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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0800660

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

Cindy Ella Dozier, Employee, ... Petitioner,

v.

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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cindy Dozier, Employee, Appellant,

v.

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

Appellate Case No. 2012-213606

Appeal From The Workers' Compensation Commission

Opinion No. 5272
Heard May 6, 2014 – Filed September 17, 2014

AFFIRMED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant.

Wesley Jackson Shull, of Willson Jones Carter & Baxley, PA, of Greenville, for Respondents.

WILLIAMS, J.: In this workers' compensation appeal, Cindy Dozier argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in denying her claim for permanent total disability pursuant to section 42-9-10 of the South Carolina Code (Supp. 2013). In addition, she contends the Appellate Panel improperly applied the doctrine of res judicata to bar her claim for Complex Regional Pain Syndrome (CRPS/RSD)[1] when the doctrines of waiver and

[1] CRPS, also known as Reflex Sympathetic Dystrophy (RSD), "is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in

estoppel should have prevented American Red Cross (ARC) from denying its existence. Last, Dozier contends the Appellate Panel erred in relying on medical opinions that Dozier did not suffer from CRPS/RSD. We affirm.

FACTS/PROCEDURAL HISTORY

Dozier sustained an admitted injury by accident on January 17, 2008, while working as a phlebotomist for ARC. On October 10, 2008, Dozier filed a Form 50 and Form 15, asserting injuries to both arms and entitlement to temporary compensation. Dozier contended the repetitive heavy lifting at ARC caused her to develop bilateral carpal tunnel syndrome. In lieu of a hearing, the parties entered into a consent order, wherein ARC stipulated Dozier sustained a compensable injury to her left wrist. In addition, ARC authorized treatment for her left wrist as well as a medical determination of her work status and the source of her right wrist pain.

Dozier filed another Form 50 on August 6, 2009, alleging injuries to both her arms, her neck, her back, and her psyche. In response, ARC filed a Form 51 on August 14, 2009, admitting an injury to her left wrist, but denying injuries to her right arm, her neck, and her back. ARC contended she achieved maximum medical improvement (MMI) on August 10, 2009, when ARC's initial authorized treating physician placed her at MMI. As a result, ARC claimed the only remaining issue was the extent of permanent disability to Dozier's left wrist.

Single Commissioner David Huffstetler held a hearing on November 3, 2009. At the hearing, he summarized the parties' arguments as follows:

> [Dozier] takes the position that she suffered injuries to both arms, also to her neck and back. . . . And [she] seeks additional treatment for her arms, in particular for [CRPS/RSD] and asks that Dr. Moore be assigned as her treating physician. The defense admits an injury to the left arm only. They deny all other body parts and I assume that [ARC] also den[ies] the request for Dr. Moore to be the treating physician.

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ongoing cycles of extreme pain. It is often triggered by an accident, surgery, or other injury." *See Mizell v. Glover*, 351 S.C. 392, 397 n.1, 570 S.E.2d 176, 178 n.1 (2002).

Commissioner Huffstetler subsequently issued an instruction to Dozier's counsel to draft a proposed order stating: "[Dozier] suffered injuries to both arms, including [CRPS/RSD], and her neck. [ARC] to pay all causally-related medical bills to date and additional treatment to be directed by Dr. Moore." Commissioner Huffstetler then issued an order on December 17, 2009, which he personally drafted, finding Dozier had injured both of her arms in the course of her employment with ARC. Because she continued to be disabled, Commissioner Huffstetler held she was entitled to temporary total disability as well as continuing medical treatment for both of her arms through a physician of ARC's choosing. The order made no findings regarding Dozier's back, neck, or CRPS/RSD claims.

Dozier timely filed a notice of appeal with the Appellate Panel and argued Commissioner Huffstetler erred in: (1) failing to order ARC to pay past causally-related medical treatment; (2) allowing ARC to designate a treating physician when ARC willfully failed to provide medical treatment and required Dozier to submit to five independent medical evaluations; (3) failing to assess a mandatory 25% penalty for improper termination of temporary compensation; (4) failing to find Dozier injured her neck and back; and (5) admitting a physician's report into evidence. During the pendency of the appeal, ARC agreed to designate Dr. Timothy Zgleszewski, of Palmetto Spine and Sports Medicine, as Dozier's authorized treating physician. As a result, Dozier withdrew her complaint regarding ARC's selection of her authorized treating physician.

