THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2012-213267

Joseph C. Coonce, Employee, ... Appellant,

v.

Fleet Source, Inc., Employer, and The South Carolina Uninsured Employers' Fund, of whom The South Carolina Uninsured Employers' Fund is the Respondent.

BRIEF OF APPELLANT

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4. Whether the Circuit Court erred in misapplying the law of the case doctrine to limit the disability compensation to the left arm only.

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. The case arises out of a work-related fall suffered by the Claimant, Joseph (Jody) Coonce on February 3, 2004. H e injured his left wrist when he fell in an icy parking lot while lowering the landing gear on his truck.

Coonce was employed as a long haul truck driver with a company called Fleet Source. Fleet Source was involved with a fraudulent insurance scheme. Because of the extensive litigation over the insurance coverage questions (extending to many other cases beside this one), the merits of this case were not heard until May 18, 2009 – more than five years after the initial injury Due to the lack of consistent and timely medical treatment, Coonce developed severe Complex Regional Pain Syndrome which went untreated for years.

Commissioner Andrea Roche heard the case. She found the injury to the left arm to be compensable. Medical treatment was ordered. At the time, Coonce was working for Papa John's delivering pizza, so no temporary total disability compensation was ordered. As the actual employer was uninsured and no longer in business, the South Carolina Uninsured Employers' Fund ("Fund") was ordered to provide benefits.

Although Coonce had surgery for his injury in 2004, he did not begin followup treatment until after the May 2009 hearing. At the time of the hearing, Dr. Zgleszewski had performed an evaluation in which he opined that Coonce had, "*Possible* left upper extremity complex regional pain syndrome. . . . He needs a triple-phase bone scan to center on the left upper extremities *to rule in or out the probability* of complex regional pain syndrome." [R. p. 208 (emphasis added)].

Dr. Zgleszewski took Coonce out of work on January 14, 2010. The Fund began paying weekly compensation from that date forward. Dr. Zgleszewski placed Coonce at maximum medical

improvement (MMI) on September 28, 2010.

The Fund filed a Form 21 (Employer's Request for Hearing) on November 15, 2010. [R. p. 59].

The case was heard by the Honorable Derrick Williams on January 14, 2011. At the hearing, Coonce contended he was permanently and totally disabled due to the arm injury and the affect on his central nervous system (CRPS). Coonce sought a disability award under S.C. Code Ann. § 42-9-10 (2004). The Fund contended this was a single member case, such that Coonce was limited to a single member partial disability award to his arm under S.C. Code Ann. § 42-9-30 (2004).

Commissioner Williams issued his Decision and Order on May 11, 2011. He found Coonce had suffered a 100% loss of use of his arm. He made no findings of fact or conclusions of law regarding the Fund's argument that this was a single member case.

Coonce appealed to the Appellate Panel of the Full Commission. After hearing oral arguments on August 15, 2011, the Appellate Panel affirmed on October 25, 2001. The Appellate Panel added a Finding of Fact and Conclusion of law holding this was a single member case and limiting the disability award to the arm under Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

This appeal followed.

STATEMENT OF THE FACTS

Jody Coonce was employed as a truck driver with a company called Fleet Source. On February 3, 2004, he injured his left arm when he slipped and fell on ice in Maryland as he was lowering the landing gear on his trailer. Coonce was taken to a local emergency room which put his arm in a soft cast.

Upon his return to South Carolina, Coonce reported to his employer. He continued working for three weeks – hiring a lumper to do his unloading – until the Employer fired him on April 16, 2004. On May 4, 2004, Coonce had surgery to his left wrist. The surgery fused his wrist. He also lost the ability to manipulate his fingers, thus leaving him with no use of his left arm and hand. Coonce developed Complex Regional Pain Syndrome (also known as RSD) in his central nervous system as a result of the arm injury.

Coonce found a job with a different trucking company about six weeks after the surgery. He drove trucks more or less continuously until October 10, 2008. He then tried delivering pizza for Papa John's. He worked for Papa John's into early 2009. He was let go because he was physically unable to do the job due to his inability to use his left arm.

