

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

Opinion No. 5117 (S.C. Ct. App. filed April 17, 2013)
Withdrawn, Submitted and Refiled June 26, 2013

Loida Colonna, Petitioner

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 26, 2013.

QUESTIONS PRESENTED

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Petitioner Loida Colonna hereby petitions this Honorable court for a writ of certiorari to the Court of Appeals to review that court's decision in this matter. In making this Petition, Petitioner respectfully asserts that the Court of Appeals erred in affirming the Decision and Order of the Workers' Compensation Commission. Petitioner further asserts that the court misconstrued and misapplied this Court's precedents in Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) and Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), effectively rendering meaningless "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Petitioner asks the Court to review the following issues:

1. Whether the Court of Appeals erred in affirming the finding by the Workers' Compensation Commission that Petitioner "... did not suffer compensable injuries, either directly or indirectly to her ... back ... as result of her work accident on February 21, 2004" when it is an undisputed that as a result of her work injury (1) Colonna suffers from a condition of the central and sympathetic nervous system (Reflex Sympathetic Dystrophy or "RSD") which itself is located in the spinal canal, and (2) required surgical implantation of a spinal cord stimulator in her back which in and of itself creates the additional disabilities of no lifting over 20 pounds and no driving.
2. Whether the Court of Appeals erred in holding as a matter of law that Petitioner was barred from proceeding under the economic model of disability when the additional disability from the injury to her central and sympathetic nervous systems (RSD) created a far greater disabling effect than

would be caused by a mere foot and ankle injury without the presence of RSD.

3. Whether the Court of Appeals erred in affirming the ruling by the Workers' Compensation Commission that Petitioner had suffered no additional permanent partial disability to her foot and leg following her change of condition when it is undisputed that (1) she contracted RSD *after* the original disability award, and (2) that she suffered an additional impairment rating because of a separate surgery to a different part of her leg than the part on which the original disability award was based.

STATEMENT OF THE CASE

On June 26, 2013, the Court of Appeals issued an amended opinion affirming the Decision and Order of the South Carolina Workers' Compensation Commission. Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. withdrawn, submitted and refiled June 26, 2013)(Shearouse Adv.Sh. No. 29 at 16). This workers' compensation appeal arises out of work-related injuries sustained by the Petitioner, Loida Colonna on February 21, 2004. The Employer and Carrier accepted Colonna's claim and began providing various benefits under Title 42, the Workers' Compensation Act.

The case has a long procedural history. The issues on appeal all arise out of a hearing held on June 11, 2009, before Workers' Compensation Commissioner Avery Wilkerson.

Prior Procedural History:

Loida Colonna worked as a geriatric nurse for Marlboro Park Hospital. On February 21, 2004, she slipped on a wet floor and twisted her ankle. She filed a claim for workers' compensation benefits. Her employer accepted her claim and began providing medical treatment. As Colonna was unable to work, she also began receiving weekly temporary total disability benefits. Other than a brief trial attempt, Colonna has been unable to work since her injury.

A hearing was held on April 18, 2005 before the Honorable J. Alan Bass. Commissioner Bass issued an Order on August 22, 2005 finding that Colonna had not reached maximum medical improvement; “had some aggravation of pre-existing psychological problems because of this injury”; “was sincere in her complaint and is not purposefully exaggerating her symptoms”; and “continues to be unable to work . . .” Commissioner Bass ordered further medical care to be provided as well as continuing payment of temporary total disability compensation. [R. pages 15-20].

Colonna’s medical condition deteriorated. She underwent surgery to her right foot on May 19, 2005. The surgery was a “right talonavicular joint arthrodesis, i.e., fusion of the ankle. [R. Pages 184-185]. Her surgeon, Dr. Mark Easley, opined her condition had plateaued and she was released prn on March 29, 2006. Dr. Easley assigned an impairment rating of 40% to her right lower extremity – of which 50% was allocated to the injury and 50% to a preexisting condition. [R. page 324-325].

Dr. Easley also referred Colonna to Dr. Pasi for evaluation of right foot and ankle pain. On May 9, 2005, Dr. Pasi made the first tentative diagnosis of RSD, noting Colonna suffered from “questionable complex regional pain syndrome Type I.” [R.P. 168]. CRPS Type I is a newer term for Reflex Sympathetic Dystrophy (RSD). Lumber sympathetic nerve blocks were ordered. These blocks are a common treatment for RSD as the condition arises in the sympathetic nervous system. On June 22, 2005, Dr. Pasi noted “it is somewhat unclear as to whether she has a true CRPS at this time . . .” [R.P. 199]. From that point on, Dr. Pasi treated Colonna for chronic pain and anxiety, but there is no further mention of RSD/CRPS through the visit of December 11, 2006. [R. Pages 199-295].

