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JAN 23 2015

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

S.C. Supreme Court

Lower Court Case No. 1002925

Appellate Case No. 2014-001691

Neal Beckman, Employee,.....Respondent,

v.

Sysco Columbia, LLC, Employer, and  
Gallagher Bassett Services, Inc., Carrier,.....Petitioners.

Petitioners' Reply Brief

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## ARGUMENT

1. Substantial evidence supports the Commission's decision that Respondent is only entitled to permanent disability compensation for the injury to his back.

As outlined in Singleton, 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 [pursuant to section 42-9-30] . . . To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected. Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Petitioners assert that Respondent's admitted back injury did not have a disabling effect on any other body parts and substantial evidence in the record supports the Commission's decision to contain Respondent's compensation to the scheduled back injury. Respondent's arguments to the contrary must be distinguished.

- a. The Claimant's assertion that the Sacroiliac (SI) joint is a separate unscheduled injured body part is not preserved for appeal.

Petitioners assert that the issue of whether the SI joint is a separate injured body part is not preserved for review on appeal. At the initial hearing before the single Commissioner, the Respondent's opening position for the record was that "this is more than just a back injury. That this injury *affects* his buttocks, his right S.I. joint, his legs and his right foot" (emphasis added). R. p. 54, lines 15-17. Respondent did not assert that he sustained an injury to an unscheduled body part and thus there is no corresponding ruling. At the Full Commission hearing, Respondent's counsel even conceded that the single Commissioner had the authority to award compensation as outlined in the single Commissioner's Order, which was affirmed by the Full Commission.

Commissioner Beck: But even assuming that fact, Mr. Riesen, would you dispute that the Commissioner had two (2) approaches to take in this case: one (1), to go either a [§42-9-]20 or – or a [§42-9-]10 case, or two (2), to award to the back taking into account the radiculopathy?

Mr. Riesen: No question.

Commissioner Beck: All right.

Mr. Riesen: She had – she could go either way.

Commissioner Beck: She could.

R. p. 110, line 21- p. 111, line 5.

If Respondent was asserting an injury to an unscheduled member as a matter of law as argued in the Respondent's Brief, he would not have conceded that the single Commissioner could have awarded compensation to the back only pursuant to §42-9-30 as the Respondent would have been able to pursue a §42-9-20 wage loss claim based on injuries to a scheduled and unscheduled member. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

The issue of whether the SI joint was a separate injured body part was not raised before the Commission thus it was not preserved for review by the Court of Appeals. See Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004)(The long-established preservation requirement is that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments); also See State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003)(Issues not raised and ruled upon in a trial court will not be considered on appeal). When the Court of Appeals did not rule on this specific issue, the Respondent did not file a petition for rehearing to the Court of Appeals or a petition for a writ of certiorari with this Honorable Court following the Court of Appeals decision. Therefore, Petitioners respectfully request that this Court decline to address the issue.

b. The Claimant's compensation for permanent loss of use of his back encompasses his SI joint.

In the event that the Court finds this issue is properly preserved, Petitioners assert that to the extent the Respondent injured his SI joint; it is part of the back. According to Dr. Zgleszewski, Respondent sustained a 10% medical impairment to the back and a 5% medical impairment to the SI joint for a combined rating of 15% to the back. R. p. 193. Therefore a reasonable mind must conclude that 10% of the impairment addresses the lumbar spine and 5% addresses the SI joint in calculating the total impairment of 15% to the entire back. In addressing Respondent's impairment, Dr. Boyd, the neurosurgeon, opined that Respondent's impairment is 8% based on the AMA Guides to Impairment, DRE Lumbar Category II without providing a separate rating to the SI joint.