On November 23, 2010, the Appellate Panel affirmed Commissioner Huffstetler's order as modified, requiring ARC to pay for all causally-related medical treatment before December 24, 2008, and after June 29, 2009. The Appellate Panel did not rule on the issues of Dozier's alleged injuries to her neck and back nor did it determine whether her CRPS/RSD was a work-related condition.[2] Neither party appealed this order.

Over the next two years, Dozier continued to be treated at ARC's expense with Dr. Zgleszewski. During that time, Dr. Zgleszewski referred her to Dr. Gerald Shealy, an orthopedist at the Medical University of South Carolina, for carpal tunnel

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[2] Dozier did not specifically raise CRPS/RSD in her issues on appeal to the Appellate Panel; however, she raised Commissioner Huffstetler's failure to address her neck and back injuries that were necessarily related to her claim for CRPS/RSD. Also, the "Statement of the Case" portion of the order reflects Dozier's claim she suffered from work-related neck and back injuries as well as two work-related conditions, carpal tunnel syndrome and CRPS/RSD.

surgery. Dr. Shealy treated her from December 2, 2010, until May 23, 2011, at which time he concluded she had attained MMI for her carpal tunnel syndrome. Dr. Shealy also assigned Dozier a 5% impairment rating to both hands and "at her request, she [wa]s provided with a permanent restriction of 5 pounds." On August 9, 2011, Dr. Zgleszewski concluded Dozier had attained MMI and assigned a 5% impairment rating to both arms based on her carpal tunnel and a 12% impairment rating to her central nervous system based on her CRPS/RSD diagnosis.

ARC then requested a hearing on September 2, 2011, seeking to terminate Dozier's temporary compensation and to determine her permanent disability. After both parties drafted prehearing briefs, ARC withdrew its request for a hearing. Dozier filed a subsequent Form 50 on October 17, 2011, alleging injuries to both arms as well as her central nervous system and requesting a finding of permanent and total disability. ARC responded, admitting injuries only to the "bilateral wrists."

In response to Dozier's Form 50, Single Commissioner Gene McCaskill held a hearing on February 6, 2012. At the hearing, Dozier contended she was permanently and totally disabled because the five-pound work restrictions imposed upon her by Dr. Shealy and Dr. Zgleszewski prevented her from returning to the workforce. ARC responded, arguing Dozier was only entitled to permanent partial disability to each wrist because she failed to establish she suffered from CRPS/RSD, which was necessary to bring her injury within the ambit of permanent and total disability. Specifically, ARC claimed Dozier had chosen not to pursue her CRPS/RSD claim in her December 2009 appeal, as it was neither raised to nor ruled upon by the Appellate Panel; thus, res judicata barred Dozier from asserting it. In the alternative, ARC argued the preponderance of the evidence did not support a medical diagnosis of CRPS/RSD.

At the hearing before Commissioner McCaskill, Dozier testified she sustained injuries to both her wrists while working as a phlebotomist for ARC. After her injuries, she stated ARC agreed for Dr. Zgleszewski to be her authorized treating physician for CRPS/RSD. Dozier never paid for any of her treatments with Dr. Zgleszewski, stating instead that ARC paid for Dr. Zgleszewski to administer three stellate ganglion blocks as well as four carpal tunnel injections in each of her wrists.

Dozier testified she experienced pain in her wrists, hands, shoulders, and neck on a constant basis. Dozier claimed her hands were almost always cold, her nails were brittle, she experienced frequent hair loss, and her skin was "blotchy sometimes." When questioned about her activities, she stated her husband and daughters did all the cooking and housework. Because she was unable to work, she spent most of

her days at home, where she would read her Bible and watch television. Dozier testified she visited the South Carolina Department of Vocational Rehabilitation in an effort to return to work, but it was unable to offer her any services because of her five-pound lifting restriction.