A second hearing was held on March 8, 2007 before the Honorable G. Bryan Lyndon.

Commissioner Lyndon issued an Order on May 8, 2007 finding Colonna had reached maximum medical improvement on March 29, 2006 with a 50% permanent partial disability to her right lower extremity. He ordered Respondents to provide pain management and physical therapy, but were not required to pay for evaluation/treatment for Claimant's psychological condition. [R. pages 21-29].

Colonna appealed to the Appellate Panel contesting the finding of maximum medical improvement. The Appellate Panel affirmed in a Form Order dated September 18, 2007. [R. pages 30-33].

Current Procedural History:

After the 2007 hearing, Colonna's condition continued to deteriorate. She filed for a change of condition for the worse, which was accepted. Respondents resumed payment of temporary total disability compensation and provided ongoing medical treatment.

Colonna underwent another surgery to repair her Achilles tendon and fuse her midfoot in 2007.¹ [R. Page 332]. On July 23, 2008, Dr. Easley placed Colonna at "MMI from orthopaedic care." He assigned a 35% impairment rating to her right foot. [R. Page 326]

Although Dr. Easley had released her, Colonna continued to wear a boot cast on her right leg. [R. Page 330]. On July 24, 2008 – the day after Dr. Easley's release – Dr. Pasi confirmed that Colonna had truly developed Reflex Sympathetic Dystrophy (RSD) as a result of her right leg injury. As Colonna had "failed most conservative options and her condition has gotten worse, Dr. Pasi recommended a spinal cord stimulator. [R. Page 331].

¹The actual report of these additional surgeries is not in the Record. The 2007 surgeries are documented in Dr. Pasi's 2008 reports. [R. Pages 328-346]. The note stating the additional 35% impairment rating from Dr. Easley done on July 23, 2008 is the only record from the surgeon himself. [R. Page 326].

On October 8, 2008, Dr. Pasi surgically implanted a trial Boston Scientific Octrode spinal cord stimulator. [R. Pages 335-339]. On December 12, 2008, Colonna underwent surgical implantation of a permanent spinal cord stimulator in her back by Dr. Pasi and a neurosurgeon, Dr. Peter Gross. [R. Page 5; page 103, lines 10-25].

Dr. Pasi placed Colonna at maximum medical improvement on March 18, 2009. Colonna was still in significant pain from four years ago. Dr. Pasi noted "She suffered injury to right lower leg, ankle and foot. She also has been [complaining of] pain on her right side of her body including back neck shoulder." [R. Page 343]. Dr. Pasi noted Colonna was "Retired on disability." [R. Page 344].

Colonna is totally disabled and has been awarded social security disability benefits. She cannot drive nor lift over 20 pounds *specifically* because of the spinal cord stimulator. [R. Page 104, lines 16-23]. She suffers from "anxiety because I'm in significant pain. I'm always anxious from debilitating anxiety and depression. And the sleep, I can't sleep at night because I have lots of pain." [R. page 100, lines 7-11]. Her anxiety and pain, along with the medications required to treat those conditions, causes forgetfulness and a cognitive deficit. [R. page 98, lines 3-7]. Regarding her condition since the 2007 hearing, she testified "My condition, one day I can survive but the next day I'm lying in bed elevating my right leg on two to three pillows." [R. page 109, lines 3-5].

A third hearing was held on June 11, 2009 before the Honorable Avery B. Wilkerson, Jr. Commissioner Wilkerson issued an Order on March 1, 2010. Commissioner Wilkerson specifically found:

1. Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant suffered an admittedly compensable injury to her right ankle/foot on February 21, 2004.

2. Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant did not suffer compensable injuries, either directly or indirectly, to her right knee, left knee, back, neck, or right shoulder as a result of her work accident on February 21, 2004.
3. Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant has reached MMI for her right ankle/foot injury.
4. Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Defendants are entitled to stop payment of TTD benefits as of the date of this hearing, June 11, 2009.
5. Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant has not suffered any additional permanent partial disability.
6. Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant is entitled to ongoing medical treatment as recommended by the authorized, treating physician, Dr. Pasi, pursuant to Dodge v. Broccoli. [R. page 38].

After this Order was issued, Colonna's then-attorney moved to be relieved. Colonna, then appearing pro-se, timely appealed Commissioner Wilkerson's Order to the Appellate Panel of the Full Commission. She also filed a Form 59 (Appellant's Informal Brief). [R. page 4-14]. She then retained her current attorney.

