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S.C. SUPREME COURT

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

Opinion No.: 2017-UP-229 (S.C. Ct. of App. filed May 31, 2017)
Tracking No.: 2017-001956

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

v.

South Carolina Second Injury Fund, Petitioner/Appellant

[In re: Joe Mathis, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS APPROPRIATELY HELD THAT CARRIER (RESPONDENT ARROWPOINT CAPITAL CORPORATION) WAS ENTITLED TO REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND PURSUANT TO S.C. CODE ANN. § 42-9-400?

Pursuant to Rule 242, SCACR, Respondent Arrowpoint Capital Corporation/Arrowood Indemnity Co. opposes Petitioner South Carolina Second Injury Fund's Petition for a Writ of Certiorari ("Petition"). Petitioner has not raised any "special and important reasons" why this honorable Court should accept its appeal, nor does its Petition raise any legitimate novel question of law. The Court of Appeals' ruling was unanimous and is not in conflict with prior decisions of this Court. Petitioner does not raise any constitutional issues or federal questions. See Rule 242(b) SCACR (writ of certiorari "will be granted only where there are special and important reasons"). The Court of Appeals' ruling was in line with established legal precedent concerning a carrier's entitlement to reimbursement from the South Carolina Second Injury Fund. As a result, the Petition should be denied.

STATEMENT OF THE CASE

Petitioner correctly notes that this case involves Respondent's claim for partial reimbursement from the South Carolina Second Injury Fund, pursuant to S.C. Code Ann. § 42-9-400. In the underlying workers' compensation claim, 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.)[1]

[1] Respondent notes that it has no copy of Petitioner's Appendix, which was to be filed according to Rule 242(e) SCACR. Therefore, Respondent cites the Record on Appeal.

Claimant worked continuously for the Exide Corporation and its successor corporation, Yuasa-Exide, Inc., until November 30, 1998.[2] 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 dangerous levels while working at the Sumter plant. During Claimant's twenty-three year employment tenure, his blood lead levels ranged from 9 to 64 micrograms per deciliter of blood (μg/dL), with several test results above 40 μg/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. (R. pp. 187, 249.)

Dr. Barry Weissglass evaluated Claimant on June 24, 2009, and opined that 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 pant 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

[2] 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

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. (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 Respondent'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

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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.

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 utlilize 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.)

Once Claimant's claim had been established, 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 Respondent's reimbursement claim on April 20, 2010. On June 28, 2011, Respondent 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.

In support of its application for reimbursement, Respondent 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. Shippen also confirmed these opinions. (R. pp. 166-168.) For reasons unbeknownst to Respondent, the Second Injury Fund denied reimbursement.

Respondent filed a Form 54, Request for Heàring, on October 28, 2011. Petitioner filed a Form 55 on November 18, 2011, denying Respondent's entitlement to reimbursement. (R. pp. 46-47.) Following a hearing on August 13, 2012 (R. pp. 147-159), the Hearing Commissioner

issued a Decision and Order dated November 27, 2012, in which she found Respondent did not meet the requirements for reimbursement from the South Carolina Second Injury Fund. (R. p. 24.)

Respondent 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 affirmed the order of the Hearing Commissioner. (R. pp. 7-14.) Respondent 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.) Respondent timely filed a Notice of Appeal the Court of Appeals on October 6, 2014. The parties participated in Oral Argument on January 25, 2017. The Court of Appeals filed an Order on May 31, 2017, reversing the Circuit Court's order denying reimbursement. Relying on this Supreme Court's analysis in 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), the Court appropriately concluded that the only reasonable inference to be drawn from the substantial evidence in the record was that Claimant's prolonged heavy metal exposure and alleged brain damage combined with or aggravated the pre-existing cognitive disability from which Claimant suffered to cause "substantially greater" disability that would have been caused by a single subsequent injury. Petitioner filed a Petition for Rehearing on June 15, 2017. The Court of Appeals denied rehearing in an order issued on August 18, 2017. Petitioner petitioned this honorable Court for a Writ of Certiorari on September 21, 2017.[3]

[3] Respondents have filed a Motion to Dismiss Petitioner's Petition for Certiorari in light of its untimely filing.

CONSIDERATIONS GOVERNING SUPREME COURT REVIEW

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

ARGUMENTS

Respondent is entitled to reimbursement from the South Carolina Second Injury Fund, as it has met its burden in proving the elements for reimbursement under S.C. Code Ann. § 42-9-400. Respondent has proven that Claimant had permanent preexisting impairments/conditions that constituted a hindrance or obstacle to his employment or reemployment. It has 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, it has 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 Respondent satisfied all of these elements, the Court of Appeals correctly determined that Respondent was entitled to reimbursement from the Fund. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

I. THE COURT OF APPEALS APPROPRIATELY DISMISSED PETITIONER'S ARGUMENT CONCERNING WHETHER RESPONDENT 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 Respondent has not made the requisite payment of compensation and medical benefits pursuant to S.C. Code Ann. § 42-9-400(a). As an initial matter, Respondent notes that it entered into a compromise settlement with the claimant, Mr. Joe Mathis, for $95,000.00. Therefore, to argue that no 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. Petitioner argues that there was no "award" made in this case for which Respondent 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 the Court of Appeals. 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, 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 from the Fund. Instead, it seeks to convince this Court that Respondent paid no compensation for Claimant's disability or medical benefits by extracting language from a portion of the settlement agreement and then somehow attempting to say that, despite Respondent'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 Respondent 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, Respondent paid the $95,000.00 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.

