed to lead, and it employed them all for many, many years. If the lead exposure was a hindrance or obstacle to employment, Claimant would not have been able to work as he did over the course of twenty-three (23) years. Carrier cannot prove that the lead exposure or brain damage preexisted and constituted a hindrance or obstacle to Claimant's employment.

In efforts to establish that Claimant had a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment, Carrier relies heavily on the Claimant's blood levels and the OSHA regulations regarding permissible

exposure to lead. R.p.362. However, the prevailing statute is S.C. Code Ann. § 42-9-400 and this Court is not required to give deference to OSHA regulations. See S.C. Code Ann. § 42-9-400.

Carrier also asserts, in error, that there is "an irrebuttable presumption" that certain conditions are permanent and serious enough to constitute a hindrance to employment. Section 42-9-400(d) states in relevant part that "[w]hen an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists." S.C. Code Ann. § 42-9-400(d). The statute does not state that the presumption is irrebuttable. The presumption that a listed condition is a hindrance or obstacle to employment is a rebuttable presumption, which may be overcome by evidence rebutting it. BLACK'S LAW DICTIONARY 558 (3rd pocket ed. 2006). More importantly, the statute also requires that one (1) of the thirty-three (33) listed conditions preexist in order to implicate a presumption. S.C. Code Ann. § 42-9-400(d). While heavy metal poisoning and brain damage are listed conditions entitled to a presumption, Carrier has not established that those conditions preexisted, which is a prerequisite to reimbursement.

1. Claimant did not have preexisting brain damage.

Carrier alleges that Claimant had brain damage prior to his occupational exposure. This allegation is not supported by the evidence in the record. Claimant's Initial Occupational History form, which was completed in approximately 1984, indicated that he had been exposed to lead but had not sustained any work injuries. R.pp.192-193. Claimant's 1986 examination revealed he was healthy. R.p.195. Claimant's physical examinations from 1986 through 1995 revealed elevated cholesterol but he was noted to

be "otherwise healthy." R.pp.195-198. On August 12, 2009, Claimant testified via deposition. R.pp.214-262. Claimant testified in his deposition that he worked for Yuasa Exide for approximately twenty-three (23) years, from 1975 to 1998. R.p.224. He noted that his most recent physical examination was normal and that in the last twenty-five (25) years he had only visited a doctor for a pinched nerve in his back that required physical therapy, which he underwent after he stopped working for Yuasa Exide. R.pp.230-234.

While the vocational assessment indicated that Claimant was severely deficient in academic achievement and functionally illiterate, the records also revealed that Claimant was a high school graduate with no history of failure of grades and had never been "diagnosed with a learning disability or with need for placement in specialized educational classes." R.pp.176 and 181.

Further, The South Carolina Supreme Court has indicated that "brain damage" contemplates a condition that is both permanent and severe. Sparks v. Palmetto Hardwood, 401 S.C. 619, 738 S.E.2d 831 (2013). See also, Crisp v. SouthCo., 401 S.C. 627, 738 S.E.2d 835 (2013). While Carrier has not alleged "physical" brain damage, the Fund believes that the same analysis applies. Here, there is no evidence that Claimant's alleged brain damage is either permanent or severe.

2. Claimant's lead exposure is not his first and subsequent injuries.

In this case, Carrier asserts that the lead exposure is Claimant's first and second injuries. R.p.147-158. More specifically, Carrier's position is that the lead caused the Claimant's conditions, and, subsequent to the development of his maladies, he was further exposed to lead. Carrier alleges that Claimant's continued or subsequent exposure resulted in additional or worsening maladies. Thus, Carrier argues that it is

entitled to reimbursement for payment of a lump sum settlement that neither represents indemnity nor medical payments. However, by statute, the Fund only reimburses for disability benefits and medical payments. S.C. Code Ann. § 42-9-400.

In this case, the only evidence presented is subsequent to the initial exposure to lead. 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, Dr. Edward L. Baker, Jr., and Dr. J. Routt Reigart. 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.

Dr. Reigart completed a Brief Health Evaluation of the Claimant. R.p.189. Dr. Reigart assigned impairment ratings to Claimant and noted that the Claimant's condition is attributable to his occupation. R.p.189. Thus, Dr. Reigart directly relates the conditions to employment and not to any preexisting condition. Further, Dr. Reigart does not address any SIF criteria, and he does not address the possible effect any preexisting medical condition may have had on Carrier's subsequent liability for compensation and medical benefits or whether the preexisting conditions, if any, constituted hindrances or obstacles to employment. Lastly, Dr. Reigart is also not a treating physician.

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. Drs. Baker, Reigart and Hu 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.293-294.