Her attorney then filed a Motion for Leave to File Amended Brief. The Appellate Panel summarily denied this Motion in a Form Order dated July 21, 2010. [R. page 41].

Arguments before the Appellate Panel were heard on September 20, 2010. The Appellate Panel issued a Decision and Order affirming the Single Commissioner on December 7, 2010. [R. page 42-46].

Petitioner timely filed and served her Notice of Appeal on December 30, 2010. However, Petitioner mistakenly filed the original appeal in the South Carolina Court of Appeals based on the

2007 version of S.C. Code Ann. § 42-15-60 (2007). Because this case accrued before the 2007 amendments, the appeal should have been filed in the Court of Common Pleas.

Respondents filed a Motion to Dismiss in the Court of Appeals. Petitioner filed a Return asking the Court of Appeals to transfer the appeal to the Florence Court of Common Pleas pursuant to Rule 204, SCRAP. The court denied the Motion to Dismiss and transferred the case per Rule 204. No appeal was taken from the court's Order denying the Motion.

Petitioner received the Order of the Court of Appeals on March 11, 2011. She then filed and served her Notice of Appeal to the Florence County Court of Common Pleas that same day.

Respondents filed a subsequent Motion to Dismiss in the Circuit Court on April 14, 2011. Arguments were heard by the Honorable D. Craig Brown on May 25, 2011. Judge Brown issued an Order on June 6, 2011 denying the Motion and setting the case for a hearing on the merits. [R. page 47-50].

Arguments on the merits were heard on June 8, 2011, before the Honorable Michael G. Nettles. Judge Nettles issued an Order on July 6, 2011. Judge Nettles made additional findings of fact and affirmed the Decision and Order of the Workers' Compensation Commission. [R. page 51-65].

Petitioner timely filed a Notice of Appeal to the South Carolina Court of Appeals. Oral arguments were heard on October 18, 2012. The Court of Appeals issued an opinion affirming the decision below on April 17, 2013.

Petitioner timely filed a Petition for Rehearing on May 2, 2013. On June 26, 2013, the Court of Appeals issued an amended opinion granting the Petition for Rehearing, but still affirming the decision below. This Petition for Writ of Certiorari followed.

ARGUMENT

Boiled down to its essence, this case presents an important test of this Court's previous jurisprudence regarding "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 106-7, 354 S.C. 100, 103 (2003). In the instant case, Petitioner Loida Colonna is a perfect example of this common-sense fact.

Colonna injured her foot and ankle in a work-related accident. After multiple surgeries, she developed Reflex Sympathetic Dystrophy. As this Court has previously observed, "Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain." Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) Cf. Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa 1995)(finding that reflex sympathetic dystrophy, now known as CRPS, which is a dysfunction of the sympathetic nervous system is compensable as an unscheduled injury). The sympathetic nervous system is a subpart of the central nervous system. For this reason, treatment for RSD runs the gamut from lumbar sympathetic nerve blocks to spinal cord stimulators.

In Colonna's case the record is replete with evidence that she is permanently and totally disabled as a result of the combined disabling effects of the RSD and the foot injury. A foot injury alone would not render her totally disabled. It is the combination of the foot injury with the sympathetic nervous system injury that disables her. And even though the pain is *perceived* in the foot, the disabling abnormal pain response results from the injury to the sympathetic nervous system. This is the real world application of the rationale behind Wigfall and Mizell.

The Commission, the Circuit Court, and the Court of Appeals all made the same error. First, they failed to recognize the medical and legal fact that RSD is an injury of the sympathetic nervous system – again, perceived in an extremity, but actually occurring in the sympathetic nervous system. Mizell. Secondly, they overlooked the obvious fact that Colonna underwent a surgical procedure to her back to treat the RSD. The Court of Appeals created an unreasonable and impossible standard that implantation of a spinal cord stimulator must be accompanied with serious complications to “affect” the back – overlooking the fact that the spinal cord stimulator comes with its own set of disabling restrictions, to wit: no lifting over 20 pounds and no driving. [R. Page 104, lines 16-23].

The standard for granting *certiorari* is “where there are special and important reasons.” Rule 242 (b), SCRAP. In the instant case, the decision of the Court of Appeals directly conflicts with the prior decisions of this Court in Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 354 S.C. 100 (2003) and Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002). Mizell confirms that RSD is a separate condition of the sympathetic nervous system. Wigfall and its predecessor, Singleton, “stands for the rule that an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury.” Wigfall 106, 354 S.C. at 103. Petitioner showed additional injuries, both in terms of the RSD and the surgical implantation of the spinal cord stimulator to treat the RSD. Therefore, this case meets the standard for granting *certiorari* and Petitioner respectfully asks the Court to grant her petition.

