THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable Michael G. Nettles, Circuit Court Judge

Civil Action No. 2011-CP-21-0633

Loida Colonna,.....Appellant,

v.

Marlboro Park Hospital, Employer, and
Gallagher Bassett Services, Inc., Carrier,.....Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

Pursuant to Rules 221 & 240(e), SCACR, Respondents Marlboro Park Hospital and Gallagher Bassett Services, Inc. hereby file their Return in Opposition to Claimant/Appellant Loida Colonna's Petition for Rehearing and Petition for Rehearing *en banc* ("Petition") of this Court's Opinion No. 5117 in this case. Colonna v. Marlboro Park Hosp., 2013 S.C. App. LEXIS 124 (Ct. App., April 17, 2013) ("Opinion"). Claimant has presented no facts or arguments that this Court either overlooked or misapprehended and, therefore, her Petition should be denied.

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SC Court of Appeals

I. This Court considered and properly rejected Claimant's argument that the insertion of a spinal cord stimulator constituted an injury to a second body part.

This Court considered and correctly rejected Claimant's arguments that the insertion of a spinal cord stimulator to treat the on-going pain she was having in her right ankle/foot constituted an injury to a second body part that would allow her to proceed under S.C. Code § 42-9-10. This Court properly relied on Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960), Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 106, 580 S.E.2d 100, 103 (2003) (explaining that Singleton stands for the proposition that "an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional *injuries* beyond a lone scheduled *injury*"), and Bixby v. City of Charleston, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (analyzing whether the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual *disability* as a result" of the compensable injury), to hold that the insertion of a spinal cord stimulator to alleviate her Reflex Sympathetic Dystrophy ("RSD") did not constitute an injury to her back.

Claimant's attempts to present medical/scientific evidence for the first time in her Petition should be rejected. (Petition p. 2 – argument that the spinal cord stimulator "prevents patients from undergoing MRI's and other types of imagining," etc.; and Petition p. 2 n.1 – discussing recommendations for a spinal cord stimulator made by a company, Boston Scientific, that did not even make the device used by Claimant).[1] First, this evidence should not be considered because it was not presented to the Commission, the Circuit Court or even to this Court in Claimant's direct appeal. *See, e.g.*, Kennedy v. South Carolina Retirement Syst., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (a party cannot present arguments and evidence for the first time on rehearing). Second, much of this evidence is nothing more than "testimony" by

Claimant's attorney and, as such, cannot serve as evidence. *See, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (argument of counsel is not evidence). Finally, evidence of the recommendations by a company that did not even make the device Claimant is using is entirely irrelevant, even if it had been presented below.

This Court did not fail to consider Claimant's testimony on this point. Instead, this Court specifically "recognize[d] Colonna's testimony before the single commissioner conflicted with Dr. Pasi's conclusions." Colonna, 2013 S.C. App. LEXIS 124 **14-15. As the facts were in conflict, "a finding of fact by the Commission is conclusive." Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991); *see also* Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001) (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive). This Court properly upheld the Commission's reliance on statements by Claimant's treating physician, Dr. Sonia Pasi, whose notes indicated that the implantation of the spinal cord stimulator was successful, and that Claimant's spine was stable and her range of motion was normal. Dr. Pasi did not indicate that the insertion of the spinal cord stimulator was causing Claimant any problems whatsoever.

This Court properly distinguished Claimant's situation from that of the claimant in Haley v. ABB, Inc., 174 N.C. App. 469, 621 S.E.2d 180 (N.C. Ct. App. 2005). In Haley, the "trial of the spinal cord stimulator was not successful and plaintiff was left with **severe back pain** at the site of the insertion of the device into his spinal cord." 174 N.C. App. at 472, 621 S.E.2d at 182 (emphasis added). Here, Claimant merely alleged she disagreed with the Functional Capacity

[1] Claimant testified that the company that made her device was Research Scientific. (R. p. 104, lines 18-20).