As a chronic illness, lead poisoning is the illness itself. As a chronic illness, lead poisoning does not stand apart from the maladies it causes. As their experts note, the Claimants' "[c]onditions [were] caused by lead exposure in the workplace." R.p.294. As the doctors write, "Chronic lead poisoning is manifested by a range of damage to various systems of the body." *Id.* They go on to say, "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.298. Thus, the manifestations of lead poisoning do not preexist the chronic illness, and the chronic illness is not separate and apart from the conditions to which it leads. They are one and the same. During the short life of the Second Injury Fund, it existed to encourage the hiring of disabled persons. Am. Motorists Ins. Co. v. S.C. Second Injury Fund, 300 S.C. 17, 386 S.E.2d 278 (S.C. Ct. App. 1989). The Second Injury Fund was not created to

encourage long term exposure to toxins in the workplace so that employers can go without liability.

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

The Commission determined that Claimant's exposure to lead during his twenty-three (23) years of employment constitutes a single occupational exposure based on the plain meaning of the statute. Section 42-9-400(a) references "subsequent disability," "preexisting impairment," and "subsequent injury." The injury for which reimbursement is sought is an occupational disease, which is a chronic illness as previously discussed herein. Since this case involves a chronic illness, the plain meaning of the statute requires that the preexisting condition predate the chronic illness. In this case, the evidence indicates the contrary, as Claimant's neuropsychological evaluation revealed that his neurocognitive deficits were related to his lead exposure. R.pp.180-186.

Since Carrier has no evidence of actual preexisting conditions prior to his exposure to lead with Employer or its predecessors, this claim for Second Injury Fund reimbursement should be denied.

C. THE CAROLINAS RECYCLING DECISION WARRANTS AFFIRMATION OF THIS CASE.

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

Moreover, the Commission determines the weight of the evidence. In Anderson et al. v. Campbell Tile Co., the South Carolina Supreme Court held that opinions of medical experts may constitute substantial evidence sufficient to support a judgment. 202 S.C. 54, 24 S.E.2d 104 (1943). Anderson does not require that the opinions of medical experts are the only evidence that may constitute substantial evidence nor does it exclude other sufficiently compelling evidence that would support a judgment. Anderson also held that the Commission determines the weight given to the opinion of medical experts. Id. While Carrier submitted medical certificates supporting the elements of

reimbursement, the Commission is not required to give medical questionnaires conclusive effect to the exclusion of other more compelling evidence. Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). The Commission's decision to place little weight on the opinions of physicians that did not actually treat Claimant and place more weight on the totality of the other medical evidence was well within their discretion. The Commission's decision was supported by the substantial evidence in the record.

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

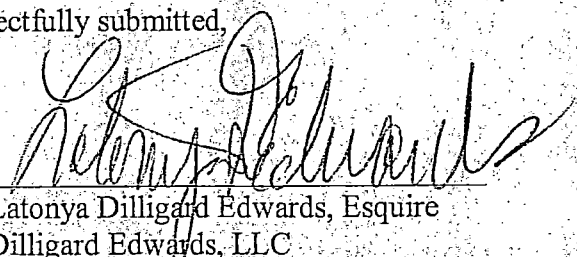
In Burnette v. City of Greenville, this Court reversed and remanded a case to the South Carolina Workers' Compensation Commission so that it could enter findings of fact concerning Claimant's lumbar injury and disability ratings. 401 S.C. 417, 737 S.E.2d 200 (2012). In Burnette, Claimant was a police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

It is well settled that an agency's interpretation of its own statutes will be given great deference unless compelling reasons require otherwise. CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011). In this case, there are no compelling reasons that require this Court not to give deference to the Commission's interpretation of the applicable statute.

CONCLUSION

For the reasons cited herein, the South Carolina Second Injury Fund requests that this Honorable Court affirm the decision below as supported by substantial evidence in the record.

Respectfully submitted,

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June 23, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Court Tracking No. 2014-002212
Civil Acton No. 2013-CP-43-02283
WCC File No. 9832185

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

v.

South Carolina Second Injury Fund, Respondent,

[In re: Joe Mathis, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

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1. Respondent's argument that payments made pursuant to a settlement agreement are not reimbursable under the Second Injury Fund statute is not preserved for appeal and should be disregarded by this Court.	2
2. The Fund's position that it requires a formal decision and order to consider reimbursement is disingenuous in light of the practices of the Fund and the history of the Sumter battery plant claims.	2
B. Appellants have met their burden of proof in establishing that Claimant suffered from a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment.	4
1. The Circuit Court erred in failing to find that Appellants were entitled to a statutory presumption that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment.	4
2. The Circuit Court erred in finding there were no conditions that preexisted Claimant's occupational exposure.	5
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In response to the arguments presented in Respondent's Initial Brief, Appellants hereby submit this Reply Brief for the Court's consideration.

ARGUMENT

APPELLANTS HAVE MET THE REQUIREMENTS FOR REIMBURSEMENT PURSUANT TO S.C. CODE ANN. § 42-9-400.

As set forth in their Initial Brief and in the arguments below, Appellants have met the requirements for reimbursement from the South Carolina Second Injury Fund and request that the Order of the Circuit Court be reversed.

A. Appellants have made payment to Claimant as part of a settlement agreement for his workers' compensation claim and have met the requirements for reimbursement from the Second Injury Fund.