- 1. The fact Colonna required a spinal cord stimulator to treat her work-related RSD which itself causes inherent physical limitations conclusively proves her injury affected two body parts.**

Ten years ago this Court was asked to revisit the “two-body part rule” originally espoused in Singleton v. Young Lumber Company, 236 S.C. 454, 114 S.E.2d 837 (1960). Wigfall v. Tideland

Utilities, Inc., 580 S.E.2d 100, 354 S.C. 100 (2003)(“Because the Legislature's intent is clear from the statute’s language and the decision by the Legislature not to statutorily overturn Singleton, we affirm the rule that where a claimant has only one scheduled injury his recovery is pursuant § 42-9-30.”). This case does not present another challenge to Singleton or Wigfall. What this case does present is a chance for the Court to correct a fundamental misapprehension of those holdings by the Workers’ Compensation Commission – a misapprehension which has been amplified by the erroneous analysis in a published decision by the Court of Appeals.

The Workers’ Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C.Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

In this case, the Commission only addressed disability under the medical model. See S.C. Code Ann. § 42-9-30 (2004)(providing compensation paid for loss of use to the leg is 195 weeks). The explanation for this omission goes back to the findings that the injury is limited to the “right foot/ankle” and that “Claimant did not suffer compensable injuries, either directly or indirectly, to her right knee, left knee, **back**, neck, or right shoulder as a result of her work accident on February 21, 2004.” [R. page 138, Finding of Fact 2 (emphasis added)].

Had Colonna’s injury been entirely limited to her right leg, then she would be limited to a maximum compensation of 195 weeks – not withstanding the fact she is totally and permanently

disabled. The basic rule set out in Singleton states, “Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation.” Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). This rule is colloquially referred to as the “two-body part rule.”

The part of Singleton relevant to this case states, “To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected.” [Id.]. The point here is that if two or more scheduled members are injured, the claimant is entitled to proceed under general disability as a matter of law without further inquiry. However, if the actual injury is confined strictly to one body part, the claimant can still proceed under the general disability statutes if he can “show that some other part of his body is affected.” Id. See, also Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002) (injury to scheduled member that affected other parts of body compensable as general disability). It is enough that the other body part be *affected*. There is no requirement that a separate impairment rating be given. Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010)(proof that claimant’s leg was affected by radicular symptoms from back injury was sufficient to establish right to proceed under general disability statute). “The Singleton Court intended ‘impairment’ to encompass a physical deficiency.” Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Cf. Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% to leg affirmed because ruptured Achilles tendon not limited to foot because pain traveled up into leg); Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 2005)(for workers' compensation purposes, there is no requirement that loss of use, or partial loss of use, of member of body requires evidence of direct injury to member itself).

In the instant case, the Court of Appeals found “Colonna’s argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment.” Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. withdrawn, submitted and refiled June 26, 2013)(Shearouse Adv.Sh. No. 29 at 16, 22). The court further noted “ Implantation of a spinal cord stimulator, without evidence of causally-related symptoms, pain or ill effects in the spine, does not render the body part ‘affected’ under the Act and therefore, there are no additional body parts, including the back, which were affected by [Colonna's] work injury or subsequent treatment for same.” Id.

This is simply incorrect. A spinal cord stimulator is implanted in the spinal canal A spinal cord stimulator inherently creates additional limitations on one’s physical abilities – which is the very definition of impairment.

The Court of Appeals treated the spinal cord stimulator as if it were entirely beneficial, overlooking the fact that the spinal cord stimulator comes with its own list of restrictions and complications. The spinal cord stimulator is implanted for a lifetime. It is not like an injection where one feels a momentary sting, but suffers no permanent effects.

Colonna herself addressed two specific limitations from the spinal cord stimulator. She testified:

And also, sir, I – I cannot drive. I cannot drive because the – I have a spinal cord stimulator. I – the reason – the company who makes the spinal cord stimulator, Science – Research Scientific advised me to shut it off for safety² but if I shut it off

²The spinal cord stimulator made by Boston Scientific has a similar restriction: “Automobiles and Other Equipment. Patients should not operate automobiles, other motorized vehicles, or potentially dangerous machinery/equipment with therapeutic stimulation switched on. Stimulation must be turned off first. Sudden stimulation changes, if they occur, may distract patients from attentive operation of the vehicle or equipment.”

only after a few minutes I'm already in significant pain; so, I – I have no choice but to turn it back on. [R. Page 104, lines 16-23].

