

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Melody L. James, Susan S. Barden, T. Scott Beck, Appellate Panel

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WCC File No. 0800660

OCT 01 2014

Opinion No. 5272 (S.C. Ct. App. filed September 17, 2014)

SC Court of Appeals

73721

Cindy Ella Dozier, Employee, ... Appellant,

v.

American Red Cross, Employer, and Sedgwick CMS, Carrier, ... Respondents.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

The Appellant, by and through her undersigned attorney, hereby files this Petition for Rehearing and Rehearing en banc. On September 17, 2014, this Court issued an opinion affirming the Decision and Order of the South Carolina Workers' Compensation Commission. Dozier v. American Red Cross, Op. No. 5272 (S.C.Ct.App. filed September 17, 2014)(Shearouse Adv.Sh. No. 37 at 18).

As grounds for granting her Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) the Commission's finding that Dozier had a 5-pound work restriction disqualified her from sedentary

work; (2) the vocational opinion of James Myers' lacked a foundation as he opined work was available at a sedentary to light level when Dozier's restrictions were less than sedentary; (3) selection by an employer of a doctor to treat RSD/CRPS and authorizing his treatment specifically for that condition constitutes waiver and estoppel; and (4) the only competent medical evidence in the record confirms Dozier suffers from RSD/CRPS as a complication of her work-related injuries.

ARGUMENT

I. Cindy Dozier is permanently and totally disabled as there are no jobs available to someone with permanent restrictions of no more than occasional lifting up to 5 pounds.

This Court affirmed the Commission's finding "that Claimant is not permanently and totally disabled *due to the fact that work is available that would allow her to work under the 5-pound weight restriction* Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome." Dozier v. American Red Cross, Op. No. 5272 (S.C.Ct.App. filed September 17, 2014)(Shearouse Adv.Sh. No. 37 at 18). Respectfully, this finding is clearly erroneous, as there is *no evidence* any such work is available.¹ See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability).

¹Defense counsel stated at the hearing before Commissioner McCaskill that "The vocational evaluation we received from Mr. Myers was done on a five pound lifting restriction. He found jobs and – he did a market survey and he found jobs that were – that come underneath those restrictions." [R. p. 287, lines 15-19]. This statement is patently incorrect – yet appears to have been relied on by the Commission. See Law Firm of Paul L. Erickson, P.A. v. Boykin, 651 S.E.2d 606, 375 S.C. 204 (Ct. App. 2007)(argument of a party's counsel is not evidence). No where in the Record on Appeal does Myers ever state any job exists within the five-pound lifting restriction. Myers opined "Ms. Dozier should be able to return to work in a Sedentary to Light Physical Demand level (PDL) position . . .," i.e. a job requiring the ability to exert ten-pounds of force. [R. p. 616].

The determination of disability in workers' compensation is a multi-step analysis. The first step is determining the injured worker's permanent physical restrictions. The Commission correctly held Dozier was limited to a "5-pound weight restriction." [R. p. 84]. Both Dr. Shealey and Dr. Zgleszewski concurred in the 5-pound restriction. On May 23, 2011, Dr. Shealey provided Dozier "with a permanent restriction of 5 pounds" for the carpal tunnel syndrome. [R. p. 399]. Dr. Zgleszewski concurred that the "5-pound lifting restriction for the carpal tunnel syndrome [is] reasonable." [R. p. 250, lines 1-19]. Dr. Zgleszewski further stated "she is unable to use either upper extremity on a repetitive basis secondary to her CRPS and chronic pain from her failed CTS release surgery." He added "in my medical opinion from a medical standpoint, Ms. Dozier *cannot perform even at a sedentary position* if the job requires anything greater than less than occasional use of her arms given the diagnoses she has of CRPS and CTS." In his deposition, he testified her permanent restrictions "would be no lifting greater than 5 pounds and that she could not even perform a sedentary position if the job required anything greater than less than occasional use of her arms given the diagnosis of the CRPS and the carpal tunnel syndrome, and also, in my medical opinion, I stated that she cannot use either upper extremity on a repetitive basis." [R. p. 230, lines 7-24].

The next step in the analysis is determining whether the employee is unable to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). In answering this question, the Commission can rely on expert vocational testimony – provided the expert's opinion is based on the physical limitations as found by the Commission (and consistent with the evidence). The Commission specifically relied on the opinion of James Myers. However, this is where both the Commission and the Court erred.