Dr. Zgleszewski first evaluated Dozier on September 8, 2009. During his deposition, Dr. Zgleszewski stated he diagnosed Dozier with carpal tunnel syndrome, CRPS Type II, and myofascial pain. He affirmed that ARC had never disputed or refused to pay for any of Dozier's treatments, including the stellate ganglion blocks. Dr. Zgleszewski stated a patient would only receive a stellate ganglion block to reduce the pain associated with CRPS/RSD.

Dr. Zgleszewski based his CRPS/RSD diagnosis on Dozier's fulfillment of all the criteria set forth in the International Association for the Study of Pain (IASP). In explaining his diagnosis of CRPS/RSD, he stated that the triple phase bone scan indicated a slight increase in blood flow, which can indicate CRPS/RSD. When questioned by ARC's counsel, Dr. Zgleszewski acknowledged he did not note in his medical reports that Dozier experienced cyanotic or mottled skin,[3] sudomotor changes, trophic changes, soft tissue atrophy, joint stiffness, nail changes, or hair loss. Dr. Zgleszewski agreed that, under the Fifth Edition American Medical Association (AMA) Guides for Impairment, Dozier would not qualify for CRPS/RSD, but he stated most physicians who treat CRPS/RSD disagree with the AMA's requirements for that diagnosis.

Dr. Zgleszewski testified unequivocally that the IASP was authoritative in his field for diagnosing CRPS/RSD, and it would be inappropriate for a board-certified pain management physician to base a diagnosis on the criteria listed in the AMA for diagnosing CRPS/RSD. Based on his continued treatment of Dozier, he explained how Dozier met all the criteria for CRPS/RSD pursuant to IASP. Considering Dozier's reported symptomatology, her medical records, and her physical exam, Dr. Zgleszewski assigned her a 5% impairment to the left and right upper extremities based on her carpal tunnel syndrome and a 12% impairment to her central nervous system based on CRPS/RSD.

Prior to Dr. Zgleszewski's appointment as Dozier's authorized treating physician, Dr. Blake Moore independently treated Dozier from August 2008 until July 2009. Dr. Moore reported that a nuclear medicine bone scan revealed bilateral wrist uptake, which he found to be "consistent with the diagnostic impression of a

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[3] Cyanotic skin is bluish in color based on a lack of oxygen. Mottled skin is swollen and marked by small indentations.

Complex Regional Pain Syndrome as previously suspected." Dr. Moore subsequently referred Dozier to First Choice Healthcare, where she was treated by Dr. Lisa Mancuso and Dr. George Bitting from January 2009 until August 2009.

Unlike Dr. Zgleszewski and Dr. Moore, Dr. Mancuso and Dr. Bitting opined that Dozier did not suffer from CRPS/RSD. After her initial evaluation of Dozier, Dr. Mancuso stated in a letter to Dr. Moore that she did not believe Dozier suffered from CRPS/RSD because (1) there was no specific precipitating event; (2) both of her limbs were affected, which was not typical with CRPS/RSD; and (3) she had no sudomotor[4] changes. Similar to Dr. Mancuso, Dr. Bitting testified during his deposition that he did not believe Dozier was suffering from CRPS/RSD. Dr. Bitting based his opinion on her triple phase bone scan, which was relatively normal, and Dozier's experiencing pain in both arms, as opposed to only one extremity. Further, Dr. Bitting stated a specific traumatic event typically triggered CRPS/RSD, and it was unlikely for Dozier to first experience symptoms almost two years after her accident. When questioned, Dr. Bitting admitted he had not examined Dozier in over two years and could not speak to her current condition or diagnosis.

Dozier also treated with Dr. Shealy from December 2010 until May 2011. He performed carpal tunnel release surgery on both hands and released her at MMI on May 23, 2011. In Dr. Shealy's medical notes, he stated, "It is my opinion that [Dozier] has a 5% permanent residual impairment to her dominant right hand and a 5% permanent residual impairment to her nondominant left hand secondary to surgery and the carpal tunnel decompression. At her request, she is provided with a permanent restriction of 5 pounds." When questioned during his deposition about the weight lifting restriction in his report, Dr. Shealy stated he remembered Dozier specifically requesting a five-pound lifting restriction. Dr. Shealy testified he did not typically assign a permanent weight restriction because most of his patients are able to resume their normal activities after the surgery. However, Dr. Shealy admitted he could have refused to assign that weight restriction, despite Dozier's request.