Before the manifestation of the RSD and implantation of the spinal cord stimulator, Colonna was able to drive herself, albeit for short distances. [R. Page 84, lines 3-10]. Now – thanks to the spinal cord stimulator – she cannot drive at all.³

Colonna also testified “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. page 103, lines 10-14]. She specifically attributed her inability to lift twenty pounds to the spinal cord stimulator in her back. This is direct evidence of pain (“hurting . . . my back); weakness (“straining”); and limitation (“I can’t lift twenty (20) pounds.”) resulting from the spinal cord stimulator.

Inability to lift 20 pounds and inability to drive because of increased pain are unquestionably impairments as the term is commonly understand – and as it is used in workers’ compensation. As the Court stated in Wigfall, “The Singleton Court intended ‘impairment’ to encompass a physical deficiency.” Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Lifting and driving restrictions are patently physical deficiencies.

The Court of Appeals sloughed off these impairments by pointing to other notations in Dr.

<http://www.controlyourpain.com/prescriptiveinformation.cfm>

³The Court of Appeals misquoted the testimony by stating: “Colonna also testified she could only drive short distances after the implantation of the spinal cord stimulator, and her husband typically drove her everywhere.” Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. withdrawn, submitted and refiled June 26, 2013)(Shearouse Adv.Sh. No. 29 at 16, 23). Colonna testified in the 2007 hearing that she could drive short distances with her husband. [R. Page 84, lines 3-10]. After the spinal cord stimulator was installed, she could not drive at all. [R. Page 104, lines 16-23].

Pasi's medical records which it considered "substantial evidence in the record to support the circuit court's decision that Colonna did not suffer additional injury or impairment to her back as a result of the spinal cord implantation." Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. withdrawn, submitted and refiled June 26, 2013)(Shearouse Adv.Sh. No. 29 at 16, 23). With all due respect to the Court of Appeals, "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The role of the appellate is to analyze the evidence under this standard – not to mine the record for inconsequential nuggets not even mentioned by the trier of fact.

In this case, the Circuit Court improperly made its own findings of fact. It is those findings which were affirmed (and quoted) by the Court of Appeals. If one looks at the actual orders of the Single Commissioner and Appellate Panel, there is no evidentiary support for the finding that "Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant did not suffer compensable injuries, either directly or indirectly, to her . . . back . . . as a result of her work accident on February 21, 2004." [R. Page 38]. The orders *do not even mention* the spinal cord stimulator or the RSD. This is particularly shocking considering Respondents admit the spinal cord stimulator was implanted to treat the RSD. It is simply impossible for any appellate court to read these orders and conclude the Commission ever actually considered the dispositive evidence in the case. See Hutson v. S.C. State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Commission's findings as based on rank speculation); Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the

Commission,” is not evidence and cannot form the basis of a finding).

Certiorari should be granted for multiple reasons. The lower appellate courts made their own findings of fact – findings never made by the Commission because the Commission never considered the medical conditions which bring this case within the ambit of Wigfall and Singleton. Instead of looking at the important legal issues raised by Petitioner – as well as the fundamental deficiencies in the Commission’s orders – the Court of Appeals denied Petitioner meaningful review. The issues presented in this case are too important to the entire workers’ compensation system for a decision so flawed to stand.

2. As RSD is a condition of the sympathetic and central nervous systems, it is an injury to those body parts as a matter of law.

The Court of Appeals overlooked or misapprehended Petitioner’s argument concerning the RSD and the fact RSD *per se* constitutes an injury to the sympathetic nervous system. Indeed, just as a stroke is a brain injury and a heart attack is a heart injury, RSD is by definition an injury to the sympathetic and central nervous systems. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002)(“Reflex Sympathetic Dystrophy (‘RSD’) is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain.”). Cf. Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa 1995)(finding that reflex sympathetic dystrophy, now known as CRPS, which is a dysfunction of the sympathetic nervous system is compensable as an unscheduled injury).⁴

⁴Petitioner has argued at every level that her leg injury caused an indirect injury to her back via the mechanism of the RSD and attendant spinal stimulator. See Brief of Appellant pages 12-15. Before the Appellate Panel, Petitioner argued “Now, the Defendants concede that they have to provide for the spine stimulator. I think that concession showed that the spine and nervous system are affected body parts.” [R. Page 115, lines 11-14]. [R. pages 4-7 (Form 59 - Appellant’s Informal Brief); R. pages 53-55 (“Appellant contends that due to her right ankle

The court concurred with the circuit court's conclusion that: "The 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." Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 53). With respect to both tribunals, this finding is incorrect – and is a finding never made nor even addressed by the Appellate Panel. Cf. Burnette v. City of Greenville, Op. No. 5059 (S.C.Ct.App. filed December 5, 2012)(Shearouse Adv.Sh. No. 44 at 29)(medical opinion of commissioner is not substantial evidence).

