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

Cindy Ella Dozier, Employee, ... Appellant,

v.

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

FINAL BRIEF OF APPELLANT

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2. Whether Respondents are estopped from contesting the existence of CRPS/RSD when Appellant withdrew her appeal on the issue in detrimental reliance on the Employer's selection and authorization of a specialist to provide treatment for those conditions.

3. Whether Respondents waived the right to litigate the existence of CRPS/RSD when they knowingly and willingly provided treatment for the condition for two years based on a common understanding of a previous order of the Commission, only to first raise the issue denying CRPS 10 days before a hearing on permanent disability.

4. Whether the Commission erred in finding Appellant's claim for CRPS was barred by *res judicata* when the previous Order was either decided favorably to Appellant or did not decide the issue one way or the other.

5. Whether the Commission erred in finding Appellant did not suffer from CRPS when the only competent evidence showed she did in fact suffer from CRPS.

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission filed by the Employee, Cindy Dozier. The case arises out of a work-related injury suffered by Dozier on January 17, 2008 on her job with the Employer, American Red Cross. The Employer and Carrier are the Respondents.

Initially, Respondents admitted the injury to the left arm, but denied all other body parts.

On October 10, 2008, Dozier filed a Form 50 (Request for Hearing) and Form 15 (Part III) alleging she suffered injuries to both arms. She further contended that she was entitled to receive temporary total disability compensation. [R. pp. 88-90].

The case was scheduled for a hearing on December 4, 2008, before Commissioner Avery B. Wilkerson. In lieu of the hearing, the parties entered into a Consent Order stating: "Claimant sustained a January 17, 2008, compensable injury to her left wrist as a result of her employment with American Red Cross." It was further agreed, "that Dr. Ugino shall be the authorized treating physician and shall address whether Claimant's alleged right wrist problems were caused by her work for Defendants" and "that the parties agree that Dr. Ugino will also address Claimant's work status." [R. pp. 1-2].

Dr. Ugino declined the appointment as authorized treating physician. The parties agreed to designate Dr. McIntosh as authorized treating physician. However, Employer refused to provide actual treatment through Dr. McIntosh; instead providing only a one-time evaluation.

On August 6, 2009, Dozier filed a Form 50 alleging she sustained compensable injuries to her left arm, right arm and neck/back on January 17, 2008. Dozier also claimed she had been diagnosed with carpal tunnel syndrome and Complex Regional Pain Syndrome (CRPS/RSD), both conditions

being work-related. She sought treatment as directed by Dr. Blake Moore, contending that although the parties agreed to Dr. McIntosh as the authorized treating physician, she was sent to Dr. McIntosh for a defense medical evaluation rather than for treatment. She contended she is not at Maximum Medical Improvement (MMI) and sought temporary total disability on a running award from August 11, 2009. [R. p. 91].

Employer filed a Form 51 admitting an injury to the left wrist, but denying the injuries to the right arm and neck/back. Employer contended Claimant is at MMI as of August 10, 2009. Employer contended all temporary compensation due has been paid. Employer further contended all necessary medical treatment had been provided. Employer contended the only issue is the extent of permanent disability to Claimant's left wrist. [R. p. 94].

Dozier filed a second Form 50 on August 24, 2009, alleging an injury to her "arms, back/neck," and claiming that she sustained, "psychological overlay." [R. p. 97]. Employer timely filed a September 17, 2009, Form 51 admitting an injury to Dozier's "left wrist only." [R. p. 100].

The case was tried before Commissioner David W. Huffstetler on November 3, 2009. At this hearing, the respective position of each party was read into the record as follows:

> The Claimant takes the position she suffered injuries to both arms, also to her neck and the back. She seeks payment of all causally related medical treatment received to date. She seeks an award of compensation for temporary total disability from September 8, 2008, forward. And seeks additional treatment for her arms, in particular for reflex sympathetic dystrophy 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 you also deny the request for Dr. Moore to be the treating physician. [R. p. 144, line 23 – p. 145, line 12]

On December 17, 2009, Commissioner Huffstetler issued a Decision and Order finding as a fact that: "The claimant suffered injuries to both arms by accident arising out of and in the course of

her employment. The injury to her right arm flows from repeated trauma while keyboarding. The opinion on causation given by Dr. Boyd [sic] is not refuted in the medical evidence."[1] [R. p. 5]. The Order further provided, "The defense shall provide the claimant with medical treatment for both of her arms through a physician of their choosing." [R. p. 6].

On December 30, 2009, Dozier filed a Form 30 (Notice of Appeal), making the following exceptions:

1. Whether the Single Commissioner erred as a matter of fact and law in failing to order past causally related medical treatment to be paid by the carrier pursuant to § 42-15-60?

2. Whether the Single Commissioner erred as a matter of fact and law in allowing Employer to designate a treating physician when good cause existed to designate Dr. Moore or one of the other treating physicians, such good cause being shown by Defendant's willful failure to provide medical treatment through the agreed upon authorized treating physician and the fact that Employer obtained five IMEs?

3. Whether the Single Commissioner erred as a matter of fact and law in failing to assess the mandatory 25% penalty for improper termination of temporary compensation?

[R. p. 601].

On January 4, 2010, Dozier filed an Amended Form 30 adding two more issues:

4. Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant injured her neck/back when such finding was supported by the opinions of the treating physicians?

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[1]Dozier was not treated by a Dr. Boyd. There were two unrefuted medical opinions on causation from doctors with a "B" in the name. Dr. Blake Moore opined Dozier suffered from Complex Regional Pain Syndrome (CRPS/RSD). [R. pp. 362, 370, 373, 379, 393]. He specifically stated, "I believe that has a significant injury that appears to be work related to the standard of 'reasonable medical certainty." [R. p. 393]. Dr. George Biting also wrote: "In my opinion to a reasonable degree of medical certainty, the problems which I have diagnosed and for which I have been treating Ms. Dozier were most probably caused by the work injury described by Ms. Dozier either directly, by aggravation of a pre-existing condition(s), repetitive trauma, or a combination of all three." [R. p. 614].

5. Whether the Single Commissioner erred as a matter of fact and law in failing to exclude the report of Dr. Bethea?

[R. p 115].

During the pendency of the appeal, Employer designated Dr. Timothy Zgleszewski as the authorized treating physician and specifically authorized him to treat Dozier's CRPS/RSD.

Dozier filed her Appellant's Brief to the Full Commission on March 5, 2010. In her brief, she wrote:

> After the hearing, the Defendants designated Dr. Zgleszewski as the authorized treating physician. **As Dr. Zgleszewski is acceptable to Claimant, she no longer requests Dr. Moore be designated the treating physician.** She does seek reimbursement for the treatment Dr. Moore and his referring physicians provided during the time Defendants failed to provide treatment.

[R. p. 603 (emphasis added)].

The appeal went forward on the single remaining issue, to wit: "Claimant is entitled to be reimbursed for causally related treatment she obtained on her own during the time Defendants refused to provide treatment." [R. p. 603].

Oral arguments were held on May 18, 2010. The Appellate Panel issued a Decision and Order in which Commissioner Huffstetler's Order was "AFFIRMED AS MODIFIED." The modification addressed the single remaining issue of treatment Dozier paid for on her own. [R. pp. 7-11].

Over the next two years, Dozier continued to treat at Employer's expense for her CRPS/RSD with Dr. Zgleszewski. [R. pp. 423-517]. Dr. Zgleszewski referred Dozier to Dr. Gerald Shealy for carpal tunnel surgery. Dozier treated with Dr. Shealy from December 2, 2010 through May 23, 2011. [R. pp. 399-415]. Dr. Shealy placed Dozier at Maximum Medical Improvement (MMI) for the carpal tunnel syndrome on May 23, 2011. [R. p. 399]. Dr. Zgleszewski placed her at MMI for CRPS/RSD on August 9, 2011. [R. p. 425].

On September 2, 2011, Employer filed a Form 21 (Employer's Request for Hearing) seeking to stop temporary compensation and to determine Dozier's permanent disability. [R. p. 117]. A hearing was set for October 13, 2011 before Commissioner Scott Beck. [R. p. 586]. The parties each filed their Form 58 (Pre-Hearing Brief) and Notice of Witnesses and Written Medical Reports. Among the medical reports listed by Employer were 55 pages of Dr. Zgleszewski's records documenting the diagnosis and treatment for CRPS/RSD. [R. pp. 118-120]. Prior to the scheduled hearing, Employer withdrew their Form 21 and cancelled the hearing.

Dozier then filed a Form 50 (Request for Hearing) on October 17, 2011. [R. p. 121]. She alleged injuries to "both arms, central nervous system" consistent with Dr. Zgleszewski's opinion in the Form 14B. [R. p. 425]. Dozier requested a finding of permanent and totally disability based on her injuries.

On November 15, 2011, Employer timely filed a Form 51 (Employer's Response to Request for Hearing). The Form 51 admitted injuries "only to the bilateral wrists. All other alleged injuries are denied." [R. p. 123].

The case was tried before Commissioner Gene McCaskill on February 6, 2012. At the hearing, Dozier argued she was permanently and totally disabled based on the complete lack of employment available to someone with her restrictions of lifting no more than 5-pounds on an occasional basis. She also requested continuing medical treatment. [R. p. 280, line 19-p. 285, line 5; p. 291, line 18-p. 293, line 14].

Employer denied that Dozier was permanently and totally disabled relying on a vocational report from James Myers. Employer specifically denied that Dozier suffered from CRPS/RSD – although admitted that if she did have it, they were not denying that it was related. [R. p. 285, line 6-p.

291, line 16].

Regarding the new denial of CRPS/RSD, Dozier responded that: "They provided that medical treatment. Everybody's understanding for the last two years has been that Ms. Dozier's CRPS and need for treatment has been a part of this case. Nobody has ever contested it until ten days ago, and it's a classic example of waiver and estoppel, Your Honor." [R. p. 293, lines 7-12].

On March 8, 2012, Commissioner McCaskill issued instructions to Employer's attorney to "draft the order consistent with the below findings and return to this office within 30 days." [R. p. 588]. The specific findings were:

- Pursuant to the medical records on file, The Claimant reached MMI on 08/09/11.
- The Claimant has a 20% disability to the left upper extremity and a 20% disability to the right upper extremity.
- The Claimant is entitled to on-going pain medication management, appropriate physician follow-up visits and medication compliance testing.
- The Defendant is to receive credit for overpayment of TTD from date of MMI.

[R. p. 588].

Employer's counsel forwarded the proposed Decision and Order to Commissioner McCaskill on April 9, 2012. On April 16, 2012, Dozier's attorney wrote a letter to Commissioner McCaskill objecting to certain portions of the proposed Order which were inconsistent with the order instructions or the evidence. [R. pp. 590-595]. Employer's counsel responded on April 17, 2012. [R. pp. 596-598].

Commissioner McCaskill issued the Decision and Order on May 24, 2012. He made no changes to the original draft, other than changing the period a credit was given for overpayment to the date of the hearing. He held:

> **IT IS ORDERED** that as a result of Claimant's accidental injury occurring on January 17, 2008, she has sustained 20% permanent partial disability to the right and

left arms, for which she is entitled to 88 weeks of compensation, at the compensation rate of $421.99 per week. From this amount, the Defendants are entitled to a credit or offset for the overpayment of temporary total compensation paid from February 6, 2012.

[R. p. 65].

On May 31, 2012, Dozier timely filed her Form 30 (Notice of Appeal) to the Appellate Panel of the Full Commission. [R. pp. 605-607]. Oral arguments were held before the Appellate Panel on September 18, 2012.

On November 15, 2012, the Appellate Panel issued a Decision and Order affirming the Single Commissioner. [R. pp. 67-87].

This appeal followed.

STATEMENT OF THE FACTS

Cindy Dozier is 41 years old. She has been married to Lionel Dozier for 9 years. She has four children dependant on her for support. She is a high school graduate with training in phlebotomy and as a CNA. She worked as a CNA for 18 years before becoming a phlebotomist. Dozier went to work as a phlebotomist for the Red Cross on January 17, 2006. [R. p. 294, line 9 - p. 295, line 8].

Dozier injured both arms in a lifting accident on January 17, 2008. She developed bilateral carpal tunnel syndrome (CTS) and complex regional pain syndrome (CRPS/RSD). After a short time out of work, she worked light duty until September 8, 2008 when the Red Cross terminated her employment due to no longer being able to accommodate her restrictions. [R. p. 296, line 22-p. 298, line 2].

Over the next year various issues arose over Dozier's medical treatment. Employer sent Dozier for five (5) compulsory medical evaluations, but provided no treatment. Dozier treated extensively at her own expense. Dr. Moore and Dr. Rhea diagnosed and treated her for CRPS.RSD.

[R. pp. 362-398; 416-422]. A triple-phase bone scan indicated CRPS. [R. p. 221, line 2-p. 222, line 9]. Dr. Moore referred Dozier to Dr. Mancuso and Biting for treatment of the CRPS. They diagnosed her with a multitude of causally related conditions – which required treatment -- but suspected she might not have CRPS. Both Dr. Mancuso and Dr. Biting deferred to Dozier's current treating physician for diagnosis and treatment of her current condition (as of 2011). [R. pp. 613-614; 199, lines 6-24 (emphasis added)]

A hearing was held before Commissioner Huffstetler on November 9, 2009. Commissioner Huffstetler found Dozier was not at MMI; that she suffered compensable injuries to both arms; and that she was entitled to ongoing temporary compensation and medical treatment for her arms. [R. pp. 3-6].

Respondents selected Dr. Timothy Zgleszewski as the authorized treating physician to treat her CRPS/RSD. Treatment began on January 26, 2010. Dozier received physical therapy and stellate ganglion blocks with some relief. She continues to receive treatment from Dr. Zgleszewski. [R. p. 298, line 3-p. 300, line 6; pp. 423-513].

Dr. Zgleszewski also gave her three injections for the CTS. As the injections were not successful, he referred Dozier to Dr. Gerald Shealy for CTS surgery.

Dr. Shealy treated her from December 2, 2010 through May 23, 2011. He performed surgical decompression of the median nerve in both the right and left carpal tunnel. He released her at MMI (for the CTS only) on May 23, 2011. He assigned 5% impairment ratings to both hands along with "a permanent restriction of 5 pounds." No further treatment for the CTS was recommended. [R. p. 399].