Several vocational reports were introduced into evidence regarding Dozier's ability to work after her injuries. Dr. Robert Brabham, of Psychological and Training Services, P.A., evaluated Dozier on October 13, 2009. He concluded that based on her work-related injuries and the ensuing limitations on nearly any use of her

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[4] A patient experiences sudomotor changes when his or her skin is dry or overly moist.

hands, she was unable to effectively perform the essential duties in any gainful work activity. Glen Adams, a vocational consultant with Adams & Wilkinson, evaluated Dozier on August 30, 2011. Adams submitted a sixteen-page report in which he concluded Dozier was unqualified for any jobs in her labor market based on her five-pound lifting capacity. Adams noted that Dozier is limited to "sedentary" employment, although she did not meet the full definition of "sedentary" because this restriction required lifting, pushing, and pulling up to *ten* pounds on an occasional basis.

Last, James Myers, a certified rehabilitation counselor, submitted a report to ARC regarding suitable jobs for Dozier in her geographic labor market. At ARC's request, Myers evaluated Dozier on September 26, 2011. The results Myers submitted to ARC were based on her previous vocational experiences as well as her "sedentary" work restriction. Myers concluded Dozier qualified for several alternative employment opportunities, including (1) a sorter, (2) a customer service representative, (3) an industrial order clerk, (4) a greeter at Wal-Mart, (5) a collection clerk, and (6) an EKG technician. Based on the results of his labor market survey, Myers opined she would qualify for all these positions.

After hearing testimony from all parties and considering the evidence presented at the hearing, Commissioner McCaskill issued an order on May 24, 2012. In his order, Commissioner McCaskill found the following: (1) Dozier could not relitigate the issue of CRPS/RSD based on res judicata, and even if she could, she failed to prove by a greater weight of the evidence that she suffered from CRPS/RSD as a result of her initial compensable injury; (2) Dozier reached MMI on August 9, 2011; (3) Dozier was not permanently and totally disabled because work was available that would allow her to work under her five-pound lifting restriction; (4) Dozier sustained a 20% permanent partial disability to each arm; and (5) Dozier was entitled to ongoing future pain management treatment and appropriate physician follow-up visits.

Dozier appealed to the Appellate Panel, which affirmed the single commissioner in full. This appeal follows.

STANDARD OF REVIEW

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(5)(e)

(Supp. 2013). However, we may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Id.*

Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the Commission reached. *Lark*, 276 S.C. at 135, 276 S.E.2d at 306. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (internal quotation marks omitted). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

APPLICABLE LAW

1. Permanent and Total Disability

Dozier first claims the Appellate Panel erred in denying her claim for permanent and total disability because ARC presented no credible evidence any employment was available based on her five-pound lifting work restrictions. We disagree.

A claimant is entitled to permanent and total disability benefits "[w]hen the incapacity for work resulting from an injury is total." S.C. Code Ann. § 42-9-10(A) (Supp. 2013). Our supreme court explained this concept in *Stephenson v. Rice Services, Inc.*:

> There are two situations in which the [Appellate Panel] can find a claimant totally disabled. First, for certain conditions resulting from work-related injuries, a claimant is deemed totally disabled and need not demonstrate loss of earning capacity to recover workers' compensation benefits. *See, e.g.*, S.C. Code Ann. § 42-9-10 (Supp. 1994) (classifying loss of certain limbs and body parts as total disability as a matter of law; classifying as total disability paraplegia, quadriplegia, and physical brain damage resulting from compensable

> injuries). . . . Under the circumstances in which a worker is deemed totally disabled, the medical model of workers' compensation predominates.
>
> In contrast, the earning impairment model predominates when a worker is not statutorily deemed totally disabled. Under this model, the [Appellate Panel] may predicate a finding of total disability on the claimant's complete loss of earning capacity as a result of a work-related injury. *See* S.C. Code Ann. § 42-1-120 (1985) ("The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."); S.C. Code Ann. § 42-9-10 (Supp. 1994) ("When the incapacity for work resulting from an injury is total, the employer shall pay . . . to the injured employee during the total disability. . . .") . . . . Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity.