The spinal cord stimulator was implanted to treat RSD. It was not implanted for a mere foot/ankle injury – it was specifically implanted to treat the severe intractable pain resulting from a condition defined by our State's highest court as "a rare condition affecting the sympathetic nervous system." See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002). Medical science confirms that the Mizell Court understood RSD. The sympathetic nervous system itself is part of the central nervous system. It is localized in the thoracic and lumbar areas of the spinal cord. As to CRPS/RSD, "It is now generally believed that a central nervous system abnormality is present based on the autonomic changes of abnormal sweating and skin blood flow." AMA Guides to Permanent Impairment (5th Edition), page 343.

Dr. Pasi confirmed Colonna has all the signs of RSD: allodynia; skin color changes; coldness; hair growth changes; and atrophy. [R. Page 345]. These signs do not result from a mere twisted ankle. They are specific to RSD — and specifically result from abnormalities in the central and

injury, she developed RSD prompting a need for a spinal stimulator."); R. page 114, line 17-page 115, line 17].

sympathetic nervous system.

Respondents put great stock on the allegation that Colonna perceives her pain to be largely in the injured leg.⁵ The distinction is between *normal* sensations of pain and *abnormal* sensations of pain. The mechanism of RSD renders a normally innocuous stimulus, such as light touch, excruciatingly painful (“allodynia”). In the unaffected person, an injury to the foot might be painful – but the pain would be concordant with the injury. To the person with RSD, the pain is beyond belief – well out of proportion to the injury. The explanation lies in the abnormal processing of the stimulus – a processing problem within the sympathetic and central nervous systems. See Simms v. State Compensation Ins. Fund, 116 P.3d 773 (Mont. 2005)(“RSD is a malfunction of the central nervous system which involves the sending of abnormal pain signals from non-painful stimulæ.”).

Both the medical evidence and the definitions previously adopted by this Court in Mizell confirm that RSD is a condition of the sympathetic and central nervous systems. The petition should be granted because the “decision of the Court of Appeals is in conflict with [this] prior decision of the Supreme Court.” Rule 242(b)(3), SCRAP (listing the character of reasons the Court will consider in granting a writ of certiorari). As the RSD is by definition an injury to a separate (unscheduled) body part and substantially increases Colonna’s disability, the Circuit Court and Commission erred in holding Petitioner was limited to a single member disability award. And as noted in the previous argument concerning the spinal cord stimulator, the Commission never even

⁵The record shows Colonna complains bitterly of back pain as well as “chronic pain in her neck, upper back and arms which is not controlled with any conservative treatment including PT.” [R. Page 343]. This is not surprising as 92% of CRPS patients report their pain spreading to other parts of the body. 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, Volume 25, Number 4, May 2009.

mentioned RSD in any of its orders.

3. As the evidence showed Colonna suffered additional impairment to her left leg as a result of the second surgery and the RSD, there is no substantial evidence supporting the Commission's finding of no additional permanent partial disability.

In its Opinion, the Court of Appeals affirmed the Commission's finding that Petitioner suffered no additional permanent partial disability to her left leg and back – finding the issue was not preserved and affirming on the merits. Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. withdrawn, submitted and refiled June 26, 2013)(Shearouse Adv.Sh. No. 29 at 16, 25-26). Although appeal of this issue is raised in the alternative and is admittedly a less fundamental error than the rulings on the spinal cord stimulator and RSD, they are nonetheless worthy of review and correction by this Court. The Court of Appeals applied an unduly strict issue preservation regime – finding an issue not preserved due to a simple scrivener's error on left versus right or leg versus foot. Additionally, the Court of Appeals applied an improper standard of review in analyzing the Appellate Panel's factual findings regarding disability.