Dr. Zgleszewski placed Dozier at MMI on August 9, 2011. On a Form 14B, he assigned 5%

impairment ratings to the left and right upper extremities along with a 12% impairment to the central nervous system for the CRPS/RSD. He recommended additional pain management including the option of a trial spinal cord stimulator. Dr. Zgleszewski checked, "The claimant is unable to return to work at his or her current employment." 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." [R. pp. 423-425]. 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]. He further confirmed that the "5-pound lifting restriction for the carpal tunnel syndrome [is] reasonable." [R. p. 250, lines 1-19].

Dozier was evaluated by four different vocational experts. Two of them declared her permanently and totally disabled. The other two suggested she could possibly work, but were unable to find any potential employment within the restrictions assigned by Dr. Shealy and Dr. Zgleszewski. The jobs they identified were uniformly outside her medical restrictions. She 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."

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.

The Appellate Panel erred in failing to find Dozier to be permanently and totally disabled. The Decision and Order contains this patently erroneous finding:

> This Panel finds 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. In addition, Dr. Bitting opined that Claimant could return to work without any work restrictions. In arriving at this finding, this Panel put great weight on the report of James Myers. This Panel also took into account the fact that Claimant admitted that she had sought no employment since being released by her doctors. [R. p. 84 (emphasis added)].

This finding is clearly erroneous, as there is *no evidence* any such work is available.[2] 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 test for permanent and total disability is 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). It is undisputed that Dozier cannot return to her previous employment as a phlebotomist. She is permanently limited to no more than occasional use of her hands and no lifting over 5 pounds. As such, the inquiry for the Commission is whether a stable market exists for

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[2]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).

someone with such extreme physical limitations.

Both treating physicians gave Dozier permanent restrictions. On May 23, 2011, Dr. Shealy 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].

As the Commission "put great weight on the report of James Myers," Myers' report is a good starting point for the analysis. The Appellate Panel correctly noted the inquiry is whether "work is available that would allow her to work under the 5-pound weight restriction . . ." [R. p. 84 (emphasis added)]. Any expert opinion must be based on this foundation.

The question is whether Myers' opinion has any evidentiary basis in the restrictions established by Dozier's physicians. 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."). A look at both the medical evidence and the definition of sedentary duty shows it does not. As such, his "opinion lacks probative value" and

should not have been relied on by the Appellate Panel. 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).

Myers opined "Ms. Dozier should be able to return to work in a Sedentary to Light Physical Demand level (PDL) position . . ." [R. p. 616]. 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. Sedentary duty requires the ability to *lift 10 pounds* occasionally; light duty requires the ability to lift 20 pounds.[3] For Myers' opinion to have any

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[3]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

probative value at all, Dozier must be able to lift 10 pounds occasionally. The medical evidence shows she cannot.

Both authorized treating physicians opined that Dozier cannot lift more than 5 pounds – which *completely disqualifies her from sedentary employment.* Myers simply pretends these restrictions do not exist. He blithely disregards Dr. Shealy's restrictions; he makes no mention whatsoever of Dr. Zgleszewski's. Rather than give an honest opinion based on the actual medical evidence, Myers decides on his own that Dozier can work at a sedentary or light physical demand level – notwithstanding her actual restriction and the fact that *per his own report* all her previous work experience was at a medium duty level. [R. p. 615]. 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)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability).

Myers compounds the problem in his Labor Market Survey by misrepresenting the availability of jobs even if Dozier had been physically able to perform at a sedentary to light level.[4] As noted in the peer review conducted by Glen Adams, the listed jobs were not actually sedentary. Some were light duty; others required repetitive fingering or other repetitive use of the hands. None were within Dozier's restrictions. [R. pp. 542-551].

Conversely, the remaining evidence overwhelmingly shows Dozier is permanently and totally

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force exerted is negligible.

[4]The most blatant example is the Wal-Mart greeter job. The job description states an essential function of the 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." [R. p. 553]. Myers characterizes the job as "Meet and greet customers coming into the store," and lists the physical requirements as sedentary. [R. p. 569].

disabled. Dozier has been evaluated by 4 vocational consultants – two before the hearing in 2009[5] and two just before this hearing.

Vocational Expert Glen Adams opined Dozier is totally vocationally disabled based on her work restrictions and lack of transferable skills. He conducted a labor market survey which revealed there were no jobs within a 50-mile radius which Dozier could perform. He concluded:

> The results revealed no meaningful transferable occupations for which she qualifies. Mrs. Dozier's residual access to the labor market is defined by any remaining employment classified as "unskilled" and "sedentary" or modified "light" with a 5-pound lifting restriction and no repetitive use of the upper extremities. Based on these parameters, a labor market survey was conducted. Approximately 500 jobs were reviewed in the South Carolina Employment Security Commission database. No jobs were located in Mrs. Dozier's labor market for which she qualifies. Based on this analysis, Mrs. Dozier's access to the competitive labor market has been eliminated. Any remaining employment in her local or national economy is so limited in quantity, quality and dependability that she is considered to be **totally and permanently vocationally disabled** as a result of her bilateral carpal tunnel syndrome and complex regional pain syndrome stemming from her work as a phlebotomist at the American Red Cross. [R. p. 541(Emphasis in original)].

Adams' report is consistent with a vocational report done in October 2009 by Dr. Robert Brabham. Dr. Brabham opined: "Her limitations on nearly any use of her hands are such that even any sedentary work which might otherwise have been suggested is precluded." [R. p. 525].

The vocational testimony confirms that no work is available that would allow Dozier "to work under the 5-pound weight restriction Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome." [R. p. 84]. The Appellate Panel's contrary finding is clearly

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[5]Employer retained Harriet Wilkinson to perform a vocational evaluation in 2009. Employer did not submit Wilkinson's report for the 2011 hearing. Wilkinson opined in her deposition that Dozier could not return to work in her previous occupations as a phlebotomist and certified nursing assistant. [R. p. 136, line 18-p. 137, line 9]. This was based on Dozier's restrictions at the time – 10 pound lifting restrictions – which were higher than the 5-pound restrictions she is currently under.

erroneous and unsupported by substantial evidence.

The two additional justifications for the decision are also clearly erroneous. Dr. Bitting had not seen Dozier since August 26, 2009. At that time, he ordered a functional capacity evaluation. "[T]he reason I sent her for the functional capacity evaluation was to see what her ability would be, you know, whether she could do light work, sedentary work." [R. p. 194, lines 1-19]. In his January 2012 deposition, Dr. Bitting testified he would defer to her hand surgeon "with respect to work restrictions" and to her current treating physician (Dr. Zgleszewski) for "any other treatment that would have occurred after [he] last saw Ms. Dozier on August 26, 2009." [R. p. 195, lines 19-22; p. 199, lines 6-16]. He further testified testified that he cannot "speak to her current physical condition, diagnosis, work restrictions or impairment . . ." [R. p. 199, lines 17-24].

Regarding "the fact that Claimant admitted that she had sought no employment since being released by her doctors," Dozier actually testified she had gone "to the vocational rehabilitation place." When asked if she had "applied for any jobs," she testified, "They couldn't put me on any. . . . Well, they wouldn't even let me apply." [R. p. 320, line 18-p. 321, line 5]. She further testified she would apply for jobs if there were any she could actually do, but none of the vocational experts or voc rehab had been able to offer suggestions as to jobs she could actually do. [R. p. 333, lines 6-17]. The Appellate Panel plainly took her testimony out of context. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 660 S.E.2d 260, 377 S.C. 346 (2008)(testimony taken out of context cannot be relied on to support Commission's denial of a claim).

Moreover, there is no requirement that a disabled employee engage in a failed work search to prove disability; and certainly not when it would be a useless and futile act. Cf. Carmichael v. Dan Nance Corp., 264 S.E.2d 601, 274 S.C. 357 (1980)("Equity will not require the doing of a futile task,

nor foreclose the rights of a party . . . for failure to do something which in view of all the facts would have been useless."). It is well established that an injured worker can prove loss of earnings capacity through expert vocational testimony. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). Coleman sets out three alternative methods of proof (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment." Id. Any one of these methods will suffice. Dozier proved her disability by the first two. She presented the testimony of four experts – not one of which was able to identify a job within her restrictions. And she testified that the South Carolina Vocation Rehabilitation Department "wouldn't even let me apply." [R. p. 321, line 3].

The only conclusion supported by the competent evidence in the record is that Dozier is permanently and totally disabled. The Appellate Panel relied on incompetent evidence, a misstatement by counsel regarding the foundation of Meyer's opinion, and rank speculation to conclude "work is available that would allow her to work under the 5-pound weight restriction." Moreover, even if the Court affirms the Appellate Panel's denial of CRPS, Dozier is still disabled based on the 5-pound lifting restriction from her CTS. As such, the decision below must be reversed and an award made for permanent and total disability.

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

After the hearing before Commissioner Huffstetler in 2009, Employer designated a pain management specialist, Dr. Zgleszewski, to treat Dozier's CRPS. Treatment began on January 26, 2010. There was never a question that the CRPS was causally related nor that Commissioner Huffstetler's order required treatment for the CRPS – until Employer raised it as an issue on their Form 58 for the February 2012 hearing.

At that hearing, Dozier raised several legal and equitable bars to reconsideration of the CRPS, including *res judicata*, waiver, estoppel, and the 150 day rule. The Single Commissioner and Appellate Panel rejected these arguments, finding instead that Dozier was the party barred by *res judicata*. The Appellate Panel also found as a fact that: "This Panel finds that Claimant did not sustain RSD/CRPS to her upper extremities due to a January 17, 2008 accident for Defendant." [R. p. 83].

A. Estoppel.

Employer is also 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.

At the first hearing in 2009, the medical and lay evidence presented supported the diagnosis of CRPS/RSD. In particular, Dr. Moore made the diagnosis. [R. pp. 608-612].

On November 4, 2009, Commissioner Huffstetler issued an instruction to counsel to draw a proposed order stating: "Claimant suffered injuries to both arms, including RSD, and her neck. Defense to pay all causally-related medical bills to date and additional treatment to be directed by Dr. Moore." [R. p. 572].

On December 17, 2009, Commissioner Huffstetler issued an Order he personally drafted ordering: "The Defense shall provide the Claimant medical treatment for both of her arms through a physician of their choosing." [R. pp. 3-6]. No mention was made of the RSD one way or the other.

On January 4, 2010, Dozier timely filed her appeal to the Appellate Panel. She specifically raised this issue:

> Whether the Single Commissioner erred as a matter of fact and law in allowing Defendants to designate a treating physician when good cause existed to designate Dr. Moore or one of the other treating physicians, such good cause being shown by Defendants wilful failure to provide treatment through the agreed upon authorized treating physician and the fact Defendants obtained *five* IME's? [R. p. 115].

In the interim, the attorneys discussed the issue of which physician was an appropriate choice to treat Dozier's condition. Defendants settled on Dr. Zgleszewski – precisely because he is a physical medicine and rehabilitation doctor qualified to treat RSD. Had Dozier's condition been limited to CTS, she would have been treated by a hand surgeon – as she ultimately was by Dr. Shealy.

Dr. Zgleszewski began providing treatment for CRPS on January 26, 2010. On the first visit he scheduled her for a stellate ganglion block – a procedure specifically indicated to treat RSD/CRPS. [R. p. 511]. Employer approved this treatment and continued authorizing treatment

for the next two years - all the way through Dr. Zgleszewski's deposition on January 24, 2012.[6]

Dozier filed her Appellant's Brief to the Full Commission on March 5, 2010. In her brief, she wrote:

> After the hearing, the Defendants designated Dr. Zgleszewski as the authorized treating physician. **As Dr. Zgleszewski is acceptable to Claimant, she no longer requests Dr. Moore be designated the treating physician**. She does seek reimbursement for the treatment Dr. Moore and his referring physicians provided during the time Defendants failed to provide treatment.

[R. p. 603 (emphasis added)].

Here, Dozier withdrew an appealable issue on the authorized treating physician because (1) Employer designated a pain specialist as the authorized treating physician; and (2) authorized him to treat CRPS. Dozier changed her position in detrimental reliance on the Employer's acceptance and provision of treatment for the CRPS.

The elements of estoppel are met. As to the Employer, Employer accepted and provided treatment for the CRPS, thus conveying to Dozier that the CRPS was an admitted condition – and that the parties interpreted Commissioner Huffstetler's order to include treatment for CRPS. Employer also should have expected Dozier to act on this assurance – which she did by withdrawing the issue over the treating physician from her appeal. Lastly, Employer presumably had either actual or

---

[6]Dr. Zgleszewski testified that he had been chosen as the authorized treating physician by "Mr. Shull's law firm and his clients." He confirmed he had "been paid by the insurance carrier to treat Ms. Dozier for complex regional pain syndrome and carpal tunnel syndrome ever since January of 2010." He added:

> And received written authorization for stellate ganglion blocks not only for carpal tunnel, but also for complex regional pain syndrome, and we – and I have been the treating physician with that diagnosis since day one, and, you know, just personally as Ms. Dozier's treating physician, I'm just – I'm just confused as far as the argument of whether or not she has CRPS, as there was actually no problem getting authorization for any treatment related to the CRPS since I started treating her." [R. p. 266, lines 5-25].

constructive knowledge of the real facts, to wit, that Dozier suffered from CRPS as a complication of her injury and expected Employer to continue providing treatment for it.

As to the elements the party arguing estoppel must meet, Dozier had no knowledge or expectation that Employer would deny the CRPS two years down the road – after all, they had specifically authorized Dr. Zgleszewski to treat it. She changed her position in reliance on Employer's actions to her detriment – specifically withdrawing a meritorious issue on appeal because she presumed that Employer would continue to provide treatment for CRPS. Cf. Hopkins v. Floyd's Wholesale, 382 S.E.2d 907, 299 S.C. 127 (1989)(an employer may be estopped from asserting the statute of limitations as a bar to subsequently filed Workers' Compensation suits if by his conduct he has induced the claimant to believe the claim is compensable and will be taken care of without its being filed with the Commission within the limitations period).

As the elements of estoppel have been met, the Court should find Employer is estopped from denying the CRPS as a matter of law .

B. Waiver.

Employer is procedurally barred from contesting the diagnosis of CRPS by the authorized treating physician. The fact they provided ongoing 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, the Court should reverse the Appellate Panel on this issue.