Coonce has been treating with the authorized treating physician, Dr. Zgleszewski, since September 3, 2009. Dr. Zgleszewski took him completely out of work on January 14, 2010. He was place at MMI on September 28, 2010. Coonce continues to treat with Dr. Zgleszewski for CRPS/RSD in his left upper extremity and central nervous system. [R. pp. 240-243].

Coonce has lost virtually all use of his left arm. He has essentially zero range of motion of his forearm, wrist, hand, fingers and thumb. He is unable to grip anything at all with his hand. He wears western style shirts with snaps because he cannot button his own shirt. He also wears cowboy boots because he cannot tie shoelaces.

He suffers from severe chronic regional pain syndrome requiring continual medication "to maximize his function, control his pain and increase his overall quality of life." [R. p. 241].

Dr. Zgleszewski assigned a 29% whole person rating, which was converted to a 49% impairment rating to the left upper extremity. [R. p. 241]. He further stated, "The impairment rating

for the central nervous system is included in the LUE impairment rating." [R. p. 243].

Coonce is currently receiving social security disability. He attempted to work in two different jobs, but as found by the Single Commissioner "his arm condition prevented him from continuing to work." [R. p. 85].

STANDARD OF REVIEW

A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999). Upon a proper appeal under the Worker's Compensation Act when only a question of law is involved, the facts having been concluded by the finding of the Commission, the appellate court as to review and correction of errors has plenary powers. Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 35 S.E.2d 42 (1945).

The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and provide a basis from which they reasonably may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures. Broughton v. South Carolina Game and Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). The substantial evidence rule, prescribed in the statute, means the appellate court will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276, S.E.2d 304 (1981). However, when only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). The Commission must consider all the evidence in the record when developing its findings of fact. Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App.1999).

ARGUMENT

The primary issue on appeal is legal application of the "two body-part rule" set out in Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Although the *injury* itself was to the arm, the central nervous system has been *affected* by the complex regional pain syndrome. 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."). As such, Coonce should have been found permanently and totally disabled based on the factual findings that "He also has been diagnosed with complex regional pain syndrome, which compounds his arm problems" and "his arm condition prevented him from continuing to work." [R. p. 85]. The law and the evidence require the Commission to make an award for total disability under the general disability statutes. S.C. Code Ann. § 42-9-10 (2004).

1. The Commission misinterpreted the application of *Singleton* by requiring a *direct injury* to a second body part rather than the second body part be *affected* by the original injury.

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). The Commission is required to apply whichever statute provides the greatest benefits for the Claimant.

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 arm is 220 weeks). Had Coonce not developed CRPS, such that his injury was entirely limited to his left arm, then he would be limited to a maximum compensation of 220 weeks – not withstanding the fact he 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. "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).

The parties agree the central issue in this case is whether a "condition *affecting* the sympathetic nervous system" caused by a compensable arm injury constitutes an affected body part for purposes of bringing the case with S.C. Code Ann. § 42-9-10. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002)(emphasis added). The Commission erred by overlooking the term "affected" as used by the Supreme Court in Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). The Commission's interpretation would read *affected* entirely out of the case law, replacing it with a regime requiring a direct injury with a separate impairment rating to the second body part.[1]

There can be no question that the Supreme Court meant exactly what it said when it chose to use the term *affected.* McCaskey v. Shaw, 295 S.C. 372, 368 S.E.2d 672 (Ct.App. 1988)("Until our Supreme Court tells us otherwise, we will have to assume that it meant what it said . . ."). The general rule is that words are given their ordinary meaning. The only requirement is that the *affect* encompass a *physical deficiency*, as opposed to "a loss of earning capacity, age, lack of training or any other economic factor." Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)(rejecting claimant's argument that the term "impairment" should include both medical and wage loss considerations).