There are two SI joints, one on each side of the lower spine. The SI joints are connected to the sacrum, the triangular bone at the bottom of the spine. There are other spinal joints and ligaments that provide stability to the spine as well. Although the Supreme Court confirmed in Gilliam that the hip socket is part of the pelvis, the anatomy of the SI joints were not specifically addressed. Gilliam v. Woodside Mills, 319 S.C. 385, 461 S.E.2d 818 (1995). Respondent's assertion that this is the same issue as in Gilliam is in error as the Court did not address whether the SI joints are considered part of the back for workers' compensation purposes. When the Commission has addressed a SI joint in the disability award to the back, the decision has been upheld. Petitioners assert that this scenario is similar to Sanders wherein the Claimant's disability for his SI joint and his lumbar spine was compensated based on his loss of use of his back. See Sanders v. MeadWestvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (Ct.App. 2006) (An award of benefits to a

workers' compensation claimant for “permanent loss of the use of the lumbar spine and sacroiliac joint (SI joint)” was not reversible error, even though the statute that provided for compensation for an injury to the back did not specifically mention the lumbar spine or the SI joint; the order and record reflected that claimant's injury and subsequent disability was to his back). In Sanders, the Court of Appeals stated:

[E]ven though the SI joint and lumbar spine are not specifically mentioned in section 42-9-30, we find no reversible error in the manner in which the Appellate Panel characterized Sanders' injuries. A review of the Appellate Panel's order and the record reflects Sanders' injury and subsequent disability was clearly to his back. This approach is consistent with our policy of liberally construing the Workers' Compensation Act in favor of coverage. [*Schulknicht v. City of N. Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002); *see also Mgmt. Recruiters v. R.J.R. Mech., Inc.*, 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct.App.1991)] (finding when construing a judgment, the determinative factor is the “intent of the officer who wrote it, as gathered not from an isolated part of the judgment, but from all parts thereof”).

Sanders at 69-70, 290-291.

Petitioners therefore assert that the Commission awarded Respondent compensation for the entire back which takes into account any alleged disability to the SI joint and Respondent is not entitled to additional compensation for the SI joint as an unscheduled member.

c. The Claimant's alleged radiculopathy is refuted by the objective evidence in the record.

Petitioners hereby submit that all of the diagnostic tools, testing, a commissioner's eye witness account, physical evaluations, and video surveillance are not snippets of the record as suggested by the Respondent but rather are objective and substantial evidence relied upon by the finder of fact in determining that Respondent's left lower extremity is not an affected body part. Contrary to the Respondent's assertion, this is not the same situation as in Massey where there

was no evidence in the record to support the decision of the Commission. See Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985).

The Petitioners concede that during the course of treatment, Dr. Zgleszewski references the Respondent's subjective complaints of radicular symptoms; however, the physical evaluations and diagnostic testing do not support a diagnosis of radiculopathy. In fact, Record pages 131, 135, 138, 142, 146, 150, 152, 157, 163, 167, 173, 175, 178, 182, 185, 188, 191, 194 do not contain a diagnosis of lumbar radiculopathy as asserted by Respondent.

In the Respondent's Brief, Respondent asserts that his normal EMG/NCS study results constitute a medical opinion by a commissioner as discussed in the Burnette decision. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct.App. 2012). The Respondent's argument is contradicted by his admission that the authorized treating physician was the person who interpreted the EMG/NCS study. Dr. Zgleszewski states "Mr. Beckman given his EMG/NCS does not have a radiculopathy in either leg...". R. p. 153. Although the Respondent asserts that the EMG/NCS is prone to a high percentage of false negatives, there is no evidence in the record to support this assertion.

Respondent alleged that his April 2010 MRI documented muscle spasms and radiculopathy; however, both the April 2010 and March 2011 MRIs were interpreted by Dr. Boyd, a neurosurgeon, and he noted that the MRI did not reveal any significant nerve root compromise and there is no role for surgery. R. pp. 227-229. Dr. Boyd noted objective evidence of the back spasm but did not note any evidence to support the Respondent's alleged radicular complaints. R. pp. 205-206. Dr. Boyd stated, "He has been treated extensively with conservative treatment and based on his MRI findings I do not believe that there is any role for surgery here." R. p. 206. Further, the physical examinations by Dr. Zgleszewski never reference

sensory and motor changes which would support that his back injury has a disabling effect on his left lower extremity. To the contrary, the “physical examination” and “lower extremity motor/sensory/dtr” sections of Dr. Zgleszewski’s notes consistently state that Respondent’s gait and station is nonantalgic; he is able to raise up on his heels and toes; the bilateral lower extremity motor examination is normal; the deep tendon reflexes of the bilateral patella and Achilles tendon are normal; and the bilateral lower extremity sensory examination is normal. R. pp. 132, 139, 147, 153, 158, 164, 168, 176, 179, 183, 186, 189, 192. Respondent’s videotaped exercise routine at Gold’s Gym also did not reveal any motor deficiencies to support his alleged radiculopathy. R. p. 249 and video. Therefore, Respondent’s assertion that his radicular complaints are supported by objective physical examination is rebuttable by the evidence in the record.