The Court reasoned:

The Appellate Panel's reliance on these medical opinions is also supported by James Myers' report, *which presented jobs within Dozier's weight restrictions*. Myers listed twelve jobs he concluded Dozier qualified for based on her education, prior vocational experience, geographic location, and physical work restriction of "sedentary." Myers stated he relied upon Dr. Shealy's medical opinion and Dozier's previous life experiences when he identified possible alternative employment opportunities. To that end, Myers specifically noted Dr. Shealy placed a five-pound restriction upon Dozier at her own request. Because Myers relied upon Dr. Shealy's assessment of and restrictions placed upon Dozier, *we find it reasonable to conclude the employment opportunities Myers generated for Dozier were also within the five-pound weight restriction*. Dozier at 28 (emphasis added).

Myers *never* states the jobs he listed are within the five-pound weight restriction. The jobs he listed are *all* outside Dozier's five-pound restriction. She simply does not qualify for any work in the market. Sedentary work requires the ability to *lift 10 pounds* occasionally; light duty requires the ability to lift 20 pounds.² Myers did not even pretend the jobs he listed were within the medical

²The full PDL definitions for sedentary and light duty state:

S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

L-Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

restrictions. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012) (“To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it.”); Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012) (reversing Commission’s finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee’s claim).

The word “sedentary” is a term of art. Physical Demand Levels are defined by the Dictionary of Occupational Titles (DOT). Myers and the other vocational experts appearing in this case all based their opinions on the DOT classifications. For Myers’ opinion to have any probative value at all, Dozier *must* be able to lift 10 pounds occasionally. The medical evidence shows she cannot.

Respectfully, it is error for this Court to “to conclude the employment opportunities Myers generated for Dozier were also within the five-pound weight restriction” when Myers’ report states otherwise. Dozier at 28 (emphasis added). Both authorized treating physicians opined Dozier cannot lift more than 5 pounds – which *completely disqualifies her from sedentary employment*. Myers simply pretends these restrictions do not exist. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) (“It is, of course, elementary that the factual or underlying basis for the expert’s opinion be set out, otherwise the opinion lacks probative value.”). Such an unsupported opinion must be rejected as rank speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012) (“the full commission’s conclusion is based on rank speculation and cannot now be used as the basis for denying [employee’s] claim for lost wages.”).

The Court suggests that only the Wal-Mart greeter job was outside Dozier’s restrictions. The significance of the Wal-Mart greeter job description is that Myers lists it as a sedentary job – no

different than the other sedentary (or light) jobs listed by Myers. The Wal-Mart job is the only job which was actually verifiable with a job description from the actual employer. Myers did not provide sufficient information for the others for an actual job description to be available. [R.p. 542-548]. However, Myers did provide the DOT job code for the remaining eleven jobs – albeit inaccurately in several instances. The peer review reveals these inaccuracies. [R.p. 542-548].

Even overlooking the inaccuracies, eleven of the twelve jobs are listed in Myers' report with the description: "Physical requirements: Sedentary."³ [R.p. 568-571]. These jobs are all *by definition* outside the five-pound weight restriction. Myers adds the "average wage of these employers was based upon a *sedentary physical demand level* provided by the Department of Labor . . ." [R.p. 571]. Even if Dozier has the education and transferable skills to perform these jobs, the job descriptions uniformly exceed the restrictions imposed by her doctors.

Nowhere in Myers' report does he ever state any of the potential jobs are within Dozier's actual restrictions. From what little he does state, they are not. Conversely, the remaining evidence overwhelmingly shows Dozier is permanently and totally disabled. One cannot read Myers' report and conclude a reasonably stable job exists within Dozier's restrictions. See, e.g. 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); Beckman v. Sysco Columbia, LL, Op. No. 5205 (S.C.Ct.App. withdrawn, submitted and refiled July 9, 2014)(Shearouse Adv.Sh. No. 27 at 42, 49)(reversing

³ The twelfth job (job #2) was with an employer or agency in Lee Summit, Missouri. Myers did not state what the physical requirements of that job were. He listed the wrong DOT Code for a mail sorter. The Code he provided (612.462.010) was for a "MULTI-OPERATION-MACHINE OPERATOR" – which carries a "Light" physical duty requirement. The DOT Code for a "MAIL CLERK" (209.687.026) also requires the ability to work "Light" duty. Job #3 was also a light duty machine operator job.

because Commission's finding that the "injury is confined to a scheduled member is not supported by substantial evidence."); 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). There is no substantial evidence to support the Commission's findings. Therefore, Appellant requests the Court reconsider its holding and reverse the Appellate Panel.

II. Employer is procedurally barred from denying the existence of CRPS.

Respondents' designation and authorization of Dr. Zgleszewski to treat CRPS constitutes acceptance of the condition. As such, waiver and estoppel apply. Appellant respectfully requests the Court may have overlooked

A. Estoppel

Respondents should be estopped from contesting the existence of CRPS. The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. Langdale v. Harris Carpets, 395 S.C. 194, 717 S.E.2d 80 (Ct. App. 2011). To successfully assert the doctrine of estoppel, a party must show a (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. Id.