It is enough that the injury physically affect a second body part. It is not a requirement that

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[1]Dr. Zgleszewski opined that "The impairment rating to the central nervous system is included in the LUE impairment rating." [R. p. 243]. The central nervous system is not separately rated because it is not a scheduled member.

the body part actually be injured. A good example of this in practice occurred in Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010), *reversed on other grounds,* 732 S.E.2d 500, 399 S.C. 381 (2012)(proof that claimant's leg was affected by radicular symptoms from back injury was sufficient to establish right to proceed under general disability statute).[2] Hutson suffered a single member injury – to his back. His back injury caused "radicular symptoms in his right leg that *affected* the functioning of the limb." Id. Radicular symptoms are not a separate *injury* at the situs of the leg. In layman's terms, radiculopathy is irritation of a nerve root caused by compression that typically causes pain, numbness or weakness in the part of the body which is supplied by that nerve root. The injury is to the back; the symptoms (and thus the affect) are in the leg. Strictly speaking, there is no direct *injury* to the leg.

An even stronger example is found in Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002). Although not a workers' compensation case, Mizell involves CRPS (using the earlier term "RSD"). The Supreme Court gave a full description of RSD: "Reflex Sympathetic Dystrophy ('RSD') is a rare condition *affecting the sympathetic nervous system*, usually in an extremity, resulting in ongoing cycles of extreme pain. It is often triggered by an accident, surgery, or other injury. Early diagnosis and treatment of the condition is critical to curing RSD. If it is not treated early enough, the condition and the pain caused by it can be become permanent." Id.(emphasis added).

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[2]Hutson's radicular symptoms met the requirements of Singleton and Wigfall. As such, he was legally entitled to prosecute his disability claim under both the wage loss model and the medical model. The Court of Appeals held his wage loss claim failed for a lack of proof of wage loss; not because of the two-body part rule. The Supreme Court reversed holding the Commission's finding regarding no proof of wage loss was based on "rank speculation." Hutson v. S.C. State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)

In this case, the undisputed evidence shows Coonce suffered an injury to his left arm which in turn resulted in complex regional pain syndrome. On an official form created by the Commission itself *for the very purpose of determining whether additional body parts are affected as described in Singleton*, Dr. Zgleszewski unequivocally opined: "Body part(s) affected: Central Nervous System." [R. p. 243]. This is conclusive evidence that Coonce satisfied the two-body part rule.[3] It was legal error of the Commission to hold that his injury was limited to the left arm. See 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). *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 Circuit Court made the same error in affirming the Commission. The court concluded:

> The Full Commission, as the ultimate finder of fact, was free to conclude based upon the Form 14B that the injury itself was limited, for purposes of permanent disability benefits, to the left arm only and that the involvement of the central nervous system by way of RSD/complex regional pain syndrome did not constitute a separately awardable injury to another body part. [R. p. 6].

This is simply incorrect. The Appellate Panel is not "free to conclude" anything not based on evidence. The Form 14B explicitly states that the "Central Nervous System" was affected by the CRPS. To conclude otherwise is to ignore the evidence and resort to speculation.

The Circuit Court cited to Brunson v. American Koyo Bearings, 718 S.E.2d 755, 395 S.C. 450 (Ct.App. 2011), for the proposition that the Appellate Panel is "free to interpret or reject medical

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[3]Strictly speaking, the *central nervous system* is an unscheduled member as it is not listed in the applicable statute or regulations. S.C. Code Ann. § 42-9-10 (2004); 25A S.C. Code Reg. 67-1101 (2004).