Respondents argue that there was never an "award" made in this case for which Appellants may be reimbursed because there was never a formal decision or order from the Commission. This position has never been argued by Respondents and is not preserved for appeal. However, even if this Honorable Court considers Respondents' argument, Appellants submit 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 claims and the Fund was a signatory to the Consent Scheduling Order that was executed by the Commission.

1. Respondent's argument that payments made pursuant to a settlement agreement are not reimbursable under the Second Injury Fund statute is not preserved for appeal and should be disregarded by this Court.

Appellants submit the Court should not consider the argument presented by Respondent in Section I. A. of its Initial Brief as it has not been properly preserved. See, e.g., State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review) and Smith v. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) (noting only issues raised to and ruled upon by the Appellate Panel are cognizable on appeal). The Circuit Court's Order makes no mention of the definition of an "award" or that Second Injury Fund reimbursement cannot be awarded where a settlement agreement was reached between the parties. Respondents did not appeal any Circuit Court findings – or lack thereof – to this Court. This issue further was not ruled upon or considered by the Appellate Panel and the lack of such consideration was not appealed to the Circuit Court.

2. The Fund's position that it requires a formal decision and order to consider reimbursement is disingenuous in light of the practices of the Fund and the history of the Sumter battery plant claims.

Appellants submit that it would be patently unfair to deprive them of reimbursement from the Fund based on the argument that they have not made a requisite payment to Claimant because the parties settled the claim at mediation. The parties in this matter 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 hearings. For the fifty (50) claimants who would initially be requesting hearings on or before June 30, 2009, mediation was ordered to take place the week of

December 7, 2009. The Fund was a signatory to this agreement. (R. pp. 37-43.) The Fund further attended a few of the mediations and never asserted that the lack of a formal hearing would bar reimbursement.

In practice, the Fund has paid reimbursement in cases that have been resolved via settlement agreement without a formal hearing. The Fund has never taken a position similar to the one presented in its Brief. As such, there was no way for Appellants to foresee that Respondent would take the position that a settlement would negate their ability to obtain reimbursement from the Fund.

Respondent cites S.C. Code Ann. § 42-9-400(a) in which the “award” language is used. The purpose of this section is to require the carrier and employer to pay all medical and indemnity benefits in the first instance, prior to seeking reimbursement from the Fund. The purpose of this language is not to require a formal decision and order, but instead to ensure timely payments by the carrier/employer for a claimant’s injury. There is no provision of S.C. Code Ann. § 42-9-400 that requires a formal decision and order prior to consideration for reimbursement from the Fund.

Appellants further note that pages 10 and 11 of the settlement paperwork approved by the Commission on November 8, 2010, is entitled “Order and Award.” The language specifically provides that “the terms of the settlement agreement are adopted herein and made the Order and Award of the South Carolina Workers’ Compensation Commission.” (R. pp. 34-35.) (emphasis added) Appellants fail to understand the argument that this settlement agreement is not an “award” where is it specifically entitled as such and has been executed by the South Carolina Workers’ Compensation Commission.

Finally, Respondent relies on S.C. Code Ann. § 42-9-5 in its argument regarding this issue. Appellants note that S.C. Code Ann. § 42-9-5 is only applicable to post-July 2007 injuries. The instant injury took place on November 30, 1998, and, as such, Section 42-9-5 is inapplicable.

Given the reasons set forth above, even if this Court considers this argument advanced by Respondent, Appellants contend it should not be a factor in the Court's decision regarding Appellants' entitlement to reimbursement from the Fund.

B. Appellants have met their burden of proof in establishing that Claimant suffered from a preexisting condition that was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment.

1. The Circuit Court erred in failing to find that Appellants were entitled to a statutory presumption that Claimant's preexisting conditions were permanent and serious enough to constitute a hindrance or obstacle to employment.

Respondent's argument that heavy metal poisoning and brain damage did not constitute a hindrance or obstacle to Claimant's employment is inapplicable in light of the South Carolina Supreme Court's recent decision in State Accident Fund v. South Carolina Second Injury Fund (In re: Johnny M. Adger v. City of Manning), 409 S.C. 240, 762 S.E.2d 19 (2014). In State Accident Fund, the Court found the Commission erred in incorrectly applying the presumption found in Section 42-9-400(d). Despite the employer being entitled to a presumption that the claimant's preexisting diabetes was a hindrance to his employment, the Commission found the medical evidence rebutted the presumption. The Court noted the Commission further erred in concluding as a matter of law that the employer had the burden to prove that the claimant's preexisting diabetes

was permanent and serious enough to constitute a hindrance or obstacle to his employment. Id. at 246-47, 762 S.E.2d at 22-23.

The Court went on to reason that, because the employer was entitled to the presumption set forth in Section 42-9-400(d), the burden to rebut the presumption shifted to the Second Injury Fund. Id. at 247, 762 S.E.2d at 23. Substantial evidence was required in order to rebut the presumption. Id. In State Accident Fund, the Fund was unable to present such evidence and the Commission's order was reversed. Id. at 248, 762 S.E.2d at 23.