Evaluation ("FCE"), conducted on April 8, 2009,[2] "because I can't lift twenty (20) pounds without straining and hurting my right foot and right ankle as well as my back. Since I have a spinal cord stimulator in my back and I can't lift twenty (20) pounds." (R 103 lines 10-14). These are, in fact, two separate statements ("I have a spinal cord stimulator in my back" and "I can't lift twenty (20) pounds") regarding why she felt she disagreed with the evaluator's conclusion that she was attempting to demonstrate a greater level of disability than was actually present.[3] She did not testify about severe or on-going or debilitating pain caused by the insertion of the spinal cord stimulator, as we as the case in Haley.

Claimant's assertion that this Court erred by reaching its own medical opinion or conclusion, as was found in Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), is simply incorrect. This Court upheld the Circuit Court's finding that, "[t]he spinal cord stimulator was implanted for the sole purpose of deriving a benefit to nerve deficits in her right leg. The spinal cord stimulator was not implanted to diagnose, remedy or treat any condition in her spine." First, this case is distinguishable from the type of conclusion drawn in Burnette because, in that case, the single commissioner was drawing medical conclusions from what he/she saw or did not see on the MRI. 401 S.C. at 428, 737 S.E.2d at 206. In contrast, here, both this Court and the Circuit Court are stating what the evidence plainly shows: there is

[2] The FCE concluded that Claimant "is at minimum able to work at the LIGHT Physical Demand Level for an 8 hour day," and that Claimant demonstrated "a voluntary effort to demonstrate a greater level of disability than is actually present." (R. pp. 347-348).

[3] Claimant's assertion that she "complain[ed] bitterly of back pain," (Petition p. 6 n.3), is simply not supported in the record. To the extent there is any evidence of back pain, it is that she complained of "chronic pain in her neck, **upper back** and arms which is not controlled with any conservative treatment including PT." (R. p. 343) (emphasis added). The spinal cord stimulator was inserted in the lumbar region of Claimant's back, not her upper back, (R. 337-338, 341), and there is no evidence in this Record that any pain in her upper back is caused by the spinal cord stimulator.

no evidence in this record whatsoever that the spinal cord stimulator was inserted for any reason other than to treat the ongoing pain in Claimant's right ankle/foot.[4]

In the end, Claimant did not prove that the insertion of the spinal cord stimulator caused a physical impairment and/or injury and this Court properly upheld the Commission's factual determination, as it is supported by substantial evidence in the record. This Court should deny Claimant's request for rehearing on this issue. Alternatively, this Court should refuse to consider newly presented evidence if any rehearing is granted.

II. This Court did not need to address Claimant's argument that RSD itself constituted a second injury because that argument was not properly preserved for appeal.

This Court did not need to directly address Claimant's argument that her RSD is a separate injury to the sympathetic and central nervous system because she failed to make this argument to the Commission or the Circuit Court. Therefore this issue was not and is not preserved for appellate review. Robbins v. Walgreens, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (where a specific argument is not raised to the Commission, it is not preserved for appeal and the appellate court cannot review it); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 843-44 (Ct. App. 1992) (issues not raised to and ruled on by the Circuit Court are not preserved for review); *see also* City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (appellate courts may not address issues raised for the first time on appeal). As the Single Commissioner found, "Claimant alleges additional injuries to her right knee, left knee, back, neck, and right shoulder." (R. p. 36). She did not allege any injury to her central nervous system until this case was on appeal. Therefore, this Court should disregard entirely her arguments regarding the nature of RSD as a separate injury.

[4] In addition, Burnette has been appealed to the South Carolina Supreme Court and may well be overturned on appeal.