evidence in light of other evidence in the record." [R. p. 6]. While that is not necessarily an incorrect statement, in this case there is no such other evidence in the record. Dr. Zgleszewski's medical opinion that the development of CRPS as a complication of the arm injury affected the "Central Nervous System" is unrefuted and uncontested. For the Appellate Panel to conclude that CRPS does not affect the Central Nervous System is rank speculation unfounded on evidence. The Panel is simply making up its own medical facts. As such, "Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, we are forced to conclude it is the medical opinion of the single commissioner, adopted by the Commission." 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 Circuit Court also repeated a logical mistake made by the Appellate Panel at oral argument, to wit: "it would seem that any and all injuries at work would in one way or the other implicate the central nervous system given the prominent role of the central nervous system in the body's functioning." [R. p. 8]. The court's resort to *reductio ad absurdum* is misplaced. It is true that Coonce perceives the pain to be in his arm. And it is true that he has this perception in his brain as the pain response travels from the arm into the brain. However, the mere fact that pain – and all other sensation – is ultimately processed in the brain (which is part of the central nervous system) does not mean that all injuries which cause pain necessarily *affect* the central nervous system.

The distinction is between *normal* sensations of pain and *abnormal* sensations of pain. The mechanism of CRPS renders a normally innocuous stimulus, such as a light touch, excruciatingly painful. In the unaffected person, an injury to the arm might be painful – but the pain would be

concordant with the injury. To the person with CRPS, 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 stimulae.").

Both the medical evidence and the definitions previously adopted by our highest court in Mizell confirm that CRPS is a condition of the sympathetic and central nervous systems. As the CRPS is both a separate (or unscheduled) body part and substantially increases Coonce's disability, the Circuit Court and Commission erred in holding Coonce was limited to a single member disability award. This Court should reverse.

2. The Circuit Court incorrectly applied the "law of the case" doctrine to the instant case.

As an additional ground for affirming the decision below, the Circuit Court made this holding:

> First, there is a prior order in this claim dated July 29, 2009, that limits this claim to the left arm only. (Find of Fact No. 4 of the Full Commission order). There was no appeal of that order, nor has there been any application for a change of condition to include other body parts. Id. In other words, the law of the case is that this claim is limited to the left arm only. [R. p. 5].

The Circuit Court's holding fundamentally misunderstands the nature of proceedings before the Workers' Compensation Commission, as well as missing the procedural posture of the 2009 hearing and the law regarding change of condition. Notably, the Appellate Panel did not make the same ruling.

The 2009 Order is not in the record. It is a mischaracterization of the record to conclude the

previous order "limits this claim to the left arm only. " The 2009 order is mentioned in passing in the Single Commissioner's Order wherein it states: "By prior order dated July 29, 2009, this claim was ruled compensable as to the Claimant's left arm and the uninsured employer and SCUEF were, among other things, directed to provide additional treatment for that arm." [R p. 80]. This passage cannot support the very different conclusion that a finding of compensability limits the claim to the left arm only. The Circuit Court erred in applying the law of the case doctrine based on an Order which was not in the record.

As to there being no application for a change of condition, there is no need for such. A change of condition is filed to reopen the case when there has been a physical change of condition after an award for permanent disability. S.C. Code Ann. § 42-17-90 (2004). The statute is one of limitations. The claimant has "twelve months from the date of the last payment of compensation pursuant to an award under this Title." Id. As no final award had been made in this case, the twelve month period had not run. By the same token any failure to appeal the 2009 order is irrelevant because "an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter." Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100, 576 S.E.2d 191 (Ct.App.2003).

It is common in workers' compensation cases for additional conditions and complications to manifest themselves well after the initial injury. If an original pleading or order could entirely limit a case to those facts, there would be no reason for the change of condition statute, the discovery rule, or even the employer's ability to end compensation upon a finding of MMI. See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 88, 518 S.E.2d 599, 607 (Ct.App.1999), *aff'd as modified*, 339 S.C.

68, 528 S.E.2d 667 (2000). ("[W]hen a claim is filed, all elements of compensation are included. It was not contemplated by the Act that different parts of the total result of one accident should be regarded as separate claims."); Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(claim does not accrue until claimant discovers injury is of sufficient severity to be considered compensable). Unlike civil litigation where there is one trial and one verdict, workers' compensation cases often involve multiple hearings and multiple decisions as the case evolves.