A. Issue Preservation.

The Court of Appeals appears to have based its preservation finding on the semantics of naming the injured body part. The court noted Petitioner raised the issue as to her “left leg and back,” whereas the circuit court referenced the “right ankle/foot.” Petitioner is not sure if the court was concerned that she admittedly referenced the wrong leg or that she referenced the leg at all. The reference to the *left* leg is a simple scrivener's error. As to referencing the leg rather than the ankle/foot, the court may have overlooked the fact that the original disability award made by the Commission in 2007 was “50% loss of use of her *right lower extremity*, or 97.5 weeks of permanent

partial disability benefits.” [R. Page 28 (emphasis added)]. This disability award was to the leg. See S.C. Code Ann. § 42-9-30 (15)(1996)(*amended by* 2007 Act No. 111, Pt I, Section 18, eff July 1, 2007, applicable to injuries that occur on or after that date) (“for the loss of a leg, sixty-six and two-thirds percent of the average weekly wages during one hundred ninety-five weeks.”).

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers’ compensation cases as there is no mechanism to rescue an issue raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)(“The commission’s failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.”) If the court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant’s arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)(“it is inferable from the record that [claimant] raised this issue before the single commissioner”). The courts have held issues are preserved where “it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order.” Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, the appellate courts have ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. Appl. 1994)(“On appeal to the full commission, the employer and the carrier first

raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990.”).

There is no question Petitioner raised the issue of additional permanent partial disability at all levels – for her leg, for her back, and for her RSD. As the above cases show, the appellate courts treat issue preservation liberally in workers’ compensation cases. To hold this issue not preserved based on a hyper-technical reading of a conflict in wording between the circuit court and the commission is, respectfully, an unfair and unnecessarily strict application of issue preservation rules – particularly when the appeal is based on the Commission’s original award of disability to the leg. Therefore, Petitioner respectfully requests the Court grant the Petition for Writ of Certiorari and reverse the holding by the Court of Appeals on preservation of this issue.

B. Permanent Partial Disability.

The Court of Appeals affirmed the Commission’s finding that: “Based on the evidence submitted by the parties, as well as testimony presented at the hearing, Claimant has not suffered any additional permanent partial disability.” [Finding of Fact 5, R. Page 44]. In analyzing this finding, the Court focused on two things: (1) “Colonna’s impairment rating for her right ankle and foot decreased from 40% to 35% between her first surgery in 2006 and her second surgery in 2008, which indicates her disability would have decreased as well; and Dr. Pasi “did not assign Colonna with an impairment rating for her RSD.” Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 57). Respectfully, neither of these observations constitute substantial evidence sufficient to support the Appellate Panel’s finding. Although substantial evidence is a highly deferential standard, it is not a rubber stamp. See Hutson v. S.C. State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Commission’s findings

as based on rank speculation).

The suggestion that Petitioner's disability decreased after the change of condition for the worse is – to be candid – facially absurd. Her original surgery was a “right foot arthrodesis” performed by Dr. Easley on May 19, 2005. [R. Pages 71, lines 295]. Based on that surgery, Dr. Easley assigned an impairment rating of 40% to her right lower extremity – of which 20% was allocated to the injury and 20% to a preexisting condition. [R. page 324-325]. In 2007, the Commission found Colonna had reached maximum medical improvement on March 29, 2006 with a 50% permanent partial disability to her right lower extremity. [R. pages 21-29].

Shortly thereafter, Colonna's condition changed for the worse. The change covered two significant aspects: (1) a torn achilles tendon; and (2) development of RSD.

The torn achilles tendon required surgical repair in 2007. [R. Page 335]. Dr. Easley assigned Colonna a 35% impairment rating to Colonna's right foot on July 23, 2008 – specifically because of the achilles tendon repair. [R. Page 326].

The second surgery was to an entirely different part of the leg. As Colonna testified, “the first one the right foot and then the second one the right ankle.” [R. Page 96, lines 13-19].

The original impairment rating was assigned following the right foot arthrodesis. That surgery fused the lower bones of the foot to address traumatically acquired “flat feet.” *It had nothing to do with the achilles tendon.* The original impairment was still there after the second surgery. The rating following the second surgery only be interpreted as 35% additional impairment.

Furthermore, even though no specific impairment rating was assigned for the RSD, the RSD emphatically resulted in substantially increased disability. See Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010)(proof that claimant's leg was affected by radicular

symptoms from back injury was sufficient to establish “prima facie case for compensation for the injury to his leg pursuant to section 42-9-30 . . .” even though no separate impairment rating was assigned to the leg). Dr. Pasi observed Colonna had to wear a boot cast on her leg. [R. Page 345]. Colonna suffered from numerous symptoms specifically as a result of RSD. Dr. Pasi documented “allodynia, color changes and cold Rt. lower extremity. atrophy on Rt lower leg compared to left. Hair changes and loss on Rt leg below knee.” [R. Page 345].