323 S.C. 113, 117-18, 473 S.E.2d 699, 701-02 (1996) (emphasis omitted) (footnotes omitted) (citations omitted).

Because Dozier's 5% impairment rating does not per se equate to permanent and total disability under section 42-9-10, the relevant question before the Appellate Panel was whether Dozier had the ability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. *See Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961). The Appellate Panel held the following regarding whether Dozier was permanently and totally disabled:

> This Panel finds [Dozier] 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. In addition, Dr. Bitting opined that Claimant could return to work without any work restrictions. In arriving at this finding, this Panel puts great weight on the report of James Myers. This Panel also took into account the fact that

> Claimant admitted she sought no employment since being released by her doctors.

The Appellate Panel found Dozier was not permanently and totally disabled based on its conclusion that employment opportunities were available to her within the five-pound lifting restriction placed upon her by two doctors, Dr. Shealy and Dr. Zgleszewski. The Appellate Panel, as the ultimate factfinder, operated within its discretion when it cited to and relied upon these doctors in making its decision. *See Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("In a workers' compensation case, the [Appellate Panel] alone is the ultimate factfinder. Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The Appellate Panel specifically made its finding in reliance on the five-pound lifting restriction imposed by Dr. Shealy and Dr. Zgleszewski and referenced Myers' report in coming to this conclusion. We find the Appellate Panel appropriately weighed all the evidence before it and chose to rely on Dr. Shealy's and Dr. Zgleszewski's medical opinions.[5] *See Stokes v. First Nat'l Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) ("Regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the [Appellate Panel] is conclusive.").

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.

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[5] We find Dr. Bitting's own testimony, to which the Appellate Panel was privy, supports the Appellate Panel's conclusion as well. When questioned by Dozier during his deposition, Dr. Bitting said he would defer to her current treating physician regarding her work restrictions or impairment rating because he had not evaluated Dozier in over two and a half years.

Dozier contends on appeal that none of these potential employment opportunities were within her five-pound lifting restriction and specifically cites to the Wal-Mart greeter job to discredit Myers' report. Dozier claims the essential function of the greeter job is "frequently lifting, placing, and deactivating items weighing up to 10 pounds without assistance, and regularly lifting merchandise over 10 pounds with team lifting," which she contends is outside her work restrictions. We agree that Dozier's restrictions would not make her a viable candidate for this position; however, Myers submitted eleven other positions that the single commissioner and Appellate Panel reviewed and considered before concluding employment was available that would permit Dozier to work within her five-pound weight restriction.

We also recognize conflicting expert testimony was presented as to whether Dozier was permanently and totally disabled. Although Dozier argues her vocational experts' findings that she was totally disabled is substantial evidence the Appellate Panel failed to consider, "[t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson*, 379 S.C. at 63, 663 S.E.2d at 501. Further, even if this court would have weighed the evidence differently, we are mindful that the Appellate Panel is the ultimate finder of fact, and when evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *See Hamilton v. Martin Color-Fi, Inc.*, 405 S.C. 478, 485, 748 S.E.2d 76, 80 (Ct. App. 2013). As a result, we affirm the Appellate Panel on this issue.

2. Res Judicata

Dozier claims the Appellate Panel erred in holding res judicata barred Dozier from raising the issue of CRPS/RSD before Commissioner McCaskill. We agree.

Res judicata encompasses both issue preclusion and claim preclusion. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 834 (1997). However, res judicata is more commonly referred to simply as claim preclusion. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). Res judicata, or claim preclusion, bars plaintiffs from pursuing a later suit when the claim (1) was litigated or (2) could have been litigated. *Crestwood Golf Club, Inc.*, 328 S.C. at 216, 493 S.E.2d at 835. Res judicata is shown if (1) the identities of the parties are the same as in the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). As the

first two issues are not in dispute, we find the dispositive question is whether the Appellate Panel previously adjudicated the issue of CRPS/RSD.