At the 2009 hearing, Coonce had not yet been definitively diagnosed with CRPS. Dr. Zgleszewski had noted the *possibility* of CRPS in his initial evaluation of Coonce on January 18, 2007. Dr. Zgleszewski ordered "a triple-phase bone scan to center on the let upper extremities and wrist *to rule in or out the probability of complex regional pain syndrome."* [R. p. 208]. Dr. Zgleszewski did not begin treatment of Coonce until September 3, 2009 – when he repeated the recommendation for further testing to diagnose CRPS. [R. p. 212]. As the CRPS was not confirmed until after the 2009 hearing, it could not have been definitively addressed in the 2009 order. However, we do know the Fund was ordered to provide treatment to Coonce by Dr. Zgleszewski. We also know Dr. Zgleszewski has continually treated Coonce for CRPS ever since it was diagnosed. If the Fund did not believe the CRPS was related to the original injury, it would have denied the treatment and forced Coonce to litigate that issue. The Fund's acceptance of liability for CRPS estops it from contesting the issue at this stage of the proceedings.

The issues raised here on appeal could not have been tried in the first hearing. The Commission can only order benefits to be provided based on the condition existing at the hearing. If conditions change – a claimant reaches MMI, returns to work, goes completely out of work, has surgery, or develops CRPS – then the benefits must be adjusted. The Commission has various

mechanisms for this – including ordering treatment for newly manifested conditions.

There is no evidence in the record on which the Circuit Court could hold an admitted malfunction of the central and sympathetic nervous systems (CRPS) was barred by the law of the case doctrine. As such, it was error for the Court to so hold. This Court should reverse.

3. The Commission must Award compensation for loss of earnings capacity under § 42-9-10 because this would result in a disability greater than the presumptive disability provided for under the scheduled member section (§ 42-9-30).

The evidence in this case shows Coonce has lost any prospect of future gainful employment. As an award under § 42-9-10 would be larger than the single member award made by the Commission, the Appellate Panel should apply that code section because it would result in the greatest possible disability award. S.C. Code Ann. § 42-9-10 (1996)(setting out requirements for general disability).

The Commission is required to apply whichever statute provides the greatest benefits for the Claimant. The policy behind the general disability portion of the act provides the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). This concept is practically identical to North Carolina's *Doctrine of Munificent Remedy*. It would defeat the purposes of the Act to deny a Claimant the opportunity to establish a greater disability than he would receive under the scheduled member statute.

Under the Doctrine, "where two remedies are created side by side in a statute, the Claimant should have the benefit of the more favorable." Gupton v. Builders Transport, 357 S.E.2d 674 (N.C. 1987), quoting 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987). In other

words, where a claimant has established entitlement to a greater award under § 42-9-10 or 42-9-20 than he would receive under a scheduled member award, the Commission is required to make the most favorable award. See McLean v. Eaton Corp., 481 S.E.2d 289 (N.C. App. 1997)(error for Commission to award partial permanent disability under scheduled injury statute without assessing whether or not the lost income statute would provide a more munificent remedy).

If interpreted under the Brown framework, Coonce would be entitled to an award for total disability under § 42-9-10. The Single Commission erred by failing to consider an award under § 42-9-10.

4. Jody Coonce has been Rendered Permanently and Totally Disabled by the Injuries to his Left Arm and Central Nervous System.

There is no doubt from the evidence that Coonce is permanently and totally disabled due to his injuries. Coonce suffered a wrist fracture which required a surgical arthrodesis of his left wrist and forearm – rendering the arm virtually unusable. He developed Complex Regional Pain Syndrome as a result of the arm injury. The CRPS affects his central nervous system. [R. p. 243].

The Commission specifically found:

> Claimant sustained a severe injury to his left arm. He also has been diagnosed with complex regional pain syndrome, which compounds his arm problems. This is supported by the prior order of compensability, the testimony of Claimant and the medical records, especially the medical records from Dr. Zgleszewski. [R. p. 96].

The reliance on Dr. Zgleszewski's medical records is noteworthy as the Order quotes Dr. Zgleszewski's opinions that:

> the body part injured was the "Left Upper Extremity" and the body part affected was the "Central Nervous system." That Form 14B also noted that "The impairment rating for the central nervous system is included in the LUE impairment rating." [R. p. 84].