III. The Commission erred in holding *res judicata* barred Appellant from seeking treatment for CRPS.

For the first time in their Form 58, Employer contended the issue of CRPS had already been litigated adversely to Claimant, and is thus barred under *res judicata*. The Appellate Panel agreed. This is patently incorrect.

The doctrine of *res judicata* prevents the relitigation of issues previously decided between the same parties, and it 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 in the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Mead v. Jessex, Inc., 676 S.E.2d 722, 382 S.C. 525 (Ct. App. 2009). The first two elements are met as to both parties. The question is whether there was a prior adjudication of the issue. Moreover, because workers' compensation often involves multiple hearings as the case evolves, the issue here is more properly framed as collateral estoppel or issue preclusion. Collateral estoppel "precludes relitigation of only those issues 'actually and necessarily litigated and determined in the first suit.' Expressed differently, 'res judicata' bars relitigation of the same cause of action while 'collateral estoppel' bars relitigation of the same facts or issues necessarily determined in the former proceeding. Liberty Mut. Ins. Co. v. Employers Ins. of Wausau, 325 S.E.2d 566, 284 S.C. 234 (Ct. App. 1985).

Commissioner Huffstetler issued an Order that orders Employer to "provide treatment to both of her arms."[R. pp. 3-6]. The Order does not explicitly address the diagnosis one way or the other. Clearly had the Order stated CTS only or specifically excluded CRPS, then the issue of CRPS would be res judicata. The fact it is not specific, combined with the fact *both parties interpreted it as finding the CRPS to be a compensable injury* shows this issue is not precluded against Dozier. The treatment Dozier required was specifically for chronic pain resulting from CRPS. If anything, *res judicata* and collateral estoppel bar Employer from contesting the issue at this stage of the litigation.

It is true that "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Center of S.C., Inc. v. Public Service Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). However, because this is a specific factual issue, the issue is not res judicata, but collateral estoppel. *res judicata* applies to issues both raised *and ruled upon.* The essential predicate here is that the issue must have

been "actually and necessarily litigated *and decided* in the workers' compensation proceeding." Liberty Mut. Ins. Co. v. Employers Ins. of Wausau, 325 S.E.2d 566, 284 S.C. 234 (Ct. App. 1985)(emphasis added).

The existence of CRPS was undoubtedly raised before Commissioner Huffstetler. It appears to have been awarded in Dozier's favor. That was certainly the interpretation of Employer, hence their decision to select and authorize Dr. Zgleszewski to treat CRPS. Dozier was under the same belief, as she did not appeal the issue further, and indeed even withdrew the issue of designating a doctor qualified to treat CRPS. If not awarded in Dozier's favor, then at best, the issue was raised but not ruled upon. Commissioner Huffstetler's 2009 order is simply too vague for anyone to determine the exact ruling. Cf. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962)(remanding for further and more specific findings of fact because general findings that respondent became aware of her condition on a particular date and that claim "was duly filed" were not express findings of fact as required). Respondents' counsel admitted as much at the Single Commissioner hearing, when in reference to the 2009 Order, he stated: "It did not make a finding as to CRPS." [R. p. 285, lines 17-18].

The bottom line is the 2012 Appellate Panel had no evidence on which it could conclude that the issue of CRPS had been *decided* in the previous hearing. The Panel had no grounds to hold it had been decided at all, and certainly not against Dozier. Therefore, the Court should reverse.

IV. 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].

Other treating doctors had the same diagnosis (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.

The Appellate Panel placed "great emphasis on the opinions of Dr. Mancuso and Dr. Bitting." [R. p. 83]. It is a curious thing that the greatest emphasis would be on the opinions of two doctors in the same practice who had not treated Dozier for over two years before the hearing – particularly since they are the *only* two doctors who thought perhaps Dozier did not have CRPS. While the Appellate Panel has the authority to weigh evidence, it cannot do so arbitrarily. It must base its findings on the totality of the record – not on isolated medical records or testimony from a doctor who admitted he "can't speak to her *current physical condition* [and] *diagnosis* . . ." [R. p. 199, lines 14-24].

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.

CONCLUSION

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

Respectfully Submitted,

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September 9, 2013

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

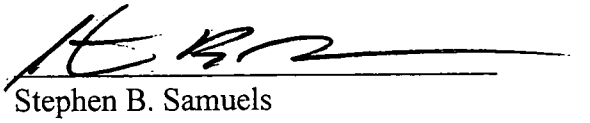
Cindy Ella Dozier, Employee, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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September 9, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2012-213606

Cindy Dozier, Employee/Claimant.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Cindy Dozier ("Appellant"), sustained an admitted injury by accident to the left arm on January 17, 2008. The parties entered into a Consent Order whereby they agreed that, "Appellant sustained a January 17, 2008, compensable injury to her left wrist as a result of her employment with American Red Cross." Treatment was initiated with several medial providers. (R. pp. 1-2)

Appellant filed an August 6, 2009, Form 50 alleging injury to, "arms, back/neck," and "psychological overlay." Appellant sought further medical treatment for the "neck, back, arms, psyche." (R. pp. 91-93) On August 14, 2009, Respondents filed a Form 51 admitting an injury to the "left wrist only." (R. p. 94)

A hearing was held before a Single Commissioner on November 3, 2009. At this hearing, position of the parties was read into the record as follows:

> The Claimant takes the position she suffered injuries to both arms, also to her neck and the back. She seeks payment of all causally related medical treatment received to date. She seeks an award of compensation for temporary total disability from September 8, 2008, forward. And seeks additional treatment for her arms, in particular for reflex sympathetic dystrophy 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 you also deny the request for Dr. Moore to be the treating physician.
>
> **Mr. Shull:**
>
> Yes, Sir. And we also take the position the Appellant is at MMI.

R. p. 144, lines 23-25; R. p. 145, lines 1-14.

Appellant's counsel did not object to the above statement by the Single Commissioner at the November 3, 2009, hearing.

The Single Commissioner emailed counsel for the parties requesting that Claimant's counsel draft a proposed Order finding, "Claimant suffered injuries to both arms, including RSD, and her neck. Defense to pay all causally-related medical bills to date and additional treatment to be directed by Dr. Moore." (R. p. 572).

The Single Commissioner issued a December 17, 2009, Decision & Order. This Decision & Order found as fact that, "The Claimant suffered injuries to both arms by accident arising out of and in the course of her employment." The Commissioner specifically ordered, "The defense shall provide the Claimant with medical treatment for both of her arms through a physician of their choosing." (R. pp. 5-6)

On December 30, 2009, Appellant filed a Form 30 Notice of Appeal with the following exceptions:

1. Whether the Single Commissioner erred as a matter of fact and law in failing to order past causally related medical treatment to be paid by the Carrier pursuant to § 42-15-60?

2. Whether the Single Commissioner erred as a matter of fact and law in allowing Defendants to designate a treating physician when good cause existed to designate Dr. Moore or one of the other treating physicians, such good cause being shown by Defendant's willful failure to provide treatment through the agreed upon authorized treating physician and the fact Defendants obtained *five* IMEs?

3. Whether the Single Commissioner erred as a matter of law in failing to assess the mandatory 25% penalty for improper termination of temporary compensation?

R. p. 105; R. pp. 600-601.

On January 4, 2010, Appellant filed an Amended Form 30 adding the following exceptions:

4. Whether the Single Commissioner erred as a matter of fact and law in failing to find Appellant injured her neck/back when such finding was supported by the opinions of the treating physicians?

5. Whether the Single Commissioner erred as a matter of fact and law in failing to exclude the report of Dr. Bethea?

R. pp. 114-115.

Oral arguments were heard on April 20, 2010. Appellant chose not to argue the issues of medical provider, compensability of her alleged neck injury, or the 25% penalty. The South Carolina Workers' Compensation issued a November 23, 2010, Order which stated in the "Statement of the Case:"

> Claimant contends she has been diagnosed with carpal tunnel syndrome and Complex Regional Pain Syndrome (CRPS/RSD), both conditions being work-related. She seeks treatment as directed by Dr. Blake Moore, contending that although the parties agreed to Dr. McIntosh as the authorized treating physician, she was sent to Dr. McIntosh for a defense medical evaluation rather than for treatment.

R. p. 8.

This November 23, 2010, Order was drafted by Appellant's counsel and included all five original issues for appeal, including the issue of whether or not the Hearing Commissioner erred by failing to find that Appellant injured her neck/back and the issue of whether or not the Hearing Commissioner erred by failing to authorize Dr. Moore as the authorized treating physician (at that point in time, Dr. Moore had opined that Appellant suffered from RSD/CRPS). Neither party appealed this Order.

Appellant filed a subsequent Form 50 on October 17, 2011. Appellant alleged an additional injured body part, making her allegations, "both arms, central nervous system." At this hearing, Appellant requested a lump sum award for permanent total disability

benefits. (Form 50, 10/17/11). Respondents filed a November 15, 2011, Form 51 which admitted "only injury to the bilateral wrists. All other alleged injuries are denied." (R. p. 123)

A hearing was held before the Single Commissioner on February 6, 2012. Appellant argued that she was entitled to a finding of permanent and total disability under S.C. Code Ann. § 42-9-10 (2007) based on the medical restrictions placed on her by her authorized treating physicians. Specifically, she contended that the 5-pound lifting restriction placed on her by Dr. Shealy and Dr. Zgleszewski left her unable to return to the workforce. In addition, Appellant argued that she was unable to return to work due to Dr. Zgleszewski's assertion that she would not be able to use either upper extremity on a repetitive basis "secondary to her CRPS and chronic pain from her failed CTS surgery."

Respondents argued that Appellant was entitled to a permanent partial disability award to each wrist only but that Appellant had not met her burden of proving permanent and totally disability and that her argument for such award was based upon her alleged and denied RSD/CRPS.

Respondents further argued that Appellant previously sought a finding of compensable RSD/CRPS with treatment for the same with a provider of her choosing at the prior November 3, 2009 hearing. However, the resulting December 17, 2009, Decision & Order did not make any findings to this effect or order treatment for RSD/CRPS. Rather, the December 17, 2009, Order gave Respondents the right to choose Appellant's treating physician. (R. pp. 5-6). In addition, Respondents argued that Appellant had chosen not to pursue the issue of RSD/CRPS in her appeal of the December 17, 2009 Order. Instead, other issues were appealed, argued, and ruled upon by the Full Commission in the

November 23, 2010, Order that was drafted by Appellant's attorney. Respondents argued that Appellant had already sought a finding of compensable CRPS/RSD and treatment for same and could not attempt to re-litigate the issue at a subsequent hearing pursuant to the doctrine of *res judicata.* In the alternative, Respondents contended that the overwhelming preponderance of the credible evidence did not support a medical diagnosis of RSD/CRPS.

The Single Commissioner issued a May 24, 2012, Decision & Order finding, inter alia: (1) Appellant did not suffer from RSD/CRPS related to her January 17, 2008, wrists injuries (Finding of Fact #33); (2) Appellant reached MMI on August 9, 2011 (Finding of Fact #4); and (3) Appellant sustained 20% permanent partial disability to each arm (Finding of Fact # 36). (R. pp. 55, 62, 63)

On May 31, 2012, Appellant filed a Form 30 Notice of Appeal and the Full Commission heard the case on September 18, 2012. (R. pp. 605-607) On November 15, 2012, the Full Commission fully affirmed the Single Commissioner's May 24, 2012, Decision & Order. (R. pp. 67-87) Appellant filed her Notice of Appeal with this Court on December 14, 2012. This appeal follows.

STATEMENT OF THE FACTS

Appellant was 41-years-old on the date of the February 6, 2012 hearing. (R. pp. 294, lines 9-10) Appellant graduated High School after the 12th grade and also obtained training and licenses as a Certified Nurse's Assistant and as a Phlebotomist. (R. p. 294, lines 17-23) Prior to working for Respondent, Appellant worked at a Certified Nurse's Assistant for 18 years. (R. p. 295, lines 1-7) Claimant had not applied for any jobs since she had been released by her doctors. (R. p 320, lines 18-25; R. p 321, lines 1-5)

Although the parties had entered into a Consent Order on January 17, 2008, pursuant to which Respondents were providing treatment, Appellant sought treatment on her own, and without Respondent's knowledge, with Dr. Blake Moore from August 15, 2008, through July 30, 2009. (R. pp. 362-398) In a letter dated August 20, 2008, Dr. Moore wrote Appellant's prior attorney a letter. (R. p 393) Dr. Moore noted, "She was noted with marked hypersensitivity in her left hand. She described temperature sensitivity, and was noted with resting edema." (Id.)

On August 30, 2008, September 20, 2008, and April 9, 2009, Claimant treated with Dr. Moore, who indicated that Appellant's skin was warm and that the color was good. (R. p. 392, 381, 363) Dr. Moore's hand-written notes do not indicate that he observed abnormal skin temperature, that the skin color was not anything less than "good," or that he observed mottled skin, brittle nails, or hair loss. (Id.)

Appellant treated at First Choice Healthcare from January 26, 2009, through August 27, 2009, upon referral by Dr. Moore. (R. p. 554-566) On January 26, 2009, Dr. Lisa Mancuso wrote Dr. Moore a letter stating, "Thank you very much for sending Ms. Dozier to me for her chronic arm pain. I doubt that she has complex regional pain

syndrome, formerly know [sic] as reflex sympathetic dystrophy, for a few reasons. One – there is no specific precipitating event, two – both limbs are affected, three – there are no sudomotor changes." (R. p 554)

Appellant was given a health history questionnaire when her treatment at First Choice Healthcare began on January 26, 2009. This questionnaire contained a review of systems portion in which Appellant was asked: "Please check all symptoms or illnesses that you have currently." (R. p 555) Specifically, Appellant was asked to check several boxes indicating which of the symptoms or illnesses that she had. Appellant was specifically asked to indicate whether or not she had the following symptoms: "Neurological: 1. Loss of sensation. 2. Muscle weakness; Skin: 1. Color changes. 2. Texture changes. 3. Itching. 4. Hair changes. 5. Nail changes; Paralysis." (R. p. 620) With respect to the neurological changes, Appellant failed to indicate that she had sustained a loss of sensation or muscle weakness. With respect to the skin changes, Appellant not only failed to indicate that she had any of them, but affirmatively chose to indicate, "none of the above." (Id.) This review of systems was signed and dated by Appellant. (Id.)