In the instant matter, heavy metal poisoning and brain damage are two enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. S.C. Code Ann. § 42-9-400(d)(23), (28) (Supp. 2002). Similar to the situation in State Accident Fund, in which the Fund submitted no evidence to rebut the presumption set forth in Section 42-9-400(d), Respondent submitted no evidence in the instant matter to rebut a similar presumption. Appellants agree that the Commission determines the weight of the evidence. However, where there was no evidence presented by the Fund to refute the evidence presented by Appellants, the weight of the evidence falls in favor of Appellants. As such, Appellants contend they have met their burden to prove the existence of permanent physical impairments that constituted a hindrance or obstacle to employment.

2. The Circuit Court erred in finding there were no conditions that preexisted Claimant's occupational exposure.

With respect to Respondent's arguments concerning the question of preexisting brain damage and heavy metal poisoning, Appellants rely on the arguments presented in their Final Brief. Respondent's statement on page 12 of its Brief that "Carrier is

necessarily required to show evidence of the condition prior to the initial exposure [to lead]" is a complete misstatement of the law of South Carolina. There is no South Carolina authority to suggest that Claimant must have had permanent physical impairments that preexisted his first-ever exposure to lead.

Appellants' position is supported by South Carolina authority concerning occupational disease claims. Appellant's position is also supported by South Carolina authority finding an entitlement to reimbursement where the preexisting condition arose out the same employment as the subsequent injury. See, e.g., Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (2012) and State Workers' Compensation Fund v. South Carolina Second Injury Fund (In re: Warren M. Hunt v. S.C. State Forestry Comm'n), 313 S.C. 536, 443 S.E.2d 546 (1994). For a more detailed explanation of these arguments, Appellants refer back to their Final Brief.

Appellants further submit that Respondent's argument regarding "brain damage" is erroneous. Respondent states on page 11 of its Brief that preexisting "brain damage" in Section 42-9-400(28) must be both permanent and severe. This argument, taken to its logical conclusion, makes no practical sense when considered in the context of the Second Injury Fund. The definition of physical brain damage as set forth in Sparks v. Palmetto Hardwood, 401 S.C. 619, 738 S.E.2d 831 (2013) and Crisp v. SouthCo., 401 S.C. 627, 738 S.E.2d 835 (2013) is meant to clarify a claimant's entitlement to lifetime benefits under S.C. Code Ann. § 42-9-10(C). A permanent and severe brain injury under Section 42-9-10 would render an employee unable to work for life. In the context of the Second Injury Fund, the employer is entitled to reimbursement for hiring or retaining an individual with brain damage, provided all other elements of reimbursement are met.

Therefore, this tends to suggest an individual with brain damage as contemplated in Section 42-9-400(d)(28) would be able to obtain gainful employment, as brain damage is a condition for which an employer could be reimbursed if it combined with or aggravated a subsequent injury arising out of the employment. Applying the definition of physical brain damage in Section 42-9-10(C) as interpreted by these Supreme Court cases is misplaced in light of the reasoning behind the Second Injury Fund reimbursement statute.

C. South Carolina case law supports a reversal of the Circuit Court's decision.

Appellants disagree that Carolinas Recycling warrants affirmation of the Circuit Court's order, as argued by Respondent in Section C of its brief. Respondent notes that this Honorable Court in Carolinas Recycling reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct. App. 2012). Appellants point out that this non-treating physician in Carolinas Recycling was Dr. William Felmly, who evaluated the claimant after his January 2001 injury, but not after the claimant's subsequent injuries. Id. at 481-82, 730 S.E.2d at 325-26. In its reasoning, this Court noted:

Dr. Felmly never treated Claimant following his October 2002 or June 2004 injury to assess his condition or opine whether either of his two preexisting physical conditions combined with or aggravated the June 2004 injury. Moreover, the Fund failed to present any expert testimony from a physician who evaluated the Claimant after his October 2002 or June 2004 injuries to discredit the overwhelming medical testimony and evidence Carrier presented to the Appellate Panel.

Id. at 485, 730 S.E.2d at 327.

In contrast to the opinion presented by Dr. Felmly, which was rendered prior to the claimant's subsequent injuries, the opinions presented by Drs. Shippen and Baker, as

well as the other expert opinions contained in Appellants' evidentiary submissions, were rendered after Claimant's subsequent injury in 1998. Therefore, Appellants do not believe the Carolinas Recycling decision warrants affirmation of the Circuit Court's order.

Respondents also attempt to distinguish Burnette from the instant matter. Appellants offered the Burnette opinion, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), to highlight that the Hearing Commissioner in the instant matter abused her discretion in formulating her own interpretation of the medical evidence contained in the opinions of Drs. Baker and Shippen. (R. pp. 163-68.) Whether the issue is compensability or reimbursement from the Fund, a Hearing Commissioner is not a medical doctor and cannot come up with her own interpretation of medical evidence where there is no other competent evidence in the record. Appellants reiterate that there was no evidence presented by the Fund to refute the opinions contained in Appellant's evidentiary submissions. As such, the Circuit Court's order in the present case is clearly erroneous in view of the substantial evidence in the record.

