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.

FINAL REPLY BRIEF OF APPELLANT

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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 [in reply to Respondents' Argument at pages 5-8].

The parties agree the controlling legal issue in this case is application of the "two-body part" rule. See Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)(if the original injury is to only 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."). If Coonce's injury were strictly limited just to his left arm – with no physical effect anywhere else in his body – then he would be limited to partial disability to his arm, notwithstanding his actual loss of earnings capacity. The two-body part rule recognizes '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." Id.

Respondents rely primarily on this Court's recent decision in Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47).[1] Although Colonna does bear some superficial similarities to the instant case, it is clearly distinguishable. The injured worker in that case, Loida Colonna, developed RSD/CRPS as a result of a foot and ankle injury. As RSD/CRPS is a condition of the central nervous system, she required the implantation of a spinal cord stimulator. Colonna argued"her claim is within the ambit of section 42-9-10 as a matter of law because the implantation of the spinal cord stimulator affected her back." This Court noted that despite Colonna's testimony regarding pain and limitations as a result of the

[1]A Petition for Rehearing in Colonna was filed on May 2, 2013. The description of Colonna above is based on the Court's initial opinion.

stimulator, the doctor who surgically implanted the stimulator "only diagnosed Colonna with RSD of 'the lower limb' and concluded her implantation surgery was successful." Id. Ultimately, the Court held "when faced with conflicting testimony, we are constrained by our limited standard of review [to] defer to the Commission on this issue." Id. The Court viewed Colonna as a factual dispute in which it was constrained to affirm under the substantial evidence standard of review.

In Colonna, the Court found no physical deficiency/impairment to Colonna's back as a result of the successful implantation of the spinal cord stimulator. The issue in this case is markedly different. Here, the conclusive medical evidence shows that Coonce suffered additional impairment – and hence disability – as a direct result of the RSD/CRPS. 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.

Perhaps most critically for the analysis of this case, 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*[2] *is included* in the LUE impairment rating." [R. p. 243 (emphasis added)]. 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.");

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[2]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.

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."). *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). In Colonna, there was no rating to the central nervous system or the back (where the stimulator had been implanted).

It was legal error for the Circuit Court to hold that Coonce's injury was limited to the left arm. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of commissioner is not substantial evidence). A simple fracture with surgical repair does not result in a 49% impairment rating to the arm or "No use of the left upper extremity." [R. p. 243]. The fact is the actual impairment rating is 29% whole person – because rating includes both the arm injury and the injury to the central nervous system.

Respondents argue the "medical form makes clear that although the central nervous system may have been implicated in the diagnosis of RSD/complex regional pain syndrome there was no medical impairment that manifested itself in any body part other than the left arm." [Brief of Respondents, page 7]. This is not how it works. In essence, the arm injury caused an injury to the central nervous system: RSD/CRPS. The central nervous system injury causes *abnormal* sensations of pain – well out of proportion to an otherwise relatively simple arm 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."). It is this difference that results in the substantially greater disability

than would be expected from a single member injury. See Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47)(the two-body part rule recognizes '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."). In holding the injury was limited to the arm, the Circuit Court and Appellate Panel simply failed to understand the medicine – a misunderstanding which caused them to arbitrarily disregard the unrefuted medical evidence from Dr. Zgleszewski. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of commissioner is not substantial evidence). Cf. Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995)("as a matter of law the hip socket is part of the pelvis and not part of the leg for workers' compensation purposes").

In essence, 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."). An stroke may not cause any symptoms felt within the brain itself, yet will still result in paralysis of one side of the body. An injury to the back may not even result in back pain, yet it can cause pain sensations in the leg. This type of condition is an archetypical example of what the Court intended in adopting the two body-part rule. If a back injury causing pain, numbness and weakness in a leg is considered an effect on the leg as a matter of law, then surely a central nervous system injury causing *severe abnormal* pain and weakness in an arm is no different. 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). Indeed, the Appellate Panel specifically found as such when it held: "He also has been diagnosed with complex regional pain syndrome, which compounds his left arm problems." [R. p. 96].

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. The CRPS unquestionably resulted from the arm injury and caused additional injury with permanent impairment to the central nervous system. As the central nervous system 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 [in reply to Respondents' argument at pages 8-9].

Respondents rely again on Colonna to argue that the law of the case doctrine prevents litigation of the issue that the CRPS injury to the central nervous system is a separate body part. Colonna is absolutely inapplicable to this case on this issue.

