

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.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 [in Reply to Respondents argument at pages 8-11].

Respondents begin their argument by noting “The commission may find a degree of disability different from that suggested by expert testimony.”¹ [Return to Petition for Writ of Certiorari, page 8, citing Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)]. The problem with using *this* argument on the facts of *this* case is that it endorses speculation – both by the Respondents’ expert and by the Commission.

The Commission found as fact that Dozier was limited to lifting no more than five pounds. [R. p. 84]. It made this finding solely for the carpal tunnel syndrome, based on the medical opinions of Dr. Shealey and Dr. Zgleszewski.² Respondents characterize the 5-pound restrictions as “self-imposed.” [Return to Petition for Writ of Certiorari, page 8]. Not only is this a *mischaracterization* – no doctor would assign restrictions without a medical basis – but it is a moot point. The Commission’s adoption of the 5-pound restriction was not appealed and is manifestly supported by substantial evidence.

¹Lyles dealt with a disability award made under S.C. Code Ann. 42-9-30 (19)(1976). The issue was whether the Commission’s finding of 58% disability to the back (thus deemed to be total disability) was proper when the medical impairment rating was 35% and the claimant was still working. Lyles simply stands for the proposition that disability can be greater than impairment, such that impairment ratings should not be used as a proxy for disability determinations.

²Respondents contend Dozier’s claim for total and permanent disability “rests entirely upon a request for a finding that she suffers from related RSD/CRPS.” [Return to Petition for Writ of Certiorari, pages 8-9]. The issue over her RSD is entirely separate. While confirmation of the RSD allows her to receive full medical treatment for her injuries, the disability award is tied into “the 5-pound weight restriction Dr. Shealey and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome.”

Respondents contend “Petitioner makes the illogical leap that, since she was placed on a 5-pound lifting restriction by her treating physicians, she could not perform jobs that were categorized as sedentary by Respondents’ vocational expert.” [Return to Petition for Writ of Certiorari, page 10]. There is nothing illogical about this. If a job *by definition* requires the ability to perform at a sedentary level (lifting 10 pounds), then a person with a 5-pound occasional lifting restriction cannot perform that job. For an expert to compile a list of sedentary jobs and then conclude, without more, that these jobs are available for someone whose restrictions preclude sedentary work is at best rank speculation; at worst, outright disingenuous. 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).

The most important step in the analysis of an injured worker’s disability is a determination of the physical work restrictions. To be sure, when faced with conflicting evidence on restrictions, the Commission can disagree with a particular doctor. However, here, there was no conflict – both treating doctors assigned the same 5-pound lifting restriction. That restriction was adopted by the Commission.

Similarly, a vocational expert must rely on medical restrictions as the core foundation for a vocational opinion. 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.”). From this starting point, the expert can go on to consider age, education, experience and transferable skills in 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). No matter the case, any vocational analysis must start with the

physical restrictions and limitations resulting from the injury. When the vocational expert disregards the medical restrictions, the resulting opinion has no probative value. By the same token, once the Commission found Dozier was restricted to a 5-pound lifting requirement, it was bound to rely on vocational evidence using that restriction as a foundation – not an opinion based on rank speculation.

Petitioner respectfully requests Certiorari be granted because the decisions of the Commission must be based on the evidence. An expert opinion without a foundation is merely an unsupported conclusion. It is not competent evidence, has no probative value, and cannot be considered substantial evidence to support the Commission’s award. The Court of Appeals error in endorsing a patently speculative opinion from a retained expert is sufficiently important to warrant review and correction by this Court.

CONCLUSION

Petitioner requests the Court grant the Petition for Writ of Certiorari. This case raises significant issues regarding the definitions and evidence required to prove disability and medical conditions in worker’s compensation cases. 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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March 31, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0800660

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Cindy Ella Dozier, Employee, Petitioner,

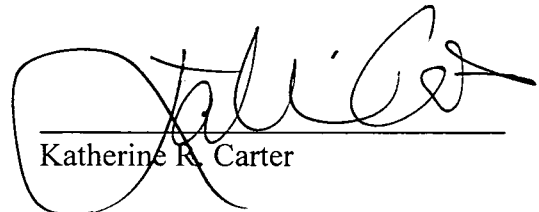
v.

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

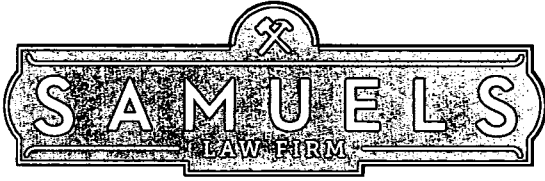
PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Reply to Return to Petition for a Writ of Certiorari** to be served upon counsel for 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 **April 1, 2015**, addressed as follows:

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


Katherine R. Carter

Columbia, South Carolina
April 1, 2015



STEPHEN B. SAMUELS
ATTORNEY AT LAW

April 1, 2015

Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Cindy Ella Dozier v. American Red Cross and Sedgwick CMS
WCC File No.: 08006600 2015-000395

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of our **Reply to Return to the Petition for a Writ of Certiorari** and Proof of Service for the same, in the above-referenced matter.

By copy of this letter and enclosure to Wesley J. Shull, we are serving a copy of our **Reply to Return to the Petition for a Writ of Certiorari** upon counsel for the Respondents as indicated by the attached Proof of Service.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration.

With kindest regards, I am

Yours very truly,

Katherine R. Carter
Paralegal to Stephen B. Samuels

/krc
Enclosure(s) as stated

cc w/encl: Wesley J. Shull, Esquire

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