D. The Second Injury Fund was intended to encourage employers to hire and retain employees with disabilities and the question of causation concerning such disabilities is irrelevant.

Respondent notes in its brief, prior to its argument presented in Section A, that "the Fund was never intended to operate as a safety net for employers . . . who place their workforce in hazardous working conditions as part of their business and due to the nature of its business." Respondent goes on to note that "Carrier wants reimbursement from the Fund for conditions caused by the exposure to lead that was its very business" and alleges

that Appellant "was wholly responsible for the alleged conditions and maladies suffered by Claimant."

In response, Appellants submit that causation is not at issue. Although there are medical opinions addressing the same, no one knows what ultimately "caused" the physical maladies from which Claimant suffered. However, even if the exposure to lead is the "cause" of Claimant's maladies, the Second Injury Fund statute, S.C. Code Ann. § 42-9-400, makes no reference to the "cause" of a pre-existing permanent impairment or subsequent injury. Reimbursement from the Second Injury Fund is available to employers who meet the elements for reimbursement from the Fund. Whether an employer caused a condition is not at issue.

Respondent's statements are without support from South Carolina authority and fail to take into account the fact that the workers' compensation system in South Carolina is a strict liability system. Arguably, every workers' compensation case involves an injury "caused by" the employer. As such, there are several cases involving Second Injury Fund reimbursement where a condition was "caused by" the employer. See, e.g., Carolinas Recycling, supra, where Claimant sustained a work-related injury to his back in 2001 and another work-related injury to his back in 2004. 398 S.C. at 481, 730 S.E.2d at 325. Employers are required to pay assessments into the Second Injury Fund for the purpose of obtaining reimbursement should circumstances warrant the same. There is no caveat carved out in Section 42-9-400 that an employer can obtain reimbursement from the Fund only if it is not at fault for the conditions suffered by the claimant. Workers' compensation is already a no-fault system. Therefore, Respondent's argument in this regard is unpersuasive.

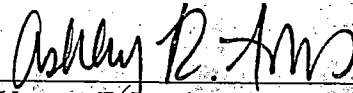
Respondent correctly notes "[t]he Fund began as encouragement for employers to hire and retain workers with disabilities." Appellants highlight that the plain language of the Second Injury Fund statute provides for reimbursement not only where an employee with a disability was hired, but also where an employee with a disability was *retained*. S.C. Code Ann. § 42-9-400(c). This is precisely the situation in the present case and is notable because Appellants *retained* Claimant in employment despite knowledge of his permanent impairments. Contrary to the reasoning in the Circuit Court order, the plain language of the statute does not require that a permanent physical impairment exist only prior to an employee being *hired*.

CONCLUSION

For the reasons stated above, Appellants respectfully request that the Order of the Circuit Court be reversed and that Appellants be granted reimbursement from the Second Injury Fund, pursuant to South Carolina Code Annotated Section 42-9-400.

Respectfully submitted,

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June 23, 2015

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

South Carolina Second Injury Fund, Respondent.

[In Re: Joe Mathis, Employee/Claimant,

v.

Yuasa Exide, Incorporated, Employer]

Appellate Case No. 2014-002212

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2017-UP-229
Heard January 25, 2017 – Filed May 31, 2017

REVERSED

Vernon F. Dunbar and Ashley R. Forbes, both of
McAngus Goudelock & Courie, LLC, of Greenville, for
Appellant.

of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund

In reversing, we are bound by our supreme court's holding in *State Workers' Compensation Fund v. S.C. Second Injury Fund*, 313 S.C. 536, 539-40, 443 S.E.2d 546, 548 (1994) (determining a firefighter's "total disability from heart disease in 1986 qualifie[d] as a subsequent disability arising out of his employment" and reversing this court's denial of reimbursement). There, the State Workers' Compensation Fund successfully pursued Second Injury Fund reimbursement when a Forestry Commission firefighter diagnosed with coronary artery disease in 1974 was subsequently rendered totally disabled due to arteriosclerosis and cardiac disease. *Id.* at 537, 443 S.E.2d at 547. In effect, the supreme court concluded the firefighter's occupational cardiac disease, as aggravated by the hazards of his work, constituted both a preexisting condition and subsequent injury. *See id.* at 539, 443 S.E.2d at 548 (holding separate work-related injuries are not required for reimbursement, and "a 'prior disability' need not result from an industrial accident").

Joe Mathis's (Claimant's) case is analogous. Section 42-9-400(a) provides for reimbursement if an "employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment." Here, Claimant suffered documented heavy metal exposure dating back to the 1980s, and this continued exposure ultimately led to his disablement. Notably, both parties acknowledged during oral arguments that Claimant's cognitive issues were attributable to his lead exposure at his workplace. 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*.