These elements were met in this case. The Court specifically stated "we are not convinced

that ARC possessed actual knowledge that Dozier suffered from CRPS/RSD because the issue of compensability of her injuries, with the exception of her bilateral wrists, was a contested issue from the outset of this litigation.” Compensability of CRPS *had* been a contested issue from the outset – up until (so far as the parties understood it) the 2009 ruling from Commissioner Huffstetler. Following that hearing, Respondents authorized Dr. Zgleszewski to treat Dozier specifically for CRPS/RSD. Respondents cannot say they were unaware of this when Dr. Zgleszewski diagnosed “Reflex Sympathetic Dystrophy of Upper Limb” in every medical record from 2010 forward. [R.p. 423-517].

Appellant respectfully asks the Court to reconsider the holding on estoppel in light of the evidence which may have been overlooked or misapprehended.

B. Waiver.

The Court held the Employer was not procedurally barred by the doctrine of waiver from contesting the diagnosis of CRPS by the authorized treating physician. Appellant asks the Court to reconsider that the Employer’s ongoing provision of treatment for CRPS by a physician specifically chosen by them to provide that treatment constitutes a *waiver* of any such defense. See Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012)(Employer waived defenses when they provided benefits for 450 days after accident). Moreover, denial of CRPS was not raised in their previous Form 21 filing, the Form 58 submitted for the Form 21 hearing, nor in their Form 51. [R. pp. 95, 102, 100-101]. It was not raised until the Form 58 in this case – ten days before the hearing.

Waiver is the “voluntary and intentional relinquishment or abandonment of a known right.” Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). The party claiming waiver

must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992).

In Jervy, the Court of Appeals held, “because [employer] knew of its defense the day of the accident, yet it paid and has continued to pay [claimant] disability compensation, and it did not assert the defense until at least 450 days after the accident, the evidence supports the Appellate Panel's finding that [employer's] defense is barred by the doctrine of waiver and laches.” Id. at 451, 721 S.E.2d at 474. In this case, Employer knew that Commissioner Huffstetler had ordered treatment for CRPS in his order notes (although the actual Decision and Order was not as specific). [R. p. 572]. They began providing treatment for CRPS on January 26, 2010 and continued providing it up through Dr. Zgleszewski's deposition on January 24, 2012 – an **uninterrupted period of 728 days!** These facts support a finding that Employer waived any defense that the complex regional pain syndrome is not related or does not exist. Therefore, Appellant respectfully asks the Court to grant rehearing and reverse the Appellate Panel on this issue.

III. The Commission erred in finding Dozier did not suffer from CRPS at the time of the hearing.

Dr. Zgleszewski, the authorized treating physician chosen by Employer, has treated Dozier's CRPS for over two years. Dr. Zgleszewski states repeatedly and unequivocally that Dozier suffers from CRPS Type II. [R. p. 272, lines 1-20]. He gave a long, detailed explanation for his diagnosis. [R. pp. 211-225]. The significance of his diagnosis – made in 2010 when he became the treating physician – is that up until then, Dozier did not have a *definitive* diagnosis. Dr. Zgleszewski made that diagnosis. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(claim

did not accrue until physician made correct diagnosis).

Other treating doctors had the same diagnosis earlier (sometimes referring to CRPS by the more generic term RSD). On January 10, 2009, Dr. Moore diagnosed her with “Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome.” [R. p. 370]. Dr. Rhea, a neurosurgeon, noted it “may be some type of a sympathetic mediated pain syndrome.” [R. p. 417]. He prescribed a “cervical sympathetic block” for the diagnosis of “RSD” on April 6, 2009. However, their opinions were not definitive, nor were they current at the 2012 hearing.

The Appellate Panel placed “great emphasis on the opinions of Dr. Mancuso and Dr. Bitting.” [R. p. 83]. Dr. Bitting’s opinion was stale. He last saw Dozier in 2009. See, Smith v. S.C. Dep’t of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)(reversing and remanding for taking of additional evidence when “[m]uch of the medical evidence upon which the single commissioner relied was more than two years old at the time of the hearing.”)(emphasis added). Cf. Johnson v. Renta-A-Center, Inc., 730 S.E.2d 857, 398 S.C. 595 (2012)(noting Commission found medical release more than a year old was “stale.”). He openly conceded he could not “speak to her *current physical condition* [and] *diagnosis . . .*” [R. p. 199, lines 17-24 (emphasis added)]. The only medical evidence from the original hearing forward relative to RSD/CRPS came from Dr. Zgleszewski – who had the unique advantage of treating Dozier for that condition for a full two years.