It would be patently unfair to deprive Respondent 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 on a doubtful and disputed basis reduced exposure to both Respondent 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 Respondent 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, Respondent contends that this argument set forth by Petitioner should not be any basis for Supreme Court review, as it should never have been (and

rightfully was not) a factor in the Court's decision regarding Respondent's entitlement to reimbursement from the Fund.

II. RESPONDENT 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.

The Court of Appeals appropriately found legal error in Petitioner's argument and the decision of the Circuit Court, which ignored 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.

The preexisting conditions of heavy metal poisoning, brain damage, and cognitive impairment are 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), (33) (Supp. 2004). In light of this Supreme Court's 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. Petitioner argues that the Carrier asserts there is an "irrebuttable presumption" that certain conditions are permanent and serious enough to constitute a hindrance to employment. This argument misstates the Respondent's argument. Rather than arguing that the presumption is "irrebuttable," Respondent argues that Petitioner failed to present any evidence to rebut such a presumption.

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 page 8 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. Respondent 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. 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. Respondent 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 Respondent, the weight of the evidence falls in favor of Respondent.

B. The Court of Appeals appropriately relied on *State Workers' Compensation Fund v. South Carolina Second Injury Fund (In Re: Warren M. Hunt v. S.C. State Forestry Comm'n)* in reversing the Circuit Court's opinion.

With respect to Petitioner's arguments concerning the question of preexisting brain damage and heavy metal poisoning, the Court of Appeals appropriately found that the circuit court's interpretation of section 42-9-400(a) conflicts with the Supreme Court's analysis in 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). Petitioner's statement on page 10 of its Petition 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. 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).[4]

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

[4] 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 Respondent does 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)

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 firefigher'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. 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, the Court of Appeals correctly found that Claimant's prolonged heavy metal exposure and alleged brain damage combined with or aggravated the preexisting cognitive disability from which Claimant's suffered to cause substantially greater disability than would have been caused by any subsequent injury.

Respondent further submits that Petitioner's argument regarding "brain damage" is erroneous. Petitioner states on page 10 of its Petition 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. Additional South Carolina case law supports the Court of Appeals' decision.

Respondent disagrees that Carolinas Recycling warrants reversal of the Court of Appeals' order, as argued by Petitioner in Section C of its petition. 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). Respondent points 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 Respondent's evidentiary submissions, were rendered after Claimant's subsequent injury in 1998. Therefore, Respondent does not believe the Carolinas Recycling decision warrants reversal of the Court of Appeals' order.

Petitioner also attempt to distinguish Burnette v. City of Greenville from the instant matter. Respondent 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. Respondent reiterates that there was no evidence presented by the Fund to refute the opinions contained in Respondent's evidentiary submissions. As such, the Court of Appeals appropriately found that the substantial evidence in the record weighed in favor of reimbursement from the Fund.

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.

Petitioner notes in its Petition on page 4 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." Petitioner 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 Respondent "was wholly responsible for the alleged conditions and maladies suffered by Claimant."

In response, Respondent submits that causation is not at issue. 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.

Petitioner'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, Petitioner's argument in this regard is unpersuasive.

Petitioner correctly notes "[t]he Fund began as encouragement for employers to hire and retain workers with disabilities." Respondent highlights 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 Respondents *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

The Court of Appeals appropriately relied on this 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. For the reasons set forth herein, this honorable Court should deny the Petition for Writ of Certiorari.

[*signature page follows*]

Respectfully submitted,

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October 23, 2017

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

Opinion No.: 2017-UP-229 (S.C. Ct. of App. filed May 31, 2017)
Tracking No.: 2017-001956

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

v.

South Carolina Second Injury Fund, Petitioner/Appellant

[In re: Joe Mathis, Employee/Claimant

v.

Yuasa Exide, Incorporated, Employer]

PROOF OF SERVICE

I certify that I have served the Respondent's Return in Opposition to South Carolina Second Injury Fund's Petition for Writ of Certiorari on the attorney of record for South Carolina Second Injury Fund, by depositing a copy of it in the United States Mail, postage prepaid, on the 23rd day of October, 2017 addressed to:

Latonya D. Edwards, Esquire
Dilligard Edwards, LLC
Attorney for South Carolina Second Injury Fund
3790 Fernandina Road, Suite 103
Columbia, South Carolina 29210

The Honorable Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

October 23, 2017

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Attorneys for Respondent

SOUTH CAROLINA SUPREME COURT

APPELLATE CASE NO: 2017-001956

JOE MATHIS,

Employee,

Claimant,

vs.

YUASA EXIDE, INC.,

Employer,

AND

ARROWPOINT CAPITAL CORP,

Carrier,

Defendants.

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at MCANGUS GOUDELOCK & COURIE, and that she has served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Rule 67-211 of the South Carolina Workers' Compensation Commission, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO: The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Latonya D. Edwards
Dilligard Edwards, LLC
3790 Fernandina Rd., Suite 103
Columbia, South Carolina 29210

DOCUMENT: Return in Opposition to the South Carolina Second Injury Fund's Petition for a Writ of Certiorari

DATE OF MAILING: October 23, 2017

Julie Kolb

Julie Kolb
Legal Assistant to Ashley R. Forbes, Esquire