Additionally, Carrier satisfies the remaining reimbursement factors that

1. An employee must have a permanent physical impairment from any origin;
2. The employer retains the employee after knowledge of the prior impairment;

3. The employee incurs a subsequent disability from injury by accident arising out of and in the course of his employment;
4. The subsequent injury combines with or aggravates the preexisting condition to cause "substantially greater" disability than would have been caused by the subsequent injury alone, *or*
5. The second injury most probably would not have occurred but for the preexisting condition.

State Workers' Comp. Fund, 313 S.C. at 538, 443 S.E.2d at 547-48 (citations omitted).

Relying upon our supreme court's analysis in *State Workers' Compensation Fund*, we conclude the only reasonable inference to be drawn from the substantial evidence in the record here is that Claimant's prolonged heavy metal exposure and alleged brain damage combined with or aggravated the preexisting cognitive disability from which Claimant suffered to cause "substantially greater" disability than would have been caused by any single subsequent injury. Such permanent physical impairments as listed in section 42-9-400(d) are presumed to be permanent and "a hindrance or obstacle to employment or reemployment."

Substantial evidence in the form of internal medical records establishes Claimant's employer had knowledge of his lead exposure dating back to the 1980s. Claimant was eventually disabled by effects from the lead exposure, which both sides conceded during oral argument. Finally, two doctors asserted in unchallenged medical questionnaires that Claimant's continued exposure to lead aggravated or combined with his preexisting condition to render him permanently disabled. Accordingly, we reverse the circuit court's order denying Carrier reimbursement.

REVERSED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young

Appellate Case No. : 2014-002212

RECEIVED

JUN 15 2017

SC Court of Appeals

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

v.

South Carolina Second Injury Fund, ... Appellant.

[In Re: Joe Mathis, Employee/Claimant,

v.

Yuasa Exide, Incorporated, Employer].

**PETITION FOR REHEARING OF APPELLANT
SOUTH CAROLINA SECOND INJURY FUND**

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR, the Appellant South Carolina Second Injury Fund (the Fund) respectfully petitions this Court for rehearing of Opinion Number 2017-UP-229 dated May 31, 2017. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. SC Retirement Systems, 349 S.C. 531, 564 S.E.2d 322 (2001).

HISTORY OF THE CLAIM

Claimant worked for Yuasa Exide, Incorporated for twenty-three (23) years until he was terminated in 1998. After being terminated from Yuasa Exide, Inc., now known as EnerSys, Claimant worked in various other capacities. R.pp.173-223-227. In 2009, eleven (11) years after Claimant was terminated from Yuasa Exide, Inc., Dr. Barry Weissglass, an expert but not a treating physician, determined that Claimant's health conditions (which included non-cardiac chest pain, aching right arm, and right thumb; intermittent shortness of breath, reduced memory function, depression and sleep difficulties) were aggravated by his employment at Yuasa Exide, Inc. R.p.180-191.

In 2009, eleven (11) years after Claimant was terminated from Yuasa Exide, Inc., Vocational Evaluator L. Randolph Waid, Ph.D., concluded that Claimant was "functioning in the borderline range of intellectual abilities", "compromised with regard to his capacity of effectively sustain his concentration" but "without history of highly compromising medical problems." R.p.186. While Dr. Waid's evaluation determined that Claimant was incapable of full time gainful employment, Claimant was actually working as a painter at the time Dr. Waid's evaluation. R.p.188.

Claimant pursued this claim as a result of alleged exposure to lead at Employer's battery manufacturing plant in Sumter, South Carolina. The underlying case was not adjudicated by any tribunal, including the Commission. Instead, the underlying case was settled by Carrier and Claimant by the payment of a lump sum of money on a doubtful and disputed basis, meaning that Carrier accepted no liability for the payment of benefits, but agreed to pay a lump sum to Claimant in order to avoid litigation. As a result of the money paid pursuant to the doubtful and disputed settlement, Carrier alleged that it incurred substantially greater liability for compensation and medical benefits (neither of which it actually paid) when Claimant's alleged preexisting heavy metal poisoning combined with or aggravated the very conditions that it caused.

The Fund asserts that Carrier cannot prove any entitlement to reimbursement because the evidence does not support that Claimant suffered any preexisting condition that combined with or was aggravated by a subsequent injury to substantially increase medical and/or indemnity costs; that the alleged preexisting conditions were neither a hindrance nor obstacle to Claimant's employment; and that pursuant to the statute, Carrier has not paid any medical costs or indemnity on this claim, which is prerequisite to reimbursement. S.C. Code Ann. § 42-9-400. The Carrier asserts it is entitled to reimbursement from the Fund because the lead to which it exposed Claimant caused and then subsequently aggravated certain medical conditions in Claimant. As a result of the continued exposure, Carrier seeks to be absolved from all financial responsibility to the Claimant simply because it continued to employ Claimant after exposing him to lead.

ARGUMENT

- I. THE COURT DID NOT ADDRESS THE FUND'S ARGUMENT THAT CARRIER HAS NOT MADE THE REQUISITE PAYMENT OF COMPENSATION AND MEDICAL BENEFITS PURSUANT TO SC CODE ANN. §42-9-400.