On January 26, 2009, Dr. Mancuso stated in her medical report, "[Ms.] Dozier is a 38 year old patient seen for consultation in the office today, kindly referred by Dr. Moore for what pt says is consideration of a stellate ganglion block for chronic arm pain ... The pain began approximately 1 year ago. The onset was sudden. There was no precipitating event. The mechanism of injury was unknown. The pain is poorly localized. The pain quality is achy, deep, sharp, shooting ... Denies temp changes or sudomotor changes in her arms/hands. Has not had a three phase bone scan." (R. p 556) Under the "SENSATION" portion of the physical exam from this report, Dr. Mancuso noted, "Sensation to touch and

pressure intact." (R. p 557) Under the 'PLAN' portion from this note, Dr. Mancuso stated, "I doubt she has CRPS Complex Regional Pain Syndrome (formerly RSD) b/c: both limbs are affected and there are no sudomotor changes." (R. p 558)

Appellant underwent a three-phase bone scan on February 3, 2009. On the report from this bone scan the radiologist stated:

> A triple-phase bone scan of the hands and wrist and distal forearms was performed following intravenous administration of 25.1 mCi of Tc 99m MDP. On early blood flow images there appears to be slight asymmetric increased activity projecting over the distal left forearm and midcarpal region and MCP region. Activity appears fairly symmetric on the blood pool and three-hour delayed images. Slight degree of activity in the radiocarpal regions bilaterally could reflect a component of degenerative change although is very minimal nonspecific although plain film correlation may be useful.

R. p 567.

On February 10, 2009, Appellant returned to FirstChoice Healthcare and was treated by Dr. George A. Bitting, Dr. Mancuso's medical partner, who stated, "Reports were reviewed and scanned into the chart: MRI report, test results. Bone scan was nonspecific, degenerative changes; neg RSD changes." (R. p. 559) On the 'GENERAL EXAM' portion of the physical exam of this note, Dr. Bitting noted, "SKIN: Warm, dry, no significant lesions, irritation, rashes or ulcers." (R. p. 560)

On March 17, 2009, Appellant returned to FirstChoice Healthcare and was treated by Dr. Bitting, who noted, "SENSATION: PERIPHERAL NERVES: Sensation to touch and pressure intact ... SKIN: Warm, dry, no significant lesions, irritation, rashes or ulcers." (R. p. 561) Appellant treated again with FirstChoice Healthcare on April 16, 2009. On this date, the authorized treating physician stated, "Three phase bone scan arms, this can pick up CRPS changes. I doubt she has CRPS Complex Regional Pain Syndrome (formerly

RSD) b/c: both limbs are affected and there are no sudomotor changes." (R. p. 562) On this date, a referral was made to a hand surgeon. (Id.)

Appellant treated with Dr. Andrew H. Rhea, a neurosurgeon, on April 6, 2009. (R. pp. 416-422) On this date, Dr. Rhea noted:

> 38-year-old female from Sumter South Carolina, referred through First Choice Healthcare. She complains of pain in the wrists and hands. This has been present since January 2008. She states it is related to her work. She states that she was involved in some repetitive work for the Red Cross involving pulling and lifting . . . She also has some neck pain but states that this came on after her cervical injections. She has some numbness and tingling in both hands.

R. p. 416.

Dr. Rhea's neuro/musculoskeletal exam revealed, "Sensory: Sensory exam was intact to light touch and pinprick throughout all 4 extremities and proprioception seems full." (R. p. 417) Dr. Rhea's impression was, "Vague pain in the wrists and forearms. She does have some cervical pain as well, but I don't believe her wrist and arm pain is a manifestation of cervical radiculopathy. She states it is secondary to repetitive injury and this may be some type of a sympathetic mediated pain syndrome". (*Id.*)

Appellant returned to FirstChoice Healthcare on May 15, 2009. It was noted that Appellant's "Sensation to touch and pressure was intact." Her skin was noted to be, "Warm, dry, no significant lesions, irritation, rashes or ulcers." It was recommended that Appellant "Continue conservative care." (R. p. 563)

On May 22, 2009, Appellant underwent a, "Bilateral upper extremity sensory and motor nerve conduction velocity study." The neurologist's impression from this study was, "Electrophysiological evidence suggestive of a mild median mononeuropathy consistent with a mild carpal tunnel syndrome affecting both extremities, affecting the sensory

component. There is no electrophysiological evidence of a cervical motor radiculopathy based on this study in the nerves and muscles tested." (R. p. 564)

Appellant returned to treat with Dr. Bitting on July 29, 2009. Dr. Bitting stated, "Pt. able to obtain gainful employment, no work restrictions from condition." (R. p. 565)

Appellant last treated at FirstChoice Healthcare on August 26, 2009. Dr. Bitting reiterated, "Imaging studies include an MRI of the cervical spine. Cervical spine series. Three phase bone scan arms, this can pick up CRPS changes. I doubt she has CRPS Complex Regional Pain Syndrome (formerly RSD) b/c: both limbs are affected and there are no sudomotor changes." A functional capacity evaluation was requested. (R. p. 566) However, Appellant never returned to treat at FirstChoice Healthcare.

When asked at the February 6, 2012, hearing whether she reported any symptoms of RSD/CRPS to Dr. Bitting or Dr. Mancuso, Appellant testified that her nails had become brittle by the time her treatment began with Dr. Mancuso on January 26, 2009. (R. p. 311, lines 9-12) Appellant was asked if she reported the "brittle nails, blotchy skin, and hair falling out" to her chosen physicians, Dr. Mancuso and Dr. Bitting, and she testified that she did report them to Dr. Mancuso, but not to Dr. Bitting because she had only "seen him I think once." (R. p. 313, lines 14-24)

Prior to the November 3, 2009 hearing, Appellant saw Dr. Timothy M. Zgleszewski for an independent medical examination on September 8, 2009, scheduled at Appellant's counsel's request. (R. pp. 514-517) Dr. Zgleszewski included in this report an explanation of the examination, stating:

> Analysis is based upon the subjective complaints, history given by the examinee, review of medical records, tests provided to me and objective clinical findings on physical examination. History was provided by the examinee. Approximately 30 minutes were spent

> with the examinee. This included taking a history and performing a detailed physical examination ...

R. p. 514.

With respect to the diagnostic testing that Dr. Zgleszewski had reviewed in preparation for his independent medical report, Dr. Zgleszewski stated:

> The examinee has had interventional spinal procedures in the past with no reported benefit. The examinee has progressed through physical therapy and chiropractic therapy wit [sic] no reported benefit. The examinee is taking Lyrica, Tramadol, Soma, Lortab, Darvocet and Darvon for the pain with little reduction of her discomfort. The examinee's diagnostic testing includes x-rays, Cervical MRI, EMG/NCS and a bone scan performed to date.

R. p. 515.

Dr. Zgleszewski further noted:

> There is a positive Phalen's in both the right and left wrist. There is a positive Tinel's sign at the wrists bilaterally. There is a negative Tinel's sign at the bilateral elbow. There was a negative Finkelstein's bilaterally. There are negative neural tension sings [sic] in both arms in the median, radial and ulnar biases. Bilateral upper extremity motor examination was normal. Bilateral upper extremity sensory examoinat [sic] was normal to soft touch and pinprick. Deep tendon reflexes at the bilateral biceps, triceps and brachioradialis are normal and symmetric today.

Id.

Dr. Zgleszewski's diagnoses were, "1. Left and right carpal tunnel syndrome 2. Cervical myofascial pain." (R. p. 516)

With respect to medical treatment that he felt necessary, Dr. Zgleszewski stated:

> The examinee will require myofascial stretch and release rehabilitation as well as rehabilitation therapy to address the upper crossed muscle imbalances as noted in the physical examination, but will require further diagnostic testing and treatment as [outlined] below prior to the initiation of rehabilitation therapy. The examinee will require trigger point injections the bilateral upper trapezius, levator scapulae and teres minor muscles ... The examinee will

> require carpal tunnel injections to the bilateral wrists. If no long term benefit is obtained, then they will need to be considered for a Carpal Tunnel Release. She had one injection to the left wrist and it was painful, which makes me wonder if it was done correctly as it should be almost pain free if not pain free.

Id.

Nowhere in Dr. Zgleszewski's September 8, 2009, independent medical evaluation report did he note observations of allodynia, mottled skin, coolness of skin to the touch, hair loss or brittle nails, or any other sign or symptom of RSD/CRPS.

Because the Single Commissioner's December 17, 2009, Order ordered additional medical treatment, Defendants agreed to authorize Dr. Zgleszewski for the treatment he had recommended in his September 8, 2009 report. This included myofascial stretch and release rehabilitation, therapy, trigger point injections, and carpal tunnel injections. On January 26, 2010, Appellant returned to Dr. Zgleszewski, who noted, "Bilateral upper extremity sensory examination is normal to soft touch and pinprick today." Under the "Treatment Plan" portion of the note, Dr. Zgleszewski noted, "The patient will require his [sic] first therapeutic right stellate ganglion sympathetic block under fluoroscopic guidance." (R. p. 500) On March 18, 2010, Dr. Zgleszewski performed a right stellate ganglion block. (R. pp. 497-498)

On March 30, 2010, Dr. Zgleszewski noted, "Ms. Dozier reports absolutely no relief of pain and increased pain in the shoulders and increased hand symptoms s/p her last stellate ganglion block. She states she has had effective blocks before but the [sic] were done through an anterior approach." (R. p. 494) On May 6, 2010, Appellant underwent a repeat right stellate ganglion block. (R. pp. 491-492)

On May 18, 2010, Dr. Zgleszewski noted, "Ms. Dozier reports little to no relief of pain s/p repeat stellate ganglion blocks, any pain relief that she did have only lasted several hours after the procedure and was felt in the beck [sic] only. She states she has had effective blocks before done in an anterior approach that decreased some of her shoulder pain but never her arm symptoms." (R. p. 488)

On June 1, 2010, Appellant received a right carpal tunnel injection, performed by Dr. Zgleszewski. (R. pp. 486-487) Appellant underwent a left carpal tunnel injection performed by Dr. Zgleszewski on June 15, 2010. (R. pp. 481-482) On June 22, 2010, Dr. Zgleszewski performed a second right carpal tunnel injection. (R. p. 479) On July 13, 2010, Appellant underwent another left carpal tunnel injection performed by Dr. Zgleszewski. (R. pp. 473-474) On July 20, 2010, Appellant underwent a third right carpal tunnel injection. (R. pp. 471-472) On this date, Dr. Zgleszewski stated, "She has had 3 carpal tunnel injections with minimal benefit and will need to be evaluated by a hand surgeon for a carpal tunnel release." (R. p. 470)

On December 8, 2010, Claimant under went repeat MRIs of the upper extremities. In her report, the radiologist stated, "Fluid is present in the proximal carpal row without evidence of tendinous, ligamentous or osseous abnormality. Please correlate with clinical findings." (R. p. 411)

On December 8, 2010, Appellant also underwent a bilateral EMG. The neurologist noted, "Performed electrodiagnostic examination upper extremities. Findings consistent with bilateral carpal tunnel syndrome. Please see report for details. Follow up with surgeon as scheduled." (R. p. 409)

On December 16, 2010, Dr. Gerald Shealy, the upper extremity specialist provided per Dr. Zgleszewski's request for a surgical evaluation, noted:

> Ms. Dozier returns with the electrodiagnostic studies confirming that she does have a moderately severe right with a mild left carpal tunnel syndrome. This is consistent with her clinical history and physical examination. The MRI is not available to me. However, based on these electrodiagnostic studies, it is felt that surgical decompression of the median nerve in the right and left carpal tunnel needs to be undertaken in order to alleviate this lady's symptoms.

R. p. 408.

On January 11, 2011, Appellant underwent an "Exploration and decompression of the median nerve of left carpal tunnel" performed by Dr. Shealy. (R. p. 407) On March 3, 2011, Dr. Shealy performed a right carpal tunnel "Exploration and decompression of median nerve in right carpal tunnel." (R. p. 403) On May 23, 2011, Dr. Shealy stated:

> Ms. Dozier has reached maximum medical improvement following surgical decompression of the median nerve in both the right and left carpal tunnel. She is discharged from care to be followed for reevaluation in the future as needed. On evaluation today following measurements of her two-point discrimination, I am noting that she continues to be symptomatic with pain in the median nerve. It is my opinion that she has a 5% permanent residual impairment to her dominant right hand and a 5% permanent residual impairment to her nondominant left hand secondary to the surgery and the carpal tunnel decompression. At her request, she is provided with a permanent restriction of 5 pounds. She is advised that she may return to work on a limited-duty status and is to return for reevaluation by me in the future as needed.

R. p. 399.

On June 28, 2011, Dr. Zgleszewski performed a bilateral upper extremity electrodiagnostic evaluation. His impression from this EMG was, "1. Abnormal electrodiagnostic examination. 2. Moderate bilateral carpal tunnel syndrome. 3. No

evidence of a cervical radiculopathy, brachial plexopathy, peripheral polyneuropathy or myopathic process." (R. p. 439)

On July 21, 2011, Appellant underwent, "1. Left carpal tunnel corticosteroid injection. 2. Ultrasound Guidance, musculoskeletal." (R. p. 433-434) On July 26, 2011, Appellant underwent, "1. Right carpal tunnel corticosteroid injection. 2. Ultrasound Guidance, musculoskeletal." (R. p. 431)

On August 9, 2011, Appellant treated again with Dr. Zgleszewski, who stated, "She is status post bilaterl [sic] carpal tunnel injections. She reports that she recieved [sic] minimal benefit in the left thumb; she experienced decreased tenderness. Despite the reduction in tenderness she reports difficulty with use and pain that 'runs up my arm.' Ms. Dozier reports no benefit with the right side." (R. p. 428) Dr. Zgleszewski further stated on this date:

> Based on the AMA Guides to the Evaluation of Permanent Impairment 5th Edition, the examinee has a 5% impairment rating to the left upper extremity and 5% impairment rating to the right extremity secondary to her left and right carpal tunnel syndromes and continued pain complaints and loss of function despite carpal tunnel release surgery and ultrasound guided carpal tunnel injections . . . Secondary to her CRPS of the bilateral upper extremities, her central nervous system has been affected by the work accident. Based on the AMA Guides to the Evaluation of Permanent Impairment 5th Edition, she has a 6% impairment to the whole person for the right arm CRPS and a 6% impairment to the whole person for the left arm CRPS. The combined impairment rating for her CRPS is therefore 12% to the whole person.