However, even if they are considered, Claimant's assertions regarding the nature of RSD are not established facts of which this Court could or should have taken judicial notice, and this record has no evidence to support them. As Respondents explained previously, while RSD can spread to other parts of the body from the initially impacted body part, it does not always. *See*, Stacy v. Great Lakes Agri Mktg., Inc., 276 Neb. 236, 249-50, 753 N.W.2d 785, 797 (Neb. 2008) (rejecting the argument that as a matter of law RSD affects the whole body and holding that, in the case before it, there was no evidence that the claimant's RSD had affected any part of his body other than his right leg); *see also* Aucoin v. Klein Indep. Sch. Distr., 1997 Tex. App. LEXIS 1 (Tex. Ct. App. Jan. 2, 1997) (upholding the lower tribunal's resolution in the employer's favor of the conflict in expert testimony between claimant's expert, who opined that RSD affects the central nervous system and employer's expert, who testified that the precise cause of RSD is unknown and that the claimant's complex regional pain syndrome "did not cause damage to her nervous system, circulatory system, or other parts of her body"). Claimant's arguments on this point do not warrant rehearing.

In addition, Claimant attempts to present new "medical" evidence in her Petition in support of her argument regarding the alleged injury to her central nervous system. *See*: 1) Petition p. 5, AMA Guides to Permanent Impairment (5th Edition); and 2) Petition p. 6 n.3 (Robert J. Schwartzman, MD, Kirsten L. Erwin, BS, and Guillermo M. Alexander, PhD, *The Natural History of Complex Regional Pain Syndrome*, Clinical Journal of Pain, Vol. 25, No. 4, May 2009. As noted above, a party cannot raise arguments or present evidence for the first time in a petition for rehearing. Kennedy, 349 S.C. at 532, 564 S.E.2d at 322.

This Court should deny Claimant's request for rehearing on this issue. Alternatively, this Court should refuse to consider newly presented evidence if any rehearing is granted.

III. This Court properly held that Claimant is not entitled to recover under Section 42-9-10.

Although Claimant expresses "concern" in her Petition that this Court misapprehended her position regarding the inapplicability of S.C. Code Ann. § 42-9-10 to her claim, her arguments are misplaced. This Court properly held that Claimant's "ability to recover under *section 42-9-10* is premised on her ability to establish an additional injury or impairment to a second body part." Colonna, 2013 S.C. App. LEXIS 124 *18. This Court is well aware of a claimant's ability to proceed under Section 42-9-10 where the claimant proves injuries to more than one body part. *See, e.g.*, Simmons v. City of Charleston, 349 S.C. 64, 76, 562 S.E.2d 476, 482 (Ct. App. 2002); Bass v. Kenco Group, 366 S.C. 450, 462-65, 622 S.E.2d 577, 583-85 (Ct. App. 2005). Thus, Claimant's arguments on this issue do not warrant rehearing.

IV. This Court properly upheld the Commission's finding that Claimant was not entitled to an award for any additional permanent partial disability.

To begin with, all of Claimant's arguments regarding preservation deal with whether an issue is preserved before the Commission; whereas, this Court correctly noted that "the circuit court's order addresses her entitlement to additional permanent partial disability benefits only in reference to her 'right lower extremity for the compensable injury suffered to the right ankle/foot.'" Colonna, 2013 S.C. App. LEXIS 124 * 19. Claimant did not file a motion under Rule 59(e), SCRCP, with the Circuit Court requesting that court to address her argument regarding her "leg rather than the ankle/foot ..." (Petition p. 8), and, therefore, that argument is not preserved for appeal regardless of whether or not it was raised to the Commission. *See, e.g.*, Reed-Richard v. Clemson Univ., 371 S.C. 304, 309 n.9, 638 S.E.2d 77, 80 n.9 (Ct. App. 2006) (explaining that "when the circuit court sitting in an appellate capacity does not address an issue

and the appellant fails to move to alter or amend on that ground, the alleged error is not preserved for further appellate review").