Dr. Zgleszewski unequivocally opined to a reasonable degree of medical certainty that Dozier had developed RSD/CRPS as a direct result of her work injury. This was the only competent evidence before the Commission. Incompetent evidence is not substantial evidence. Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust, 396 S.C. 589,

723 S.E.2d 805 (2012)(reversing Commission's finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee's claim).

Dr. Bitting's deposition testimony should be given no weight as he did not state his opinions regarding RSD to a reasonable degree of medical certainty. Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust, 396 S.C. 589, 723 S.E.2d 805 (2012)(reversing Commission's finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee's claim). Furthermore, he deferred to the current treating physician (Dr. Zgleszewski) "regarding any other treatment that would have occurred since [he] last saw Ms. Dozier on August 26, 2009." [R. p. 199, lines 6-20]. Because, "I haven't seen her in over two years," Dr. Bitting further confirmed he "can't speak to her *current physical condition, diagnosis*, work restrictions or impairment." [R. p. 199, lines 14-24 (emphasis added)]. As Dr. Bitting's opinion regarding the *current existence* of CRPS is not competent evidence, it was error for the Appellate Panel to give it any weight.

Furthermore, the Appellate Panel relies on its own diagnosis of CRPS, rather than relying on the medical experts. The Panel based its opinion on what constitutes CRPS on its own diagnostic criteria – disregarding Dr. Zgleszewski's unrefuted opinion as to the diagnostic criteria used by medical experts. [R. p. 213, line 14-p.224, line 18; p. 242, line 18-p. 243, line 8; p. 254, line 19-p. 255, line 13; p. 257, line 23-p. 261, line 2]. See Burnette v. City of Greenville, 737 S.E.2d 200, 401, S.C. 417 (Ct. App 2012) (findings based on commissioner's own medical opinion is not substantial evidence and must be reversed).

As the competent medical evidence shows, Cindy Dozier suffers from CRPS Type II as a

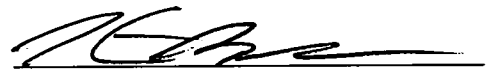
result of her work-related injury. As such, the decision of the Appellate Panel is not supported by substantial evidence and should be reversed. Respectfully, Appellant asks the Court to grant rehearing and reverse the findings regarding CRPS/RSD.

CONCLUSION

Appellant requests the Court grant the Petition for Rehearing and rehear the case *en banc*. This case raises significant issues regarding the definitions and evidence required to prove disability and medical conditions in worker's compensation cases.

For the foregoing reasons, the Court should reconsider the earlier decision and reverse the Decision and Order of the Appellate Panel. The Court should find Dozier has suffered permanent total disability as a result of her bilateral arm injuries. The Court should further find Dozier is entitled to lifetime medical treatment for her carpal tunnel syndrome and complex regional pain syndrome.

Respectfully Submitted,



Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net
ATTORNEY FOR APPELLANT

Columbia, South Carolina
October 1, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0800660

Cindy Ella Dozier, Employee, ... Appellant,

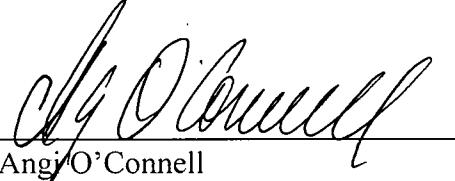
v.

American Red Cross, Employer, and Sedgwick CMS, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing** 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 **October 1, 2014**, addressed as follows:

Wesley J. Shull, Esquire
Attorney for Respondents
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607


Angi O'Connell

Columbia, South Carolina

October 1, 2014

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SC Court of Appeals



STEPHEN B. SAMUELS
ATTORNEY AT LAW

October 1, 2014

Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Cindy Ella Dozier, Employee, v. American Red Cross, Employer, and Sedgwick
CMS, Carrier.

Appellate Case No.: 2012-213606

Lower Court Case No.: 0800660

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Petition for Rehearing** in the above-referenced matter. Also enclosed is a check in the amount of \$25.00 for the filing fee. Please date stamp the extra copy of the Petition for our records.

By copy of this letter and enclosure to Wesley J. Shull, we are serving a copy of the **Petition for Rehearing** upon counsel for the Respondents as indicated by the enclosed Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/aro

Enclosures

cc w/encl.: Wesley J. Shull, Esquire

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1320 RICHLAND STREET, COLUMBIA, SC 29201 | P: (803) 779.4000 | F: (803) 779.4004 | WWW.SAMUELSLAWFIRM.NET