R. pp. 429.

Respondent's took Dr. Shealy's deposition on August 26, 2011. (R. pp. 179-183) Dr. Shealy was questioned with respect to Appellant's work restrictions and testified that he rendered them, "at her request" because "she requested me to put on her permanent

limited duties-type restrictions ... I typically don't – advise patients to do that." (R. p. 182, lines 10-25 of Transcript page 10) Dr. Shealy was also questioned regarding whether Claimant specifically requested these restrictions:

> Q: Did she – do you remember if she specifically asked you for five pounds?
> A: She did.
>
> Q: Okay. And typically you would not have done. What would you have typically given somebody who had bilateral –
> A: I'd send them back to full duty.
>
> Q: Full duty. Okay. Was there anything other than her asking you to do that that – with respect to this lady's case –
> A: That's exactly what I dictated.
>
> Q: Okay. Was there anything else that you can remember or from the chart that we've gone through that would have made you give her the five-pounds' restriction?
> A: No. Not that I recall.
>
> Q: All right. And then you stated, "She is advised that she may return to work on a limited-duty status." And when you said "limited-duty status," what exactly did you mean?
> A: Five-pound weight restriction.
>
> Q: Okay. Do you feel that she could work at a greater than five-pound weight restriction?
> A: My experience with these, and I've done many of them through the years, has been that most of these people are able to go back to their normal activities at that point in time. And I'm very reluctant to provide somebody with permanent restrictions, because I don't think they're usually indicated.
>
> Q: Did she tell you – do you remember if she told you why she wanted the restrictions?
> A: She said that she felt she couldn't get back to using her hands more than five pounds.

R. p . 182, lines 19-25 of Tr. p. 10; R. p. 182, lines 1-25 of Tr. p. 11; R. p. 182, lines 1-3 of Tr. p. 12.

In addition, Dr. Shealy testified with respect to Appellant's grip strength and claims of sensory loss and stated that he had measured her grip strength, but could not "put a whole lot of credibility" in the measurement results because "it doesn't constitute a normal bell curve." (R. p. 183, lines 10-25 of Tr. p. 15; R. p. 182, lines 1-6 of Tr. p. 16).

At the February 6, 2012, hearing, Appellant denied that she asked Dr. Shealy to give her a 5-pound lifting restriction. Appellant elaborated, "I can explain, sir. He told me – Dr. Shealy said he doesn't normally put any of his patients on a weight restriction. He asked me how many pounds could I lift, and I told him I couldn't even lift a gallon of milk. So he said he said he would put me on a five pound restriction." (R. p 307, lines 10-15)

Dr. Zgleszewski completed a Form 14B Physician's Statement on August 31, 2011. (R. p. 425) Dr. Zgleszewski stated that Appellant had a "5/5% medical impairment to RUE/LUE." Dr. Zgleszewski further opined that Appellant had sustained a "12% medical impairment to Central Nervous System." (Id.) Dr. Zgleszewski indicated that Appellant could not return to her current employment and stated that she would need future medical care and described this as, "She requires pain medication management along with appropriate physician follow up visits and medication compliance testing. She has the option of proceeding with an SCS trial if her medication regimen does not provide adequate pain control." (Id.)

At the February 6, 2012, hearing, Appellant stated that the surgeries performed by Dr. Shealy were unsuccessful and stated that she continues to have pain in, "both wrists, hands, both shoulders, and neck." When asked at the hearing by her attorney if the stellate ganglion blocks helped her, Appellant stated, "Yes. I got some relief for about a week," but after one week the blocks "wore off." (R. p. 299, lines 7-10)

On October 3, 2011, Dr. Zgleszewski issued another medical report which was apparently in response to an email sent to him by Appellant's counsel:

> Dear Attorney Samuels, I will address your questions from an email dated 10/3/2011.
>
> 1. I have reviewed the vocational evaluation from Corvel. There indeed is no mention of the diagnosis of Complex Regional Pain Syndrome (CRPS) in the report. The only diagnosis mentioned is of Carpal Tunnel Syndrome (CTS. I would agree Ms. Dozier can lift up to 5 pounds; but secondary to not only her chronic hand pain from her failed CTS release surgery, but also her CRPS of the upper extremities, she can not use her hands on a repetitive basis. In my review of the Corvel Vocational Rehabilitation report, there is no mention of the repetitive nature of her jobs, or the proposed jobs, including no detailed job description of her prior Phlebotomist position or any of the eleven positions recommended in the Corvel report. Knowing the detailed job description is vitally important for making any recommendations as to whether she would be able to return to those jobs based on her CRPS and CTS diagnoses. Her diagnosis of CRPS and her continued pain symptoms are ignored or omitted for whatever reason ...
>
> 2. Ms. Dozier cannot return to work at her current job as a Phlebotomist. She has chronic pain secondary to her CRPS and CTS which would preclude her from any job position requiring lifting greater than 5 pounds ... 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. Apparently Dr. Shealy stated in his deposition that he 'normally releases with no restrictions.' Since no two patients are alike, and since Carpal Tunnel Release surgery is not 100% successful, one needs to treat each patient as an individual. Categorical statement regarding work restrictions and accommodations are not possible due to the wide range of clinical presentations in individuals with CRPS. Work restrictions and accommodations are based upon the interaction between a person's medical impairment (if any) and the job requirements. Therefore, in my medical opinion from a medical standpoint, Ms. Dozier cannot perform even at a sedentary position if the job requires anything greater then less then occasional use of her arms given the diagnoses she has of CRPS and CTS. She cannot use either upper extremity on a repetitive basis ...
>
> 3. CRPS is a malfunction of part of the nervous system. The main symptom with CRPS is constant pain and often out of proportion to

> the severity of the initial injury. Nerves misfire, sending constant pain signals to the brain. It develops in response to an event the body regards as traumatic, such as an accident or a medical procedure. This syndrome may follow 5% of all nerve injuries. This is what Ms. Dozier has along with failed CTS surgery and continued pain symptoms.

R. pp. 423-424.

Respondents took Dr. Bitting's deposition on January 17, 2012. Dr. Bitting testified that Appellant was sent to his practice in order to perform stellate ganglion blocks to determine if Appellant had RSD/CRPS. Dr. Bitting explained his opinion that RSD/CRPS is "typically not in both limbs, and in this case Ms. Dozier was complaining of it in both limbs." (R. p. 185, lines 16-19) Dr. Bitting further explained that RSD/CRPS typically requires a precipitating event. (R. p. 186, lines 13-20) Dr. Bitting further testified that RSD/CRPS was not typically caused by repetitive trauma. (R. p. 186, lines 21-24)

Dr. Bitting stated that the bone scan performed on Appellant "was negative for the RSD that Mancuso was looking for." (R. p. 187, lines 23-25; R. p. 188, lines 1-17) Dr. Bitting further explained that the "degenerative changes" that were detected on the bone scan were most likely, "arthritic changes that people get, and I mean, a bone scan will just essentially light up if there is arthritis. In other words, you'll see it. So, I'm assuming degenerative changes would be – and it says, component of arthritic changes down in the impression, so that appears to be from arthritis." (R. p. 188, lines 20-25, p. 189, lines 1-2) Dr. Bitting was asked what "very slight increase in blood flow" indicated and answered that it, "probably doesn't indicate anything." (R. p. 189, lines 22-25)

Dr. Bitting was asked his opinion as to whether or not Appellant was suffering from RSD/CRPS during his treatment and testified that he "didn't believe she was suffering from RSD ..." (R. p. 190, lines 23-25; R. p. 191, lines 1-7) Dr. Bitting also commented on the

implications of the fact that no allodynia was found by either him or Dr. Mancuso and agreed that this fact was "also indicative that she did not have RSD ..." (R. p. 192, lines 19-25; R. p. 193, lines 1-8) Dr. Bitting reiterated that he thought that the "bulk" of Appellant's problem was carpal tunnel syndrome, not RSD/CRPS. (R. p. 196, lines 22-25; R. p. 197, ll. 1-14)

Dr. Bitting was further questioned on whether it would be likely for Appellant to later develop RSD/CRPS, and it be related to her injury of January 17, 2008, if Appellant did not have RSD/CRPS and/or RSD/CRPS- type symptoms as of August 26, 2009 (Appellant's last treatment date with Dr. Bitting). He indicated that this would not be likely. (R. p. 197, lines 8-25; R. p. 198, lines 1-2)

Dr. Bitting also stated that the fact that Appellant received ineffective sypathetic blocks would most likely further indicate that Appellant did not have RSD/CRPS. (R. p. 200, lines 23-25, R. p. 201, lines 1-11)

Appellant took Dr. Zgleszewski's deposition on January 24, 2012. Dr. Zgleszewski explained that, in diagnosing a patient with RSD/CRPS Type II, he uses the diagnostic criteria promulgated by the "International Association for the Study of Pain" (IASP). (R. p. 213, lines 20-22)

Per Dr. Zgleszewski's testimony, the IASP contains four criteria, criteria. Criteria #1 is: "The presence of an initiating noxious event, or a cause of immobilization." (R. p. 215, lines 19-21) Dr. Zgleszewski testified that, in his opinion, criteria #1 of the IASP had been met due to the fact that, "within one or two months her initial treating doctors actually placed her in a cast, and while she was in the cast – and that would be the immobilization, and that was also, I think, treating a tendonitis with pain ..." (R. p. 215, lines 24-25; R. p.

216, lines 1-3) Further, Dr. Zgleszewski testified, "So in my medical opinion, really, actually the cause of the CRPS or initiating factor was most likely the – or most probably the placement of her forearm and wrist into the cast, and that would fit Criteria 1 as immobilization ..." (R. p. 216, lines 10-15)

Dr. Zgleszewski explained that criteria #2 under the IASP is: "Continuing pain, allodynia, or hyperalgesia in which the pain is disproportionate to any known inciting event." (R. p. 216, lines 24-25; R. p. 217, line 1)

He further testified that criteria #3 under the IASP is: "Evidence at some time of edema, changes in skin blood flow, or abnormal sudomotor activity in the region of pain." (R. p. 217, lines 9-12) In explaining how this criteria was met, Dr. Zgleszewski pointed to the March 14, 2008, medical note of Dr. Nichols and quoted Dr. Nichols as stating, "[She has] been having increasing pain and swelling in her left wrist and hand since application of the cast." (R. p. 216, lines 6-8)

Dr. Zgleszewski testified that criteria #4 under the IASP is: "This diagnosis is excluded by the existence of other conditions that would otherwise account for the degree of pain and dysfunction." (R. p. 218, lines 21 – 24) Dr. Zgleszewski again reiterated that it was his opinion that Appellant's left arm being placed in a cast was what initiated the alleged RSD/CRPS, stating, "Then a cast was placed, and that would be the immobilization, and that sort of set forth the process of the CRPS." (R. p. 219, lines 17-19)

With respect to Appellant's treatment for her alleged RSD/CRPS, Dr. Zgleszewski commented on the stellate ganglion blocks, stating, "I know per the records she had some good benefit with Dr. Patel with stellate ganglion blocks, but what can happen is some patients may over time become or have less of a favorable response. I know – I think I did

three stellate ganglion blocks, none of which had any long-term benefit, which is why I believe I stopped after undergoing – having her undergo three, so I think in her case if oral medications become ineffective, I don't believe that stellate ganglion blocks would be the next step." (R. p. 227, lines 6-16)

Dr. Zgleszewski explained that his ratings on the Form 14B were 5% to each arm for the carpal tunnel release surgeries and an additional 12% to the central nervous system based on CRPS Type II. (R. p. 229, lines 15-25) Dr. Zgleszewski admitted that, on the day he rendered Appellant's impairment ratings, he did not measure her range of motion or her sensory deficits, as is required by the A.M.A. Guides 5th Edition. (R. p. 232, lines 11-25; R. p. 233, lines 1-20)

Dr. Zgleszewski was presented with Table 16.3 of the *A.M.A. Guides Fifth Edition.* Dr. Zgleszewski agreed that a 6% impairment to the whole person would convert to a 10% upper extremity impairment. (R. p. 234 lines 22-25; R. p. 235, lines 1-15; R. p . 236, lines 14-19)

Dr. Zgleszewski testified that, at the time he saw Appellant on September 8, 2009 (nearly one year and four months after she went to work for the Respondents), he did not believe that she had CRPS. (R. p. 237, lines 5-17)

Dr. Zgleszewski was also asked to compare Appellant's objective physical condition on January 26, 2010, when he first listed RSD/CRPS as a diagnosis, with Appellant's condition on September 8, 2009, when he first evaluated her. He stated that her symptoms were unchanged from September 8, 2009. Dr. Zgleszewski indicated that this initial diagnosis of RSD/CRPS on January 26, 2010, was based upon Appellant's report to him that she had received a stellate ganglion block from another physician and that it gave

her some relief. (R. p. 239, lines 13 – 25; R. p. 240, lines 1, lines 17-25; R. p. 241 lines 1-9, lines 18-24)

With respect to the eleven criteria for RSD/CRPS under the *A.M.A. Guides Fifth Edition*, Dr. Zgleszewski testified that he only observed mild symptoms of three of the eleven criteria. He stated: (1) he "never personally witnessed" cyanotic skin (R. p. 243, lines 9-19); (2) he never noted that her skin was mottled (R. p. 244, lines 2-5); (3) he noticed that her skin temperature was "cool to touch, but not demonstrable enough for me to note in a medical record." (R. p. 244, lines 17-19); (4) he noticed sudomotor changes, but did not make note of it in his medical records because, "I could not tell since the rest of her skin was dry if the dry skin was related to CRPS." (R. p. 245, lines 2-12); (5) He never noted edema (R. p. 245, lines 24-25; R. p. 246, line 1); (6) he never noted "Trophic Changes" (skin, nail, hair changes) (R. p. 246, lines 7-10); (7) he never noticed soft tissue atrophy (R. p. 246, lines 13-15); (8) he noted joint stiffness, but did not document it in his reports because, "It was minimal" (R. p. 246, lines 16-25; R. p. 247, lines 1-6); (9) he never noted nail changes (R. p. 247, lines 7-10); and (10) he never noted hair growth changes, such as her hair falling out, or growing longer or finer. (R. p. 247, lines 14-16)

At the February 6, 2012, hearing, Appellant was asked if she was aware that Dr. Zgleszewski's notes contained no mention of hair loss and answered, "I don't know why, but he knows and his nurses as well because I reported it to them on visits that I went in." (R. p. 314, lines 12-16) Appellant further testified that she told Dr. Zgleszewski about nail changes and that he knew about the coolness of her hands that she claimed. (R. p. 313, lines 23-25; R. p. 314, lines 23-25; R. p. 315, lines 1-3) Dr. Zgleszewski testified at his deposition that Appellant did <u>not</u> meet enough criteria for a diagnosis of RSD/CRPS under

the *A.M.A. Guides Fifth Edition*. (R. p. 248, lines 6-11) However, even if Appellant had met the required criteria, Dr. Zgleszewski admitted that the 10% additional impairment to each arm for a diagnosis of RSD/CRPS when added to the 5% impairment for the carpal tunnel release surgeries, combined for a total impairment of, "15% to each arm combined ..." per the *A.M.A. Guides Fifth Edition*. (R. p. 249, lines 12-18)

On September 26, 2011, Appellant was evaluated by James R. Myers, MA, QRP, CCM, CRC. (R. pp. 568-571) In his vocational assessment, Mr. Myers found the following possible alternative employment opportunities for Appellant: (1.) Sorter (sedentary exertion level); (2.) Customer Service Representative (sedentary exertion level); (3.) Industrial Order Clerk (sedentary exertion level); (4.) Greeter (sedentary exertion level); (5.) Collection Clerk (sedentary exertion level); and (6.) EKG Tech (sedentary exertion level).