As to the substance of Claimant's argument, this Court properly held that Claimant failed to meet her burden of proving any additional disability. It is beyond dispute that, in a workers' compensation proceeding, a claimant bears the burden of proving he or she is entitled to compensation and benefits. *See, e.g.*, Clade v. Campion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998) (holding that "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation"). Furthermore, the determination of the extent of an injured worker's disability "is a question of fact for determination by the Appellate Panel and will not be reversed if it is supported by competent evidence." Fishburne v. ATI Syst. Int'l, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009).[5]

In her Petition, Claimant merely rehashes much of the evidence that has been rejected at every level below. Contrary to Claimant's arguments, the Record fully supports the Commission's and this Court's conclusion that she is not entitled to any additional permanent partial disability. At a minimum, the Record reveals that: 1) Dr. Easley rated Clamant at 35% permanent partial impairment of her right foot following the second surgery, (R. p. 326); 2) Dr. Pasi found Claimant had reached MMI, and did not assign her any impairment rating for her RSD, (R. p. 343); 3) Dr. Easley released Claimant from his care and indicated that her work capabilities were "per FCE," (R. p. 327); and 4) the April 8, 2009 FCE concluded that Claimant "is at minimum able to work at the LIGHT Physical Demand Level for an 8 hour day," and that

[5] The fact that Claimant can recite "numerous examples of disability awards which exceed the impairment ratings," (Petition p. 22), is of no significance. Those cases were resolved based on different facts; this case can only be resolved based on the facts in this Record. An award cannot be based on surmise or conjecture. Clade, 330 S.C. at 11, 496 S.E.2d at 858.

Claimant demonstrated "a voluntary effort to demonstrate a greater level of disability than is actually present." (R. pp. 347-348). The fact that Claimant may have testified otherwise does not mean the Commission erred or that there is any reason for this Court to grant her Petition. Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) (explaining that, "[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive").[6] This Court did not simply "zero in on two numbers and summarily conclude the decision below is supported by substantial evidence." (Petition p. 12). Instead, this Court reviewed the Record and determined that substantial evidence (in the form of the opinions of Claimant's treating physicians) supports the Commission's determination that she has not met her burden of proving she is entitled to additional permanent partial disability.

Thus, Claimant raises no reasons for this Court to grant rehearing on this issue.

V. This Court should deny Claimant's request that her Petition be heard en banc.

Finally, Claimant's request that her Petition be heard *en banc* should be rejected. Pursuant to Rule 219, "rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219, SCACR. Neither is present here. Although Claimant attempts to fabricate a conflict between Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) and this Court's Opinion, there is no conflict and no reason for *en banc* review. In Mizell, a medical malpractice case that in no way addressed rules of construction or application of the Workers' Compensation Act, the Supreme

[6] Claimant's transparent attempt to reargue her entitlement to additional compensation based on her psychological condition, (Petition p. 11-12, discussing her "debilitating anxiety" and other psychological problems), should be rejected. This Court clearly and properly held that the finding below that she "did not sustain [a] compensable psychological injury per prior Order of the Commission," is the "law of the case," and, therefore, her psychological condition is not before this Court. Colonna, 2013 S.C. App. LEXIS 124 *16.

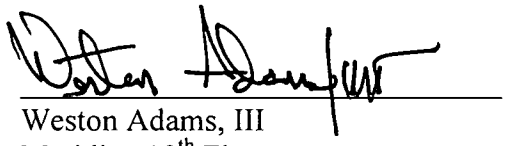
Court merely recited general evidence presented in the case before it regarding RSD. 351 S.C. at 397 n.1, 570 S.E.2d at 178 n.1. The statement regarding RSD was part of the Court's recitation of facts. As such, the nature and significance of RSD was not an issue decided by the Court.[7] The Court in no way was creating a *per se* rule for all cases of RSD, or defining it as an injury to a separate body part of system for workers compensation purposes. Thus, there is no conflict, apparent or otherwise, between this Court's ruling and Mizell.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Claimant's Petition for Rehearing.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, L.L.C.



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[7] Instead, the issues raised and decided by the Court in Mizell only included whether the plaintiffs were entitled to a new trial based on three separate procedural and evidentiary rulings made by the circuit court. 351 S.C. at 397, 570 S.E.2d at 17.

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PROOF OF SERVICE

I certify that on the 22nd day of May 2013, I served the **Respondents' Return in Opposition to Appellant's Petition for Rehearing and Petition for Rehearing *en banc*** on Loida Colonna by depositing a copy of them in the United States Mail, postage prepaid addressed to her attorney of record:

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