Dozier filed an initial Form 50, dated October 10, 2008, in which she claimed injury to both arms. On August 6, 2009, Dozier filed another Form 50, in which she claimed injuries to her arms, back, neck, and psyche. On November 3, 2009, Commissioner Huffstelter held a hearing on the issues raised by Dozier in her Form 50. At the hearing, he acknowledged Dozier requested "additional treatment for her arms, in particular for reflex sympathetic dystrophy [CRPS/RSD] . . . ." Commissioner Huffstetler requested a proposed order finding Dozier suffered from CRPS/RSD. However, when the order was issued, Commissioner Huffstetler did not rule upon or acknowledge Dozier's claim for CRPS/RSD. Dozier appealed to the Appellate Panel and in the "Statement of the Case," the Appellate Panel acknowledged Dozier's claim for CRPS/RSD and her request for treatment. However, the issue of CRPS/RSD was not specifically enumerated in Dozier's issues on appeal, and it was never resolved in the Appellate Panel's November 2010 order. Neither party appealed that order.

On October 17, 2011, Dozier filed her third and final Form 50, seeking permanent total disability and alleging injuries to both her arms and her central nervous system. Commissioner McCaskill subsequently issued an order in May 2012, in which he found "[Dozier] cannot attempt to re-litigate the issue of whether or not she sustained related CRPS/RSD or the issue of whether she sustained related injuries to her neck/back and psyche under the doctrine of res judicata." We disagree.

Here, neither Commissioner Huffstetler's 2009 order nor the Appellate Panel's 2010 order demonstrate the issue of CRPS/RSD was addressed with finality, which is required to properly assert res judicata. *See Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) ("This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues *addressed* by that tribunal in a collateral action." (emphasis added)); *Estridge v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 540, 482 S.E.2d 577, 581 (Ct. App. 1997) (finding compensability of psychological injury in subsequent change of condition proceeding was not precluded by res judicata when prior order did not discuss or resolve employee's claim for psychological injury); *cf. Johnson*, 317 S.C at 251, 452 S.E.2d at 833 (finding employee's second attempt to establish compensability of her occupational disease before the single commissioner was barred by res judicata when the employee specifically raised the same issue and the single commissioner explicitly denied employee's claim in a prior unappealed order);

Mead v. Jessex, Inc., 382 S.C. 525, 534, 676 S.E.2d 722, 727 (Ct. App. 2009) (holding single commissioner's prior findings of non-compensability regarding hip and leg injuries were not appealed and therefore were barred by res judicata). As such, we find res judicata did not bar Dozier from bringing the issue of CRPS/RSD before Commissioner McCaskill.[6]

3. Estoppel and Waiver

Next, Dozier contends ARC is procedurally barred by the doctrine of estoppel from denying she suffers from CRPS/RSD. We disagree.

The elements of equitable estoppel for the party asserting the estoppel are the following: (1) a lack of knowledge and of a means of knowing the truth as to the facts in question; (2) a reliance upon the conduct of the estopped party; and (3) a prejudicial change in position. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The elements as to the party being estopped are the following: (1) conduct by the estopped party amounting to a false representation or a concealment of material facts; (2) an intention that such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the true facts. *Id.* The party asserting estoppel carries the burden of proof. *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965).

Reviewing these elements, we find ARC's conduct does not merit the application of equitable estoppel. ARC approved Dr. Zgleszewski as Dozier's authorized treating physician during the pendency of her first appeal in January 2010. For over two years, ARC permitted Dozier to receive ongoing medical treatment, including three stellate ganglion blocks and several carpal tunnel injections, in an effort to alleviate her pain and to rehabilitate her injuries. Although Dozier argues otherwise, we find ARC's actions of paying for Dozier's treatment during this time weighs against the application of estoppel. If ARC were trying to conceal Dozier's CRPS/RSD, we find it unlikely ARC would have authorized Dr. Zgleszekski as her treating physician or approved of her ensuing treatments. In addition, 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. Because ARC does not meet the required elements as to the party being estopped, we hold the doctrine of equitable estoppel does not apply.

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[6] Our holding on this issue, however, does not necessitate reversal based on our finding that the Appellate Panel properly held, in the alternative, that Dozier did not establish she suffered from CRPS/RSD.

In the alternative, Dozier contends ARC waived its right to contest the compensability of her CRPS/RSD because it provided treatment for her CRPS/RSD for an uninterrupted period of 728 days. We disagree.