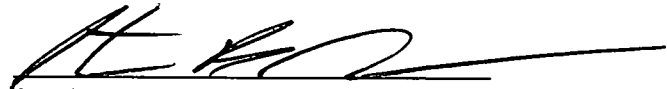
The Commission simply ignored all this evidence – evidence far too important to overlook. As did the Commission, the Court has a duty to consider all the evidence in the record. It is simply insufficient for the Court to zero in on two numbers and summarily conclude the decision below is supported by substantial evidence. The numbers alone mean nothing – particularly when a closer look shows the impairment ratings were assigned to two different and separate part of the foot/ankle (or leg). By the same token, neither the Commission nor the Court can overlook the RSD. It is a critically important part of this case – and was not present when the initial disability award to the leg was made. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct.App. 1995)(remanding for Commission to determine whether disability award should be revised to reflect additional disability resulting from condition not included by Commission in original award).

Respectfully, the Court of Appeals overlooked the same evidence of disability which was overlooked by the Commission. This is not meaningful review. The Court should grant certiorari to ensure that the standard of review is clarified once and for all. Although Petitioner requests the Court reverse on the RSD and spinal cord stimulator issues, Petitioner also requests that the Petition be granted on the overlooked evidence of additional impairment and disability to the leg, foot and ankle.

CONCLUSION

For the foregoing reasons and the reasons previously raised in the Briefs and Petition for Rehearing, Petitioner asks this Court to grant the Petition for Writ of Certiorari.

Respectfully Submitted,



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Attorney for Petitioner

Columbia, South Carolina
July 26, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Opinion No. 5117 (S.C. Ct. App. filed April 17, 2013)
Withdrawn, Submitted and Refiled June 26, 2013

Loida Colonna, Petitioner

v.

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

PROOF OF SERVICE

I, the undersigned, paralegal to Stephen B. Samuels of Samuels Law Firm, LLC, attorneys for the
Petitioner, do hereby certify that I have served one copy of the **Petition for a Writ of Certiorari**
and **Appendix**, dated July 26, 2013, first class mail addressed to the parties as indicated below:

Weston Adams, III, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211

Helen F. Hiser, Esquire
McAngus Goudelock & Courie, LLC
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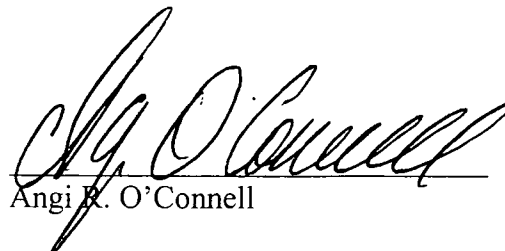
Mark A. Allison, Esquire
McAngus Goudelock & Courie, LLC
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JUL 29 2013

SC Court of Appeals

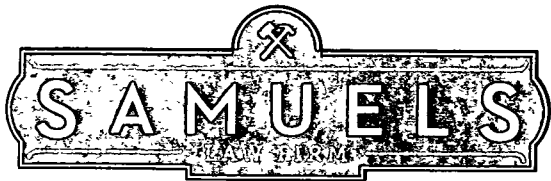
Honorable Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(Petition for a Writ of Certiorari only)



Angi R. O'Connell

Columbia, South Carolina

July 26, 2013



STEPHEN B. SAMUELS
ROBERT P. JACKMAN
ATTORNEYS AT LAW

July 26, 2013

VIA HAND DELIVERY

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Loida Colonna v. Marlboro Park

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of our **Petition for a Writ of Certiorari** in the above-referenced matter along with our check in the amount of One Hundred (\$100.00) Dollars as payment of the filing fee. We have also enclosed two (2) copies of the **Appendix**, one of which is unbound per Rule 267(d).

By copy of this letter and enclosure to Helen Hiser, Weston Adams and Mark Allison, we are serving a copy of our **Petition for a Writ of Certiorari** and **Appendix** upon counsel for the Respondents as indicated by the attached Proof of Service. We are also providing a copy of our **Petition for a Writ of Certiorari** to the South Carolina Court of Appeals pursuant to Rule 242(c).

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/aro

Enclosure(s)

cc w/encl: Helen Faith Hiser, Esquire
Weston Adams, III, Esquire
Mark A. Allison, Esquire
✓Honorable Jenny Abbott Kitchings

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JUL 29 2013

SC Court of Appeals

WE WORK FOR THE PEOPLE WHO WORK.