This reimbursement case was brought before the Commission on the eve of the sunset of the Fund. There has been no adjudication of any facts or issues in this underlying case. This case was settled on doubtful and disputed basis. R.pp25-35. According to the settlement agreement, this settlement applies to Yuasa-Exide, Inc. and all of its predecessors. R. p.26.

The Court cites §42-9-400 (a) to support its decision. That section reads as outlined below:

If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42-7-310 for compensation and medical benefits in the following manner

....

S.C. Code Ann. §42-9-400 (2006 Supplement).

The Court determined that Carrier has satisfied the requirements enumerated above. However, there can be no mistake that Carrier has not complied with §42-9-

400(a) because it has not made any payment of compensation or medical benefits which would implicate reimbursement.

Further, according to the Settlement Agreement, Carrier denies "Claimant's allegations that he has suffered permanent disability because of the aforesaid alleged injuries; is entitled to payment for past medical treatment; payment of present and future medical payment; payment of temporary total disability compensation benefits; and payment of medications, counseling and therapy." R.p.26. In the Settlement Agreement, Carrier also denies "Claimant sustained compensable injuries as a consequence of his employment duties either by accident, repetitive trauma, or exposure to lead, known or unknown chemical and toxins." R.p.27. The Employer and Carrier deny the very contentions for which they now seek reimbursement pursuant to S.C. Code §42-9-400. It is noteworthy that the reimbursement statute allows Carrier to receive reimbursement for those medical costs and compensation payments that are substantially greater "than that which would have resulted from the subsequent injury alone." S.C. Code Ann. §42-9-400(a), 2011 Supplement. Again, Carrier did not pay any medical costs or compensation to Claimant; and, as such, by definition, the "substantially greater" argument cannot be met.

The Fund presumes that the Settlement Agreement filed on behalf of Carrier and its predecessors were done so in good faith. Thus, there is no basis upon which to allow reimbursement from the Fund. There has been no award, and if these cases are to remain denied by Carrier, and if no medical or compensation benefits have been paid to Claimant, there is not an award for compensable injuries upon which reimbursement can rest.

While the Fund recognizes that there are occasions that a “doubtful and disputed” settlement agreement may benefit the parties to an underlying claim, the Fund is a state agency and a creature of statute. The Fund was created by the Legislature for specific reasons and not one of those reasons is to allow employers and carriers avoid their statutory responsibilities. Because there is no statutory authority to grant reimbursement on denied claims where no medical or weekly benefits are paid, this claims should be denied. The Court’s opinion is devoid of reference to this argument by the Fund and rehearing is warranted.

II. THE COURT FAILED TO ADDRESS THE FUND’S ARGUMENT THAT CLAIMANT DID NOT HAVE A PREEXISTING CONDITION THAT WAS PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT.

Carrier alleged preexisting lead exposure and brain damage. Under the statutory reimbursement scheme certain preexisting conditions are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. Heavy metal poisoning and brain damage are two (2) of thirty-three (33) enumerated conditions that are presumed to be permanent and serious enough to constitute a hindrance or obstacle to employment. S.C. Code §42-9-400(d) (22) and (27) (2011 Supplement). The Court did not address this argument proffered by the Fund and rehearing is warranted.

The Court also failed the address the evidence that served to rebut the presumption, if any, that Claimant’s brain damage, if it preexisted, was permanent and serious enough to constitute a hindrance or obstacle to employment. Yuasa Exide, Inc. was filled with employees that were exposed to lead, and it employed them all for many, many years. If the lead exposure was a hindrance or obstacle to employment, Claimant would not have

been able to work as he did over the course of twenty-three (23) years. This evidence rebuts the presumption, the Court did not address this issue; and, as such, this petition for rehearing is warranted.

Additional evidence rebutted the presumption that the brain damage alleged by Carrier was not permanent and serious enough to constitute a hindrance or obstacle to employment. Claimant's Initial Occupational History form, which was completed in approximately 1984, indicated that he had been exposed to lead but had not sustained any work injuries. R.pp.192-193. Claimant's 1986 examination revealed he was healthy. R.p.195. Claimant's physical examinations from 1986 through 1995 revealed elevated cholesterol but he was noted to be "otherwise healthy." R.pp.195-198. On August 12, 2009, Claimant testified via deposition. Carrier APA pp.52-101. Claimant testified in his deposition that he worked for Yuasa Exide for approximately twenty-three (23) years, from 1975 to 1998. R.p.224. He noted that his most recent physical examination was normal and that in the last twenty-five (25) years he had only visited a doctor for a pinched nerve in his back that required physical therapy, which he underwent after he stopped working for Yuasa Exide. R.pp.230-234.

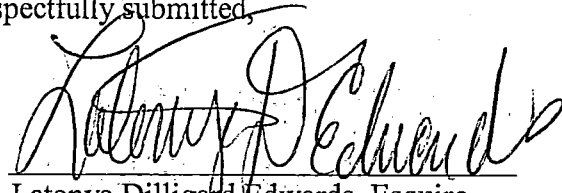
While the vocational assessment indicated that Claimant was severely deficient in academic achievement and functionally illiterate, the records also revealed that Claimant was a high school graduate with no history of failure of grades and had never been "diagnosed with a learning disability or with need for placement in specialized educational classes." R.pp.176 and 181. The Court failed to address this argument and this petition is warranted.