Respondent cites the Crisp decision in arguing that objective testing is not necessary to support his radiculopathy claims if there is a physical examination consistent with complaints reported by a patient. Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d 835 (2012). In the Crisp case, the physicians were discussing various methods to evaluate brain damage. Id. The matter at hand does not involve a medically-technical brain injury or any other methods of testing such as the neuropsychological report relied upon by Dr. Collings in evaluating the extent of Crisp’s injury. Crisp at 645, 28. The record does contain imaging reports, an EMG/NCS study and physical examinations that are all supportive of the Commission’s conclusion that the Respondent does not have radiculopathy causing a disabling effect on his left lower extremity. R. pp. 129-130, 228-229, 132, 139, 147, 153, 158, 164, 168, 176, 179, 183, 186, 189, 192.

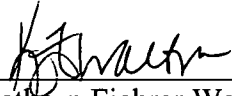
Respondent’s assertion that “all the evidence supports a finding that Beckman’s leg was affected by his back injury with radiculopathy” is incorrect. Multiple opportunities were

presented for Respondent to prove that his left lower extremity was affected by his back injury, however, the MRI did not reveal any impingement of the nerve roots; the surveillance video of his exercise routine did not reveal any lower extremity limitations; the functional capacity evaluation did not reveal any weakness; Respondent's gait was normal according to Dr. Zgleszewski; sensory exams were normal and the EMG/NCS (as interpreted by the authorized physician) showed that Respondent did not have evidence of radiculopathy. Instead Respondent is relying on his subjective complaints of occasional pain and numbness in his left lower extremity to argue that no reasonable trier of fact could reach the conclusion of that of the Commission. Petitioners contend that there is evidence to support the Commission's finding that the Claimant is entitled to 35% loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis). The Commission acknowledged Respondent's allegations that there was a disabling effect on his left lower extremity but did not find that the Respondent's allegation was supported by the evidence in the record.

#### CONCLUSION

For the reasons outlined hereinabove and in the Brief of the Petitioners, Petitioners respectfully request that the Court reverse the Court of Appeal's decision and affirm the Commission's December 5, 2012 Decision & Order.

RESPECTFULLY SUBMITTED,

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January 21, 2015

THE STATE OF SOUTH CAROLINA  
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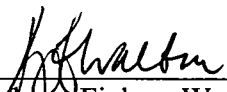
I certify that I have served the Petitioners' Reply Brief by forwarding a copy via  
U.S. Mail, postage pre-paid, on January 22, 2015 addressed to the following:

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January 22, 2015

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**Via FedEx Overnight Mail**

The Honorable Daniel Shearouse  
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JAN 23 2015

Re: Neal Beckman v. Sysco Columbia, LLC  
W.C.C. File No.: 1002925  
Carrier File No.: 011924-107312-WC-01  
Our File No.: 32.64  
Case No.: 2014-001691

S.C. Supreme Court

Dear Mr. Shearouse:

I represent Petitioners Sysco Columbia, LLC and Gallagher Basset Services, Inc. in the above named matter. Please find enclosed for filing the original and fifteen (15) copies of the Petitioners' Reply Brief. I have also enclosed a pre-paid return envelope for your use in returning one (1) clocked copy of the Petitioners' Reply Brief to my office.

By copy of this letter, I am serving all interested parties with a copy of the Petitioners' Reply Brief. Thank you for your time and attention to this matter.

Very truly yours,



Kathryn Fiehrer Walton

KFW/hje  
Enclosure

cc: Ms. Roberta Williams (w/att.) (Via E-Mail Only)  
Mr. Pete Garcia (w/att.) (Via E-Mail Only)  
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The Honorable Jenny Abbott Kitchings (w/enc.)  
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