Furthermore, Dr. Zgleszewski took Coonce out of work on January 14, 2010 and never returned him to work.

The Commission made other findings consistent with permanent and total disability, specifically that Coonce was credible. They found:

> Claimant is a believable witness. I do not doubt his testimony concerning his limitations, and he testified in line with the medical evidence. This finding is supported by his testimony at the hearing, the absence of any evidence to the contrary brought forth by the SCUEF, and the objective evidence of the injury itself as shown by the medical records. [R. p. 96].

As to the substance of this testimony, the Commission observed, "The Claimant also testified about his attempts to work following the injury and *his ultimate inability to work as his condition worsened.*" [R. p. 84 (emphasis added)]. The Order further noted, "The cross-examination of the Claimant on these issues was brief and simply did not bring forth any evidence tending to undercut the Claimant's contention that he manifested little to no vocational use and function of his left arm." [Id.].

The Commission also noted the vocational opinion of vocational expert Joel Leonard, to wit:

> That report tended to confirm that the Claimant's vocational opportunities were severely restricted as a result of the injury to his left arm and resulting impairment. In discussing the scenario of complex regional pain syndrome, Mr. Leonard opined "Mr. Coonce would be considered totally disabled in an outright manner due to an inability to sustain gainful work activity secondary to pain symptoms affecting his left arm. [R. p. 84, quoting R. p. 251].

The sum of the evidence establishes that we have a credible claimant with an objectively verified injury to his arm and central nervous system who attempted to work but was ultimately unable to do so as his condition worsened. In every respect, this meets the test for permanent and total disability.

Despite this completely one-sided evidence – as summarized by the Commission itself – he ruled:

> I do not find that he is permanently and totally disabled, based on the evidence as a whole. This finding is supported by the Claimant's own testimony and medical evidence, including the absence of any evidence tending to show a casual connection between the compensable left arm injury and the other physical problems complained of by the Claimant. [R. pp. 85-86].

It appears the Single Commissioner and Appellate Panel may have been confused by the alternative theory advanced by Coonce, to wit, that under Ellison the arm and central nervous system injury combined with rheumatoid arthritis (the reference to "other physical problems" is a reference to the arthritis). Ellison v. Frigidaire Home Products, 638 S.E.2d 664, 371 S.C. 159 (2006). However, Ellison does not come into play here because the authorized treating physician opined the arm injury affected the central nervous system (and the impairment rating includes impairment to both body parts). Because two body parts are affected, an Ellison analysis is not required.

As the totality of the evidence plainly shows Coonce has been rendered permanently and totally disabled by "his ultimate inability to work as his condition worsened," the Court should reverse Appellate Panel in part and enter an award for permanent and total disability.

CONCLUSION

For the foregoing reasons, the Court should reverse the findings of the Appellate Panel and enter an Order finding Claimant is permanently and totally disabled. The Order should further provide that Claimant is entitled to the balance of 500 weeks payable in a lump sum with lifetime proration language.

Respectfully Submitted

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September 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2012-213267

Joseph C. Coonce, Employee, ... Appellant,

v.

Fleet Source, Inc., Employer, and The South Carolina Uninsured Employers' Fund, of whom The South Carolina Uninsured Employers' Fund is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Final Brief of Appellant** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **September 9, 2013**, addressed as follows:

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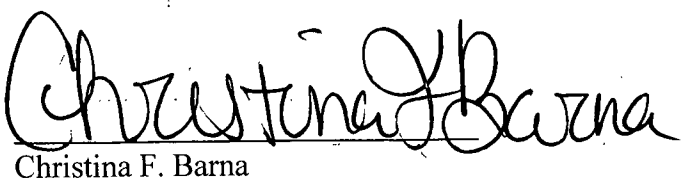

Christina F. Barna

Columbia, South Carolina

September 9, 2013