Waiver is a voluntary and intentional relinquishment or abandonment of a known right. *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). To waive a right, the party must have known of the right and known that the right was being abandoned. *Id.* The determination of whether one's actions constitute waiver is a question of fact. *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009).

Without question, ARC admitted Dozier sustained repetitive trauma to both her arms. Despite accepting responsibility for Dozier's carpal tunnel syndrome, we find ARC did not waive its right to contest the compensability of CRPS/RSD before Commissioner McCaskill. At the 2009 hearing, Commissioner Huffstelter stated, "[ARC] admits an injury to the left arm only. They deny all other body parts . . . ." In its November 2011 Form 51, ARC again admitted injuries to Dozier's "bilateral wrists" but denied "all other alleged injuries." These denials argue against the application of waiver. Furthermore, we believe a finding of waiver under these circumstances would discourage employers from providing any level of treatment for a certain condition for fear that providing treatment for a potentially unrelated condition would irrevocably affect a future finding on permanent disability. As such, we find ARC did not waive its right to contest the compensability of CRPS/RSD before Commissioner McCaskill.

4. CRPS/RSD

Last, Dozier contends the Appellate Panel erred in finding she did not suffer from CRPS/RSD when she presented competent and substantial medical evidence to the contrary. We disagree.

The Appellate Panel was presented with conflicting medical testimony regarding whether Dozier suffered from CRPS/RSD. Dr. Zgleszewski, her authorized treating physician, opined she suffered from CRPS/RSD and stated he had been treating her for CRPS/RSD for over two years. Dr. Moore, who performed her carpal tunnel release surgery, also believed Dozier suffered from CRPS/RSD. However, Dr. Mancuso and Dr. Bitting concluded Dozier did not suffer from CRPS/RSD. In support of her medical opinion, Dr. Mancuso stated (1) there was no specific precipitating event; (2) both of her limbs were affected, which was not typical with CRPS/RSD; and (3) Dozier's skin was not overly dry or moist. Similar to Dr. Mancuso, Dr. Bitting testified during his deposition that he did not

believe Dozier was suffering from CRPS/RSD. He based his opinion on her triple phase bone scan, which, in his opinion, was relatively normal, and Dozier's experiencing pain in both arms, as opposed to only one extremity. Further, Dr. Bitting stated CRPS/RSD typically was triggered by a specific traumatic event, and it was unlikely for Dozier to first experience symptoms almost two years after her accident.

Although we may have found differently from the Appellate Panel, when conflicting medical evidence is presented, this court must not substitute its judgment for that of the fact finder, which in this case was the Appellate Panel. *See Mullinax*, 318 S.C. at 435, 458 S.E.2d at 78 ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive."); *see also Lockridge v. Santens of Am., Inc.*, 344 S.C. 511, 518, 544 S.E.2d 842, 846 (Ct. App. 2001) (finding when one doctor attributed employment to injury and another doctor could not testify unequivocally about the source of an employee's injury, the Appellate Panel had the discretion to weigh the testimony and deny the employee's claim). Because of the conflicting evidence regarding Dozier's CRPS/RSD and our limited standard of review, we find the Appellate Panel did not err in this respect. *See Ballenger*, 209 S.C. at 466-67, 40 S.E.2d at 682 (finding the Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established and while medical testimony is entitled to great respect, the fact finder may disregard it if the record contains other competent evidence); *see also Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (2008) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (citation omitted)). As a result, we affirm the Appellate Panel's finding that Dozier did not suffer from CRPS/RSD.

CONCLUSION

Based on the foregoing, the decision of the Appellate Panel is

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

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

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

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).

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[1]Defense 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

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[2]The 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

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[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 Jervey, 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,

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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
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872 S. Pleasantburg Drive
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Angi O'Connell

Columbia, South Carolina

October 1, 2014

The South Carolina Court of Appeals

Cindy Dozier, Employee, Appellant,

v.

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

Appellate Case No. 2012-213606

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Stephen Benjamin Samuels, Esquire
Wesley Jackson Shull, Esquire
Virginia L. Crocker

FILED
Jan. 28, 2015

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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Re: Cindy Dozier v. American Red Cross
Appellate Case No. 2012-213606

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

CLERK

cc: Amy Bracy