CONCLUSION

For the reasons cited herein, the South Carolina Second Injury Fund requests that this Honorable Court grant its Petition for Rehearing.

Respectfully submitted,

By:

A handwritten signature in dark ink, appearing to read "Latonya Dilligard Edwards", written over a horizontal line.

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June 15, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2014-002212

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

v.

South Carolina Second Injury Fund, Respondent,

[In re: Joe Mathis, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

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

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Attorneys for Arrowpoint Capital Corporation

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

ARGUMENT

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

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

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

Petitioner's argument that there is no basis upon which to allow reimbursement from the Fund was never raised at the Commission. Moreover, the Circuit Court's Order makes no mention of the definition of an "award" or that Second Injury Fund reimbursement cannot be requested where a settlement agreement was reached between the parties. Petitioner did not appeal any Circuit Court findings – or lack thereof – to this Court. This issue further was not ruled upon or considered by the Commission's Appellate Panel, and the lack of such consideration was not presented to the Circuit Court. Therefore, Arrowpoint submits this Court should not consider the argument presented by Petitioner as it has not been properly preserved. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review) and Smith v. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (Ct. App. 2006) (noting only issues raised to and ruled upon by the Appellate Panel are cognizable on appeal).

B. Petitioner cites no legal authority for its argument.

If a party presents an argument that is merely conclusory and cites no supporting authority for the position, the argument is deemed abandoned. See State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 616, 618 (Ct. App. 2010). Petitioner cites no authority for the proposition that settling a claim on a doubtful and disputed clincher basis eliminates a carrier's ability to seek reimbursement. Instead, it seeks to convince this Court that Arrowpoint paid no compensation for Claimant's disability or medical benefits by pulling out language from a portion of the settlement agreement and then somehow attempting to say that, despite Arrowpoint's payment of \$95,000.00, the "substantially greater" argument cannot be met.

Petitioner points to S.C. Code Ann. § 42-9-400(a), but Arrowpoint submits that the purpose of this statute section is to outline the procedure for reimbursement, namely that the carrier and employer pay all medical and indemnity benefits in the first instance, prior to seeking reimbursement from the Fund. The purpose of this language is not to require a formal decision and order or specific settlement language, but instead to ensure timely payments by the carrier/employer for a claimant's injury. In this case, Arrowpoint paid the award and then sought reimbursement because it had met all requirements under the Act. There is no provision of S.C. Code Ann. § 42-9-400 that requires a formal decision and order prior to consideration of reimbursement from the Fund.

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

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

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

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

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

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

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

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

entitled to the same presumption. S.C. Code Ann. § 42-9-400(d)(23), (28), (33) (Supp. 2004). In light of the South Carolina Supreme Court's recent decision in State Accident Fund v. South Carolina Second Injury Fund (In re: Johnny M. Adger v. City of Manning), 409 S.C. 240, 762 S.E.2d 19 (2014), it is clear that Petitioner bears the burden to present evidence to rebut the presumptions created by S.C. Code Ann. § 42-9-400(d). Substantial evidence was required in order to rebut the presumption. Id. at 247, 762 S.E.2d at 23.

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Vernon F. Dunbar", written over a horizontal line.

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June 26, 2017

The South Carolina Court of Appeals

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

v.

South Carolina Second Injury Fund, Respondent.,

[In Re: Joe Mathis, Employee/Claimant,

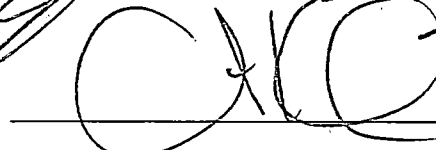
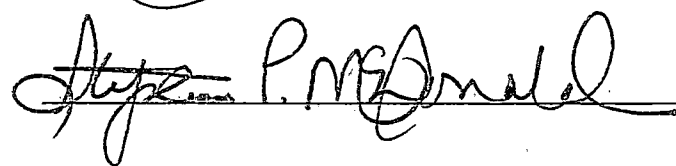
v.

Yuasa Exide, Incorporated, Employer]

Appellate Case No. 2014-002212

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

FILED

August 18, 2017

cc:

Vernon F. Dunbar, Esquire

Latonya Dilligard Edwards, Esquire

Ashley R. Forbes, Esquire

The Honorable W. Jeffrey Young

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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

Appellate Case No. 2017-001956

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S.C. SUPREME COURT

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

v.

South Carolina Second Injury Fund, ... Petitioner.

[In re: Joe Mathis, Employee/Claimant v. Yuasa Exide, Incorporated, Employer]

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Appendix contains all material proposed to be included by any of the parties and not any other material. The undersigned further certifies that the Appendix filed in this matter complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings.

March 1, 2018


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