In Colonna, the employee had already litigated the specific issue of her psychological injury. The Court ruled:

> In the 2005 Order, the single commissioner held, "[Colonna] has had some aggravation of pre-existing psychological problems because of this injury, but she has failed to prove her need for psychological treatment is the sole result of this accidental injury." In the 2007 Order, Colonna stipulated that "[she] did not sustain [a] compensable psychological injury per prior Order of the Commission." As a result, the single commissioner noted compensability of any psychological injury was not before him in light of the 2005 Order that found Colonna did not sustain a compensable psychological injury. Colonna never appealed this ruling; therefore, it

is law of the case. Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47).

In the instant case, there is no previous finding nor stipulation that Coonce did not suffer from CRPS. The issue was never ruled on until the 2011 hearing – when Commissioner Williams found "He also has been diagnosed with complex regional pain syndrome, which compounds his left arm problems." [R. p. 85]. "The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal." Bone v. U.S. Food Service, 733 S.E.2d 200, 399 S.C. 566 (2012).[3] As there was no ruling on CRPS, the law of the case doctrine cannot apply.

Furthermore, the Appellate Panel made no ruling on the law of the case doctrine. For the Circuit Court to even address the issue, it would need to know what the 2009 Order actually said The 2009 Order was not part of the Record on Appeal to the Circuit Court. Without the Order in the Record, it was an error of law for the Circuit Court to even address the issue. Such a ruling is inherently speculative. Appellate courts "are confined to the record in deciding issues on appeal." Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct.App.1985) (refusing to review evidence of insurance coverage outside the record on appeal).

An example of this kind of error appeared in Johnson v. South Carolina Dept. of Probation, Parole, and Pardon Services, 641 S.E.2d 895, 372 S.C. 279 (2007). In Johnson, the Department failed to include the order being appealed from in the record.[4] As a result, "Because the Department

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[3]The Supreme Court has granted rehearing in Bone, but has not yet issued a ruling.

[4]Respondents have designated the 2009 Order in their Designation of Matter to be Included in the Record on Appeal. However, as the 2009 Order was not in the record at the

failed to include the trial court's final order in the record on appeal, the court of appeals properly decided the case without reaching the merits. " Id.

In the case at bar, it was the duty of Respondents to include the 2009 Order in support of their law of the case argument (which was raised as an additional sustaining ground). Their failure to do so precludes consideration of the issue on appeal. As the circuit court was sitting as an appellate court, the ruling must be reversed.

3. Jody Coonce has been Rendered Permanently and Totally Disabled by the Injuries to his Left Arm and Central Nervous System [in reply to Respondents' argument at page 10-13].

Respondents argue that there is conflicting evidence as to "whether or not the Appellant was permanently and totally disabled." [Brief of Respondents, page 13]. This is simply not correct. As the Appellate Panel indicated with its amended findings and at oral argument, the ruling denying an award for total disability benefits was based entirely on its interpretation of Singleton. [R. pp. 98, 100].

The evidence is overwhelming that Coonce is permanently and totally disabled as a result of the CRPS and its impact on his left arm. His testimony – found credible by the Commission – along with the unrefuted medical and vocational evidence confirm this. [R. p. 251, 243].

Respondents point to the vocational evaluation stating "at least one of those vocational profiles precluded a finding of permanent and total disability." [Brief of Respondents, page 13]. Examination of the vocational expert's opinions shows he was convinced of the fact Coonce was permanently and totally disabled. Indeed, the Commission's reference to the vocational opinion of

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circuit court level, it cannot be added at this stage absent leave of the Court. See, Rule 210, SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal").

vocational specifically focused on the opinion supporting a finding of total disability:

> 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 vocational expert gave a possible *legal* framework where the Commission could rule multiple ways based on its view of Singleton and the two-body part rule. This extraneous legal analysis by a vocational expert – not a legal expert – recognizes the legal effect of the two body part rule; but it doesn't change the ultimate opinion that Coonce is disabled due to the combined injuries to his left arm and central nervous system. This is confirmed by the Appellate Panel's finding that: "[Coonce] also has been diagnosed with complex regional pain syndrome, which compounds his left arm problems." [R. p. 96].

The evidence of permanent and total disability is overwhelming. See, e.g., Hutson v. S.C. State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Commission's finding regarding no proof of wage loss because it was based on "rank speculation."); Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)(reversing commission's denial of case because evidence of compensable injury was overwhelming). As such, the Court should reverse the decisions below and find Coonce is permanently and totally disabled.

CONCLUSION

For the foregoing reasons, the Court should reverse the findings of the Circuit Court and 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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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply 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 **Reply 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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