Mr. Myers also performed a Labor Market Survey based upon Appellant's 5-pound lifting restrictions. This revealed several positions that Appellant was qualified to perform, including a Collection Clerk for Snelling Staffing services of Lexington, SC. This job was described as, "Post charges and checks; Know how to speak and understand the billing questions while talking to a patient with a balance." The physical requirements for this job were described as "Sedentary." (R. p. 568)

Another position found by Mr. Myers was at Palmetto Health as an EKG Technician. This required, "C.N.A: certification upon hire or within 18 months of employment, BLS (Basic Life Support) mandatory as well as CCT (Certified Cardiac Training) certification preferred; Special Training: Completion of a SC DHHS approved C.N.A: program." (Id.)

Another job identified by Mr. Myers was as a Collections Clerk at the Lexington Medical Center. The minimum qualifications for hire for this job were described as, "Responsible for all patient account functions to include billing, collections, follow up and posting of charges and money in a timely and accurate manne [sic], conducts monthly billing cycle for patient statements according to third party requirements, keeps manager apprised on all significant issues, works regularly with information which is restricted to specific persons." The physical requirements for this job are listed as Sedentary. (R. p. 569)

Another job found by Mr. Myers' Labor Market Survey was working as a greeter at Wal-Mart in Columbia, SC. The minimum job qualifications for hire were described as, "Meet and greet customers coming into the store. As an Associate with Wal-Mart, you will receive competitive wages and may be eligible for a variety of traditional and non-traditional benefits that enhance your career, compensation, home and life." The physical requirements for this job were listed as Sedentary. (Id.)

Another job found by Mr. Myers' Labor Market Survey was as an EKG Technician at Lexington Medical Center, in West Columbia, SC. The minimum qualifications for hire for this job were listed as, "Performs various clinical/technical duties related to performing EKGs, the application of, monitoring and Scanning Holters, and performing Stress Testing, Reports results of each procedure to appropriate staff." The physical requirements for this job were listed as Sedentary. (Id.)

Under the Summary portion of Mr. Myers' report, he stated:

> Based on the results of the Labor Market Survey Collection Clerk, Customer Services Rep, Industrial Clerk, Sorter, EKG Tech and Greeter, these jobs exist in a variety of counties within the 50 mile radius of the Appellant's home. The majority of positions located were in and around the City of Columbia, SC. Based upon Ms.

> Dozier's previous vocational experiences; it appears that she would qualify for all of the positions that were surveyed.
>
> As previously noted, 100% of the employers located during the Labor Market Survey were hiring. The average wage of these employers was based upon a sedentary physical demand level provided by the Department of Labor, which reflects wages above and below Ms. Dozier's reported pre-injury wage of 13.50 per hour. The average starting wage was 12.30 per hour based upon a 40 hour work week. The average median salary for a Phlebotomist was 14.40 per hour.
>
> Ms. Dozier lives in a urban area of South Eastern SC, is within a 50 mile radius of the City of Columbia SC, current unemployment is 8.1% compared to a state average of 11.9%. This information was obtained from the South Carolina Statistical abstract and US Department of Labor and is based on 2011 data: The City of Columbia, SC has a supported labor base of 250,000.

R. p. 571.

A Vocational Assessment was performed by Glen K. Adams on October 3, 2011, and submitted into evidence by Appellant. (R. pp. 526-541) Mr. Adams concluded:

> Mrs. Dozier's residual access to the labor market is defined by any remaining employment classified as "unskilled" and "sedentary" or modified "light" with a 5-pound lifting restriction and no repetitive use of the upper extremities. Based on these parameters, a labor market survey was conducted. Approximately 500 jobs were reviewed in the South Carolina Employment Security Commission database. No jobs were located in Mrs. Dozier's labor market for which she qualifies. Based on this analysis, Mrs. Dozier's access to the competitive labor market has been eliminated. Any remaining employment in her local or national economy is so limited in quantity, quality and dependability that she is considered to be totally and permanently vocationally disabled as a result of her bilateral carpal tunnel syndrome and complex regional pain syndrome stemming from her work as a phlebotomist at the American Red Cross.

R. p. 541.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). "Substantial evidence" necessary to support a decision of the Commission is:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 136, 276 S.E.2d at 307.

The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of the Court to weigh the evidence or to substitute its judgment as to the weight of the evidence on questions of fact. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981); Robbins v. Walgreen's, 375 S.C. 259, 652 S.E.2d 90 (S.C. App. 2007).

The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport

Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, 335 S.C. 46, 515 S.E.2d 532 (1999).

Section 1-23-380(A)(5) of the South Carolina Code also provides:

> The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand a case for further proceedings. The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Where there is a conflict in the evidence, either of different witnesses or the same witnesses, the findings of fact of the Commission as triers of fact are conclusive. Hoxit v. Michelin Tire Corporation, 304 S.C. 461, 405 S.E.2d 407 (1991).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE COMISSION'S FINDING THAT APPELLANT DID NOT SUSTAIN COMPENSABLE RSD/CRPS.

The central issue in this case is whether there is substantial evidence to support the Commission's finding that Appellant did not sustain related RSD/CRPS. This is factual determination made by the Commission. Voluminous evidence exists to show that the Commission correctly concluded that Appellant's alleged RSD/CRPS was not related to her January 17, 2008, repetitive trauma injury. This evidence is substantial and includes: (1) Dr. Zgleszewski's medical reports and testimony; (2) the medical records and testimony of Dr. Mancuso and Dr. Bitting; (3) the three-phase bone scan; and (4) Appellant's failure to complain of the symptoms commonly associated with RSD/CRPS.

1. Dr. Zgleszewski:

Dr. Timothy Zgleszewski's independent medical examination report of September 8, 2009, diagnosed Appellant with, "1. Left and right carpal tunnel syndrome 2. Cervical myofascial pain." (R. pp. 517) Nowhere in this report (one year and eight months after her work for Defendant) did he note observations of allodynia, mottled skin, coolness of skin to the touch, hair loss or brittle nails. Nowhere in his report does he mention a diagnosis of RSD or CRPS. Nowhere in his report does Dr. Zgleszewski state that he feels Appellant needs treatment for RSD/CRPS. In fact, Dr. Zgleszewsk recommended "myofascial stretch and release rehabilitation as well as rehabilitation therapy to address the upper crossed muscle imbalances," and "trigger point injections the bilateral upper trapezius, levator

scapulae and teres minor muscles ... The examinee will require carpal tunnel injections to the bilateral wrists." (R. p. 516)

After the November 3, 2009, hearing, Respondents agreed to allow Dr. Zgleszewski to treat Appellant's wrists, based on his Sept 8, 2009, report.

In his deposition testimony, Dr. Zgleszewski:

- Admitted that he did not believe Appellant had RSD/CRPS when he first treated her on September 8, 2009, approximately one year and nine months after her Januar 17, 2008, repetitive trauma injury to her wrists;

- Admitted that what caused him to perform the first unsuccessful stellate ganglion block on January 26, 2010, was not his objective findings ("she was still reporting the same symptoms"), but rather that Appellant had told him that she had already received a successful stellate ganglion block from a "Dr. Patel;"[1]

- Admitted that Appellant did not sustain a "noxious or cause for immobilization" to the right wrist, as is required by the IASP, the diagnostic criteria he presented and used for his diagnosis of RSD/CRPS;

- Admitted that he never "personally witnessed," noted in his reports, many of the commons signs of RSD/CRPS, including; cyanotic skin, mottled skin, edema, trophic changes, soft tissue atrophy, nail changes, or hair growth changes;

- Admitted that Appellant did not meet enough criteria for a diagnosis of RSD/CRPS under the *A.M.A. Guides Fifth Edition*, the very same treatise he used to render Appellant's impairment ratings;

- Admitted that his impairment ratings he rendered to Appellant's whole person combined with her 5% impairment ratings of 5% to each arm for the CTS releases would equate to impairment of 15% to each arm for both the CTS and the alleged RSD/CRPS.

2. <u>Dr. Mancuso & Dr. Bitting</u>:

Dr. Lisa Mancuso and Dr. George Bitting treated Appellant for eight months, from January 26, 2009, through August 26, 2009. (R. p. 554-567) This treatment was initiated by Appellant. Claimant treated on numerous occasions with both doctors. Both Dr.

[1] Respondents note that no medical evidence from a "Dr. Patel" was submitted into evidence by either party. Dr. Zgleszewski testified that he did not know to which "Dr. Patel" Appellant was referring, but decided to proceed with the stellate ganglion block anyway. (R. p. 227)

Mancuso and Dr. Bitting were unequivocal in their opinions that Claimant did not have RSD/CRPS. Dr. Bitting was questioned extensively by both parties at his deposition regarding his opinion that appellant did not have RSD/CRPS. His opinion was unchanged.

3. Three-Phase Bone Scan:

Appellant underwent a three-phase bone scan on February 3, 2009, which was later interpreted as being negative for signs of RSD/CRPS by Dr. Bitting. Dr. Zgleszewski, in his September 8, 2009, report, stated that the report from this bone scan had been reviewed. Given Dr. Zgleszewski's diagnoses of Appellant at the time of the September 8, 2009 report, there was no evidence that he felt that it was indicative of RSD/CRPS, either. (R. p. 516) No medical opinion exists in the record of this case that interprets this diagnostic test as positive for RSD/CRPS.

Substantial evidence exists to support the Commission's denial of Appellant's claim for alleged RSD/CRPS. The Commission's decision should be affirmed.

4. Appellant's Failure to Report RSD/CRPS Symptoms:

On January 26, 2009, Appellant completed a health history questionnaire when her treatment at First Choice Healthcare began. She was asked to "check all symptoms or illnesses that you have currently." (R. p. 555; R. pp. 617-620) Appellant did not report any neurological or skin changes on this form, which she signed and dated. (Id.)

This questionnaire was completed more than one year after Appellant's injury. If Appellant sustained RSD/CRPS related to her January 11, 2008, injury, Respondent's submit that some sign or symptom would have existed by January 26, 2009, and she would have reported it accordingly. This evidence is especially compelling given that the reason

for Appellant's referral to FirstChoice Healthcare was for a diagnosis of possible RSD/CRPS.

Further, the medical notes from Dr. Zgleszewski, as well as his deposition testimony, indicate that Appellant made virtually no complaints of symptoms that would be associated with RSD/CRPS. Dr. Zgleszewski's diagnosis on January 26, 2010, nearly four months after his initial evaluation of September 8, 2009, was based primarily on Appellant's unsubstantiated verbal report that she had received prior successful stellate ganglion blocks by another physician and that one of her arms had been placed in a cast sometime in 2008. Dr. Zgleszewski went on to perform a series of three admittedly unsuccessful stellate ganglion blocks and ultimately sent Appellant for a surgical evaluation for carpal tunnel syndrome, which had been one of his original diagnoses. His opinion regarding RSD/CRPS was faulty and not based on credible objective criteria.

II.

SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE COMISSION'S PERMANENT PARTIAL DISABILITY AWARD.

"The commission may find a degree of disability different from that suggested by expert testimony." Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct.App. 1993). "No fact finding body is compelled to blindly accept an expert's opinion"). Id., quoting Windham v. City of Florence, 221 S.C. 350, 359, 70 S.E.2d 553, 556 (1952). Appellant's argument that she is permanently and totally disabled rests entirely upon a request for a finding that she suffers from related RSD/CRPS. Without that finding, her argument crumbles.

Appellant treated with Dr. Gerald J. Shealy, an orthopedic hand surgeon, from December 2, 2010, through May 23, 2011. (R. p. 399-415) The language quoted supra from Dr. Shealy's deposition shows that it was Appellant who requested a 5-pound lifting restriction which Respondent's submit was an effort to increase the value of her claim and delay its conclusion. This mirrors Appellant's earlier self-diagnosed RSD/CRPS and request for a stellate ganglion blocks from Dr. Zgleszewski. Had it not been for her own verbal request, Dr. Shealy would have placed Appellant back on regular duty work, as had Dr. Bitting, on July 29, 2009. (R. p. 182, lines 10-25 of Tr. p. 10; R. p. 182, lines 1-25 of Tr. p. 11; R. p. 182, lines. 1-3 of Tr. p. 12)Because the Commission found that Appellant did not sustain a compensable RSD/CRPS injury, the only work restrictions of any relevance involved in this claim were those of Dr. Shealy, who admitted that they were actually self-imposed restrictions that Appellant requested. Despite the self-imposed work restrictions for her carpal tunnel release surgeries, Respondents' vocational expert still found jobs that Appellant could perform. The Comission correctly took these employment suggestions by Respondents' expert into account in finding that Appellant was not permanently and totally disabled. Appellant, rather than looking for or applying for any work, decided to stay at home with her 8-year-old daughter (who was approximately 5-years-old at the onset of this claim). (R. p. 323, lines 20-22) Appellant failed to meet her burden of proving that she was not employable. Substantial evidence supports this conclusion, including Respondent's Vocational Assessment and Appellant's admission that she had failed to apply for any available jobs whatsoever.

The Commission's disability award of 20% to each arm is quadruple the impairment ratings of 5% rendered by both Dr. Zgleszewski and Dr. Shealy for her CTS

release surgeries. Dr. Zgleszewski, at his deposition, converted his "whole person" impairment ratings to 10% to each arm to account for the alleged RSD/CRPS, admitting that the combined impairment for both the alleged RSD/CRPS and the CTS release surgeries would equate to 15% to each arm. Thus, the Commission's disability award is higher than Dr. Zgleszewski's impairment ratings, even including the increase for the alleged but denied RSD/CRPS. The Appellate Panel's award of 20% permanent partial disability to each arm is supported by substantial evidence and should be affirmed.

III.

THE DOCTRINEs OF *RES JUDICATA, WAIVER* AND *ESTOPPEL* DO NOT BAR RESPONDENTS FROM MAINTAINING A DENIAL OF APPELLANT'S ALLEGED RSD/CRPS; RATHER *RES JUDICATA* APPLIES TO BAR APPELLANT FROM RELITIGATING HER RSD/CRPS CLAIM.

Whether the above legal doctrines apply to the factual scenario of this case is the only legal issue appealed and, therefore, is the only issue not governed by the substantial evidence standard. Appellant repeatedly states in her Initial Brief that Respondents' authorization Dr. Zgleszewski to treat Appellant after the November 3, 2009, hearing is somehow proof that they were conceding the issue of compensability of the alleged RSD/CRPS and are, therefore, not entitled to maintain a denial of the RSD/CRPS claim. ("During the pendency of the appeal, Employer designated Dr. Timothy Zgleszewski as the authorized treating physician and specifically authorized him to treat Dozier's CRPS/RSD" ... "Respondents selected Dr. Zgleszewski as the authorized treating physician to treat her CRPS/RSD" ... "Defendants settled on Dr. Zgleszewski – precisely because he is a physical medicine and rehabilitation doctor qualified to treat RSD" ... "after all, they had

specifically authorized Dr. Zgleszewski to treat [RSD/CRPS]") As stated supra, Dr. Zgleszewski did not diagnose RSD/CRPS until January 26, 2010. Appellant fails to explain how or why Dr. Zgleszewski would or could have been chosen and authorized to treat a condition for which he had not made any diagnosis. If Respondents had wished to concede the issue of RSD/CRPS, they would have authorized Dr. Moore, who was the only doctor during that time period to have given any opinion that Appellant may have RSD/CRPS.

1. Estoppel:

The elements of estoppel have been summarized as: (As to the party being estopped): (1) Conduct which is calculated to convey the impression that the facts are inconsistent with those which the party subsequently attempts to assert (including misrepresentation or concealment of material facts); (2) Intention or an expectation that such conduct may be acted upon by the other party; and (3) Actual or constructive knowledge of the true facts; (As to the party asserting estoppel): (1) Lack of knowledge or means to know the true facts; (2) Reliance on the conduct of the other party; (3) Change of position to the extent that one party would be prejudiced or injured. *See* Provident Life & Accident Ins. Co. v. Driver, 371 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994).

Dr. Zgleszewski was authorized by Respondents sometime after the November 3, 2009, hearing and his January 26, 2010, evaluation of the Appellant. At that point in time, Dr. Zgleszewski had not diagnosed Appellant with RSD/CRPS. Dr. Zgleszewski admitted under oath that he did not believe when he evaluated her on September 8, 2009, that she had RSD/CRPS. Dr. Zgleszewski made no mention of a diagosis of RSD/CRPS in his report from his September 8, 2009, evaluation. However, Dr. Zgleszewski does make

specific recommendations for treatment, none of which included treatment for RSD/CRPS. (R. p. 516)

After Respondents had authorized treatment, Dr. Zgleszewski performed a series of 3 unsuccessful stellate ganglion blocks. Though these stellate ganglion blocks were authorized by Respondents, this was the only treatment rendered by Dr. Zgleszewski for the alleged RSD/CRPS. After it became apparent, even to Dr. Zgleszewski, that these were not helping Appellant, he then reverted back to his original diagnosis of bilateral CTS, performed several more CTS injections, and ultimately referred Appellant to Dr. Shealy. Respondents provided and continued to provide, Carpel Tunnel Syndrome treatment with Dr. Zgleszewki and Dr. Shealy.

Essentially, Appellant argues that a carrier who provides any level of treatment for a certain condition is forever barred from raising the issue of compensability or causal relation of the condition to the admitted injury. For policy-driven reasons, this argument is faulty because it would only encourage delay or denial of medical treatment, whether causally related or not, for fear that providing any treatment for an unrelated condition would irrevocably affect the disability fate of a worker's compensation claim. This would only increase the time and cost of litigation of workers' compensation claims as well as result in a claimant's injuries being permanently worsened due to medical treatment not being provided in a timely manner. This result would be a step backwards for claimants as well as for employers and carriers.

Respondents should not be punished by being required to litigate the issue of a potential permanent and total disability award because they authorized three stellate ganglion blocks, rather than refusing to authorize them. A referral to authorize the stellate

ganglion blocks would have likely resulted in at least one additional hearing and further delay of the resolution of this claim.

In order for Appellant to prove *estoppel*, she must prove 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. Provident Life & Accident Ins. Co. v. Driver, 371 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994). Appellant cannot show evidence of such conduct. Respondents' authorization of Dr. Zgleszewski at a time when he had not diagnosed Appellant with RSD/CRPS cannot be interpreted as a "false representation" or "concealment."

Appellant, in her Brief, attempts to argue *estoppel* by referring to the Single Commissioner's November 4, 2009, email request for Appellant's attorney to draft an order finding compensable injuries to "both arms, including RSD, and her neck. Defense to pay all causally-related medical bills to date and additional treatment to be directed by Dr. Moore." Appellant, perhaps unknowingly, is arguing against her position on this issue because the Single Commissioner's decision to change his ruling indicates that he affirmatively intended to deny the RSD/CRPS portion of the claim.

For whatever reason, the Single Commissioner, between November 4, 2009, and December 17, 2009, changed his mind on this issue of the alleged RSD as well as the issues of the compensability of the neck, depression, and control of medical treatment. Appellant desperately attempts to argue that this indicates that the December 17, 2009, Order "required treatment" for CRPS by stating, "No mention was made of RSD one way or the other." Unfortunately for Appellant, the December 17, 2009, Decision & Order

also does not mention the issues of the compensability of Appellant's alleged neck condition or depression. Both the neck and depression were raised by Appellant at the November 3, 2009, hearing. The fact that the Single Commissioner may have originally requested that Appellant's counsel draft an Order finding compensable RSD and ordering medical treatment by Dr. Moore, but later issued an actual Order silent as to the issue of compensability of RSD, but permitting Respondents to retain control of the medical treatment of the claim logically indicates that the Single Commissioner's intentions were to fully set forth in the actual order that did not specifically find the RSD/CRPS compensable. In addition, Appellant must have interpreted the December 17, 2009, Order as a denial of the neck, depression and RSD/CRPS because she filed a Form 30 appealing these very issues, including the neck and the failure to provide medical treatment through Dr. Moore. (R. p. 105; R. p. 114-115; R. pp. 600-601)

Appellant further attempts to prove *estoppel* by alleging that she did not argue the issue of the control of medical treatment at the April 20, 2010, oral arguments based on the Respondent's authorization of Dr. Zgleszewski's treatment. However, Appellant gives no explanation as to why all of the other issues that were originally appealed on the December 30, 2009, Form 30 were not argued; namely, the compensability of the "neck/back," and the 25% penalty for alleged wrongful termination of benefits. Appellant must expect this Court to believe that Respondents' authorization for treatment with Dr. Zgleszewski was a "false representation" designed to fool Appellant into also believing that her back/neck had been accepted as parts of this claim because Dr. Zgleszewski had also opined that she had sustained compensable injuries to them (although only the left

wrist was admitted on the record and the Single Commissioner's Order does not find the neck/back compensable).

As stated above *estoppel* requires that the authorization of Dr. Zgleszewski was calculated by Respondents to "convey the impression that the *facts* are otherwise than, and inconsistent with, those which the party subsequently attempts to assert." The authorization of Dr. Zgleszewski in no way changed the facts of this claim or the wording of the December 17, 2009, Decision & Order. In fact, had the Single Commissioner issued an Order consistent with his November 4, 2009, email request to Appellant's attorney, Respondents would have filed a Form 30 appealing the issue of the compensability of the alleged RSD/CRPS. As such, *estoppel* should also apply to bar Appellant's position, as Respondents also relied upon the wording of the December 17, 2009, final Decision & Order.

2. Waiver:

Appellant further incorrectly asserts in her Initial Brief that Respondents did not raise a denial to Appellant's claim of RSD/CRPS until they filed their Form 58, ten days before the February 6, 2012, hearing. This is simply untrue. The hearing transcript from the November 3, 2009, hearing proves otherwise. (R. p. 144, lines 23-25, R. p. 145, lines 1-14)

In addition, Respondents filed a November 15, 2011, Form 51 that admitted an injury to "only to the bilateral wrists. All other alleged injuries are denied."

Appellant's reliance on Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012), is misplaced. Jervey dealt with the issue of whether an employer could be time-barred under S.C. Code Ann. §42-9-260 (1996) from denying an accident as being compensable and terminate benefits after the expiration of the 150-day

period. In the instant case, Appellant's repetitive trauma or accident was admitted. Respondent's denial of the RSD/CRPS is essentially a denial of the extent of the injuries resulting from the trauma, not a denial of the compensability of the claim. To the extent Appellant attempts to use it, Jervey does not apply.

However, since this Court of Appeals in Jervey did state that S.C. Code Ann. § 42-9-260(F) (1996) would permit an employer to terminate benefits for any cause after the expiration of the 150 days, Jervey actually lends credence to the Commission's conclusion that Respondents were permitted to deny the alleged RSD/CRPS at the February 6, 2012, hearing. If an employer is permitted to deny the compensability of an accident well after the expiration of the 150-day period, then surely the denial of the extent of an injury from said accident after this period is permissible as well.

3. *Res Judicata*:

To establish *res judicata*, Respondents must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). *Res judicata* applied to a decision of the Workers' Compensation commissioner, affirmed on appeal by the Circuit Court, that an injury to a finger did not cause psychological injury and prevented relitigation of the claim for psychological injury. Owenby v. Owens Corning Fiberglass, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993).

In the case at hand, the first element cited above is easily met, as the parties are the same. The language quoted supra in the "Evidence of the Case" that was placed on the record at the November 3, 2009, hearing indicates that Appellant proceeded with the issue of whether she had sustained related RSD/CRPS at the November 3, 2009, hearing.

The December 17, 2009, Order specifically stated, "The defense shall provide the Appellant with medical treatment for both of her arms through a physician of their choosing." This Order was in direct contravention of Appellant's position at the hearing that she wished for her treatment to be switched to Dr. Blake Moore for treatment of her RSD/CRPS. The record on this could not be any clearer. (R. p. 144, lines 23-25; R. p. 145, lines 1-14)

By Form 30 dated December 30, 2009, Appellant appealed this issue and then voluntarily withdrew the issue in her brief dated March 5, 2012, only after her January 26, 2010, appointment with Dr. Zgleszewski (at which time he agreed to provide a stellate ganglion block upon her insistence). Rather than argue this issue as part of her appeal, Appellant chose to withdraw the issue and rely on the fact that Dr. Zgleszewski had provided a stellate ganglion block at the January 26, 2010, visit. Under Appellant's theory, Respondents should, therefore, be forever barred from questioning this diagnosis.

Another possible reason for why Appellant chose not to argue the issue of control of medical treatment at the oral arguments of April 20, 2010, exists. Perhaps Appellant strategically decided not to make these arguments and appeals because, rather than moving forward with the appeal and facing the possibility of losing this issue, she opted instead to attempt to "back door" the issue of the compensability of the RSD/CRPS by insisting that Dr. Zgleszewski's provision of the stellate ganglion block (and Respondent's authorization of same) was an admission of compensability of the RSD/CRPS. Whether Appellant's decision to forego arguing this issue was strategic or otherwise is, however, irrelevant. Appellant chose not to appeal the issue further, and the Single Commissioner's denial of the RSD/CRPS became the law of the case.

In addition, Appellant reinstated into the appeal the issue of compensability of RSD/CRPS and control of the medical treatment upon drafting the unappealed November 23, 2010, Order of the Full Commission, which affirmed the original Hearing Commissioner with respect to this issue.

Appellant, in her Brief, argued that Drake v. Raybestos-Manhatten, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), precludes the application of either collateral estoppel or *res judicata* because the Single Commissioner's December 17, 2009, Decision & Order is "vague." Drake involved an appeal made from the Appellate Panel to the Circuit Court. The Circuit Court affirmed the Commission in part and, upon its own motion, remanded the case back to the Commission for "further and more specific findings of fact relative to the timeliness of giving notice and filing of respondent's claim." The critical distinction between Appellant's case and Drake is that, in Drake, one of the parties had appealed one of the issues ruled on by the Commission to a higher court. The Circuit Court then remanded the case back to the Commission for further and more specific findings on that particular issue. The issue about before the South Carolina Supreme Court in Drake was to determine "the propriety" of the remand. Had one of the parties in this case appealed the issue of the compensability of the alleged RSD/CRPS further, perhaps it would have been remanded back for clarification and a more specific finding under Drake. However, the Supreme Court, in Drake stated, "We will not, however, to support an award of the Commission, imply a finding of fact as to the basic issues of liability of compensation, where, to do so, would impose upon this Court the function of determining such facts from conflicting evidence." Id., 128, 129. Appellant is asking this Court to do precisely what it refused to do in Drake; namely, to determine facts from conflicting evidence.

At the November 3, 2009, hearing, Appellant sought a finding of compensability for her alleged RSD/CRPS and also a finding switching control of the treatment to Dr. Moore in order to treat the alleged RSD/CRPS. This request was not granted by the Single Commissioner in his December 17, 2009, Order. The unappealed November 23, 2010, Order of the Full Commission affirmed the Single Commissioner on this point; therefore, this issue was fully adjudicated prior to the February 6, 2012, hearing and May 24, 2012, Order. All three elements of *res judicata* are present. Appellant should not be allowed to litigate this issue a second time.

IV.

MICHAU V. GEOGETOWN COUNTY DOES NOT LESSEN THE WEIGHT THAT SHOULD HAVE BEEN GIVEN TO THE OPINIONS OF DR. BITTING.

Appellant, in her Brief, attempts to argue that Dr. Bitting's deposition testimony should "be given no weight" because he did not state his opinions regarding RSD/CRPS to a reasonable degree of medical certainty. This is premised on Michau v. Georgetown County, 396 S.C 589, 723 S.E.2d 805 (2012).

Appellant is misapplying this case. In Michau, the issue before the South Carolina Supreme Court was the *admissibility* of an independent expert's report because the opinion had not been given to a reasonable degree of medical certainty, per S.C. Code Ann. § 42-1-172 (2007). The issue before the Court in Michau was only the evidentiary issue of whether the Single Commissioner had erred by allowing the report of the employer's expert into evidence. In Michau, the attorney for the claimant had made an objection to said expert's report being submitted into evidence at the hearing because it had not been stated to a reasonable degree of medical certainty, and the Single

Commissioner allowed the report into evidence over his objection. In fact, the claimant's attorney in Michau appeared at the hearing with a Memorandum of Law outlining the argument behind his objection and stated said objection onto the record.

In the instant case, Appellant's attorney made no objection to Dr. Bitting's deposition testimony being submitted into evidence. Once this testimony was submitted and was made a part of the record, it became evidence that the Single Commissioner and Appellate Panel could consider and give whatever weight they wished. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969).

Appellant's argument that Dr. Bitting's testimony should have been given no weight is simply inapplicable to this situation and is only made because Dr. Bitting's testimony was damaging to her quest for a permanent and total disability award.

CONCLUSION

Substantial evidence exists in the record of this case to support the Commission's denial of Appellant's alleged RSD/CRPS injury. The rest of the issues appealed, but for the evidentiary issue that involves Michau, hinge on this factual issue. Thus, if this Court affirms the Commission's denial of the alleged RSD/CRPS claim, it need not go further.

The Commission's permanent partial disability award was fair and was supported by substantial evidence.

The legal doctrines argued, supra, do not affect the Commission's award, and Appellant has shown no error of law, as required.

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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

Cindy Ella Dozier, Employee, ... Appellant,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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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 32-34].

Respondents never directly address the argument and evidence presented proving Dozier is permanently and totally disabled. In her Brief, Dozier noted the Appellate Panel made this patently erroneous finding:

> This Panel finds 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. In addition, Dr. Bitting opined that Claimant could return to work without any work restrictions. In arriving at this finding, this Panel put great weight on the report of James Myers. This Panel also took into account the fact that Claimant admitted that she had sought no employment since being released by her doctors. [R. p. 84 (emphasis added)].

This finding is clearly erroneous, as there is *no evidence* any such work is available. Respondents' second vocational evaluator, James Myers, ignored the 5-pound lifting restriction and simply speculated that Dozier could perform competitive work. The jobs Myers claimed Dozier could perform were uniformly outside her physical restrictions. 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).

Instead, Respondents argue that "Appellant's argument that she is permanently and totally disabled rests entirely upon a request for a finding that she suffers related RSD/CRPS. Without that finding, her argument crumbles." [Brief of Respondents, page 32]. This is simply incorrect. The issues regarding RSD/CRPS, estoppel, waiver, etc., stand alone. The Court could affirm on those issues, yet would still be compelled to reverse on the permanent and total disability issue because

the 5-pound lifting restriction disqualifies Dozier from any gainful employment.

Respondents effectively raise the curious argument that substantial evidence does not support the factual finding that Dozier is "under the 5-pound weight restriction Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome." [R. p. 84]. This attempt to discredit the doctors' restrictions fails.

On May 23, 2011, Dr. Shealy provided Dozier "with a permanent restriction of 5 pounds" for the carpal tunnel syndrome. [R. p. 399]. There is no medical or lay evidence to contradict the Commission's finding. Regardless of the circumstances surrounding the restrictions,[1] it is still a documented fact that Dr. Shealy assigned the restrictions. Respondents want to argue that the restrictions were "self-imposed," but the Appellate Panel rejected this argument.

Respondents completely ignore the additional evidence that Dr. Zgleszewski concurred that the "5-pound lifting restriction for the carpal tunnel syndrome [is] reasonable." [R. p. 250, lines 1-19]. This testimony confirms that both treating physicians assigned a permanent 5-pound weight restrictions specifically for the carpal tunnel syndrome. These opinions are unrefuted by any other

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[1]It is insulting and demeaning to both Dr. Shealy and Cindy Dozier to suggest she "requested a 5-pound lifting restriction which Respondent's submit was an effort to increase the value of her claim and delay its conclusion." [Brief of Respondents, page 32]. The evidence clearly shows that Dr. Shealy assigned the 5-pound restriction based on his medical expertise, diagnosis and treatment of Dozier. No treating doctor – particularly one selected and paid for by a workers' compensation carrier – is going to assign restrictions to an injured worker without a medical foundation.

Furthermore, as Dozier explained: "Dr. Shealy said he doesn't normally put any of his patients on a weight restriction. He asked me how many pounds I could lift, and I told him I couldn't even lift a gallon of milk." So he said he would put me on a five pound restriction. [R. p. 307, lines 10-15].

evidence.[2] They are substantial evidence sufficient to support the Appellate Panel's finding that Dozier injury limits her to "work under the 5-pound weight restriction Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome." [R. p. 84 (emphasis added)].

Furthermore, Dr. Zgleszewski added "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]. While these opinions address both the denied CRPS and the accepted carpal tunnel syndrome, he plainly includes the carpal tunnel syndrome as an essential component of the restrictions. The Appellate Panel found that the 5-pound restrictions were a result of the carpal tunnel syndrome. For this analysis, the CRPS made no difference.

Respondents then argue that despite these restrictions (which they never acknowledge were found by the Commission to be a 5-pound lifting restriction), Respondents argue their "vocational

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[2]In the same finding, the Appellate Panel notes in passing that "Dr. Bitting opined that Claimant could return to work without any work restrictions." However, this notation does not reverse the essential finding that Dozier cannot lift over five pounds made by the Appellate Panel. Moreover, Dr. Bitting last saw Dozier in 2009. He expressly deferred to Doctors Shealy and Zgleszewski. He further testified he cannot "speak to her current physical condition, diagnosis, work restrictions or impairment . . ." [R. p. 199, lines 17-24].

expert still found jobs that [Dozier] could perform. [Brief of Respondents, page 33]. This again is simply not true. [R. pp. 542-551]. Myers opined "Ms. Dozier should be able to return to work in a Sedentary to Light Physical Demand level (PDL) position . . ." [R. p. 616]. Sedentary duty requires the ability to *lift 10 pounds* occasionally; light duty requires the ability to lift 20 pounds.[3] For Myers' opinion to have any probative value at all, Dozier must at a minimum be able to lift 10 pounds occasionally. The medical evidence shows she cannot. And most importantly, the Commission's factual finding shows she cannot.

It was legal error for the Appellate Panel to give *any* weight to Myers' opinion – let alone "great weight." His opinion lacks foundation, misrepresents the physical requirements of the jobs he listed, and must be rejected as rank speculation. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because

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[3]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.

"rank speculation" cannot outweigh competent evidence of disability).

Respondents suggest the 20% permanent partial disability award is supported by substantial evidence. This is not the issue. This is not a medical model case; this is a loss of earnings case. The Commission is required to apply whichever statute provides the greatest benefits for the Claimant. The policy behind the general disability portion of the act provides the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). Essentially, the disabled worker has the right to elect the greater remedy – which in this case is an award of permanent and total disability under S.C. Code Ann. § 42-9-10 (2007).

This Court should reverse the decision below. The Commission's finding that Dozier is limited to lifting no more than 5-pounds is supported by substantial evidence. The report of James Myers must be rejected as speculative, as he ignored the actual work restrictions. An opinion that there is work available at a sedentary to light level is not probative of disability for a person who cannot lift more than 5-pounds. As such, the only competent evidence in the record is that Dozier is permanently and totally disabled.

II. Employer is procedurally barred from denying the existence of CRPS [in reply to Respondents' argument at pages 34-42].

Respondents contend it was not their intent to authorize treatment for RSD/CRPS for if they had done so, they would have authorized Dr. Moore. This argument fails. It is not the name of the particular doctor they chose; it is the type of treatment the chosen doctor was authorized to provide. Had their intent been to treat Dozier solely for CTS, she would have been sent to a hand surgeon (as she ultimately was). Here, they chose a physiatrist – by definition the type of doctor who specializes

in pain syndromes, including RSD/CRPS. Then, they explicitly authorized that physiatrist to treat Dozier for RSD/CRPS. This is undisputed. Dr. Zgleszewski testified he had "been paid by the insurance carrier to treat Ms. Dozier for complex regional pain syndrome and carpal tunnel syndrome ever since January of 2010." He added:

> And received written authorization for stellate ganglion blocks not only for carpal tunnel, but also for complex regional pain syndrome, and we – and I have been the treating physician with that diagnosis since day one, and, you know, just personally as Ms. Dozier's treating physician, I'm just – I'm just confused as far as the argument of whether or not she has CRPS, as there was actually no problem getting authorization for any treatment related to the CRPS since I started treating her." [R. p. 266, lines 5-25].

Dr. Zgleszewski began providing treatment for CRPS on January 26, 2010. On the first visit he scheduled her for a stellate ganglion block – a procedure specifically indicated to treat RSD/CRPS. [R. p. 511]. Respondents authorized RSD/CRPS reatment for the next two years - all the way through the date of hearing.

None of these facts are disputed. Respondents try to explain their acceptance of RSD/CRPS away by suggesting a refusal "to authorize the stellate ganglion blocks would have likely resulted in at least one additional hearing and further delay of the resolution of this claim." [Brief of Respondents, page 36]. This statement is telling. If Respondents *truly* believed that they were not obligated by the 2009 order to provide treatment for RSD/CRPS, then they simply would have refused to provide it. See Jervey v. Martint Environmental, Inc., 721 S.E.2d 469, 396 S.C. 442 (Ct. App. 2012)(employer waived right to deny claim when it knew of its defense, yet continued to provide benefits for 450 days). If Dozier had lost the issue and was collaterally estopped from raising it, how could there possibly have been an additional hearing? And how would that have delayed resolution of the claim. The issue of permanent disability was not reached until two years

later on February 26, 2012 – at a hearing requested by Dozier; not Respondents.

Thus, while Respondents try to explain their two-year acceptance of RSD/CRPS as an innocent effort to expedite resolution of the claim, in actuality they provided the treatment because all involved believed it had been ordered by the Commission and they were obligated to provide it. It is these actions and these assurances which created the detrimental reliance which caused Dozier to Dozier to drop the issue from her appeal of the 2009 order.

There *was* ambiguity in Commissioner Hufstetler's final order. The parties knew his intent from his original order instructions. However, the actual order drafted personally by Commissioner Hufstetler was silent on RSD/CRPS – and for that matter, on CTS as well. While the Commissioner certainly had the authority to change his ruling in the final written order, the end result left both parties nonplussed. The ambiguity was resolved when Respondents began providing treatment for RSD/CRPS through a doctor specializing in that specific condition.

For those reasons – and the mutual understanding between counsel – Dozier wrote in her in her Appellant's Brief to the Full Commission:

> After the hearing, the Defendants designated Dr. Zgleszewski as the authorized treating physician. **As Dr. Zgleszewski is acceptable to Claimant, she no longer requests Dr. Moore be designated the treating physician**. She does seek reimbursement for the treatment Dr. Moore and his referring physicians provided during the time Defendants failed to provide treatment.

[R. p. 603 (emphasis added)].

Here, Dozier withdrew an appealable issue on the authorized treating physician because (1) Employer designated a pain specialist as the authorized treating physician; and (2) authorized him to treat RSD/CRPS. Dozier changed her position in detrimental reliance on the Employer's acceptance and provision of treatment for the RSD/CRPS.

Additionally, the Court should note Dozier did still seek reimbursement for treatment provided by Dr. Moore– who, as Respondents observe, had diagnosed Dozier with RSD. This makes it abundantly clear that Dozier abandoned an appealable issue solely in reliance on the designation of Dr. Zgleszewski. For these reasons, the Court should reverse the Commission's findings and hold Respondents have waived the denial of RSD/CRPS and were estopped from relitigating the issue in the 2012 hearing. Cf. Hopkins v. Floyd's Wholesale, 382 S.E.2d 907, 299 S.C. 127 (1989)(an employer may be estopped from asserting the statute of limitations as a bar to subsequently filed Workers' Compensation suits if by his conduct he has induced the claimant to believe the claim is compensable and will be taken care of without its being filed with the Commission within the limitations period).

III. The Commission erred in finding Dozier did not suffer from CRPS at the time of the hearing [in reply to Respondents' argument at pages 29-32].

Respondents argue at great length looking for evidence contradicting the expert medical opinion of Dr. Zgleszewski – who is the physician chosen and authorized by Defendants specifically to treat Dozier's CRPS. However, the essential question is whether Dozier suffered from work-related RSD/CRPS *at the time of the hearing.* As such, it is Dr. Zgleszewski's opinion which is dispositive. Not the opinions of a doctor who last treated her in 2009 and admits that he cannot "speak to her current physical condition, diagnosis, work restrictions or impairment . . ." [R. p. 199, lines 17-24]. Not the medical opinions of the Appellate Panel in relying on a medical definition of RSD/CRPS which is not authoritative and not correct. [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).

Had the Employer sent Dozier to a different doctor other than Dr. Zgleszewski, or had they not authorized treatment for RSD/CRPS, then the result could be different. If they had sent Dozier to Dr. Bitting in February 2012 or some other time shortly before the hearing, then his opinion would have had some probative value because it would have been based on her current condition. The problem is they didn't. Dr. Biting'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, diagnosis, work restrictions or impairment . . ." [R. p. 199, lines 17-24]. 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.

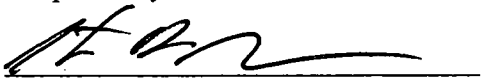
Dr. Zgleszewski unequivocally opined to a reasonable degree of medical certainty that Dozier had developed RSD/CRPS as a direct result of her work injury. This was the only competent evidence before the Commission. Incompetent evidence is not substantial evidence. Michau v. Georgetown County ex rel. 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). As such, the finding that Dozier did not suffer from RSD/CRPS related to her

2008 injury is not supported by substantial evidence and must be reversed.

CONCLUSION

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

Respectfully Submitted,



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September 9, 2013

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

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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